RECENT CASES

Directors Guild order that members not work for HBO is exempt from the antitrust laws, Federal District Court rules

In a thoughtful, long-awaited, and long decision, which is likely to have a significant impact on the economics of pay television program production, Judge Abraham D. Sofaer of the Federal District Court in New York City has held that the Directors Guild of America does not violate the antitrust laws when it prohibits Guild members from working as directors on programs intended for exhibition on pay television which are produced by companies, such as Home Box Office, that have not signed a Guild agreement.

From 1973 to 1978, the Guild waived its requirement that members work only for signatories, apparently in order to enable HBO, and pay television generally, to become established. In 1978, however, the Guild sought to enter a collective bargaining agreement with HBO which would have compensated Guild members at the network prime-time rate or at a certain percentage of the revenue derived from pay television's exhibition of a program (whichever was greater). When these terms were refused, the Guild informed its members that they faced disciplinary action if they continued to work for HBO.

HBO responded by bringing a lawsuit alleging that four groups of directors - freelance directors, director-owned loan-out companies, producer-directors, and director-packagers - were independent contractors and that the Guild's combination with these groups was an illegal restraint of trade.

Judge Sofaer first pointed out that "a broad range of concerted labor activity" has been exempted from the provisions of the antitrust laws, provided that a union has been able to establish that it acted in its self-interest and apart from any non-labor group. Most recently, in H.A. Artists & Assoc., Inc. v. Actors Equity Ass'n, 101 S.Ct. 2102 (1981, ELR 2:11:3), the United States Supreme Court upheld Equity's system of licensing agents and regulating their fees. The agents were independent contractors - a non-labor group - but because of their control over an actor's access to jobs, they were in a position to influence a producer's compliance with the wage structure negotiated with the union. In another leading case, American Federation of Musicians v. Carroll, 391 U.S. 99 (1968), band leaders challenged a musicians union regulation governing the minimum prices that band leaders could charge for club dues. This direct price restraint was upheld. The band leaders, although

independent contractors, competed with union-member musicians for shares in the fee charged for a club date, so regulation of the fee was necessary to protect the wages and job security of musicians in the band. The status of each of the four director groups with which the Guild combined therefore was the key element in determining the validity of the Guild's employment restriction and was carefully reviewed by the court.

At present, about 800 of the Guild's 1,250 active director members are freelance directors. A freelance director resembles an independent contractor in that he or she may accept or reject offers to direct particular shows; may contract to work on an individual program rather than for a fixed period; and may have considerable discretion in selecting assistants and in exercising his or her skills. Nevertheless, many aspects of a freelance director's work suggest that they are employees of a production company: freelancers do not risk any monetary

capital; their additional compensation for a rerun or other supplemental use of a program is similar to that received by other entertainment industry employees; they are treated as employees for tax purposes; they do not control the time or place of their work and must complete their work at the producer's request; and they have no right to control the creative elements of the shows they direct. Employers reserve the right to approve director decisions on hiring and creative issues. And freelance directors do not formulate or administer production budgets, and have limited input in the selection or development of a script, the selection of talent and the editing of a program. Disillusioning as it may be, "Even famous, award-winning directors ... are often closely supervised by their producers," and "the Guild's aims for director independence and creative control ... do not accurately represent current reality in the television film industry."

Further, freelance directors are indistinguishable from staff directors in creativity, skill, compensation and the degree of supervision to which they are subject. Guild agreements provide that staff directors receive 80% of the compensation payable to freelance directors for work on commercially sponsored programs. The 20% adjustment is based on the greater security and fringe benefits generally available to staff directors. But independent production companies do not require staff directors, and the use of tape and the dearth of live television programming also have reduced the need for full-time staff directors, who now work primarily on such regularly produced programs as news shows, soap operas and sports programs. And even if freelance directors are not equivalent to employees of a production company, the similarity of function and overlap of capacities between staff and freelance directors creates a

"mutuality of interest" that readily justifies their bargaining collectively, stated the court.

