

1 DIVISION OF LABOR STANDARDS ENFORCEMENT
2 Department of Industrial Relations
3 State of California
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BEFORE THE LABOR COMMISSIONER
OF THE STATE OF CALIFORNIA

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|------------------------------------|---|--------------------|
| GLORIA ESTEFAN, EMILIO ESTEFAN, |) | CASE NO. TAC 36-88 |
| FOREIGN IMPORTED PRODUCTION AND |) | |
| PUBLISHING, INC., and ON THE ROAD, |) | |
| INC., |) | |
| |) | DETERMINATION |
| Petitioners, |) | |
| |) | |
| vs. |) | |
| |) | |
| STAN MORESS and |) | |
| MORESS ORGANIZATION, INC., |) | |
| |) | |
| Respondents. |) | |

The above-entitled controversy came on regularly for hearing before the Labor Commissioner, Division of Labor Standards Enforcement, Department of Industrial Relations, State of California, by Chester A. Barchiesi, an attorney of the Division of Labor Standards Enforcement, serving as Special Hearing Officer under the provisions of Section 1700.44 of the California Labor Code.

Petitioners did not appear in person but were represented by James P. Tierney, an attorney at Law.

Respondents appeared in person and through the President of the Mores Organization, Inc. Respondents were

1 represented by attorneys Philip Scott Ryan and Marcus A. Sanders
2 of the Law Firm of KELLY, MCAULIFFE, SIEMENS, HENTSCHEL & RYAN.

3 Evidence, both oral and documentary, having been
4 admitted, the matter having been argued in writing, and
5 submitted for decision, the following determination is made:

6 1. That the Labor Commissioner does not have
7 jurisdiction over the controversy as presented to the Special
8 Hearing Officer.

9 2. That petitioners take nothing by their
10 petition.

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12 I

13 INTRODUCTION

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15 On December 5, 1988, the Labor Commissioner received
16 for filing a "Petition to Determine Controversy" submitted by
17 petitioners against respondents. Upon its receipt, the Labor
18 Commissioner assigned Case Number 36-88 to the petition.
19 Subsequently, on July 3, 1989, the Labor Commissioner received
20 "First Amended Petition to Determine Controversy" for filing.
21 The amended petition alleged the filing was in compliance with
22 Section 1700.44 of the California Labor Code. The amended
23 petition also alleged all petitioners were "artists" as the term
24 is defined in Labor Code Section 1700.4(b). Further, in
25 summary, the amended petition alleged respondents entered into
26 an oral agreement with petitioners to procure or attempt to
27 procure employment for petitioners from sometime in 1986. From
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1 date of the oral agreement until date of filing, petitioners
2 allege respondents did in fact procure or attempt to procure
3 employment for petitioners without a valid "talent agency"
4 license. Therefore, petitioners seek recovery of all previously
5 paid "commissions" together with interest thereon and damages,
6 including exemplary damages, suffered by petitioners as the
7 direct or proximate result of respondents' conduct. Petitioners
8 also seek to have the oral agreement between the parties
9 declared illegal, null and void.

10 Respondents deny making any agreement whereby
11 respondents would procure or attempt to procure employment for
12 petitioners. Respondents do, however, acknowledge an agreement
13 existed between the parties whereby respondents would act as
14 personal managers commencing sometime in January or February of
15 1986. Respondents further state that many of the violations of
16 the Labor Code alleged by petitioners occurred outside the one
17 year limitation authority imposed by Section 1700.44 of the
18 Labor Code and are therefore barred by the Statute of
19 Limitations.

20 Respondents deny that petitioners, Foreign Imported
21 Productions and Publishing, Inc. ("FIPPI") and On The Road,
22 Inc. ("OTRI") are "artists" as defined in Labor Code Section
23 1700.4(b) or authorized to do business in the State of
24 California.

25 Hearing on the dispute between the parties was held on
26 November 28, 1989, in the office of the legal section of the
27 Division of Labor Standards Enforcement in Ventura, California.
28 Written closing arguments were submitted pursuant to direction

of the Special Hearing Officer.

II

ISSUES

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6 1. Are petitioners artists pursuant to Section
7 1700.4(b) of the California Labor Code?

8 2. Did respondents procure or attempt to procure
9 employment for petitioners in violation of the talent agency
10 laws?

11 3. Are petitioners entitled to recover commissions and
12 or fees from respondents for conduct contrary to law?

13 4. Are portions of the petition barred by the Statute
14 of Limitations?

15 5. Should the agreement between petitioners and
16 respondents be held unlawful, null and void?

