

## **A B Cs of C B As**

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### PREAMBLE

Important. Names the parties to the contract. Thus, only a party can file a grievance or go to arbitration. Unless contract specifies otherwise.

### RECOGNITION

Very important. Describes the unit and grants the Union recognition. Best language is that the Union is recognized as the representative of “all musicians employed by the Employer.” Omissions are important too, e.g. does it cover the librarian; all musical work of the employer? (no chamber music, etc.) May be helpful if contract is otherwise silent re: sub-contracting.

### EMPLOYMENT OF ORCHESTRAL PERSONNEL

Sets minimum number of musicians. DOES NOT GRANT ANYONE JOB SECURITY. Important in some smaller orchestras for artistic reasons, but usually let the Music Director lobby and/or negotiate for increased size.

Should spell out the precise number of musicians in each section, and which instruments are principals. (Don’t leave out tuba or harp.)

### DEFINITIONS

Be very careful. These definitions are often the key to winning or losing a grievance. What is a “member of the orchestra”? What is a principal player? Who’s “tenured”? Rights of probationers (any standard at all?) Likewise, arbitrators, who are not usually familiar with the industry, will need to know the meaning of such terms as: Extras? Subs? Per Service? Part-time? Full-time? Tour? (one overnight?) Runout—how many miles away? “Service”? “Doubling”?

## UNION SECURITY AND CHECK-OFF

The basic language for all but “right to work” states is:

All employees (musicians) shall become and/or remain members of the Union by the 31<sup>st</sup> day after their date of first hire, and shall remain members in good standing as a condition of employment. Failure to maintain membership in good standing, or to pay the equivalent dues and initiation fees, shall, upon request of the Union, subject the defaulter to immediate dismissal from employment. Upon the receipt of written authorization, the employer will deduct all uniformly-applied dues and initiation fees from the wages of any Union member or agency fee payer, and remit same to the Union by the 10<sup>th</sup> day of each month.

“St. Louis Clause”—If your orchestra votes to include it, you may wish to negotiate into the above union security clause the obligation to pay ICSOM, ROPA or OCSM dues, and/or Orchestra dues, if any, and Strike Fund dues, if applicable, as an additional condition of employment. If that is agreed-upon with the employer, every member of the orchestra is bound, whether they voted for it or not.

This clause has been the subject of unfair labor practice charges by disgruntled musicians on three (3) occasions. The NLRB has found it to be legal and binding each time.

## SEASON LENGTH

If 52 weeks, what are starting and ending dates of each “contract year” (see Definitions).

If less than 52 weeks, how many consecutive? Is there a separate summer season? Is it mandatory or optional?

## COMPENSATION

- Make sure there is a provision which assures that everyone gets the minimum increase above their previous year’s salary (e.g., overscale players) and that scale is increased by the increase.
- If you have agreed on split years (i.e. one-half at one rate of pay and the second half, another), count the weeks before each split (especially if you have an odd number of weeks of guarantee).

- Make sure you state that the first increase is retroactive if you have settled after the expiration of the prior agreement.
- Overtime—If there are different rates for concert overtime vs. rehearsal overtime, try to make the rehearsal overtime higher, since it's much more likely to occur at rehearsals, and that is really where you want the premium pay to be a deterrent. Overtime should be payable in 15 minute segments, but in any event, do not forget the phrase, "... or any portion thereof". No "grace periods", please.
- Extra services—Spell out the rates for each extra service in a week and try to make the rate higher for each one, e.g. X for the 9<sup>th</sup> service, X½ for the 10<sup>th</sup>, etc.
- Solos—I believe it's better to simply state that compensation for solos, (as defined, e.g. in front of orchestra, standing at your seat, etc.) is to be negotiated by and between management and the player. And, if no mutual agreement, player not required to play it.
- Subs and Extras—Should be paid pro-rata of regulars including a pension contribution, or other fringe benefit.
- Doubling—Payable for all services, i.e. rehearsals as well as concerts? Spell out instruments for which doubling is payable, and try to spell out that doubling is payable even if musician is only playing one instrument, which is not his/her primary, e.g. oboe plays only English Horn at a particular concert.

Finally, an additional payment should apply to each extra instrument beyond the first double.

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Seniority Pay—I like the formula of \$X per week times years of service, payable in 5 year increments. Thus, a 20 year player in an orchestra with a seniority bonus of \$5 will be entitled to an additional \$100 per week over and above scale or any other overscale he/she receives.