The Guild's agreements with the 400 loan-out companies established by freelance directors to contract out the services of their director-owners also qualified for the statutory exemption to the antitrust laws because of the strong "economic interrelationship" between the loan-out companies and Guild members. Loan-out companies, which are often formed to exploit tax advantages available to freelance directors, are treated as employers of the director by the Guild for purposes of the director's compensation. The companies all have executed collective bargaining agreements with the Guild. But the use of a loan-out company does not increase the director's right to control production, or alter the director's status to that of an independent contractor or entrepreneur. The directors utilizing a loan-out and the loan-outs themselves are labor groups, concluded the court. And the

loan-outs would be a labor group even if they are not viewed as identical to their owners because they are in a position to substantially affect the Guild-established wage scale.

The third group of directors challenged by HBO, producer-directors, also qualify as a labor group. The difficulty of defining production responsibilities "precludes a finding that all directors who are also called producers are independent contractors in the work they perform," stated the court. A narrow group of producer-directors, defined by HBO as having supervision and control over the fiscal and artistic aspects of creating a television program, would be correctly denominated independent contractors. But these producer-directors would still be in job or wage competition or in an economic interrelationship affecting legitimate union interests. Producer-directors perform the functions performed by directors, and the Guild has an interest in

preserving the director's part of the producer-director's job for its members. Further, if producer-directors were not permitted to combine with the Guild, a production company might avail itself of the services of such an individual to escape its employment obligations to the Guild.

The fourth category of directors allegedly participating in an unlawful combination with the Guild are packagers - those who produce and market television programs . As distinguished from a loan-out, a packager is an entrepreneur with an established office and employees and, as such, would not be entitled to combine with a labor organization. However, the Guild represents director-packagers with respect to their activities as directors, and does not prevent them from working in a non-Guild capacity for a non-signatory employer. Entrepreneurs were found to be within the statutory exemption in Equity and Carroll for certain collective representation

purposes. The director-packager is in a position to threaten Guild employment terms, and therefore may also be considered a labor group, ruled the court.

HBO's second major contention was that Guild agreements with production companies restrain competition because programs are made available to commercial television on better terms than those proposed to HBO. A nonstatutory exemption to the antitrust laws protects collective bargaining agreements if the terms are agreed to at arm's length, apply only within the bargaining unit and concern legitimate union interests. The agreements with production companies were definitely pursued in the Guild's self-interest, and no evidence was presented to suggest that the Guild acted jointly with any employer to place HBO at a disadvantage. Even when reached at arm's length, certain terms in an agreement may be questioned as to their impact on the product market. But all of the terms challenged by HBO were found to be

protected by the nonstatutory exemption. One such provision requires a signatory producer to give 60 days notice prior to selling a program to pay television. This notice period was reasonable, not likely to interfere with sales in the television industry, and "fundamental to the interests of the union," found the court.

Another provision, appearing in the special Amendment to the Guild's Freelance and Basic Agreements, requires that a signatory pay directors the greater of the applicable minimum network primetime rate and four percent of the gross revenue derived by the signatory from licensing the exhibition of a Guild director's program to pay television. The percentage of the gross is a percentage based on the license fee paid to the signatory, not of the total earned by a licensee such as HBO. The production of programs for pay television therefore may become more expensive than the production of programs for free television. If HBO and other pay

television companies were placed at a disadvantage relative to free television, this might violate the antitrust laws. But it was not claimed that the Guild conspired with producers or the networks to discriminate in price in order to destroy pay television. The Guild sought the percentage of the gross provision to benefit from pay television's anticipated higher profits. (The court did suggest, however, that the Guild proceed carefully in bargaining with directorpackages for a percentage-of-the-gross guarantee since such packagers might feel a greater pressure to agree to this provision.)

The Guild also sought to limit the term of exhibition licenses to a specified period such as 15 exhibition days on any one pay television system within a six month period, and to limit all license agreements to a one year term. The product market thereby would be more restricted for pay television companies than for free television. But this restriction again was not part of a

conspiracy between the Guild and any producer or network to limit exhibition rights. Pay television generally broadcasts fewer programs and schedules frequent reruns, reducing work opportunities for Guild members. Restricting such showings would be a legitimate union objective, the court ruled.

