

**THE 2007-2008 MOTION PICTURE INDUSTRY COLLECTIVE
BARGAINING NEGOTIATIONS—A BRIEF OVERVIEW**

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Beginning in 2007, the major motion picture and television producers and the major television networks, represented by their multiemployer bargaining association, the Alliance of Motion Picture and Television Producers, Inc. (“AMPTP”), commenced a series of negotiations with four of the “above-the-line”² Guilds which have long represented the very talented and creative persons who write, direct and star in theatrical and television motion pictures. By virtue of its October 31, 2007 expiration date, the Theatrical and Television Basic Agreement between the AMPTP and the Writers Guild of America ,

¹ The author should disclose at the outset that he represents the multi-employer bargaining association that bargains on behalf of the employers. An attempt has been made to present a neutral overview, but due apologies are offered for any pro-employer bias that might slip through.

² The term “above-the-line” is a term of art which refers to actors, writers, directors and producers. The term “below-the-line” is used to refer to the crews engaged in physical production and includes a broad range of crafts and classifications, including camerapersons, editors, art directors, wardrobe persons, carpenters, electricians, grips, drivers and many others.

West and the Writers Guild of America, East (collectively “WGA”), was the first of the agreements up for negotiation.³ Waiting in the wings, with agreements expiring in July of 2008, were the Directors Guild of America (“DGA”), the Screen Actors Guild (“SAG”) and the American Federation of Television and Radio Artists (“AFTRA”).⁴

While these are separate agreements and have significant differences, the WGA, DGA, SAG and AFTRA agreements and, to some extent, many of the below-the-line agreements, share some common provisions, particularly in the important area of “residuals.” Residuals is a broad term used to refer to payments required by these agreements when theatrical and television motion pictures are exhibited, in whole or in part, in other media (such as on DVDs, basic cable or pay television) or, in the case of television, when the program is rerun on domestic television or is released in foreign markets. While differences exist in the formulae contained in the various agreements, significant similarities and historical patterns have emerged in terms of the ratio of residuals paid to writers and directors, on the one hand, and performers, on the other. From the employers’ standpoint, maintaining at least some standardization in the method of calculating and paying for such uses is quite important in light of the very significant costs involved in administering their residual obligations. It is primarily because of the

³ The WGA West and the WGA East are separate unions which bargain together for a single collective bargaining agreement.

⁴ AFTRA’s collective bargaining agreement actually was due to expire November 15, 2007 and consisted of two parts, commonly referred to as the “front of the book” and “Exhibit A.” The “front of the book” is negotiated primarily with the major television networks, although the AMPTP and the production companies it represents also attend. That portion of the agreement is negotiated separately from the “Exhibit A.” Exhibit A covers dramatic television programs produced for exhibition on network prime time and historically has been negotiated jointly by SAG and AFTRA with the AMPTP. It was the expectation of the parties, at least as of early 2007, that this would be the case during this series of negotiations. In fact, due to a falling out between AFTRA and SAG, AFTRA negotiated separately and reached agreement with the employers on a new Exhibit A in mid-2008, while the AMPTP and SAG have yet to reach agreement on a new contract.

overlaps between these agreements that negotiations with each Guild inevitably impacts negotiations with the others.

The agreements are also similar in terms of the types of productions as well as the types of exploitation of traditional productions which are covered. As a result, there have been watershed negotiations relating to all of the Guilds over the years as new forms of exhibition have come on line, such as the advent of television and the exhibition of theatrical motion pictures in that medium and the development of the pay television and home video markets. With respect to the current set of negotiations, a common issue that was looming was the applicability of the agreements to “new media.” Due to the rapid emergence of new technologies, including the internet, cell phones, PDAs and the like, including the increasing practice of delivering theatrical and television motion pictures to consumers through such new media, rather than through DVDs or over the air, each of the Guilds entered this set of negotiations intent upon negotiating what they considered “fair compensation” for their members for such uses . In addition, each Guild had a goal of establishing or confirming its jurisdiction over the production of new programs made for initial release in such new media.⁵ Indeed, well before negotiations commenced, many signatory companies had already commenced producing for new media as well as releasing theatrical and television motion pictures (or portions thereof) in new media. While the existing agreements had “sideletters” containing experimental provisions which dealt with some such productions and uses to a limited extent, a variety of grievances and arbitrations

⁵ Disputes between the parties existed and to some extent continue to exist regarding the scope of each Guild’s jurisdiction over production for new media.

had been filed by the Guilds challenging the manner in which talent was paid under these provisions.