## SERVICES

If you still have 9 service weeks, try to get rid of them. Even when they are framed by 7 service weeks, they are still "killers" and should not be allowed without additional compensation. Also, avoid "service averaging".

## VACATIONS

Virtually every 52 week orchestra has anywhere from 8 to 10 weeks of vacation (not including relief weeks). Thus, if your orchestra has fewer than 52 weeks, the number of vacation weeks should be based on a formula of at least  $8/44$ , or approximately one week of vacation for each 5.5 work weeks.

Generally, unless the contract states otherwise, vacation entitlement accrues as you work. Thus, if you want to have it otherwise, e.g. all full-time players get all weeks of vacation even if they missed some weeks of work on an unpaid leave of absence, you must spell it out.

If there are still some orchestras with rotating vacation weeks, i.e. each player has some week(s) off while the orchestra is in session, make sure you spell out the selection process and priorities, e.g. first come, seniority, etc.

- Define a week—e.g., Sunday–Saturday, or any period of 7 consecutive days, etc.
- Relief Weeks—Originally applicable only to string players, today they are usually applicable to all members. Same reminder as for rotating weeks re: selection process for which week, but also try to have all weeks available for selection and try not to allow management to designate only weeks during which, because of the repertoire, your instrument is not being utilized.

## OTHER LEAVES

Sick Leave—The key here is to coordinate the number of paid sick days with the waiting period before Long Term Disability checks in. For example, if the policy has a 30 day waiting period, make sure there are at least 30 days of paid sick leave available. Of course, since LTD usually only pays 50 - 66 % of salary, make sure unused sick leave accumulates as much as possible, so that one can receive full pay for as long as possible before going on LTD.

- If you must agree to produce a doctor's note, try to make it mandatory only after at least 3-7 days of illness. Even better, if you can get it, make it mandatory only if management has reasonable grounds for demanding it, e.g. prior history of the individual, potential contagion, etc.

- Parental Leave—Try to get the time off paid—or at least some of it. Need not have the same amount of time for father as for mother.

If there are pregnancy complications, mother is entitled to sick leave for any such time out due to complications. And, father would be entitled to, at least, Family Medical Leave Act leave, i.e. up to 12 unpaid weeks.

- Family Medical Leave Act (“FMLA”)—Incorporate the statute by reference into your contract so that you can enforce it, if necessary, through the grievance procedure.

Remember, under FMLA the employer can require that you use up paid leave, if you have any, (vacation, sick leave, personal leave, etc.) before using unpaid during the FMLA leave period.

Primary purpose of FMLA is for employees to have time off to attend to family illnesses or other emergencies other than that of the employee him or herself. Can also be used for maternity or paternity leave at the birth or adoption of a child.

Personal Leave—Two areas to cover:

1. To be available for any reason at the discretion of the employee. No need to tell the employer the reason, and
2. Provided proper advance notice is given, employer has no discretion to refuse.

Obviously, should not be abused, e.g. no personal leave should be taken if player has an important solo in the concert on that day, or should not be taken if the day includes the only rehearsal for a concert (unless player takes the concert off as well.)

Leaves of Absence—usually there are 3 kinds of such leaves:

1. Short term
2. Long term
3. Sabbatical

An unpaid leave of absence for a year is not a sabbatical. A sabbatical, by definition, requires some pay, e.g. full pay for six months or half pay for a year, etc.

## BENEFITS

- Pension - if your orchestra pension plan is the AFM-EP, the only real issue for you to negotiate is the percentage contribution. And, try to have language which requires the percentage to be paid on “all W-2 earnings”, which, for acceptance by the AFM-EP, needs to be defined as “scale wages”.

If yours is a privately-trusted local pension plan, the contract need not spell out all of the features of the plan; but it’s not a bad idea to spell out the Normal Retirement Benefit and the minimum eligibility therefore, e.g. after 30 years of service and age 62, the Normal Retirement Benefit shall be \$50,000 per year.

The only other language necessary is that which incorporates the Trust Agreement and the Plan Document into the collective bargaining agreement by reference (which should include the employer’s obligation to submit to periodic audits).