An Assumption Agreement also is required under the Special Amendment. The agreement requires a signatory to secure from the licensee, buyer, or distributor of any program produced by a signatory, an agreement to assume the signatory's obligation to the Guild member. The licensee becomes directly responsible to the Guild for payment of the director's percentage of gross fees, and would be liable for the payment of the director's compensation for the use of the program in supplemental markets. The assumption agreement is designed to guarantee that directors receive the compensation and benefits for which producers are contractually liable, even

when an entity other than the signatory becomes the actual exhibitor or licensor. The ease in transferring exhibition rights, as well as the fact that a significant number of packagers are funded by licensees such as HBO, supports the Guild's need for the guarantees provided in the assumption agreement, found the court. And the Guild's use of the agreement did not unreasonably restrain trade. The agreement did not force purchasers of programs into the position of signatories, as argued by HBO, since only the compensation terms and exhibition restrictions of the Special Amendment were involved. The requirements of the agreement have been suspended in those instances when other means of guaranteeing a director's compensation were proposed.

In all, the Guild's conduct was ruled exempt from the antitrust laws. And even if the Guild's restriction on the employment of its members had not been found exempt, HBO had not shown that the Sherman Act was violated

or that there had been any threatened loss or damage to its business caused by the Guild, the court concluded.

Home Box Office, Inc. v. Directors Guild of America, Inc., Case No. 78 Civ. 3095 (S.D.N.Y., January 28, 1982) [ELR 3:19:1]

Criminal defense lawyers may acquire client's "life-story" rights in payment of fees, California Supreme Court rules in "Skid Row Stabbings" murder case

With what appeared to be great reluctance, the California Supreme Court has ruled that criminal defense lawyers are not automatically disqualified from representing clients whose "life-story" rights they have acquired in payment of their fees. The decision is of great significance to the legal profession, if not the entertainment

industry, because it is at odds with the American Bar Association's code of Professional Responsibility as well as earlier cases in which criminal convictions have been overturned or questioned precisely because the accused's lawyer had book writing plans while trials were in progress. (See, e.g., ELR 2:14:4)

The California Supreme Court's decision was rendered in a matter whose facts made it an almost perfect "test case." The accused was Bobby Joe Maxwell who has been charged with ten counts of murder in what was known as the "Skid Row Stabbings" of 1978 and 1979. The circumstances of some of those slayings were such that Maxwell faces the death penalty. Maxwell retained three experienced defense lawyers to represent him. He then entered into a written contract with his lawyers in which Maxwell irrevocably assigned to them, as their fee, "any and all right, title and interest, of any kind, nature and description throughout the world in and to the

story of [his] entire life," including all entertainment and commercial exploitation rights. Maxwell will receive 15% of the amount received from any such exploitation, his lawyers the remaining 85%. In the agreement, Maxwell promised to cooperate in their exploitation efforts and not to disclose his story to others except with the lawyers' permission or as required by law or his defense. The carefully drafted agreement also had Maxwell waive all defamation and invasion-of-privacy claims he may have from the exploitation of his story. And he agreed to waive the attorney-client privilege if asked to do so by his lawyers.

Contracts of this sort have long been frowned upon because they create potential conflicts of interest between the lawyer and the client. And the contract between Maxwell and his lawyers itemized several of these potential conflicts. It points out, for example, that the lawyers may wish to create damaging publicity to enhance

exploitation value, may avoid mental defenses because they may invalidate the contract itself, and may even wish to see him convicted and sentenced to death for publicity value. Nevertheless, in the agreement, the lawyers promised to raise every defense which they feel warranted and to conduct the defense "as would a reasonably competent attorney acting as a diligent conscientious advocate."

When arraigned, Maxwell pleaded not guilty and then notified the court that he was indigent and had entered into a "life-story" rights contract with his attorneys in order to pay them. On two or three separate occasions, judges questioned Maxwell about the contract and about the potential conflicts of interest it created for his attorneys. On every occasion, Maxwell waived the conflicts and insisted he wished to be represented by his lawyers. Nonetheless, the lawyers were disqualified and substitute counsel appointed to represent him.

It was this order that the California Supreme Court has reversed in an opinion by Justice Newman. In so doing, it acknowledged the argument that "life-story fee contracts are inherently prejudicial, unethical, and against public policy," and that "It is said that they tempt lawyers, consciously or subconsciously and adversely to the client's interests, to tilt the defense for commercial reasons." Nevertheless, the court emphasized that Maxwell has a right to counsel of his own choice, because confidence in his lawyer is vital to his defense. And the court noted that Maxwell has been advised of the conflicts and has chosen to waive them.

