BEFORE THE LABOR COMMISSIONER

FOR THE STATE OF CALIFORNIA

HOWARD ROSE, Petitioner, vs. WILLIAM REILLY, Respondent.	Case No. 43-97 DETERMINATION OF CONTROVERSY

Introduction

The above-captioned matter was initiated by a petition filed on August 7, 1997, by HOWARD ROSE, (hereinafter "petitioner") against WILLIAM REILLY (hereinafter "respondent"), charging that respondent violated the Talent Agencies Act, Labor Code §§1700 *et seq.*, by acting as a talent agency without holding a license as required by law. By the petition, petitioner seeks a declaration that a certain agreement is void, an accounting of sums received and expended, and an award of any sums found due.

Respondent filed an answer to the petition, and the matter was subsequently heard on May 4, 1998.

Petitioner appeared in person, and was represented by Joseph D. Schleimer, Esq. Respondent appeared in person and was represented by Andrea J. Pflug, Esq.

Based on the testimony and evidence presented at the hearing, the Labor Commissioner adopts the following Determination of Controversy.

Contentions

The parties contentions are as follows:

1. Petitioner contends that:

(a) As a director of television commercials, petitioner is an "artist" as defined in the Talent Agencies Act.

(b) Respondent, through his production company, was to approach advertising agencies in an attempt to find work for petitioner as a director. Petitioner would be compensated by director's fees which might be generated from any work obtained. Respondent would be compensated by fees which might be generated for his production company from any work obtained.

(c) Respondent was acting as a talent agency, as defined in the Talent Agencies Act, but was not licensed as a talent agency.

2. Respondent contends that:

(a) While stage, motion picture, and radio directors are "artists" as defined in the Talent Agencies Act, petitioner, as a director of television commercials, is not an "artist" under the Act.

(b) Respondent, through his production company, was to approach advertising agencies in an attempt to find work for respondent's production company. Petitioner would be compensated as an employee of respondent's production company on any work obtained. Respondent would be compensated by fees which might be generated for his production company from any work obtained.

(c) Respondent was not acting as a talent agency.

Findings of Fact

1. For 15 years prior to 1996, petitioner had been employed as a television cameraman. In 1996, petitioner decided that he wanted to become a television director, and decided that he would begin by directing television commercials.

2. In order to obtain work as a director of commercials, petitioner needed a "spec reel," which was a visual resume, in the form of a collection of several sample or model commercials.

3. In or about June, 1996, petitioner met respondent, who was then employed as a "director's rep" by a company called "HKN." At or about the same time, respondent quit his job at HKN, and started his own company. Respondent described his new business as a "production company," whose business was to get work from ad agencies, and to produce television commercials.

4. At the time that petitioner and respondent met, petitioner had two or three model commercials for his "spec reel," but needed some additional "spots." Those additional "spots" were produced and added to petitioner's "spec reel" through respondent's new business. However, the parties dispute the nature of the arrangement under which the "spec reel" was completed.

5. When petitioner's "spec reel" was completed, respondent took the "spec reel" on trips to Dallas and other cities, and, using the "spec reel," obtained two projects, a commercial for Avery Labels, and a commercial for Suzuki. In the bids which respondent made to obtain these projects, there was a line item for the director's fees. On the Avery Labels project, the director's fee was $5,000 per day. On the Suzuki project, the director's fee was $3,500 per day.

6. The agreed sum for the Suzuki project was paid by the advertising agency, and petitioner was paid the director's fee in full for that project. On the Avery Labels project, half of the agreed sum was paid by the advertising agency, and petitioner was paid a portion of the director's fee. However, a dispute arose between the parties before the advertising agency paid the balance of the agreed sum, and as a result respondent withheld a portion of the director's fee from respondent. The sums paid to petitioner were paid through a production services company called Johnson-Burnet, whose business it is to act as an employer of labor on entertainment industry projects. Johnson-Burnet carried workers' compensation insurance, handled payroll deductions (or issued Internal Revenue form 1099's) etc.

7. At the time that the "spec reel" was produced, respondent's production company had no employees.

8. Petitioner was not compensated for his services in the preparation of his "spec reel." Michael Schenk, a producer, and Peter Gulla, a cameraman, also worked on the "spec reel" without compensation.

9. The agreement between the parties was verbal, and was not reduced to writing.

10. Respondent is not licensed as a talent agency, and has never been so licensed.

Conclusions of Law

1. The Labor Commissioner has jurisdiction over this matter pursuant to Labor Code §1700.44.

2. Petitioner is an "artist" within the meaning of Labor Code §1700.4(b). While the language of §1700.4(b) only lists, "directors of legitimate stage, motion picture and radio productions," this does not indicate an intent on the part of the Legislature to exclude directors of television productions. Section 1700.4(b) also contains language which causes the definition of "artist," to include, ". . . persons rendering professional services in . . . television and other entertainment enterprises." This language is broad enough to encompass petitioner here, particularly since the Talent Agencies Act is a remedial statute, and is to be liberally construed to achieve the protection of the public.

3. Petitioner contends that respondent obtained work for him as a director of television commercials on at least two occasions, and attempted to obtain further work on other occasions. Respondent disputes this, and contends that he obtained (and attempted to obtain) projects for his production company, which then employed petitioner to direct the projects. Respondent cites *Chinn v. Tobin*, TAC 17-96 for the proposition that a television production company which hires actors and other necessary employees for a project is not a talent agency with respect to the artists which it hires for that project.

While *Chinn v. Tobin* does state this proposition, this does not necessarily mean that the proposition applies to every television production company, in every conceivable circumstance. It is certainly possible that a television production company might hire a director as an employee, compensated on a salary or other basis (or that a director might be a part owner of a television production company, compensated by a share of the profits). It is then possible that such a production company could bid on projects, and complete such projects, without having offered or attempted to procure employment for the director,[1] and without having acted as a talent agency.