- Health Insurance - Since very few AFM locals have health insurance plans, most orchestras are covered by an employer-sponsored plan. Again, the details of the plan need not be spelled out in the contract, but the name of the current carrier, for identification purposes, should be mentioned, as well as the employer’s obligation to “...continue to provide coverage equal to or better than the current Aetna plan” in the event they change carriers.

If you can, you should try to lock them into that plan with that provider, except that they may change carriers upon consent of the union. If you can’t achieve that, at least have language which requires that if they do change carriers, the benefits are at least “substantially comparable” to the current plan.

- Long Term Disability - The important issues regarding LTD are:
  1. Benefit level should be no less than 50% of salary, preferably 66 % or higher.
  2. The cap (they all have dollar caps) must constantly be raised as the salaries increase, to make sure that no one gets less than the agreed-upon percentage of “gross individual salary”.

3. As mentioned earlier in connection with sick leave, the LTD waiting period should be covered by sick leave so that there is no gap in income.

4. If the employer pays the premium, the benefits will be taxable to the employee. If the employee pays the premium, the benefits will not be taxable. And, if the employer pays 50% of the premium, 50% of the benefits will be taxable.

So, make sure to give each employee the right to decide if he/she wishes to pay all or any part of the premium.

- Instrument Insurance - Things to keep in mind:
  1. Is the insurance on your instrument sufficient to cover its appraised value?
  2. How many of each musician's instruments are covered? It should be at least all that are used in the orchestra.
  3. Does the insurance cover accessories, e.g. bows, carrying cases, etc.?

Once again, none of this needs to be in the contract other than the employer's obligation to provide the insurance and to incorporate the terms of the plan by reference.
- Dental Insurance - Major concerns—what is the maximum annual payout? Does it cover orthodontics (assuming it's a family plan)? Is it worth the premium?
- Flexible Spending Accounts - also known as "Section 125 plans". The contract can merely state that the employer will establish and administer such a plan, and, if you can get it, the amount of the employer's contribution. Mostly, it is funded through your contributions which are before taxes.
- Domestic Partners - Ideally the contract should state that domestic partners shall be treated as spouses for all purposes under the contract. That means for all family coverages, bereavement leave, etc. You may need to agree to an affidavit from the partners demonstrating their commitment to each other.

## SERVICES, TOURS AND RUNOUTS, AUDITIONS

I mention these sections only because if I didn't you'd think I forgot them. I haven't. It's just that there is nothing special to be said about them that you can't learn from reading the contracts of other orchestras.

There is, however, one thing to be said about per diem. A recent exchange of e-mails on the topic of taxability of per diem elicited an explanation from Bob Grossman, Philadelphia Orchestra Librarian, which I believe is the clearest I have seen. Bob wrote:

“There are two basic ways the IRS view per diem. It can be done in a full accounting style or a non-accounting style. The accounting payment style works simply by having the employer reimburse the employee for the actual receipts and bills of expenses occurred. Thus, the per diem amount varies with the expenses occurred and each day spent in a city would produce different results. The accounting department would need to total itemized expenses declared by each person and pay them back accordingly without any taxes.

“In the other non-accountable version, the employer can simply decide any amount of per diem that they wish to offer to their employees. In this case, the ENTIRE per diem received is considered taxable income. But, the employee can then choose to deduct all of their tour/travel expenses on their income tax schedule 2106. Thus, somebody with accurate records and high expenses could wind up deducting even larger amounts than the per diem money they received. So even though taxes were paid at the time the per diem was issued, it could all be recovered on when filing your 1040 at income tax time.

## RADIO, TELEVISION AND RECORDING

1. Make sure your contract has the standard AFM boilerplate. It is:

No service or any part thereof shall be recorded, reproduced or transmitted in any manner or by any means whatsoever by the Employer or by any other person without a specific written agreement with the Union.

2. In granting permission for the making of archival and/or grant application tapes, insist that the penalty for misuse, e.g. commercial sale, be equal to two hundred (200%) per cent of the applicable AFM rate. If the penalty is only 100%,

then you are actually giving the Employer the ability to make “speculative records”; that is, the employer could try to sell an archival tape and if it gets caught, it only has to pay what it would have had to if it did it legitimately. AFM policy frowns on “spec” recordings.

3. To the extent that your management gives tapes to composers, guest soloists, guest conductors, etc., make sure that they (the management) take full responsibility as set forth above, for any unauthorized use by the third party.

