ARBITRATION PROCEEDING

In the Matter of the Arbitration

-between-

SCREEN ACTORS GUILD, INC.,

Claimant,

-and-

WARNER BROTHERS TELEVISION, a division of Warner Brothers, Inc.,

Respondent.

Re: Whether "Holding Fee" is Subject to Pension and Health Contributions

OPINION AND AWARD

OF

ARBITRATOR

Joseph F. Gentile
Arbitrator

December 30, 1985

Los Angeles, California

[1963-2777-85]

STATEMENT OF THE MATTER

The instant arbitration proceeding was between the SCREEN ACTORS GUILD ("SAG") and WARNER BROTHERS TELEVISION ("Warner"). It involved a claim by SAG against Warner for certain contributions claimed to be due and owing by Warner to the Guild's Pension and Health & Welfare Plans ("Plans"). The hearing was pursuant to the Screen Actors Guild - Producers Television Agreement, as amended, of 1977 ("TV Agreement") and the Screen Actors Guild - Producers Basic Agreement of 1977, as amended ("BA").

This claim came to regular hearing before the Arbitrator on October 25, 1985, in the offices of the law firm of Berger, Kahn, Shafton & Moss, 11620 Wilshire Blvd., Sixth Floor, Los Angeles, California.

The factual context for this matter was rather straightforward and not in dispute. In fact, the essence was established through a written "Stipulation Re Facts and Issues" dated and executed on the day of the hearing.

On or about August 5, 1982, Warner entered into a written agreement with Spotlight Attractions, Inc., f/s/o Sorrell Booke ("Spotlight" and "Spotlight Agreement"). Spotlight was Sorrell Booke's loan-out company. In this document Warner and Spotlight agreed to a number of items which related to Sorrell Booke's ("Booke") involvement with the production of "Dukes of Hazzard" ("Dukes") and other ancillary activities.

Paragraph 4 of the Spotlight Agreement was entitled "Series 'Holding' Right." In pertinent part, this provision stated the following:

> "In consideration of the payment of a 'holding' fee of $200,000, payable upon execution of the

> agreement, SA hereby grants WB an exclusive and irrevocable 'holding' right to Booke's acting services and the right to assign Booke to a role in either a spinoff series based upon 'Dukes' or a new television series, said holding right to be exercisable for a period commencing with the completion of Booke's acting services on 'Dukes' . . ."

The Spotlight Agreement was amended on or about April 13, 1984. Paragraph 4 was one of the provisions modified by this 1984 amendment. The specific terms of the modifications need not be restated herein; however, they expressed a time frame for the "holding" period. The time period would commence following the last day on which Booke's services were rendered for "DUKES." The amendment also indicated that any services rendered by Booke in further production arrangements would be paid for.

The acting services of Booke to Warner on "DUKES" ended on or about January 2, 1985. Spotlight was paid the agreed to $200,000 "holding fee" as provided for in the Spotlight Agreement, as amended.

The Plans gave written notice to Warner stating that Spotlight had failed to pay contributions due to the Plans with respect to the Spotlight Agreement. The Plans demanded that Warner, as the producer and as agent for Spotlight, Booke's loan-out company, pay the contributions then due and owing. These claims were subsequently modified and the only claim made in this arbitration proceeding was for pension and health and welfare contributions based on the $200,000 "holding" fee.

The specific issues agreed to by the Parties and expressed in the "Stipulation Re Facts and Issues" were as follows:

"a. Is the holding fee subject to pension and health contributions?

"b. If so, is there any ceiling applicable to such contributions?

"c. If so, what is the ceiling amounts?"

APPEARANCES BY COUNSEL

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DISCUSSION

Section 22(a)(5)(c) provides that . . .

"If the loanout company does not pay pension and health and welfare contributions within ten (10) working days of the due date thereof, the Producer borrowing the player's services shall pay, as agent for the loanout company, the amount of such required contribution(s) within ten (10) working days after the Guild or

> the respective Fund has given written notice to Producer of such failure of the loanout company to pay."

It was this provision which triggered the instant claim by SAG.