Justice Newman's opinion concluded by stressing that it should not be taken to constitute "moral or ethical approval of life-story fee contracts." Justice Kaus concurred in the result, but added that he "had hoped that our opinion would find harsher language respecting the 'life story' contract's propriety as well as its

enforceability." Chief Justice Bird concurred as well, in part, because she noted that court appointed counsel usually are not paid in full for their work. "Therefore," she wrote, "the only way in which an indigent may be able to secure counsel of his choice may be through a 'life story' arrangement."

Justice Richardson dissented. It was his view that "Counsel cannot simultaneously wear the hat of a literary or theatrical agent whose goal is commercial promotion and the hat of a counselor at law who is guided by strict ethical constraints."

Maxwell v. Superior Court, L.A. 31162, California Supreme Court, January 28, 1982 [ELR 3:19:3]

ABC and CBS may be ordered to pay up to $2.3 million to five television producers to reimburse them

for discovery costs incurred during Government antitrust action against the networks

If "The Reimbursement of Nonparty Discovery Costs" were a television program, it probably would not attract high ratings or win an Emmy. But a decision on this issue by a Federal Court of Appeals in California may result in an award of up to $2.3 million to five producers of television programming: Columbia Pictures, Gulf & Western Industries, MCA, Twentieth Century-Fox and Warner Communications.

The $2.3 million represents costs which the studios incurred in responding to subpoenas from CBS and ABC to produce pretrial discovery material for use in an antitrust suit brought by the Justice Department. The Government, in challenging the networks' practices in acquiring prime-time programming from independent producers such as the studios, placed in issue several

hundred transactions pertaining to the production of television programs and theatrical films over more than a 20-year period. The studios unsuccessfully sought to quash the networks' subpoenas; and their motion to quash "reserved" the right to seek reimbursement of discovery costs if production were ordered. It required 18 months to complete the production of the documents sought by CBS and ABC, and some studio offices and personnel were specifically devoted to this project. Ultimately, consent judgments were entered against CBS and ABC (ELR 2:11:1).

The studios then moved for reimbursement of their costs, but their motion was denied by a Federal District Court.

The Court of Appeals has reversed that decision, however. It noted that although party witnesses generally bear the burden of discovery costs, nonparty witnesses "are powerless to control the scope of litigation and

discovery, and should not be forced to subsidize an unreasonable share of the costs of litigation to which they are not a party." The networks argued that the studios were "interested" in the outcome of the litigation. Nevertheless the fact that the studios may benefit from the consent decrees would not require them to bear all the expenses of discovery, stated the court. Victims of antitrust violations might be chilled from cooperating with the Government if they then were subject to unreimbursed discovery costs. And the Government, rather than the studios, had determined the scope of its case. It also was argued that the studios were large corporations able to bear the burden of discovery costs. But, said the court, this did not make $2.3 million in costs "reasonable" or explain why the studios should subsidize the defense of other large corporations. The fact that the discovery may have been relevant to the networks'

defense also would not justify placing the burden of costs on the nonparties.

The court concluded that the studios should be entitled to an award of some compensation, but since the District Court did not explain its grounds for denying reimbursement, the matter has been remanded for a determination of what amount, if any, would be reasonable.

It also was held that the studio's request for reimbursement was timely because they had expressly reserved their right to seek reimbursement and had kept the court and the networks fully informed of their progress and expenses. The networks were on notice of the costs which were being incurred and could have modified or limited their discovery demands if they felt that "their exposure to potential reimbursement exceeded the value of requested material."

United Stales v. Columbia Broadcasting System, Inc., Case Nos. 80-5345 and 80-5346 (9th Cir., Jan. 22, 1982) [ELR 3:19:4]

Cable television ordinance adopted by Boulder, Colorado is not exempt from the antitrust laws, U.S. Supreme Court rules

The battle for cable television franchises in the city of Boulder, Colorado is not over. The United States Supreme Court has held that a Boulder city ordinance, prohibiting a local cable television company from expanding its business, is subject to antitrust scrutiny.

In 1964, Boulder entered a twenty year, non-exclusive license-contract with a predecessor of Community Communication Company (CCC), under which CCC was licensed to supply cable television throughout the city.

