BEFORE DIXON Q. DERN, ARBITRATOR

In the Matter of:	)	
Charles Hunt, et al.	)	
Claimants,	)	
and	)	Case No.: -0-
Pepsico, Inc. and BBDO Worldwide, Inc.	)	ARBITRATOR'S FINDINGS
Respondents	)	AND FINAL AWARD
	)	
	)	

This matter came on for hearing on September 23, 2005 before Dixon Q. Dern, acting as sole arbitrator pursuant to mutual stipulation of the parties. Claimants or their predecessors-in-interest (all herein for convenience the "Claimants") were members of a musical group known as the Flamingos, the performers of the musical composition in contention here. Terry Johnson, one of the members, appeared at the hearing. Steven Ames Brown, Esq. of San Francisco, California appeared as counsel for Claimants. Ronald Y. Rothstein, Esq. of Winston & Strawn, LLP, Chicago, Illinois, appeared as counsel for Respondents. Each party submitted oral testimony and written evidence and each party has submitted a post-hearing brief. The matter now stands submitted.

This is a case dealing with the construction and application of a collective bargaining agreement, namely the 1994 SAG [Screen Actors Guild] Television Recorded Commercials Contract (the "CBA") and the provisions of Article 28 thereof relating to reuse of union-covered materials from other media in television commercials. For purposes of this matter, the parties stipulated that the CBA, as described in the preceding sentence, is the applicable collective bargaining agreement governing the dispute before me. Respondents are signatory to or otherwise bound by the CBA.

STATEMENT OF BACKGROUND FACTS

1. The background and historical procedure of this case is as follows. In or about 1959 Claimants recorded a phonograph record of a song entitled "I Only Have Eyes For You" (the "Song"). The Song was released on the "End" label; that label belonged to a company under common ownership with a company known as "Gone Recording Corp," both of which companies were eventually acquired by Rhino Records, for which Warner Special Projects acted as agent. In or about January, 1997 Respondent BBDO entered into an agreement with Warner to secure what is commonly known as a "master use" license whereby it acquired the right to use the sound recording of the Song in a television commercial. Respondent BBDO paid Warner $250,000 for that master use license and also paid an additional $250,000 for a "synchronization" license for the underlying music rights which were also controlled by Warner or an affiliate. The uncontroverted evidence is that Warner, in turn, paid Claimants one half of the fee received for the master use license i.e. $125,000.

2. Article 28 of the CBA is headed "Limitation of Use in Commercials of Material Produced Under Other AFTRA [American Federation of Television and Radio Artists] or Screen Actors Guild Contracts." Under this Article the producer of a commercial agrees that "no part of

any phonograph record...made under the jurisdiction of AFTRA...shall be used in commercials without separately bargaining with the principal performer and reaching an agreement regarding such use prior to any utilization of such photography or sound track..." The second paragraph of the Article deals with the situation where the material is used without a separately bargained agreement having been reached and reads as follows:

> If Producer fails to separately negotiate as provided above, the principal performer shall be entitled to damages for such unauthorized use equivalent to three (3) times the amount originally paid the principal performer for the number of days of work covered by the material used plus the applicable minimum use fees under this Contract, but not less than three (3) times the applicable session fee at the rates provided under this Contract plus the applicable minimum use fees under this Contract. However, the principal performer may, in lieu of accepting such damages, elect to bring an individual legal action in a court of appropriate jurisdiction to enjoin such use and recover such damages as the court may fix in such action."

3. At the time when Respondents produced the commercial that used the Song, they did so without "separately bargaining" with the Claimants as to a fee for such use. Several reasons for this were forwarded by Respondents and are discussed in the Findings below.

4. After seeking an agreed-upon fee for the use of Claimant's performance, on or about January 2004 Claimants brought an action In the United States District Court, Northern District of Illinois, seeking, essentially, injunctive relief and damages. In a series of decisions culminating in a decision and Order of October 4, 2004 (*Hunt V. Pepsico, Inc.*, 2004 U.S.Dist. LEXIS 19964) the Court (Kennelly, M., District Judge) dismissed Claimant's action for an injunction and court-ordered damages. In reaching this conclusion, the Court reasoned, essentially, that the last sentence of Article 28, cited above, permits the filing of a court action only in those situations where both an injunction and damages are claimed and that absent grounds for an injunction (which the Court did not find here) the CBA is "plainly susceptible of a reasonable interpretation that disputes of this type are subject to arbitration, except in cases in

which a viable claim for injunctive relief may be made, in which case the performer may file suit in court." Having declined to award damages, the Court directed Claimants to submit their claim for damages to arbitration "under paragraph 56 of the..." CBA. (Paragraph 56 of the CBA is the general arbitration clause which provides in part that "All disputes and controversies of every kind and nature whatsoever between any Producer and the Union or between and Producer any...performer arising out of or in connection with this Contract...as to...construction...of this Contract and/or such contract or engagement shall be submitted to arbitration...").