4. Unless you can negotiate a better deal, you needn’t spell out all the rates for all the various media activities. Merely have a sentence stating that any and all media work shall be done in accordance with the terms and conditions of the applicable AFM agreement, and if there turns out to be a project for which there is no AFM agreement, then the terms and conditions thereof must be negotiated in advance.

## SEATING

Many orchestra contracts have a provision which, in essence, states that the Music Director shall have the right to reseat musicians at any time.

I do not believe that such a clause was ever intended to apply to titled chairs. Nevertheless, in recent years there have been attempts by Music Directors to “reseat” titled chair players by arguing that it was either not a demotion or that even if it was, the contract gave him/her the unfettered right to do it.

Obviously, this is a very dangerous interpretation of the language, and it needs to be clarified to at least exclude titled chairs. Ideally, it should be deleted altogether and any movement back (not including revolving string sections, obviously) should be treated as a demotion, if the affected player wishes to challenge.

In addition, there appears to be a growing trend to exclude the concertmaster from the job security protections of the contract. This, too, I find dangerous—certainly for concertmasters, but also because it could eventually lead to the exclusion of other principal players, not only from the job security protections, but from the bargaining unit as well. See Kentucky River cases.

## JOB SECURITY

Those provisions and procedures which relate to job protection are the most important of any collective bargaining agreement.

In most orchestra contracts, there are two different procedures to be followed, depending upon whether the proposed dismissal is for musical or artistic reasons (“non-renewal”), or for non-musical or non-artistic reasons (“just cause”).

For most of unionized industry the only standard of job security are the words “just cause”. These are very powerful words, and books have been written about what they mean. In essence, they mean whatever an arbitrator says they mean. And they (the words “just cause”) ordinarily include concepts of “due process”, which include what is referred to as “progressive discipline”. Thus, where an employee is discharged for “just cause”, the decision as to whether or not he or she committed an act or failed to fulfill a duty, and whether or not he or she has been afforded “due process”, and whether or not the penalty of discharge was proper or too severe, are all questions which should be left to the arbitrator, and need not be spelled out in the contract.

Most importantly, therefore, do not allow the contract provision to enumerate examples of “just cause”. If such examples are spelled out, you have taken from the arbitrator a great deal of discretion which he/she would otherwise have. For example, if one of the examples is “drunkenness”, and a player shows up drunk, the arbitrator then has no discretion to rule that even if he/she was drunk, he/she did nothing disruptive, and indeed, played beautifully that night. That is because once the parties have agreed that drunkenness = just cause, all that needs to be proven is the fact of drunkenness. Nor can the arbitrator find that discharge was too severe a penalty. The parties have already agreed that it is not.

The best language is simply: “No musician may be dismissed except for just cause.” Period.

Because it was decided years ago that most labor arbitrators were not in a position to judge the very subjective issue of musical competence, a different procedure was developed to deal with such cases, which eliminates the employer’s obligation to prove “just cause”. The system is known as “Peer Review” and most orchestras today have some form of it in their contracts.

In my opinion, if the Peer Review Committee does not have the authority to make a final and binding decision, even if the vote has to be more than a simple majority, it is not worth giving up the protections of “just cause”. That is, Committees which are merely advisory are to be avoided.

The other critical issue is that of the Music Director’s membership on the Committee. To me, putting the Music Director on the Committee is like putting the prosecutor on the jury. And, it matters not how many votes he/she gets, his/her presence in the room produces a “chilling” effect on the musician members which cannot be measured.

### GRIEVANCE AND ARBITRATION

The grievance and arbitration provisions are the replacement and substitution for the right to strike. Thus, we should try to assure that we have the ability to grieve virtually any disagreement with management without their ability to argue that the issue is not arbitrable. In other words, if we can’t strike over it, and it’s not arbitrable, we are left without a remedy. Thus, the definition of a “grievance” takes on greater significance than it might otherwise appear to have. We should attempt to have the broadest definition we can get. My suggested language is: “any and all disputes arising between the parties.”

Notice that this language is not limited to “the interpretation or application of the terms of this agreement”. This limitation, which, I will concede, is the more commonly-used definition, would likely exclude unwritten past practices and/or new issues which may arise during the term of the agreement.

Notice also that the definition refers to disputes arising “between the parties”. The “parties” to a collective bargaining agreement are the employer and the union—not the employees.