The company has since supplied news, information and entertainment to many of Boulder's citizens via its cable television operation,

In 1979, Boulder Communications Company (BCC), informed the city that it had been formed by six citizens of Boulder, and offered to supply Boulder with "the best that cable has to offer." BCC tendered a resolution under which it would receive a permit to build its system if CCC's license were revoked or if CCC agreed not to expand. In December 1979, Boulder enacted an ordinance imposing a ninety-day moratorium on CCC's expansion. When CCC continued building, city authorities arrested its construction crews and tore down its cables. CCC then sought and obtained a federal court order enjoining Boulder from taking any action to restrict the conduct of its cable television business. (ELR 2:8:6) The trial judge found the direct and immediate effect of the ordinance to

be a restraint of trade, and thus a violation of federal antitrust laws.

The Court of Appeals reversed that decision on the grounds that the city of Boulder is exempt from the antitrust laws under the authority of Parker v. Brown, 317 U.S. 341 (1942). (ELR 2:20:4) In that case the Supreme Court held that restraints of trade imposed by a state are not prohibited by the Sherman antitrust act.

Emboldened by the reversal, the city enacted a new ordinance which permanently excluded CCC from providing cable service outside of a prescribed area encompassing only one-third of the city's residents. The enforcement of this new ordinance was enjoined by the same trial judge who had ruled against the 90-day moratorium. (ELR 2:20:4) Not surprisingly, the Court of Appeals reversed the trial judge again. (660 F.2d 1370) However, the U.S. Supreme Court then heard the case

and recently handed down a 5-3 decision in favor of CCC.

The Supreme Court has held that Boulder's ordinance would not be exempt from the antitrust laws unless it constitutes an action of the State of Colorado itself in its sovereign capacity or unless it constitutes municipal action in furtherance of clearly articulated and affirmatively expressed state policy.

The state of Colorado had no policy on cable television, leaving municipalities the option to exercise their local "home rule" powers to regulate cable franchises. The Court determined that the delegation of "home rule" powers to the city had not fulfilled the requirement of "clearly articulated and affirmatively expressed state policy," because the "home rule" policy was a position of mere neutrality respecting municipal action. The case has therefore been remanded to the District Court for

consideration of whether the ordinance does violate the antitrust laws.

The Court's decision did not address whether the ordinance had infringed upon the cable television company's First Amendment rights.

Community Communications Company, Inc. v. City of Boulder, Case No. 80-1350, U.S. Supreme Court, January 13, 1982 [ELR 3:19:5]

Penthouse Magazine did not libel Miss America Pageant in fictional article about a "rowdy" beauty contest

Penthouse Magazine may claim the victor's scepter, roses and crown in a libel action involving an article entitled "Miss Wyoming Saves the World. . . ." The

article, which was published in the August 1979 issue of the magazine, purportedly satirized a beauty pageant and included descriptions of "immoral antics" of the protagonist, a fight among the contestants, and the partially nude appearance of one contestant.

In a lawsuit brought by the Miss America Pageant, Inc., a Federal District Court in New Jersey (in an earlier proceeding) denied Penthouse's motion for summary judgment on the basis that "the mere fact that a work could be characterized as fictional did not provide its publisher with a complete defense" in a libel action. Penthouse then argued that the article was a form of parody, satire, humor or opinion protected by the First Amendment, and that the Miss America Pageant was a public figure and had not established actual malice by clear and convincing evidence.

Penthouse noted that it had previously published four fictional works by Philip Cioffari, the author of the

article. Cioffari, a professor of English and creative writing, assured Penthouse that the article was fictional and was not intended to be a true statement of facts about an actual Miss America pageant. The article was compared to a Mad Magazine or National Lampoon satire. However, the affidavits of the author and editor of the piece did not refer to any intent to parody or satirize the pageant. Further, the cases cited by Penthouse as mandating "hospitability" to the humor of parody involved trademark and copyright infringement claims. Defamation actions were distinguished by the court as focusing on the personal interest in reputation rather than a property right. Furthermore, said the court, society's interest in the free flow of ideas having been served by the publication of the story, this interest would not preclude an award of damages for defamation solely because the story was characterized as, or was in fact, parody.