Warner did not pay the contributions on the basis that a "holding fee," as involved in the Spotlight Agreement, was neither covered by nor within the meaning of "gross compensation" as used in Section 22(a). SAG disagreed and argued that a "holding fee" was within the meaning and intent of Section 22(a) because the language of this provision was clear, unambigious and very broad in its coverage.

Section 22(a) provides in pertinent part for the following:

> "(a) . . . Producer agrees to contribute to the Plans amounts equal to 9% of all gross compensation as and when paid by Producer to all players for services covered by and subject to this Agreement in television motion pictures, but not in excess of the money ceilings as provided below. . ."

The second paragraph of Section 22(a) then goes on to define the term "gross compensation" as used in the above quoted language from the first paragraph. As defined by the TV Agreement, ". . .'gross compensation' as used in this subsection (a) means all salaries and other compensation or remuneration including rerun fees, foreign telecast fees and additional compensation for theatrical use and for use in Supplemental Markets ecluding, however, meal penalties, payments for rest period violations, traveling, lodging or living expenses, interest on delinquent payments, reimbursement for special hairdress or for wardrobe damage, but without any other deductions whatsoever. Such term also includes amounts paid to an employee with respect

to services as an actor (including compensation paid as salary settlements) whether or not any services were performed." [emphasis supplied]

In developing its arguments, SAG relied on these phrases to support its fundamental argument as previously noted: "all gross compensation"; "all salaries and other compensation or remuneration"; "but without any other deductions whatsoever" and "whether or not any services were performed."

Warner responded to SAG's position by noting that all of the above requirements are directly and expressly tied to "services." Warner argued that no "services" were rendered, but that the "holding fee" paid to Booke was neither for "services" nor "employment," but pay "for a right to order services for which additional payment must then be made." In this regard, Warner also noted that the "service" requirement continued into the language of Section 22(a)(5)(a) and (b):

> "(5) Loanouts
>
> Where Producer borrows services from a signatory loanout company, the following shall apply:
>
> a) Pension and health and welfare contributions subject to the ceilings shall be based on the loanout price for the player's acting services.
>
> b) Producer agrees to enter into a separate agreement with the loanout company covering only acting services and the loanout price applicable thereto. . ."
>
> [emphasis supplied]

It was Warner's position that a reasonable and fair reading of Section 22(a)(5)(a) and (b) with Section

22(a) supported its position that the language relied on by SAG to support its position was conditioned on a player performing acting services or subject to a "pay-or-play" situation; such "services" were absent from the "holding fee" arrangement.

Testimony and documentation were made a part of this evidence record with respect to "bargaining history." Though there was some apparent and understandable confusion as to specific time frames, this evidence record established that the "exclusions" enumerated in Section 22(a), such as "meal penalties," were in the 1960 SAG TV Agreement. The evidence record further established that the last sentence of the second paragraph of Section 22(a), namely, "[s]uch term ["gross compensation"] also includes amounts paid to an employee with respect to services as an actor (including compensation paid as salary settlements) whether or not any services were performed," was added to the 1974 SAG TV Agreement.

Though most difficult to summarize, the general testimony as to "bargaining history" relative to the addition to Section 22(a) in 1974 appeared to be given in the context of a "play-or-pay" situation. There was no indication that a "holding fee" situation as presented in the instant case was reasonably contemplated during these negotiations.

Whatever may have been said and done during the bargaining of the agreements which preceded the 1977 TV Agreement and the BA, the subject of "holding fee" as found in this case was neither directly nor impliedly expressed in the terms of the two relevant Agreements.

It is admitted that a "holding fee" is a type of option and as such may arguably fall within Section 24 of the 1977 TV Agreement; however, the Arbitrator still determined that given the absence of clear direction on either the inclusion or exclusion of "holding fee" from Section 24, the words "nor impliedly expressed" should still be used.

Warner did raise a question as to whether a "holding fee" was included within the scope of the 1977 TV Agreement. Whether this issue need be raised and answered within the scope

of this hearing will be resolved prior to the end of this discussion.