In the absence of specific language to the contrary, an employee has the right to file a grievance. However, unless the contract expressly provides for it, he/she may not take the case to arbitration. Only the Union can take the case to arbitration. If their refusal to do so is for “arbitrary and capricious” reasons, a “duty of fair representation” charge may be filed with the NLRB.

Time limits - Most grievance and arbitration procedures are chock-full of time lines. These time lines are traps for the Union to fall into! That is, most of these contracts state that a failure to abide by the time limits results in forfeiture of the grievance; and, since the Union files 99% of the grievances, the limits are one-way traps. Besides trying to eliminate forfeiture as a penalty for missing the time limit, and besides trying to get as much time as possible to file, at least insist that the employer too has to respond within some time limit and if it fails to do so, the grievance is automatically granted.

### NO STRIKE-NO LOCKOUT

Try to keep this clause as simple as possible:

“The Union agrees not to strike (except for sympathy strikes) and the employer agrees not to lockout during the term of this Agreement.”

If you don't expressly reserve the right to engage in “sympathy strikes”, they will be prohibited by the No Strike Clause as well. “Sympathy Strike” is the term used to describe the employees of one bargaining unit observing and honoring the picket line of another.

### DURATION AND RENEWAL

Avoid at all costs a provision which, after stating the expiration date of the contract, goes on to state something like:

If either party wishes to negotiate a successor agreement, it shall give notice of its intention to do so at least x days prior to the expiration date. In the absence of such notice, this Agreement will automatically be renewed for one year.

The first part of this paragraph is innocuous. It's the underlined sentence which is sometimes disastrous. Unlike the NLRB 60-day notice, which, if you fail to send on time, merely delays your right to strike until 60 days after you do send it, the language quoted above would prevent you from striking or getting any wage or benefit increases for at least an entire year—even if you miss the deadline by one day!

## MANAGEMENT RIGHTS

If you can, keep it out of your contract. It has no value for the Union and it could be harmful if utilized. If you must agree to it, try the following:

The Employer retains all of the rights of management that have not been limited or modified by the terms of this Agreement.

If your contract already has the full Management Rights section, make sure that it at least contains the following:

1. To the extent that it permits management to promulgate "...rules and regulations which are not in conflict with this Agreement", make sure the word "reasonable" precedes the word "rules".
2. Make sure that the exercise of the rights granted is subject to the Union's right to challenge through the grievance and arbitration procedure if the Union claims that the contract does limit that particular exercise, or that the rule being promulgated is "unreasonable".

## "ZIPPER CLAUSE" a/k/a "ENTIRE AGREEMENT"

This clause looks innocent enough on its face. It usually just says that the Agreement is the complete understanding of the parties, and that each side has negotiated everything it wanted to and no further negotiations are required.

- If it's in your contract, you have agreed that there are no binding past practices which are not mentioned or referenced in the contract.
- Very few contracts cover every conceivable situation. Thus, sometimes the Union wants to challenge the unilateral change of an unwritten but consistent past practice. The existence of this clause would defeat the Union's claim.
- And, too, sometimes issues arise during the term of an agreement which neither side anticipated. Normally, in the absence of this clause, the employer would be required to negotiate with the Union about it if it's a mandatory subject of bargaining. The existence of this clause, however, would relieve the employer from that obligation.
- If you must agree to this clause, at least try to add the following proviso:

Notwithstanding the foregoing, nothing herein shall relieve the parties of their obligation to bargain over issues which are not addressed herein, nor were discussed at any prior negotiation, nor shall it operate to deny the admissibility in arbitration of a past practice.

#### FORCE MAJEURE (“Act of God”)

Not very important for those orchestras which get paid a weekly or bi-weekly salary for up to 8 services per week.

But for those which operate on a per service basis, in whole or in part, this clause could allow the last minute cancellation of a service without payment to the musician. And even if the cancellation was not the fault of the employer, it was likewise not the fault of the musician, who may have turned down other work to do this gig and is now screwed. Avoid it if you can.

#### INDIVIDUAL OR PERSONAL CONTRACTS

It’s not absolutely necessary but it is sometimes helpful to have an agreed-upon form of individual contract actually annexed as an Appendix to the Agreement. Plus, of course, there should be a statement reciting the fact that no individual contract may contain terms or conditions which are worse than, or inconsistent with the terms and conditions of the Master Agreement.

Obviously, this review does not cover every conceivable provision in every agreement. If there are questions regarding other contract clauses, please feel free to contact our office.