In light of the new media issues and based on positions that some of the Guilds had taken publicly on other issues prior to the start of negotiations, including demands to increase the existing residuals payable for the release of motion pictures on DVDs and in other “supplemental markets,” it was apparent well before negotiations began that the negotiations would be difficult. This proved to be the case from the outset, when the WGA and the AMPTP could not even agree on when negotiations would start.

The AMPTP had requested early negotiations with the WGA, suggesting that negotiations start in the fall of 2006 or, at the latest, early 2007, in order to avoid what the employers have commonly referred to as a “de facto strike.” This term refers to the fact that the major motion picture and television producers have historically avoided scheduling productions for time periods when there could be a strike in order to avoid disruption of production and the significant costs and problems such disruptions can entail. This means that a significant loss of work will result even if agreement is reached at or around the date of contract expiration because of the long lead period involved in developing motion pictures and preparing for production. If no pictures have been scheduled for production near the contract expiration date and negotiations are not completed until then, it will normally be months before new motion pictures are ready to commence production. If negotiations can be completed six months or more before contract expiration, on the other hand, there is time to fill the pipeline and avoid this interruption in work. In order to avoid de facto strikes, the parties often commence negotiations well in advance of contract expiration and attempt to reach agreement

sufficiently early so that no de facto strike occurs. The WGA, however, had other ideas for this round of negotiations. Its new leadership apparently believed that in order to obtain the significant gains it was looking for, particularly in the areas of new media, increased residuals for DVDs and expansion of its jurisdiction to cover writing for animation, it would have to negotiate up to contract expiration in order to put maximum pressure on the AMPTP-represented employers. As a result, negotiations did not commence until July 16, 2007, less than four months prior to contract expiration.

What followed has been well chronicled in the press and will not be repeated here. Suffice it to say that negotiations moved very slowly, with accusations on both each side that the other side was not negotiating seriously. The AMPTP and the WGA negotiated from July 16, 2007 through November 5, 2007, at which time the WGA called a strike with the parties far apart on numerous issues. Negotiations broke off at that point for three weeks. The parties met again on November 26, but when no progress was made, the AMPTP declared an impasse.⁶

Rather than continue meeting with the WGA, the AMPTP made the tactical decision to ask the DGA to commence early negotiations. The DGA had been steadily preparing for negotiations, particularly in the area of new media, for well over a year. In deference to the WGA, the DGA had held off on commencing negotiations in the hopes that the WGA could reach a deal. As the WGA strike dragged on and work was disrupted for the DGA's members and everyone else in the industry, however, the DGA reached the

⁶ The WGA filed an unfair labor practice charge alleging that a good faith impasse had not been reached. The AMPTP strongly disagreed. While position statements were filed with the NLRB, this charge was withdrawn as part of the strike settlement that was ultimately reached prior to the Region reaching a decision as to whether to dismiss the charge or issue a complaint.

point where it was prepared to step forward. Prior to starting formal negotiations, however, the DGA pressed for and obtained meetings with some of the chief executives of the studios and networks so that informal discussions could take place regarding certain key issues which the DGA felt would be essential to any deal. Based on what took place at those meetings, the DGA agreed to commence formal negotiations with the AMPTP. In sharp contrast to the protracted WGA negotiations, the AMPTP and the DGA very quickly reached agreement on a new contract and that agreement was ratified in January of 2008, almost six months prior to contract expiration. The agreement included extensive new media provisions regarding the DGA's jurisdiction over production for new media and payments for exploitation of traditional product through new media, but left a great deal of flexibility for the producers in deference to the fact that both sides agreed that it was important to let this new area of business develop. In that regard, the deal was consistent with the DGA's conclusion, based upon studies which had been prepared for it by outside consultants, that meaningful revenues from this area were unlikely to be seen prior to 2010.