The 1980 amendments to Section 22(a) of the TV Agreement did not provide much additional insight into the current interpretation and application of Section 22(a) to "holding fees." Immediately following the first full paragraph of Section 22(a) the following was added:

> "Commencing February 7, 1982, with respect to employment after such date, Producers shall pay an additional one percent (1%) of all gross salaries and other compensation or remuneration to the Producer-Screen Actors Guild Welfare Plan. . ." [emphasis supplied]

Warner viewed the emphasized language as supportive of its position that Section 22(a) was tied to "services." It was also noted that the 1980 negotiations produced a new Section 22(a)(1)(c) which followed the lead-in statements of (a) and (b) with "[w]ith respect to services rendered." Warner also found in this addition certain endorsement to its arguments.

The words "gross compensation" are defined in Section 22(a). However, as correctly argued by Warner, "gross compensation" can not be read absent its entire context. The Producer agrees to contribute to the Plans amounts equal to 9% of "all gross compensation as and when paid by Producer to all players for services covered by and subject to this Agreement in television motion pictures. . ." [emphasis supplied]

That portion emphasized contains three requirements:

1) the gross compensation as and when paid by the Producer to all players must be "for services,"

2) the "services" must be "covered by and subject to the Agreement" and

3) the "services," as covered by and subject to the Agreement must be "in television motion pictures."

Assuming arguendo that the second and third requirements are established in this evidence record, the question is whether a "holding fee" as presented in this case reasonably falls within the "for service" requirement of Section 22(a). The payment of a "holding fee" to an actor is certainly compensation, but is it compensation "for services."

The "for services" requirement is carried throughout all of Section 22(a). Sections 22(a)(1)(a), (b) and the new (c) all relate to "[w]ith respect to services rendered." Sections 22(a)(2)(a)(1) & (2) and (b)(1) & (2) all commence with the statement "[w]ith respect to compensation for services." The computation of "ceilings" as found in Section 22(a)(5)(a) is based "on the loanout price for the player's acting services." Section 22(a)(5)(b) relates to "acting services and the loanout price applicable thereto."

SAG's contentions as to the broad language regarding "all gross compensation," "all salaries and other compensation or remuneration," "but without any other deductions whatsoever" and "without or not any services were performed" are persuasive; however, is it proper to construe a "holding fee" as "compensation for services" in this context.

Herein rests the ambiguity and uncertainity of Section 22(a) as applied in the instant situation. "Holding fees" were certainly not included in those items excluded from the definition of "gross compensation." "Holding fees" are not structurally compatible with those items excluded.

"Holding fees" were ignored by the Parties when contract terms were written.

By simple definition, a "holding fee" is not compensation "for services," but compensation for not doing anything until certain events, circumstances or developments either take place or do not take place. The Producer simply purchased through agreement the "right" to "hold" the actor from performing any services for a designated period of time. As already stated, it is a type of option. In the instant situation, no part of the "holding fee" money was to be credited toward the payment of subsequent services should the events, circumstances or developments take place which call for the actor to again perform.

Given the uncertainity and ambiguity in the words "for service," reference was made to bargaining history and past practice. Bargaining history failed to provide any meaningful insight into the issue of a "holding fee" as "compensation for services" within the meaning of Section 22(a). Discussions as to the "pay-or-play" situations were not persuasive as applied to the "holding fee" arrangements. In the view of the Arbitrator, they were clearly distinguishable.

The evidence record strongly indicated that Plan contributions based on "holding fee" compensation were rare. On the contrary, the evidence record strongly indicated that Plan contributions based on "holding fee" compensation generally did not take place. This was persuasive evidence.

Though SAG is correct that Section 22(a) is broadly drafted, Warner's position that a "holding fee" should not be considered as "compensation for service" within the meaning of this provision is persuasive. To uphold SAG's position would modify the words "for service" beyond that which this evidence record would support. To go that distance, the bargaining table is the forum.

Having reached the conclusion that a "holding fee" is not within the meaning of "for service" as required in Section 22(a), the claim of SAG will be denied. This is dispositive of the first issue as framed; thus, no comment will be made and no inferences should be drawn as to whether a "holding fee" is or is not covered by the Agreements or how a ceiling should or should not be ascertained given the current language.

