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The Petrillo Problem

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THE PETRILLO PROBLEM

DURING the course of the past few years a reader of the nation's press would, in all likelihood, find some daily reference to one James C. Petrillo. Moreover, the reader would find Mr. Petrillo described in somewhat opprobrious terms, as a labor "czar" or "dictator." A glance behind the headlines would reveal that Mr. Petrillo was and is the president of a labor union, the American Federation of Musicians.¹ This organization directs the labor policy of the nation's musicians. Its membership comprises the great majority of musicians—some 216,000 strong.²

The objectives of this union are similar to those of other labor organizations; the maintenance and improvement of wages, hours, and working conditions. In seeking to accomplish this goal, the union and Mr. Petrillo have come into direct conflict with the industries concerned with the commercial production of music, the radio and recording industries. The complaints have been long and loud denouncing the "tribute" exacted by the American Federation of Musicians, the "featherbedding" demands (employment of "stand by" bands and other unnecessary personnel), and the uncompromising attitude against any but union music.

On the side of the union it can be said that radio broadcasting and the recording industry have threatened to a large extent the livelihood of thousands of musicians. Radio and recording have indeed created the prospect that a few orchestras and the use of mechanical contrivances will supplant all local musicians. In order to protect the musicians comprising its membership, the American Federation of Musicians has adopted a policy of refusing to work with persons or devices when the effect will be a re-

¹ Constitution of the American Federation of Musicians of the United States and Canada (1947).

² Annual Report of the Financial Sec'y-Treas. of the American Federation of Musicians of the United States and Canada (April, 1947).

duction in the need for musicians. This policy has in large measure alienated public opinion and has resulted in the enactment of special legislation aimed at the so-called Petrillo problem.

RADIO BROADCASTING AND THE LEA ACT

Chain radio broadcasting has in no small degree reduced the employment of musicians by local radio stations. Of the 1,800 radio stations in America over fifty percent belong to one of the three major networks. The local network stations are paid to carry the large regular programs and in addition receive many free programs. Because of this chain broadcasting and the playing of records hundreds of local radio stations need employ no live musicians to fill in their broadcasting time. At the present time only 300 radio stations in America employ staff musicians. This is the threat to musicians which the American Federation of Musicians has sought to overcome. It has been the goal of the union to require employment by every radio station of an orchestra or band of local musicians of such size as is appropriate to the station and the musicians in the quality of music furnished. In line with this objective, James Petrillo has made frequent and seemingly excessive demands upon the radio broadcasters.

Mr. Petrillo as spokesman for the union, has insisted, where musicians are employed, that orchestras be manned by a full complement of men in order that they be not overworked. This action has resulted in the complaint by the radio stations that they are forced to employ musicians in excess of the number needed for efficient operation of the radio station.³ The radio networks also have charged that they are being forced to pay again for services already performed. In particular, this situation arose when the networks commenced to record the east coast programs and to play the recording to the west coast three or four hours later, instead of re-enacting the show as had formerly been the practice. For the performance of the first show and cutting the record, the

³ 92 CONG. REC. 1543 (1946).

musicians demanded the same pay as they formerly received for the two separate shows.

Mr. Petrillo demanded that radio stations refrain from broadcasting non-compensated, non-commercial musical programs of both American and foreign origin.⁴ This primarily affected broadcasts by non-union bands organized by school and non-profit groups and broadcasts of foreign origin. The objection to programs of this type arose when they were sponsored and used for advertising purposes. The American Federation of Musicians felt that the sponsor or advertiser profited from the free services obtained and that professional musicians were deprived of employment. If the broadcaster contemplated the use of a non-compensated orchestra, a requirement was made that a union orchestra also be employed or that the union be paid an equivalent or greater amount than the regular charge for a union orchestra. The American Federation of Musicians also sought to place restrictions upon the use on commercial programs of records made for non-commercial purposes bearing upon their face the marking, "only for non-commercial use on phonographs in homes."

Here again the union had no objection to broadcasting from the records so long as they were not used for the purpose of avoiding the employment of professional musicians.