The CBA contemplates involvement of Screen Actors Guild in the arbitration proceeding, but according to information furnished by the parties at the hearing, SAG apparently refused to go forward with arbitration, and the parties, themselves then moved forward with this arbitration proceeding in accordance with the Court's Order.

FINDINGS AND CONCLUSIONS

Each party is to be commended for the excellent presentations of the issues that were made in this case, both at the hearing and in the post-hearing briefs. This case presented substantial issues regarding the construction of the applicability of the arbitration provisions of the CBA, particularly in view of the Court's construction of the last sentence of Article 28. In reviewing all matters presented I have made the following findings:

1. Scope of Arbitrator's Authority: The first issue raised by both parties in their briefs deals with the scope of arbitral authority in this matter. Assuming the CBA applies (a point as to which findings are made below) both parties acknowledge that the disputes between the parties may be subject to arbitration as the Court ruled and that the Claimants are principal performers who are entitled to the benefits of Article 28. However, Respondents argue that, because there was no separate negotiation prior to use of the recording, the last paragraph of Article 28 applies and mandates that the I must find that the performers are entitled to only three times the amount originally paid for the number of days worked plus applicable minimum use fees, but not

less than three times the applicable session fees at the rates provided under the CBA plus such minimum use fees (the "Article 28 formula") because damages in excess of that amount are only awardable in a court action in which an injunction and damages are sought and granted; because the Court rejected Claimant's demand for an injunction and for court-ordered damages, Respondents contend that the Claimants have no right to damages under the plain meaning of Article 28 notwithstanding the general arbitration provision (Article 56) of the CBA. Respondents cite as support for their position that under a similar clause (Article 17 of the CBA covering the situation where a commercial is used other than as contracted for without a separate bargaining) the language of the CBA permits the performer either to opt out and arbitrate or to litigate, which is expressly different from the language in Article 28. From this they argue that the parties to the CBA intended a different result in Article 28 i.e. to limit damages to the Article 28 formula (rather than actual damages, if proven) in any case where there has been no separate negotiation and no award by the Court of damages. There is no question that the language of the two sections differs in this respect.

Claimants, citing the Court's ruling, have argued that such an interpretation of the CBA would leave the parties without a remedy (other than the Article 28 formula) in cases where the Court declined to rule on damages and that that would preclude any arbitration under Article 58 as to the damages issue., notwithstanding the Court's Order.

I read the Court's decision in a different light than that proposed by the Respondents. Basically, in arriving at its decision the Court held that it would not pre-empt the arbitration provisions of Article 56 unless the matter before it were one in which both equitable relief (an injunction) and legal relief (damages) were to be awarded. Having determined that grounds for injunctive relief were not present, the Court referred the disputes between the parties to arbitration; in doing so the Court basically followed the mandate of the Supreme Court in deferring to arbitration any disputes that are the subject to an arbitration agreement between the parties that by its terms is applicable to such disputes and permits of arbitral determination of such disputes -- a decision which is consistent with the cases cited by the Court, namely cases of the *Steelworkers Trilogy* (all citations intentionally omitted), and other cases implementing §301 of the LMRA and with cases such as *Moses H. Cone Memorial Hospital v. Mercury Construction Corp* (citation omitted) and other cases, not involving collective bargaining agreements, that arise under the Federal Arbitration Act. I find that in construing this CBA the Court has found that the broad provisions of Article 56 permit arbitration of all disputes, including demands for actual damages in a situation such as this where a performer has opted out of the Article 28 formula but is unable to sustain a court action for damages solely because there is no basis for an injunction.