Not surprisingly, the DGA's ability to reach agreement on new media provisions resulted in pressure on the WGA from a wide variety of sources to return to the bargaining table and attempt to reach agreement. The WGA ultimately requested and got meetings with some of the same chief executives who had been involved in paving the way for the DGA deal. Finally, effective February 12, 2008, a little more than three months after the strike had started, a new agreement was reached. Significantly, while there are a few differences, the new media provisions of that agreement follow the pattern set by the DGA deal.

There are, of course, conflicting views as to whether the DGA could have made the deal it made if there had never been a WGA strike, as well as to whether the WGA could have reached an agreement itself without a strike if negotiations had commenced earlier and the parties had had more time to address the issues. No one will ever know the answers to those questions. One point that is clear, however, is that once the DGA reached agreement with the AMPTP on new media, there was great pressure on the WGA to accept the same deal. Similarly, once the WGA had accepted the new media pattern that the DGA had set, the pressure was that much greater on SAG and AFTRA to follow suit. However, the hope that this would result in quick resolution of these negotiations has only proved to be partially true.

As previously noted, the AMPTP had historically negotiated jointly with SAG and AFTRA for terms and conditions covering network prime time dramatic programming covered by the SAG Television Agreement and Exhibit A of the AFTRA Network Code. This was made possible by the fact that, historically, AFTRA represented performers on programs produced on videotape and SAG represented performers on programs produced on film⁷ so there was little overlap or competition between them. Since their interests were aligned with respect to this type of programming, it made sense to join forces. With the advent of digital production, however, both SAG and AFTRA are now pursuing many of the same productions and there are other disagreements between the two

⁷ The SAG Agreement covered both videotape and film, but there were few videotaped programs produced under the SAG Agreement.

unions. For these and other reasons, AFTRA and SAG advised the AMPTP that they would negotiate their agreements separately.⁸

The AMPTP requested that SAG commence negotiations as early as possible. However, SAG was not prepared to meet until April 15, 2008. Once negotiations began, it quickly became apparent that SAG had a number of significant demands, not the least of which were its insistence that the DGA/WGA pattern deal for new media would not be acceptable to SAG and its demand to increase residuals for DVDs. The parties held more than eighteen days of negotiations, with little progress being made. In early May of 2008, with a June 30 expiration date looming for both SAG and AFTRA, the AMPTP advised SAG that it had to turn to AFTRA negotiations (which had previously been scheduled) and would meet again with SAG at a future date to be determined.

The AMPTP and AFTRA commenced negotiations on May 7, 2008. The parties held seventeen days of negotiations and ultimately announced that agreement had been reached on May 28, 2008. Not surprisingly, that agreement included new media provisions which followed the DGA/WGA pattern, modified in certain respects to reflect differences peculiar to performers as well as to reflect the historic ratios between DGA and WGA residuals, on the one hand, and AFTRA residuals.

Having reached that agreement, the AMPTP turned its attention back to SAG in the hopes of reaching agreement prior to the June 30, 2008 expiration date of the SAG Agreement. While the parties met on several occasions, they remained far apart on

⁸ There are actually two SAG Agreements that are negotiated together—the SAG Codified Basic Agreement, covering theatrical films and the SAG Television Agreement, which is essentially a supplement that incorporates certain portions of the Codified Basic Agreement and contains specific provisions relating to television production.

new media, DVD residuals and other issues. The DVD proposal was similar to one the WGA had pressed and ultimately dropped in its negotiations and was a problem for the AMPTP both due to its cost impact and because it would upset the residual historical ratio among the Guilds. With neither party budging, on June 30, 2008, the AMPTP presented its final offer to SAG. While, at SAG's request, a further meeting was held for SAG to ask questions about that final offer, the offer has not been accepted and there have not been any further negotiation sessions since that time.

So where does that leave things? As of this writing, despite the fact that its contract expired over a month ago, SAG has not sought strike authorization from its members. There are many who feel that SAG would not get that authorization if it sought it or that, at best, it would obtain authorization by an insufficient margin to make a strike palatable. Whatever SAG's reasons, however, the SAG Agreement remains open and there has been a "de facto" strike as the major studios have sharply curtailed theatrical productions due to the absence of a contract.