GUILDS AND UNIONS IN A RIGHT-TO-WORK STATE

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CHAPTER 15

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Texas is a "right-to-work" state, as are more than 20 others. This paper will address some of the interactions between Texas law and the rules of the entertainment guilds. Many of the principles also would apply within other states.[1]

I. BACKGROUND

The three main entertainment guilds are:

1) the recently merged Screen Actors Guild/American Federation of Television & Radio Artists ("SAG/AFTRA"),
2) the Directors Guild of America ("DGA"), and
3) the Writers Guild of America ("WGA"), which has an east and a west division.

The primary below-the-line crew union is the International Alliance of Theatrical Stage Employees ("IATSE"), with the Teamsters union frequently providing drivers and location managers for film and television productions.[2] IATSE and Teamsters each have a number of "Locals" that represent members either within a geographic area or within a particular trade.[3]

These organizations each have a collective bargaining agreement or minimum basic agreement (collectively, the "CBAs") that employing producers may choose to sign. Most of the members of the guilds and unions work as freelancers, moving from project to project. Unlike independent contractors, however, the members who work for companies that have signed a CBA are treated as employees and are entitled to certain benefits and working conditions.

II. GUILD RULES

The guilds have rules and requirements for their members (collectively, "Member Rules"). These Member Rules include language requiring their members to work only for companies that have signed a CBA.

- **For SAG/AFTRA members:** "No member shall work as a performer or make an agreement to work as a performer for any producer who has not executed a basic minimum agreement with the guild which is in full force and effect."[4]
- **For DGA members:** "DGA members may provide their professional services only to producers with current DGA signatory status."
- **For WGA members:** "No member shall accept employment with, nor option or sell literary material to, any person, firm or corporation who is not signatory to the applicable [CBA]."[5]

Guild members who perform services in violation of the foregoing rules face consequences from their union. These range from a reprimand to a fine to expulsion from the guild.

III. SIGNATORY COMPANY RULES

When a production company signs a CBA, it becomes a "producer signatory." As such, it agrees that every person hired into a "covered" position will be governed by the terms of the CBA. This is true whether or not the individuals hired are union or guild members. In effect, it is each job that determines coverage, and those working the covered jobs are entitled to the benefits of the CBA's working conditions. This explains why both union and non–union members can work alongside each other on a production.[6]

The CBAs do not demand that signatory companies hire only guild or union members. They do, however, attempt to mandate that non-member hires join the applicable guild within a set period of time thereafter. In some cases, the CBAs purport to require

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[1] This paper will not delve into the history of closed shops, agency shops, the National Labor Relations Act nor the Taft-Hartley Act. Similarly, it will not explore the regulations regarding multi-employer pension and health plans, which are an important benefit for union and guild members.

[2] The less-well-known American Federation of Musicians represents many of those who supply music within the entertainment industry.

[3] Due in part to the organizational structure of IATSE and Teamsters, with their national and area Locals, the focus of this paper will be on the entertainment guilds.

[4] This is commonly known as "Global Rule One."

[5] Rule 8, WGA Code of Working Rules.

[6] For example, grips and electricians are covered positions within the IATSE CBA. So every person who works as a grip or electrician on an IATSE production is covered by the CBA, whether or not s/he actually is a member of the union. Similarly, performers with speaking roles are covered by the SAG/AFTRA CBA (but background performers in Texas are not) and thus every actor hired is governed by the CBA.

that a signatory company not hire an employee if s/he has previously worked under a guild contract and has failed to subsequently join the applicable organization.[7] In others, the CBAs purport to fine a signatory company or to require that the company itself pay the equivalent amount in union dues.[8]

Importantly, there is no requirement that a production company sign a CBA. Likewise, there is no requirement to use "all" or "none" of the guilds and unions for any particular production.[9] Pursuant to basic contract law, a company is not bound by an agreement that it does not sign. So, if a non–signatory production company hires a union or guild member in violation of that member's obligation to work only for a CBA employer, there is no recourse against the company.

IV. FINANCIAL CORE (OR DUES PAYING NON-MEMBER)

All of the entertainment guilds (somewhat reluctantly) offer a status known as Financial Core ("Fi-Cor").[10] Some refer to their members who go Fi-Cor as "dues paying non-members." A member of a guild who is Fi-Cor is authorized to work in both union and non-union jobs. Otherwise, pursuant to the Member Rules, they are not to work for employers who do not sign a CBA.

Fi-Cor requires payment to the particular guild of that portion of the regular dues that covers the costs of bargaining and administering the CBA; this is most of the dues amount. Those who go Fi-Cor typically do not do so to save a few dollars. Some do it specifically to be allowed to work non-union when desired; others do not want to pay for lobbying or for the support of other activities with which they might disagree. Full guild members argue that Fi-Cor participants are "free riders" and hurt the ability of the guilds to improve wages, benefits and working conditions for their professional members.

Dues paying non-members are not entitled to all the benefits of full membership in their guilds. For example, they normally cannot hold office, vote in elections, attend certain events, or be considered for awards given out by their guild. When working under a CBA, however, they (as with any non-union hires) are entitled to the benefits of the pay and working conditions of that CBA.

The relevance of Fi-Cor in a right-to-work state is that it can trump the mandate of Global Rule One. For example, Fi-Cor allows a SAG/AFTRA actor to take a job on a nonunion production without violating the obligations owed to his/her guild. It technically does not make a difference to a non-signatory company as Fi-Cor is an agreement between the performer and the guild alone.

V. RIGHT-TO-WORK V. COLLECTIVE BARGAINING AGREEMENT

So--how do the foregoing "requirements" square with the law in right-to-work states like Texas?