The Court quotes the following from one of the *Trilogy* cases (citations omitted): "[A}n order to arbitrate should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that governs the asserted dispute." The Court them goes on to state "No such 'positive assurance" exists here...the Commercials Contract is plainly susceptible of a reasonable interpretation that disputes of this type are subject to arbitration, except in cases in which a viable claim for injunctive relief may be made, in which case the performer may file in court..." (See p. 3 of the decision).

In short, the Court's decision reflects the current role of the federal courts in deferring disputes to arbitration where the parties' agreement clearly reflects that they have elected arbitration of all disputes; to construe the Court's decision as then precluding any consideration of the very disputes that the Court referred to arbitration would be a misreading of the Court's ruling and a distortion of the meaning of Article 28. In conceding by its arguments that the CBA should apply, Respondents are bound to arbitrate that which could have been resolved by a Court (once the Claimants opted out) but for the Court's determination to refer the damages issue (absent an injunction) back to an arbitrator. Consistent with my reading of the Court's

Order, I find that the issue of damages under Article 28 is an arbitrable issue in this proceeding, and that the Claimants are not bound to accept the Article 28 formula, if liability in fact lies.

2. AFTRA Jurisdiction Over Recording: The next issue deals with whether the Song was recorded under an AFTRA union contract. Generally, AFTRA has jurisdiction over producers of phonograph recordings. If the Song were recorded by a company that was signatory to an AFTRA collective bargaining agreement covering such recordings, then the requirements of Article 28 (i.e. material covered by another union contract) would be satisfied. The evidence presented during the hearing was as follows;

(a) On June 16, 1957 Gone Recording Corp. ("Gone") signed an agreement to be bound by the AFTRA Code of Fair Practice for Phonograph Records (the "AFTRA Code"). (See Exhibit 1 in this proceeding)

(b) On September 20, 1958, Claimants (at least those involved in this proceeding) signed an exclusive personal services agreement (the "Gone PSA") with Gone to render performing services as singers for phonograph records.

(c) According to the testimony of Mr. Johnson, which was the best evidence on the point introduced, The Song was recorded in late 1958 –early 1959, and hit the "charts" during the period following that. The Song was released on the "End" label. The End label was the label of End Music Company ("End"), a corporation that was distinct from Gone, but had common ownership with Gone. End did not become a signatory to the AFTRA Code until 1961, i.e. after release of the Song on the End label. Respondents contend that the evidence supports their position that the Claimants in fact worked for End, either directly or because the Gone PSA had been assigned to End, and that Claimants have the burden, which they have not sustained of proving that they in fact were hired by Gone and that Gone was the employer for the recordation of the Song.

Respondent also raised the issue as to the Claimant's AFTRA membership, i.e. were they members at the time of the recording? The evidence as to membership or non-membership was inconclusive at best, particularly in view of the lack of records at AFTRA, as testified to by a custodian of records for AFTRA who testified telephonically. However, if in fact Gone were a signatory to the AFTRA Code at the time of the recording, the Claimants' membership in AFTRA would not be relevant to a finding as to the applicability of the AFTRA Code.

Claimants' evidence in this regard is (a) the fact that they had an exclusive recording agreement with Gone, not End, (b) that End could have been the label that the principal used for these types of recordings (this was tendered as pure speculation and received by the arbitrator as such), and (c) Johnson's recollection (for which there is no existing documentation) that the principal of both companies paid the Claimants directly for their work as Gone recording artists.

Based on the documentation that was furnished (namely the Gone PSA) and the fact that there was no documentary evidence presented that could evidence a direct employment relationship with End during the period when the Claimants were "exclusive" to Gone under paragraph 7 of the Gone PSA, I find that the weight of the evidence favors a finding that the recording of the Song is a sound recording made under an AFTRA contract (i.e. the AFTRA Code) other than the CBA and that Article 28 is applicable to the recording. In view of this finding, it is unnecessary to make further findings that deal with the joint employer argument asserted by Claimants.

3, <u>Limitation of Actions</u>: The next issue to consider is the applicable period of limitations. Respondent argues that because this hearing is in California, I should, as a procedural matter, apply California's four year statute of limitations that is applicable to contract actions. Claimant, understandably, seeks to apply Illinois' ten year statute. According to the Complaint filed with the Court, Claimants (or some of them) are residents of Illinois; none appear to be residents of California. The fact that the parties stipulated to an arbitrator hearing

The matter in California should not determine the limitation of the action. In fact, whether or not Claimant successfully "forum shopped" (as Respondent's counsel casually suggested), the Illinois contacts are predominant in this action, i.e. some parties are residents of that State and, more importantly, the Court that mandated arbitration hereunder did so under procedural laws that would not have limited the action and precluded arbitration in accordance with its Order. Accordingly, I find that this action is not barred by the running of any statute that might limit the action. Although alluded to in the hearing, but not argued, I also do not find that the action should be barred by laches.