But it is also possible that a television production company could, by the use of a "spec

[1] Since the director, in this scenario, is already an employee of the production company, no new employment is being sought or obtained for him.

reel," seek to interest advertising agencies in using a particular director for a project. It is then possible that such a production company could bid on the project -- including in its bid a fee for the director -- and would thus have procured (or attempted to procure) employment for the director, thereby making itself a talent agency.

The difference between the two situations set forth above is a question of fact, and turns on the details of the arrangement between the parties.

In the case at bar, the agreement between the parties was oral. This makes is difficult to ascertain the terms of the agreement. Each of the parties testified consistently with his contention as to what the contract provided, and thus the testimony of each of them tends to cancel out that of the other.

However, there are several points in the testimony which tend to support petitioner's version of the parties' agreement.

First, both parties agree that petitioner was not employed by respondent's production company on a regular, day-to-day basis, with a regular salary. Instead, petitioner was compensated only when, as, and if respondent was successful in bidding for a project. Second, both parties also agree that respondent's production company never directly employed petitioner. Any compensation which petitioner received was paid through Johnson-Burnet, a production services company. While such a compensation structure is not conclusive evidence of the absence of an employment relationship, neither does it provide any evidence that an employment relationship did exist.

The argument that respondent did not employ petitioner, but rather sought employment for him is reinforced by the fact that respondent claims petitioner was obligated to work exclusively for his production company for some period of time.[2] Since petitioner relied on his earnings to support himself and his family, it seems unlikely that he would have agreed to an exclusive employment contract which provided compensation only when, as, and if respondent was successful in bidding on a project. (It could be argued that it would have been unwise for petitioner to enter into any agreement -- even an exclusive representation contract -- on such

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[2] Respondent's testimony as to the length of the exclusive obligation was not clear, but respondent did say that it could have been as much as a year.

terms, but such a representation contract seems at least somewhat less unlikely than an employment relationship.)

It is also significant that respondent withheld from petitioner a portion of the compensation due on the Suzuki commercial. Under California law, an employer is not permitted to withhold wages from an employee because of an offsetting claim, but must pay the wages, and seek any offset in a separate action. *Barnhill v. Saunders* (1981) 125 C.A.3d 1, 177 C.R. 803. The act of withholding a portion of the compensation is inconsistent with petitioner being an employee of respondent's production company.

Respondent also testified that, if an advertising agency had asked for the services of petitioner as a director, but had wanted to use its own production company, respondent would have agreed to such an arrangement. Respondent did not indicate how petitioner would have been compensated, nor how respondent's production company would have been compensated, in such a situation -- but the possibility of such an arrangement weighs against petitioner being an employee of respondent's production company.

Labor Code §1700.4(a), defines "talent agency" as a person who "engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist." In *Weisbren v. Peppercorn Prod., Inc.* (1995) 41 C.A.4th 246, 48 C.R. 437, the court of appeal held that a single instance of procuring, offering, or attempting to procure employment is sufficient to satisfy this definition. In this case, the preponderance of the evidence supports petitioner's contention that respondent engaged in the act of "procuring, offering, promising, or attempting to procure employment or engagements" for petitioner. Accordingly, respondent acted as a "talent agency" within the meaning of this section.

4. Labor Code §1700.5 provides that no person shall engage in the occupation of a talent agency without having first obtained a license from the Labor Commissioner. Respondent violated this section by procuring and attempting to procure employment for petitioner without holding a license.

5. Because respondent functioned as a talent agent under the verbal agreement between petitioner and respondent, that agreement is contrary to the Talent Agencies Act, and is illegal and void, *Weisbren v. Peppercorn Prod., Inc., supra.*

6. Since the agreement between petitioner and respondent is illegal and void, respondent is not permitted to obtain quasi-contract recovery for the value of expenditures made on behalf of petitioner, or services furnished to petitioner, see 1 Witkin, Summary of California Law (9th ed., 1987) "Contracts," §446 and cases cited.

7. Labor Code §1700.25 does not apply to respondent, because -- even though respondent has acted as a talent agency -- respondent is not a licensee under the Talent Agencies Act, see Labor Code §1700.3(b).

8. The statute of limitations applicable to this action is Labor Code 1700.44(c), which provides for a one-year period, prior to the filing of the petition. The petition in this matter was filed on August 7, 1997. The period within the statute of limitations therefore extends to August 7, 1996.

Order

1. It is hereby ordered that a certain verbal agreement entered into between petitioner and respondent in or about June of 1996, be, and the same is hereby declared null, void and unenforceable. (Said agreement provided for respondent to assist petitioner in the preparation of a "spec reel," and then for the use of the "spec reel" in attempting to obtain projects from advertising agencies and others.) This order bars any recovery by respondent based on said agreement, as well as any recovery by respondent for money paid, laid out and expended, services rendered, or any other quasi-contractual theory based on said agreement.

2. It is hereby ordered that, within 45 days from the service of a copy of this order on the attorneys for respondent, respondent shall prepare, or cause to be prepared, and deliver to petitioner, an accounting of any and all sums received from petitioner, on or after August 7, 1996, or received from third parties in connection with any project in which petitioner and respondent were involved under said verbal agreement, on or after August 7, 1996.

4. It is further ordered that any sums shown as due by said accounting shall be forthwith paid to petitioner.

Dated May 26, 1998.

JAMES G. PATTILLO
Hearing Officer

Adoption By The Labor Commissioner

The above determination is adopted by the Labor Commissioner in its entirety.

Dated: July 30, 1998.

Signature

Print Name JOSE MILLAN
For the Labor Commissioner

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