Given the above findings and conclusions, the Arbitrator need not address the propriety of granting or not granting attorney fees and/or the appropriate amount of such fees. The only comment by the Arbitrator is that this case was a difficult and close case.

AWARD

Based on the evidence as presented, it is the AWARD of this Arbitrator that . . .

A "holding fee" as found in this factual situation was not subject to pension and health contributions.

Claim DENIED.

Respectfully submitted,

Joseph F. Gentile
Arbitrator

JFG:kk

Los Angeles, California

December 30, 1985

[1963-2777-85]

which Producer observes) up to a maximum of $75.00. Thereafter, the liquidated damages payment shall cease unless either the Union or the principal performer gives written notice to Producer of nonpayment. In the event such notice is given and full payment, including accrued liquidated damages, is not made within 12 working days thereafter, the Producer shall be liable for an immediate additional liquidated damages payment of $75.00 plus further liquidated damage payments at the rate of $10.00 per day from the date of the receipt of notice of nonpayment, which shall continue without limitation as to time until the delinquent payment together with all liquidated damages are fully paid. Such liquidated damages shall be in addition to any and all other remedies which the Union may have against Producer under this Contract.

The liquidated damages herein provided shall not be invoked if the principal performer is at fault for failure to execute his/her W-4 Form or other required tax forms or if the principal performer, having been furnished an engagement contract on or before the date of employment, fails to return the signed contract promptly, or when there is a bona fide dispute as to compensation.

B. In the event of a claim, any undisputed sums due and payable to principal performer shall nevertheless be paid within the time periods specified in Section 42, Payment. Failure to make timely payment shall activate the liquidated damages provisions hereof.

C. Liquidated damages for late payment shall accrue commencing 12 business days after the settlement of a disputed claim.

D. In the event Producer fails to make timely payments as required hereunder, the Union may, by written notice, require the payment of session fees, use fees and other fees to be sent to principal performers in care of a designated Screen Actors Guild office.

45. CONTRIBUTIONS TO PENSION AND HEALTH PLANS

A. Producer and advertising agencies signatory to Letters of Adherence, shall become parties to the "Screen Actors Guild-Producers Pension Plan for Motion Picture Actors" and "Screen Actors Guild-Producers Health Plan for Motion Picture Actors" and shall contribute to the Plans amounts equal to 12.65% of all gross compensation paid to principal performers as herein defined with respect to television commercials produced on and after February 7, 1994. Of such 12.65%, 0.15% shall be allocated to the Screen Actors Guild/Producers Industry Advancement and Cooperative Fund.

B. This Section 45 applies with respect to extra performers employed in accordance with Schedule D.

C. The term "gross compensation" as used in this subsection A means all salaries, session fees and other compensation or remuneration including holding fees and use fees, foreign use payments and theatrical or industrial use payments; excluding however, allowances; payments for meal period violations; rest period violations; traveling, lodging, or living expenses; liquidated damages for late payments; flight insurance allowance; reimbursements for special hairdress or for wardrobe maintenance or damage to wardrobe or personal property; but without any other deductions whatsoever. Such term also includes amounts paid to an employee with respect to services as a principal performer or as an extra performer ("performer") (including compensation paid as salary settlements) whether or not any services were performed.

D. All contributions shall be allocated between the Pension and Health Plans as determined by the Plan Trustees and will be subject to reallocation from time to time in accordance with the determination of the Trustees based on actuarial studies.

E. If, during the term of this Contract, the Union negotiates a higher rate of employer contributions than 12.65% with the AMPTP or any successor organization, for its theatrical and TV film contracts, this Contract may be reopened for negotiations with respect to pension and health contributions only.

F. Where Producer borrows acting services from a signatory loan-out company, or enters into a contract with a principal performer under which covered services and noncovered services are to be provided, the following shall apply:

1. There will be a separate provision in principal performer's agreement or loan-out agreement covering only acting services. Where other services are involved and there is a dispute over the portion of the compensation allocated to acting services, the principal performer's "customary salary" shall be given substantial consideration in resolving such dispute.