4. Measurement of Damages; Offset: In breach of contract matters, the measure of damages is the amount which will compensate the aggrieved party for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. In attempting to establish such damages, the parties' arguments differ.

Assuming applicability of the CBA, Respondent contends that the amount that the Claimants should receive in damages is the amount under the Article 28 formula; Respondents introduced as their expert Ms. Shirley McMahon who administers residual payments for an agency in Chicago. Having qualified, Ms. McMahon, in response to direct questioning, presented a computation as to amounts that would be due Claimants under Article 28, based on information she had independently obtained regarding the number of runs and uses of the commercial; in short, as I understand her computations, her estimates (as set forth in Exhibits L and M in the record) are that a payment of $16,395.00 would be made to one of the Claimants who sang as a single in one part of the commercial and that payments of $9443.13 would be made to all five of the group for a second portion of the commercial wherein all sang. The total for the entire usage would be $63,616, of which the single performance represented approximately 25% of the total. Ms. McMahon further testified that it was her opinion that most performers who "separately negotiated" prior to use of their performance accepted scale (or possibly scale with a slight markup) for their performance; on cross examination, Ms. McMahon conceded that her information as to the usages of Claimant's performance was based on information furnished by Respondents and that she did not know whether it was complete; she also indicated that her experience as to setting rates was limited to arrangements made with performers prior to use of their performances.

Claimants contend that, in cases not "separately negotiated" before the use but rather negotiated after the use, a pattern has been established wherein companies and their advertising agencies have, in effect, agreed to rates that are measured by the rates paid for the master use recording from which the performance is taken. Citing six cases of which both Claimants' counsel and Mr. Chuck Ruben, their consultant (who testified) were aware (and in which they were both apparently involved), as described in the Claimants' post-hearing brief (and in Exhibit 4 introduced for purposes of identification), Claimants contend that the negotiated rates for performances, on average, are 255% to 291% of the fee paid to the record company for the master use license. On this theory, using an "average multiplier" of 255%-291%, Claimants claim a low amount of damages of $637, 500 and a high amount of $727,500, (although they also argued for higher figures as well, assuming each performer were to be paid such "multiplier") based on the $250,000 fee paid for the master use license.

Having asserted that payment of Article 28 formula payments do not meet the test of the actual damages suffered by Claimants, the burden is on Claimants to introduce evidence of the amount which will compensate them for detriment proximately caused by the breach or which would be likely to proceed from the breach. Taking these two elements in reverse order, in this case no evidence was introduced as to damages that were "likely to proceed from" the breach, primarily, in my view, because the performers are for the most part retired or (unfortunately) deceased. As to evidence of amounts that would compensate Claimants for damages proximately caused by the breach, the only evidence introduced was the "average modifier" formula proposed by Claimants which, at best, demonstrated what amounts had been received by others in cases where claims were made after a use had occurred; the facts surrounding those negotiations (other than the amount of the master use fee) were not disclosed in the hearing, making it difficult for this Arbitrator to determine the relevance, if any, of the testimony regarding the same. Bearing on this, as well, is the fact the witness as to such amounts was Mr. Ruben who, as a consultant to artists, had been the negotiator in the cases cited; although I did not consider his testimony that of a disinterested expert, I did permit the testimony, but considered its source in weighing its value in this proceeding. Although Mr. Ruben (and for that matter others) may have succeeded under different (and unknown) circumstances to secure amounts in excess of the master use fees, this in and of itself does not establish that that formula is the applicable measure of damages for these Claimants in this case. What is needed here is evidence of the results of the injury to these performers because of the breach, i.e. damages from the loss of the benefit of the bargain that they would have made. Specific evidence of that was not, and perhaps cannot be, introduced.