17 6. Does the Labor Commissioner have jurisdiction over
18 the dispute between the parties?

19 III

20 APPLICABLE LAW

21
22 Petitioners brought this action under the provisions of
23 Division 2, Part 6, Chapter 4 of the Labor Code commencing with
24 Section 1700. This portion of the Labor Code is commonly known
25 as the Talent Agency Act ("Act") [Sections 1700 through
26 1700.47].

27 In Section 1700.4(a) of the Act, the term "talent
28 ...

1 agency" is defined and in Section 1700.4(b), the term "artist"
2 is defined.

3 Section 1700.4(a) provides:

4 "'Talent agency' means a person or corporation who
5 engages in the occupation of procuring, offering, promising, or
6 attempting to procure employment or engagements for an artist or
7 artists, except that the activities of procuring, offering, or
8 promising to procure recording contracts for an artist or
9 artists shall not of itself subject a person or corporation to
10 regulation and licensing under this chapter. Talent agencies
11 may, in addition, counsel or direct artists in the development
12 of their professional careers."

13
14 Section 1700.4(b) provides:

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16 "'Artists means actors and actresses, rendering
17 services on the legitimate stage and in the production of motion
18 pictures, radio artists, musical artists, musical organizations,
19 directors of legitimate stage, motion picture and radio
20 productions, musical directors, writers, cinematographers,
21 composers, lyricists, arrangers, models, and other artists and
22 persons rendering professional services in motion picture,
23 theatrical, radio, television and other entertainment
24 enterprises."

25
26 The Act also provides in Section 1700.44 that the Labor
27 Commissioner may hear and determine controversies which arise
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1 under provisions of the Act. Referral of matters arising under
2 the Act to the Labor Commissioner is mandatory and the Labor
3 Commissioner has original jurisdiction in such situations.

4 IV

5 DISCUSSION AND FINDINGS

6
7 In the present controversy, the parties are in
8 disagreement as to the legal propriety of respondents' conduct
9 with respect to various engagement opportunities performed or
10 disregarded by petitioners. Petitioners claim respondents acted
11 improperly with respect to engagements performed in Puerto Rico,
12 Crested Butte, Colorado, New Jersey, London, England and Miami,
13 Florida. In addition, respondents are alleged to have been
14 responsible for petitioners losing income during the months of
15 September and October 1988.

16 From the evidence presented, there is no question an
17 oral agreement was entered into sometime in early 1986 (January
18 or February) wherein respondents would serve as personal
19 managers for petitioners and receive 10 percent commissions for
20 such services. The agreement apparently was never memorialized
21 in writing in deference to one of the petitioners (Deposition of
22 Stan Mores, Vol 1, pg.40). The management relationship between
23 petitioners and respondents remained in effect until July
24 5, 1988, at which time petitioners terminated the arrangement.

25 According to witness Jorge Pinos, petitioners were
26 represented by William Morris Agency, Inc. (Morris Agency), a
27 talent agency in Beverly Hills, California, prior to and after
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1 the period involving the arrangement with respondents(early 1986
2 through 7/5/88). In fact, it was Mr. Pinos, an employee of
3 Morris Agency, who recommended respondents for the role of
4 managers to petitioners. After respondents became personal
5 managers for petitioners, Mr. Pinos in his handling the
6 petitioners' account for Morris Agency would routinely forward
7 requests for "bookings" and other information pertaining to
8 petitioners through respondents. This procedure was particularly
9 the situation with respect to benefit engagements which Gloria
10 Estefan and the Miami Sound Machine ("MSM") might perform. Mr.
11 Pinos' testimony indicated he did not object to respondents
12 handling the benefit engagements for petitioners. Apparently,
13 any insistence on the part of Mr. Pinos to handle arrangements
14 for "benefits" to be performed by Gloria Estefan and MSM would
15 have fostered ill-feelings and created disharmony in the
16 relationship among the participants. Further, Morris Agency did
17 not receive talent agency commissions for any efforts pertaining
18 to benefit functions. The evidence adequately supports the
19 conclusion that Morris Agency tacitly approved respondents'
20 involvement in discussions which culminated in "bookings" for
21 petitioners denominated "benefits".

22 With respect to respondents' denial of the status
23 alleged for FIPPI and ORTI in the Petition, it does appear that
24 petitioners have failed to carry the requisite burden.
25 Petitioners presented no evidence at the hearing which would
26 establish FIPPI and ORTI were in fact artists pursuant to
27 statute. Additionally, petitioners presented no evidence to
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1 establish the lawful standing of FIPPI or ORTI to appear in
2 forums within the State of California. As to these two
3 petitioners, this hearing officer finds neither petitioner was
4 authorized to file a petition nor claim artist status in the
5 proceeding.