To enforce these demands, the union threatened strikes and boycotts, and the broadcasting industry yielded in order to avoid the greater losses that would have resulted from failure to comply. It was claimed by the broadcasting industry that its expenses were increased millions of dollars annually in order to maintain peace with the musicians union.⁵

The activities of Petrillo and the American Federation of Musicians aroused the ire of the broadcasters and the general public to such an extent that early in 1946 Congress amended the Communications Act of 1934 by adding Section 506, known as the

⁴ *Id.* at 1544.

⁵ *Id.* at 1543.

Lea Act.⁶ This amendment makes it a criminal offense to coerce or compel a radio broadcaster by threats of force, violence, intimidation, duress or any other means to do any of the following acts:

1. Employ more persons than the broadcaster needs.
2. Give anything of value in lieu of employing excess persons.
3. Pay more than once for services rendered.
4. Refrain from broadcasting educational or cultural musical programs where participants have received no compensation.
5. Refrain from broadcasting programs that originate outside the United States.
6. Pay for the privilege of, or suffer any restriction upon, the production, preparation, manufacture, sale, purchase, renting, operation, use or maintenance of recordings and transcriptions.
7. Pay for the use of a recording or transcription upon a re-broadcast of a previously paid-for broadcast.
8. Pay for services not to be performed.

Of interest as background to the enactment of the Lea Act are certain incidents cited by the Committee Report of the House of Representatives. In 1945 in a peremptory wire to the radio networks Mr. Petrillo ordered employment of a double crew of musicians whenever music was played for FM and AM broadcasting simultaneously. The Committee Report concluded that the demand was completely absurd:

"Two orchestras required for simultaneous broadcast would be an anomaly. It is reported that one of the networks has a staff orchestra of 95 pieces and compliance with this order would require the employment of 190 musicians to needlessly duplicate and embarrass the work of one orchestra."⁷

The report cited many additional incidents, where non-union bands were kept off the air and out of theatres. In Cincinnati a

⁶ 60 STAT. 89 (1946), 47 U. S. C. § 506; (Supp. 1946).

⁷ 92 CONG. REC. 1544 (1946).

Masonic Shrine Band was prevented from broadcasting to advertise a circus for the benefit of crippled children.⁸ The musicians union threatened work stoppage at the radio station if the Masonic Band were permitted to play. In Milwaukee the Catholic Knights gave a Christmas party for 3000 children and their parents. A musical program was planned, to be performed by child musicians. In order to avoid picketing by the musicians union an eleven piece orchestra was paid \$84 to stand by.⁹ These incidents were attributed to Mr. Petrillo but it appears that he had only an indirect connection with them as they are all matters within the jurisdiction of the respective local unions.

The Committee Report charged that on several occasions Petrillo had successfully prevented broadcasts by service bands.¹⁰ In 1940 the Mutual Broadcasting System attempted to schedule a series of broadcasts using army talent to stimulate public interest in the national defense program. It was alleged that Petrillo announced that no army band could broadcast its music over the airways until he, Petrillo, and the Secretary of War had a chance "to talk it over and mark out the terms."¹¹ Although Petrillo and the American Federation of Musicians received the blame, it appears that federal law prevented the army bands from broadcasting, for the following army regulation existed concerning use of bands off military reservations:¹²

"(a) . . . no enlisted man in the active service of the United States Army . . . whether a non-commissioned officer, musician, or private, shall be detailed, ordered, or permitted to leave his post to engage in any pursuit, business, or performance in civil life, for emolument, hire, or otherwise, when the same shall interfere with the customary employ-

⁸ *Id.* at 1548.

⁹ *Id.* at 1550.

¹⁰ *Id.* at 1548.

¹¹ *Id.* at 1557.

¹² The By-Laws of the American Federation of Musicians refer to the army regulation in Art. X, Section 17, Subsection 3, as follows: "It will be observed that the instructions are military instructions to commanding officers. Permission of the Federation is not contemplated in any case and will not be given. The duty of commanding officers is prescribed in the instructions by which alone they will be governed."

ment, and regular engagement of local civilians in the respective arts, trades or professions.

"(b) This law is intended to prevent the competition of military personnel with civilians. . . .