A. Federal Law

Employment regulations exist under both Federal and state laws. Pursuant to Federal law, an employer may not lawfully agree with a union to hire only union members (i.e., a "closed shop"). Indeed, the guild CBAs all have language cautioning that they should not be construed as requiring a closed shop. Federal law, however, does <u>not</u> prohibit an employer from agreeing with a union that new hires must join the union within a certain number of days after hiring (i.e., a "union shop"). Accordingly, in non-right-to-work states, the CBAs have a tool to enforce language stating that those employed under a CBA "shall" become members of the applicable guild within a set period after hiring.[11]

The major entertainment employers (such as the studios that are primarily responsible for negotiating the CBAs and the television networks) are long-time signatories under all the CBAs. In other words, they agree to follow the CBA for all productions, no matter where they are produced within the U.S.[12] This saves them the time and trouble of negotiating and executing

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[7] After signing a CBA, a producer is entitled to determine the date of "first hire" of any guild member. This in part determines if members in non-right-to-work states are eligible to work on the particular production.

[8] *See, e.g.*, "Union Security" sections of the CBAs.

[9] In Texas, many low-budget productions enter agreements with SAG/AFTRA while not "going union" in other areas.

[10] Fi-Cor status is largely a result of the decision in *Communications Workers v. Beck*, 487 U.S. 735 (1988), in which the Supreme Court held that those working under a union contract cannot be forced to pay in dues more than their share of the costs of collective bargaining and administration of the CBA (including the grievance process).

[11] *See, e.g.*, Sec. 1-400 of CBA for DGA; Art. 6 of CBA for WGA; Sec. 2 A-C of CBA for SAG/AFTRA; Article 17 for IATSE.

[12] There are different rules for productions shot in whole or in part in other countries, including in the calculation of residuals and benefit plan contributions.

new documents every time they directly hire a writer or set up a production as they already are signatory producers. Thus, they always "go union." In contrast, smaller independent production companies and single-picture companies more typically sign a new agreement pursuant to a CBA for each guild or union they want to contract with for each separate production they produce. This is especially true in right-to-work states as producers shift between union and non-union projects, often based on the budget.[13]

B. Texas Law

When a production company signs on to a CBA, it technically agrees that it will abide by all parts of the particular CBA. But provisions that require the company to agree with each performer that the performer shall be or later will become a member of the guild conflict with the Texas Labor Code (the "Code"). [14] Texas's right-to-work legislation is constitutional.[15]

Section 101.052 of the Code, entitled "DENIAL OF EMPLOYMENT BASED ON LABOR UNION MEMBERSHIP PROHIBITED,"[16] plainly states:

> "A person may not be denied employment based on membership or nonmembership in a labor union."

This rule confirms that Texas employers, even those that have signed a CBA, must not discriminate in hiring based on union or guild membership.

Texas courts have long acknowledged the rights of employees to join or not join a union. [17] Consequently, the Member Rules and the CBA provisions that call for an individual who works under a CBA to join the guild thereafter are not enforceable in Texas. Likewise, SAG/AFTRA cannot properly require Texas production companies to comply with "Station 12" obligations.[18]

Perhaps more troubling to the language of the CBAs and the Member Rules is Section 101.053 of the Code:

> CONTRACT REQUIRING OR PROHIBITING LABOR UNION MEMBERSHIP VOID. A contract is void if it requires that, to work for an employer, employees or applicants for employment:
>
> 1) must be or may not be members of a labor union; or
> 2) must remain or may not remain members of a labor union.

This Section conflicts with certain language in the CBAs and the Member Rules. Ominously, the statute explicitly holds such contracts "void" (not voidable).

We did not find Texas entertainment cases specifically determining that a contract (CBA) that demands the joining of a union after employment is void in its entirety. But Texas courts will not enforce contracts that violate the public policy of Texas. And Texas case law holds that the right of membership in a union and the right of nonmembership are protected interests.[19]

Because Texas employees have the absolute right not to join a union, the parts of CBAs that purport to require all those hired under a CBA to join the guild are unenforceable in Texas. Accordingly, Texas producers should not be inquiring into guild membership in their hiring decisions.

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[13] Of course, employees in all states have the right to organize. Consequently, some production companies find that a show can be "turned" (i.e., after production begins, the employees vote to be represented by a union). This is more common on projects with large budgets.

[14] Acts 1993, 73rd Leg., ch. 269, Sec. 1, eff. Sept. 1, 1993.

[15] *Construction and General Labor Union, Local No. 688 v. Stephenson*, 225 S.W.2d 958 (Tex. 1950) (construing former TEX. REV. CIV. STAT. ANN. ART. 5207a).

[16] "[T]he title of [a statute] carries no weight, as a heading does not limit or expand the meaning of a statute." *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 809 (Tex. 2010) (internal quotation marks omitted).

[17] *See Lunsford v. City of Bryan*, 297 S.W.2d 115 (Tex. 1957); *City of Round Rock v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013).

[18] Station 12 is the process by which entertainment employers submit their cast lists to SAG/AFTRA, which then checks the names against the membership roster to determine if the performers are in good standing and thus "cleared" to work.

[19] *See City of Round Rock v. Rodriguez*, 399 S.W.3d 130 (Tex. 2013) (addressing relevant sections of the Texas Labor Code that protect an employee's right to unionize or right to work); *Local Union No. 324, International Brotherhood of Electrical Workers, A.F.L. v. Upshur-Rural Electric Cooperative Corp.*, 261 S.W.2d 484 (Tex. Civ. App. – Texarkana 1953) (former Tex. Rev. Civ. Stat. Ann. Art. 520a § 3).