6 The evidence indicates Gloria Estefan and MSM performed
7 a live appearance in San Juan, Puerto Rico in late February 1987
8 (probably February 22, 1987). Exhibits No. 1 and the deposition
9 transcript of Stan Mores (Vol. 1, pgs 110-127) reveal
10 petitioners apparently had an agreement with Pepsi-Cola Company
11 for a minimum of five(5) full days of services by Gloria Estefan
12 and MSM. [The agreement appears to have been entered into
13 sometime after September 16, 1986] Two of the service days were
14 to be performance dates by the musical artists. The evidence
15 further reflects payments were made to petitioners through
16 respondents by Pepsi-Cola International in the amount of
17 \$35,000.00, in two separate checks. According to Stan Mores,
18 the money paid by Pepsi-Cola was to cover expenses which the
19 group(Gloria Estefan and MSM) would incur for the Puerto Rico
20 engagement. The evidence also discloses the "agreement" with
21 Pepsi-Cola was a "deal" which did involve Morris Agency and a
22 total amount of \$500,000.00. Stan Mores further testified the
23 Puerto Rico engagement and another(Greenwich, Connecticut) were
24 obligations under an "umbrella agreement" with Pepsi-Cola.
25 Exhibit No. 2 shows there were claims for additional expenses
26 incurred by respondents for both Puerto Rico and Greenwich
27 engagements. This same exhibit which states the account balance
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1 due respondents from MSM as of July 1, 1987 claims commissions
2 for three tour dates(Taiwan, Japan, and SE Asia), but does not
3 claim any commissions for Puerto Rico and Greenwich. Based upon
4 the state of the evidence, petitioners have failed to carry
5 their burden as to procurement or attempted procurement of
6 employment by respondents in connection with the so-called
7 Pepsi-Cola conventions. Additionally, the two Pepsi-Cola
8 engagements discussed occurred well before December 5, 1987 and
9 therefore, are barred by the one year provision expressed in
10 Section 1700.44 of the Labor Code.

11 Petitioners allege respondents were responsible for
12 procuring a benefit engagement in Crested Butte, Colorado for
13 Gloria Estefan and MSM on Febraury 28,1987. This particular
14 engagement was a celebrity ski event on behalf of of Cystic
15 Fibrosis. Exhibit No. 3 indicates that MTV Networks("MTV") was
16 to pay \$5,000.00 plus provide certain other amenities for the
17 artists in exchange for their personal appearance at the
18 "event". There does not appear to have been commissions charged
19 for this event by either Morris Agency or respsondents. The
20 charge of \$5,000.00 is not consistent with the normal appearance
21 fees which petitioners were obtaining at that point in time from
22 their various engagements. From this, it can be inferred that
23 the Crested Butte, Colorado event was in fact a simple benefit
24 affair and the money paid was to cover expenses of the musical
25 group as testified to by respondent Stan Moress. Here again,
26 this event appears to have been one which Morris Agency was not
27 truly interested in handling. Furthermore, the event occurred
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1 in February 1987; thus, any actual violation of the Act is
2 barred by the Statute of Limitations.

3 Petitioners make similar claims against respondents for
4 the procurement of employment at two other benefits. One of
5 these, The Jerry Lewis Telethon was in August 1987. Peti-
6 tioners were to tape music for use in the telethon in New Jersey
7 on August 24, 1987. In this case, however, it does appear that
8 respondents sought to receive a commission of 10 percent.
9 Exhibit No. 2b tends to support this position as the exhibit
10 shows MSM was billed as of September 1, 1987 for an appearance at
11 Holmdel, New Jersey on August 24, 1987 in the amount of
12 \$1,500.00. Whether such a commission was or was not paid to
13 respondents is unknown from the evidence. The second of the
14 so-called benefits was the Royal Gala in London, England. This
15 event was scheduled for December 4, 1987. The evidence does not
16 support any conclusion except the event was a genuine benefit
17 with payments made to cover per diem, living accommodations and
18 transportation. Respondents do not appear to have received any
19 monies from this engagement.

20 As to the Jerry Lewis Telethon, respondents have
21 violated the Labor Code. By billing for an engagement which was
22 associated with a benefit, the respondents crossed over the line
23 in their "understanding" with the Morris Agency. On the other
24 hand, the violation occurred outside the time limitations of the
25 Labor Code. Therefore, the violation is time barred.