"(e) It is not the policy of the War Department for officials of the army to make arrangements with musicians' unions which would nullify the provisions of these regulations."¹³

This regulation was issued pursuant to a federal statute enacted in 1916.¹⁴

The Committee Report of the House of Representatives indicates that a prime motive for passing the Lea Act was the belief that the American Federation of Musicians was an organization not conducted in a democratic way but at the unrestricted will and command of Mr. Petrillo. Charges were made that voting privileges of members were so allocated as to permit minority domination of the union.¹⁵ It was also said that members were accepted without having to meet any qualifications as musicians and that only a third of the membership relied primarily on musical service for their living.¹⁶ Since these charges were largely the cause of the passage of the Lea Act, it is pertinent to examine briefly the organization of the American Federation of Musicians, as disclosed in its constitution and by-laws.¹⁷ The Federation consists of 704 local unions, each comprising a specific geographic location and having offices in the largest city in the area. For each 100 members the local is allowed one delegate to the National Convention. The National Convention meets once a year and controls the policy of the union. One vote is allowed for each 100 members, but no local is permitted to cast more than 10 votes. This limitation is intended to prevent control of the annual convention and its policies by the three largest locals, New York, Chicago and Los Angeles.

¹³ Army Regulation No. 250-5 (1945).

¹⁴ 39 STAT. 188 (1916), 10 U. S. C. § 609 (1940).

¹⁵ 92 CONG. REC. 1542 (1946).

¹⁶ *Ibid.*

¹⁷ Constitution of the American Federation of Musicians of the United States and Canada, Articles IV to VI (1947).

Generally, the local unions attend to local matters,¹⁸ and the national organization deals with problems cutting across boundaries of the locals. Between annual conventions national affairs are conducted by the International Executive Board, consisting of the President (Mr. Petrillo), Vice-President, Secretary, Financial Secretary-Treasurer¹⁹ and the Executive Committee. These officers are elected annually by the National Convention. The Executive Board enforces policies established by the convention and establishes policies on questions newly arising.

As proof of Mr. Petrillo's dictatorial powers²⁰ the Committee Report cited a portion of Article 1, Section 1, of the Federation's By-Laws, which empowers the president to issue executive orders which may

“(a) enforce the constitution, by-laws, standing resolutions, or other . . . rules or (b) may annul and set aside same or any portions thereof, except such which treat with the finances of the organization, and substitute therefor other and different provisions of his own making . . .”

The remainder of the sentence, which was not quoted, requires that such executive order be published in the next issue of the *International Musician* and states that the president's power is absolute “when in his opinion, such orders are necessary to conserve and safeguard the interest” of the union and its membership. It is also stated that the president's power extends to cases “where existing laws are inadequate or provide no method of dealing with a situation.”

There is no question that Mr. Petrillo has very considerable powers as president of the American Federation of Musicians. But there is evidence that many of his edicts have been the culmination of demands and resolutions by the membership. Un-

¹⁸ By-laws of the American Federation of Musicians of the United States and Canada, Art. IX (1947).

¹⁹ *Id.* at Art. I, §§ 6 to 10.

²⁰ At the 1944 National Convention a resolution sponsored jointly by 23 locals was passed reciting that for the past two years Mr. Petrillo had done everything possible to carry out the mandates of the union, expressing a vote of confidence in him, and praying for divine blessing in his fight against the enemies of labor.

doubtedly Mr. Petrillo offers shrewd and aggressive leadership; at the same time it appears that he could not continue in office unless he was responsive to the wishes of his constituency.²¹

The sponsors of the Lea Act were careful to point out that it was not their intention to prevent strikes over such matters as contract violations, wages, hours, or working conditions.²² Representative Lea of California stated:

"This subsection does not prohibit the right to strike or to withhold services, or force individuals to work against their will or desire. It will place no limitation whatever on the use of strikes for the accomplishment of legitimate objectives, such as wage increases or better working conditions. The subsection does not prohibit strikes as such. What it does do is to prohibit the accomplishment, by actual or attempted coercion, compulsion, or constraint of certain unconscionable and wrongful objectives, regardless of the means used. A strike or threat of strike is one method by which it is possible to exert or attempt to exert such coercion, compulsion, or constraint . . ."²³

There was opposition to the bill based on the ground that it outlawed and penalized the right to strike.²⁴ A suggestion was made that the bill was solely for the protection of the radio networks and their profits.²⁵ Representative Smith stated:

"Perhaps Petrillo and the musicians' union went too far in their demands but at least they saved America from being without a musical culture, and they created jobs for thousands of talented entertainers who had no aptitude for any other way of earning their daily bread."²⁶

The Lea Act was subjected to court test soon after its passage.