2. Contributions shall be payable on the amount allocated to covered services.

3. The Producer shall have the obligation to make the contributions directly to the Plans whether the agreement is with the principal performer or with the principal performer's loan-out company.

4. If, prior to the date on which Producer assumed the obligation to make the contributions directly to the Plans, a loan-out company has failed to make the applicable pension and health contributions on behalf of the loaned-out principal performer pursuant to the provisions of any applicable SAG Commercials Contract, Producer shall not be liable for such contributions if the loan-out company failed to pay such contributions more than 4 years prior to the date of commencement of the audit that gives rise to the claim (whether or not it is of the loan-out company's records or the borrowing Producer's records). The date of commencement of the audit shall be deemed to be the date of actual audit entry, but in no event later than 90 days after the date of the Plans' notice of intent to audit. In the event that the Plans conclude, based on an audit of a loan-out company's records, that there exists a claim for unpaid contributions, the Plans or the Union must give the borrowing Producer written notification of any such claim for unpaid contributions at the time that the loan-out company is notified of such claim.

5. Claims against Producer for pension and health contributions on behalf of principal performers borrowed from a loan-out company, or claims against Producer on behalf of principal performers employed directly by the Producer, must be brought within 4 years from the date of filing of the compensation remittance report covering such principal performers.

6. Any claim for contributions not brought within the 4-year period referred to in subsections F 4 and 5 above shall be barred.

G. It is understood that the Pension and Health Plans are industry-wide and open to all Producers and advertising agencies signatory to any of the Union's collective bargaining contracts or Letters of Adherence thereto which provide for payments to the Plans as above set forth. By signing a Letter of Adherence to the Trust Agreement hereinafter referred to and upon acceptance by the Trustees, Producers and advertising agencies shall be deemed bound by the terms and conditions of the Plans and to have appointed the Producers' Trustees and Alternate Trustees previously appointed.

H. The funds contributed to the Pension Plan and the Health Plan shall be trust funds and shall be administered under the Screen Actors Guild-Producers Pension Plan Agreement, and the Screen Actors Guild-Producers Health Plan Trust Agreement both dated February 1, 1960, which Agreements and Declarations of Trust shall become part of the collective bargaining contract. The Trust Fund for the Pension Plan shall be used solely for the purpose of providing pension benefits for employees covered by the Union's collective bargaining contracts in the motion picture industry who are eligible for benefits under the Pension Plan and for expenses in connection with the establishment and administration of such Pension Plan. The Trust Fund for the Health Plan shall be used solely for the purpose of providing welfare benefits for employees covered by the Union's collective bargaining contracts in the motion picture industry who are eligible for benefits under the Health Plan, and in the discretion of the Trustees for their families, and for expenses in connection with the establishment and administration of such Health Plan.

The Trustees shall determine the form, nature and amount of Pension and Health benefits, respectively, the rules of eligibility for such benefits and the effective dates of such benefits.

I. The Plan of pension benefits shall be subject to the approval of the Internal Revenue Service as a qualified Plan. If any part of the Plan is not approved, the Plan shall be modified by the Trustees to such form as is approved by the Internal Revenue Service.

J. The Declarations of Trust shall provide that no portion of the contributions thereof may be paid or revert to any Producer.

K. Producers and advertising agencies shall furnish the Trustees of each Plan, upon request, with the required information pertaining to the names, job classification, Social Security numbers and wage information for all persons covered by this Contract, together with such information as may be reasonably required for the proper and efficient administration of the Pension Plan and the Health Plan, respectively. Upon the written request of the Union to the Producer, such information shall also be made available to the Union.

L. No part of the Producer's contributions to such Plans may be credited against the performer's overscale compensation or against any other remuneration that the performer may be entitled to, no matter what form such other remuneration may take nor shall such contributions constitute or be deemed to be wages due to the individual employees subject to this Contract, nor in any manner be liable for or subject to the debts, contracts, liabilities or torts of such employees.