26 As for the Royal Gala, this event fell within the
27 "understanding" between Morris Agency and respondents. The
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1 event was a benefit with only expenses being paid to
2 participants.

3 Petitioners allege respondents procured an engagement
4 with Westwood One, Inc. and collected commissions in the sum of
5 \$500.00. The transaction appears as an entry in Exhibit No. 10
6 dated 1/29/88. Mr. Pinos testified on behalf of petitioners
7 that Morris Agency did not "book" the Westwood One, Inc. event.
8 A previous Westwood One, Inc. event performed by MSM had been
9 "booked" by Morris Agency and was commissioned by the agency
10 according to Mr. Pinos. However, Exhibit No. 7 with its
11 attachment indicates an agreement was entered into on September
12 18, 1987 and amended as of December 21, 1987. By the signature
13 block on the documents, Mr. Emilio Estefan executed the
14 agreement and the amendment for MSM. The signature of Mr.
15 Estefan as one of the petitioners in this controversy would
16 indicate respondents were not responsible for procuring any live
17 performance by MSM for Westwood One, Inc. after September
18 18, 1987. In addition, it appears the event for Westwood One,
19 Inc. probably took place on October 24, 1987. Thus, any
20 violation, for this event is barred by the one year limitation
21 of Section 1700.44 of the Labor Code.

22
23 Next, petitioners allege respondents accepted an
24 invitation from the principals of a world-wide tour sponsored by
25 Amnesty International for petitioners to participate in the
26 tour. Respondents acknowledge preliminary discussions about the
27 world-wide tour did take place as early as April 1988.

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1 Witnesses for both sides in this controversy testified that
2 Gloria Estefan was rather enthusiastic about doing the Amnesty
3 International tour because of her parents' experiences with
4 Cuba. Exhibit No. 24 supports this position. In the document,
5 Gloria Estefan speaks out on behalf of "human rights". The
6 evidence also indicates respondents inquired of and received
7 authorization from the Estefans for Gloria Estefan and MSM to
8 participate in the Amnesty International tour. Later on,
9 however, persons in charge of arranging the Amnesty
10 International tour deleted any participation by Gloria Estefan
11 and MSM. The evidence is clear that respondents were most
12 disturbed to learn of the abrupt exclusion of Gloria Estefan and
13 MSM from the world-wide tour. As stated in Exhibit No. 17, Mr.
14 Shea of respondents' office was surprised to learn of the
15 exclusion. Mr. Shea in unmistakable terms informed the
16 executive director of Amnesty International, U.S.A. on July 5,
17 1988 of his feelings on excluding Gloria Estefan and MSM from
18 the world-wide tour. The letter was prepared the day after Mr.
19 Shea read about the "line-up" for the world-wide tour in the Los
20 Angeles Times of July 4, 1988. (See Exhibit No. 13)

21 The evidence is unambiguous that as late as May 26,
22 1988, Amnesty International had not fixed the itinerary for the
23 1988 world-wide tour. According to Exhibit No. 12, Mr. Shea
24 informed Morris Agency as well as petitioners, Gloria and Emilio
25 Estefan, of a "draft itinerary" for the Amnesty International
26 tour. In point of fact, the "draft itinerary" was labelled
27 "confidential". Use of the term "confidential" on the itinerary
28 document reasonably infers an unsettled agenda for the tour

1 at that point in time. The "draft schedule" projected 20
2 performance sites and dates between September 2, 1988 and October
3 16, 1988. Exhibit No. 12 (a letter) also suggests Mr. Shea
4 invited all recipients of the letter to comment on the
5 prospective tour schedule, especially Mr. Pinos of Morris
6 Agency. Yet, by inter-office memorandum dated April 25, 1988,
7 personnel of the Morris Agency had been advised already not to
8 submit "offers" for performances by Gloria Estefan and MSM
9 during September and October 1988. (See Exhibit No. 11)

10 Although Morris Agency personnel knew in April 1988 not
11 to submit "offers" for engagements during September and October
12 1988, documentary evidence reveals Gloria Estefan and MSM did in
13 fact perform at nine(9) venues throughout the nation during the
14 period in question. (See Exhibit No. 14) Additionally, Mr. Pinos
15 testified Gloria Estefan was desirous of ending her domestic
16 tour in the summer of 1988. According to the evidence, Ms.
17 Estefan apparently wanted to rest and to fulfill personal goals
18 for a period of time after the summer of 1988. According to
19 Exhibit No. 14, the 1988 domestic tour for Gloria Estefan and
20 MSM did wind-up in Miami, Florida, hometown of Ms. Estefan on
21 October 1, 1988. The evidence further shows the 1988 domestic
22 tour schedule would have conflicted with nine(9) of the proposed
23 Amnesty International tour dates as listed on the "draft
24 itinerary" (Exhibit No. 12).