²¹ The union membership apparently considers Mr. Petrillo's actions as done in obedience to its instructions. Resolution 19 adopted by a unanimous rising vote of the 48th National Convention read in part, "Therefore, be it resolved, that at this National Convention of the American Federation of Musicians, the delegates present wholeheartedly endorse his (James C. Petrillo) reports, his actions, as per instructions of the Forty-sixth Annual Convention of the American Federation of Musicians in Seattle, Washington, and the results he has obtained." Official proceedings of the 48th Annual Convention of the American Federation of Musicians of the United States and Canada, 176 (1944).

²² See 92 CONG. REC. 1542, 1547, 1556, and 2821 (1946).

²³ 92 CONG. REC. 1550 (1946).

²⁴ *Id.* at 1543.

²⁵ *Id.* at 1544.

²⁶ *Id.* at 1551.

In May 1946, Petrillo, demanded the employment of three additional members of the musicians union by radio station WAAF of Chicago. The station protested, declaring that there was no need for additional personnel in the normal and efficient operation of its business. Petrillo then ordered members of the Chicago Federation of Musicians employed by WAAF to leave their work, prohibited other union musicians from accepting employment with WAAF, and placed a picket in front of the radio station to advertise the existence of a labor dispute. For his violation of the Act an information was sworn out against Petrillo.

Upon trial in federal district court,²⁷ the defendant, Petrillo, attacked the Lea Act as being unconstitutional. The court sustained the defendant's contention, holding Section 506 to be invalid as contravening the First, Fifth, and Thirteenth Amendments of the Constitution of the United States. The case was taken to the Supreme Court of the United States on direct appeal.²⁸ That Court, limiting its review to the validity and construction of the contested statute,²⁹ reversed the lower court's holding and remanded the case for trial upon the merits.

Petrillo contended in the Supreme Court that Section 506 violated the Fifth Amendment because the prohibition of pressure upon a broadcaster to employ persons in excess of his needs created an indefinite and uncertain criminal offense. It was argued that the Act set forth no means or guide by which the defendant would know the number of employees needed and in effect gave the employer absolute discretion in deciding the number of employees needed.

The Supreme Court agreed that a criminal statute is unconstitutional if it is so vague, indefinite, and uncertain that persons of ordinary intelligence cannot know what is permissible and what

²⁷ 68 Fed. Supp. 845 (N. D. Illinois, 1946).

²⁸ 332 U. S. 1 (1947).

²⁹ For "The Governments Appeal Does Not Open the Whole Case" see *United States v. Borden Company*, 308 U. S. 188 (1939).

is prohibited.³⁰ However the Court refused to hold that the Lea Act fell within this principle. The Court said:

“Clearer and more precise language might have been framed by Congress to express what it meant by ‘number of employees needed.’ But none occurs to us, nor has any better language been suggested . . .”

The argument of indefiniteness was rejected because to accept it would be to make impossible legislation pertaining to any subject on which a difference of opinion could exist. The Court was of the opinion that the Constitution placed no such insuperable obstacle in the path of legislation, for the very purpose of judge and jury is to settle questions about which there may be differences of opinion. That there may be marginal cases is not a sufficient reason to hold that a law cannot be made.³¹ If the statutory language conveys a sufficiently definite warning when measured by common understanding of the conduct involved, the Constitution requires no more.

The defendant also insisted that the statute denied equal protection of the laws guaranteed under the Fifth Amendment since it forbade radio workers from engaging in practices allowed to other classes of employees. With respect to this issue the Supreme Court answered that because Congress has prohibited some practices does not mean that it must prohibit all practices within its power.³²

The Court refused to consider whether or not the Act abridged the First Amendment as a denial of free speech in its prevention of picketing. The Court considered only the face of the Act, which made no mention of picketing. For exactly the same reason the Court refused to consider whether or not the statute violated the right to strike. The Court stated that whether some applications

³⁰ *Connally v. General Construction Company*, 269 U. S. 385 (1925); *Lanzetta v. State of New Jersey*, 306 U. S. 451 (1939).