However, this is not to say that no damages have been suffered. The Respondents in this matter did in fact fail to separately negotiate with the Claimants prior to making use of the material; their argument that they could not find the Claimants is a difficult one to accept in this day of Internet searches (where almost any one – particularly one that had celebrity—can be found). It is clear from the examples cited by Mr. Ruben (and for that matter those alluded to in the case cited by Claimants, namely *Butler et al. v. Target Corporation, et al.*, AAA Case No. 72 300 01066 04 Decided June 15, 2005) that, in determining damages, parties may reasonably take into account sums paid for other elements of the production to attempt to determine the benefit lost by the aggrieved party with whom there was no negotiation. To that extent, the cost of the master use license has relevance. Interestingly, Arbitrator Horowitz' opinion and award in the *Butler* arbitration touches on this in a portion reading "The evidence at arbitration reflects in most cases performers do not receive compensation greater than triple scale or session fees as compensation for use of their song or lyrics under Section 28 in a commercial broadcast. This is because most performers do not own the rights to their music, do not enjoy significant or sustained commercial success, or are deceased. The liquidated damage provision in Section 28 thus serves to secure reasonable compensation for most artists, particularly those who could not command a concert tour, record promotion, or meaningful creative input with the commercial..." He then proceeded to differentiate the Claimants in that case, relying in part on use of their "Grammy winning Gold Record" in the commercial and, apparently, on evidence that apparently had been introduced as to the cost of other elements of the advertising campaign – apparently his approach to measuring the damages caused by loss of the benefit of the bargain if the same had been separately negotiated in advance.

In this case, the evidence is that the Respondents paid $250,000 for the underlying music rights and $250,000 for the master use rights; it would not be unreasonable to conclude that, had a negotiation taken place, the value placed on the performers' joint contribution would be equal to that placed on the other elements of the musical portion of the commercial. The evidence regarding the "multiplier" test is not sufficient to justify a finding that the value of the Claimant's contribution (if negotiated at the time) would have exceeded the value of the other musical elements, and I so find.

Although no evidence was introduced to support the parties' assertions, Claimants further argue that it is "customary" for the record companies to pay one-half of the master use fees to the performers, but that such amount is not credited against the performers' fees that have been "separately negotiated" or gained through enforcement of Article 28 because performers are entitled to "bargain separately" for their fees, and Respondents, conceding that such payments are made by the record companies to performers, argue that payment of one-half of the master use fees is normally sufficient payment to cause most performers to accept union scale for their performances. In the present case the Gone PSA provides for payments of royalties for records sold, but does not specifically cover master use licenses and there was no evidence introduced as to circumstances causing Warner to make the payment If there had been a "separate bargaining" then Respondents could well have argued that Warner's payment should be taken into account, but there was no "separate bargaining." And no indication that the Claimants would have accepted such amount as an offset, had a bargaining occurred. Basically, the Warner payment to Claimants was distinct from the "separate bargaining" referred to in the CBA by a party not obligated to bargain under the CBA, and the evidence does not support a finding that the amount paid by Warner to Claimants shall be offset against amounts awarded under this Award, and I so find.

5. Based on the foregoing findings, I conclude that the Claimants jointly are entitled to damages in this matter in the amount of $250,000.

AWARD

1. Respondents Pepsico, Inc, and BBDO Worldwide,Inc. shall pay or cause to be paid to Claimants jointly the total sum of $250,000 as satisfaction in full of payments due under Article 28 of the 1994 Screen Actors Guild Television Recorded Commercials Contract ("CBA"); if any Pension and Health contributions are required to be paid on account of the payment of such sum, Respondents shall cause the same to be paid as required under the applicable union Trust Agreements to which either or both are bound. The payment to be made hereunder shall be divided equally between the five (5) Claimants or their heirs or successors, provided that if any party objects to such equal division, then the party that appeared in the commercial as a single singer shall receive twenty-five (25%) percent of this amount and the remaining seventy-five (75%) percent shall be divided equally between all five [fifteen (15%) percent each] members of Claimant or their heirs.

2. Payments due hereunder shall not be considered delinquent (and no interest shall be payable thereon) if paid within ninety (90) days from date of this Award or within ninety

(90) days following confirmation of the Award herein, if action is filed to confirm or vacate the same. Such interest, if any becomes due, shall be determined by reference to applicable laws of the State of Illinois.

2. Each party shall bear its own costs in this proceeding. Each party has pre-paid one-half of the arbitrator's fees in this matter, which are now fully paid.

DATED at Los Angeles, California this 10 day of November, 2005

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Dixon Q. Dern, Sole Arbitrator