25 Petitioners have not carried their burden of proof to
26 conclude respondents attempted to procure the Amnesty
27 International "booking" and thus, acted unlawfully. To the
28 contrary, it appears Morris Agency gave tacit if not actual

1 approval to the respondents to handle the world-wide tour
2 "offer". Furthermore, it was Gloria Estefan, one of the
3 petitioners, who encouraged participation in the 1988 world-wide
4 tour for personal reasons. All parties had ample opportunity to
5 challenge petitioners' participation in the Amnesty
6 International tour of 1988. It also seems evident from the
7 exhibits that there was no firm obligation on the part of
8 petitioners for tour dates. Petitioners could and did in fact
9 make engagement commitments through October 1, 1988. Petitioners
10 failed to present sufficient evidence to prove engagements were
11 lost during September and October 1988. On the other hand,
12 evidence to the contrary was admitted in the exhibits. Thus,
13 petitioners are not entitled to recover unearned fees from
14 respondents. This hearing officer is convinced Gloria Estefan
15 and MSM would have completed their 1988 domestic tour schedule
16 approximately as did occur in 1988 regardless of the Amnesty
17 International tour. Although petitioners were earning large
18 sums of money each month prior to October 1988, it is mere
19 speculation that petitioners would have continued earning such
20 sums but for the negligence of respondents during September and
21 October 1988. There were not many more days petitioners could
22 have performed.

23 CONCLUSION

24
25 In summary, petitioners have not made their case
26 completely with respect to unlicensed talent agency activities
27 on the part of respondents. The evidence suggests strongly that
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1 an "understanding" existed between Morris Agency and respondents
2 concerning the manner in which "benefit" engagements performed
3 by petitioners were to be handled. The "understanding" does
4 provide an adequate basis for respondents' conduct as to
5 "benefits" pursuant to Section 1700.44(d) of the Labor Code. On
6 the other hand, petitioners have produced sufficient evidence to
7 find that respondents usurped the "understanding" with Morris
8 Agency when respondents billed for commissions in connection
9 with the 1987 Jerry Lewis Telethon. However, this conduct by
10 respondents occurred on or about August 24, 1987 and therefore,
11 is time barred.

12 Except for the Jerry Lewis Telethon event, respondents
13 appear to have acted in conformance with the oral agreement
14 between the parties as to "benefits". In fact, there is some
15 evidence in the exhibits to conclude petitioners gave carte
16 blanche authority to respondents to execute contracts on behalf
17 of petitioners until October 1988. In addition, the amounts of
18 money paid to respondents in connection with "benefits" appear
19 to differ with the customary fees for routine performances.
20 Overall, petitioners did not rebut adequately the explanations
21 given for charges connected with "benefits".

22 As to anticipated lost revenues, the evidence is
23 conclusive that neither respondents nor petitioners should
24 reasonably have believed the Amnesty International world-wide
25 tour had been set prior to July 4, 1988. There was an
26 unrealistic basis for petitioners to forego personal appearances
27 during September and October 1988 except as a matter of choice.
28 Several draft itinerary dates for the Amnesty International tour

and dates on the domestic tour were clearly in conflict.

1 Petitioners would have had to select which tour dates were to
2 prevail, domestic or world-wide. And of course, the evidence
3 did point out petitioners wanted to curtail touring in 1988
4 about the time they did.

5 In this controversy, there is no authority for the
6 Labor Commissioner to revoke or rescind the oral agreement
7 entered into between the parties in 1986. The agreement itself
8 would appear to be valid and termination should be a matter for
9 the parties.

10 The bottom line in this controversy is that the Labor
11 Commissioner does not have jurisdiction. Although respondents
12 did commission an engagement which was not entirely a "benefit"
13 without Morris Agency involvement, the event appears to have
14 occurred on or about August 24, 1987. This date falls outside
15 the one year limitation period provided for in Section 1700.44
16 of the Labor Code. The date is also prior to respondents filing
17 an action against petitioners in federal court.

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19 Petitioners shall take nothing by their petition.

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21 DATED: February 9, 1990.

22 Chester A. Barchiesi
23 CHESTER A. BARCHIESI
24 Special Hearing Officer

25 ADOPTED:

26 DATED: Feb 22, 1990

27 James H. Lee
28 Labor Commissioner (acting)