³¹ *Robinson v. United States*, 324 U. S. 282 (1945); *Screws v. United States*, 325 U. S. 91 (1945); *United States v. Ragen*, 314 U. S. 513 (1942).

³² *National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U. S. 1 (1937).

of the Act to particular persons in special circumstances would violate the Thirteenth Amendment (prohibiting involuntary servitude) would only be decided when the question was appropriately presented.³³

Since the decision in the Petrillo case the Labor Management Relations Act,³⁴ also known as the Taft-Hartley Bill, has become law. Section 8 (b) (6) of this Act declares:

“It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.”

This provision was motivated by forces and opinion similar to those responsible for the Lea Act. Apparently it can be applied to situations which the latter Act was designed to prevent.

UNION RESTRICTIONS ON RECORDINGS

Section 302 (c) (5)³⁵ of the Taft-Hartley Bill is the occasion for Petrillo's latest declaration banning the making of records by the American Federation of Musicians after January 1, 1948. The section makes illegal the payment of royalty funds to the Federation. Having lost the right to royalties, the union refuses to continue making records.

In all probability the recording industry has been a greater threat to the welfare of musicians than chain radio broadcasting. The phonograph records, used for commercial purposes, has displaced in great degree the “live” artist and has destroyed his employment opportunities. While the commercial use of phono-

³³ Mr. Justice Frankfurter concurred in a separate opinion. Justice Reed dissented upon the ground that the amendment made an act a crime that formerly was not a crime, and that in so doing the language was so uncertain that men could not draw upon common experience to understand it. Justices Murphy and Rutledge joined in the dissent.

³⁴ 61 STAT. 143 (1947), 29 U. S. C. § 151 to 166 (Supp. 1947).

³⁵ This section provides: “. . . with respect to money or other thing of value paid to a trust fund established by such representative for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . .” The result is to benefit the employees of the recording companies and to prevent the royalty fund from being used to relieve unemployment caused by the improper use of the records.

graph records by radio stations has been an important instance of displacement, the primary cause of complaint by musicians has been the use of records in coin-operated "juke" boxes. A major purpose of the American Federation of Musicians is to assist its members in securing and retaining employment as musicians, and a battle has been raging for many years with the recording industry.

That the musicians obtain a royalty from the sale of recordings produced by their labors is a popular misconception. Only the leaders of bands and orchestras and a few "name" singers obtain such a royalty. The union has sought and finally obtained a royalty on each record pressed, to be paid into a union fund. This fund has been used to give employment to musicians displaced by use of records. The weapon used to gain this objective has been the threat not to perform musical services for the recording industry unless royalty contracts are signed. In other words—no contract, no work.

The movement to stop recordings unless royalties are paid began with resolutions introduced and passed by the local unions at the national conventions of the American Federation of Musicians some fifteen years ago. This was during the depression, when the "juke" box first began to make serious inroads on the employment of live musicians. During the following years Mr. Joseph Weber, former president of the American Federation of Musicians, and Mr. Petrillo opposed such drastic action, such stoppage, in hope that a workable solution to the problem could be found.⁸⁶

However, no solution was found partly because the recording companies feared that acting in concert with the union would violate the anti-trust laws. In 1941 the musicians, at their annual convention, passed resolutions⁸⁷ authorizing the International

⁸⁶ Broadcasting, November 3, 1947, page 35.

⁸⁷ Resolutions numbered 58, 60, 61, 63, 64, and 65. Resolution No. 58 stated, "Whereas, The expanding use of records and recordings on Radio Stations, Wired Music Companies, and coin operated music boxes is constantly reducing the employment of

Executive Board to order the termination of the making of recordings and transcriptions by union members. The Board set the date for the stoppage of recording, but World War II intervened, and the whole operation was cancelled.

When the 1942 convention met in Dallas, Article XV of the By-Laws was amended.³⁸ The general effect of the amendment was to cause all union members to stop making recordings as of August 1, 1942. This action of the national convention and the International Executive Board³⁹ was credited to Petrillo personally. The ban on recordings lasted twenty-seven months and was lifted only after the recording industry agreed to set up a royalty system. The agreement provided for a royalty of $\frac{1}{4}$ to $2\frac{1}{2}$ cents on every record pressed, to be paid into a fund controlled by the musicians union. Under the Federation's scheme of distribution the fund was passed back to the local unions on a pro rata basis of membership. The three largest locals were limited to a fixed amount. A requirement was made that the fund received by a local union must be used within each year to employ local musicians to give free music to non-commercial projects.⁴⁰ Examples of this

professional musicians, and, Whereas, Actual employment and potential employment possibilities are being destroyed and further jeopardized by the performance of members of the Federation in all recorded forms, and, Whereas, We are again confronted by the fact that the recordings made by our own members are the instruments of employment destruction. Therefore, be it resolved that the International Executive Board be hereby instructed by this Convention to order all members of the American Federation of Musicians in the United States and Canada to discontinue the making of all phonograph recordings within (90) days from the date of the adjournment of this convention and that members of the Federation not be permitted to make these phonograph records until an understanding is reached with the recording companies, record pressing companies, distributors and music box operators associations regarding the use of these recordings; and, Be it further resolved, that the entire resources of the American Federation of Musicians be placed at the disposal of the International Executive Board to protect the interests of the Federation insofar as the matter is concerned." Official proceedings of the 46th Annual Convention of the American Federation of Musicians of the United States and Canada (1941).

³⁸ Official proceedings of the 47th Annual Convention of the American Federation of Musicians of the United States and Canada, 340 (1942).

³⁹ The decision was reached on the afternoon of June 13, 1942, at the Baker Hotel in Dallas, Texas. All members of the Executive Board attended.

⁴⁰ Resolution 42, official proceedings of the 48th Annual Convention of the American Federation of Musicians of the United States and Canada, 166 (1944).

are free public park band concerts and music furnished to veterans' hospitals.

The ban on making recordings that became effective January 1, 1948, was instituted because the Taft-Hartley Act made illegal the payment of royalties to the musicians union. The International Executive Board drew up the present ban,⁴¹ which Mr. Petrillo, as president of the American Federation of Musicians, signed in October 1947. The union is demanding from the recording and transcription industries, before its members will again begin work, some legal and workable method of sharing in the profits of the records made possible by the labor of the musicians. The union feels that its members are entitled to a part of the profits arising from the commercial use of records in coin-operated music boxes and on sponsored radio broadcasting where the use of recordings and transcription displaces "live" musicians.

One possible solution to this problem is a congressional amendment to the present copyright law permitting musicians to copyright their artistic rendition of each record, just as writers may copyright their works and photographers their pictures. The individual musicians could then assign all or part of this royalty to the union to be distributed in giving employment to the union members who are displaced because of the use of the records.

⁴¹ On October 16, 1947, at Chicago, Illinois, the following letter was drafted and published to the union membership and to the recording and transcription companies: "For the information of members, by unanimous vote of the International Executive Board, the following communication has been sent to all recording and transcription companies having contracts with the American Federation of Musicians:

'Gentlemen:

Your contract with the American Federation of Musicians for the employment of its members in the making of musical recordings will expire on December 31, 1947.

This contract will not be renewed because on and after January 1, 1948, the members of the American Federation of Musicians will no longer perform the services provided for in said contract.

This notice carries with it our declared intention, permanently and completely, to abandon that type of employment.

Very truly yours,

James C. Petrillo,

President, American Federation of Musicians.'

Members will kindly govern themselves accordingly."

CONCLUSION

In conclusion it is suggested that the "Petrillo Problem" is not entirely the result of arbitrary acts of a single capricious labor leader. There is good reason to believe that Mr. Petrillo's pronouncements have the support of the membership of the union he heads. The objectives of the union are the same as those of other unions, to secure improved wages, hours, and working conditions and to protect their employment. Its struggle is not to hold back a technological advance but to prevent the use of a technical means, which the individual musician makes possible, from being wrongfully used to displace his future employment. What the outcome of the present controversy will be cannot be predicted. A wider understanding, however, of the economic forces creating the controversy will help in coming to a just settlement.

Warren A. Roquet.