Damages could not be awarded, however, in the absence of proof of actual malice under the standard of New York v. Sullivan, 376 U.S. 254 (1964). Penthouse contended that it believed that the story was not about real persons or events, that it was justified in relying on the author's representation as to the fictional character of his story, and that it did not publish the story with "reckless disregard for whether [the story] would be reasonably understood as relating facts and events about plaintiff which actually took place at its beauty pageant."

In the case of a work of fiction which is not intended to convey the truth, asking whether an author or publisher had the subjective intent to publish a falsity would be too "simplistic," stated the court. Actual malice in the context of a fictional work was discussed extensively in Bindrim v. Mitchell, 91 Cal.App.3d 61 (1979, ELR 1:4:1). In Bindrim, a California appellate court rejected

a motion to set aside a jury verdict which found Gwen Davis Mitchell, the author of the novel "Touching," liable for defamation. The novel included a description of nude therapy sessions conducted by a psychiatrist. Mitchell had attended nude therapy sessions conducted by Paul Bindrim, a psychologist, prior to writing her novel. The court found that the novel's depiction of the therapy sessions was false in such respects as the use of obscene language by the fictional doctor and the description by a fictional patient of bizarre sexual fantasies. Tape recordings of the sessions conducted by Bindrim revealed that no patients had related such fantasies. Mitchell "was in a position to know the truth or falsity of her story," and the jury therefore was entitled to find that the publication of the novel was in reckless disregard of the truth or with actual knowledge of falsity, stated the California court.

The Miss America Pageant claimed that evidence presented in the case of Pring v. Penthouse, 7 Media Law Reporter 1101 (D.Wyo. 1981, ELR 3:11:1), demonstrated actual malice on the part of Penthouse. In Pring, a jury found that readers of the Penthouse article could reasonably conclude that the Miss Wyoming of the article, who was portrayed as sexually promiscuous and immoral, was Kimberli Pring, the real Miss Wyoming of 1978. The jury awarded Pring $1.5 million in actual damages and $25 million in punitive damages against the magazine, and $35,000 in actual and punitive damages against Cioffari. The court reduced the punitive damages award against Penthouse to $12.5 million.

In their testimony during Pring, both Robert Guccione, the publisher of the magazine, and a senior editor stated that the story was about a contestant in the Miss America pageant. Guccione acknowledged that the article contained such incidents of reality as the contest itself,

the titles of the contestants, the boardwalk, the judges, and the audience. But Guccione viewed the article as "pure fantasy."

The court ruled that even though Penthouse's editors knew that the Miss America pageant was a real event and that Cioffari's story had not occurred at a real Miss America pageant, this did not demonstrate a subjective awareness on the part of the editors that they were publishing direct, false statements about the pageant. The only false portrayal of the pageant seemed to arise from an innuendo that the pageant had permitted the participation of rowdy or immoral individuals. But the story portrayed the pageant in a "straightforward" manner; pageant officials were not depicted as participants in the story's activities. Unlike Bindrim, the pageant was a "mere backdrop" in the article and the events described did not reflect on its character, the court concluded in granting summary judgment to Penthouse.

Miss America Pageant, Inc. v. Penthouse International, Lid., 524 F.Supp. 1280 (D.N.J. 1981) [ELR 3:19:6]

Kansas City Chiefs prevail in worker's compensation and breach of contract cases arising out of line-of-duty injuries suffered by its players

Injuries are common in the National Football League, so common in fact that a Missouri appellate court recently noted that injuries are a "normal incident of a professional football game." This disquieting finding was among those relied upon by the court to reverse a decision of the Missouri Industrial Commission awarding offensive guard Gery Palmer compensation for an injury to his back.

Palmer's injury occurred during a game while he was executing a play called a "left trap." Palmer's job was to drive the oncoming defensive tackle out of position to create a hole for the ballcarrier. To do so successfully, it was essential that Palmer stay lower than the defensive player. Unfortunately, he did not. At a hearing to collect workman's compensation for his injury, Palmer testified that the defensive player, Larry Hand, "saw the play coming, stepped down inside ... to close the play. . . . It was a situation where he got considerably lower than I did ... and he drove up through me, you know, stopping me completely.... I felt a numbing sensation all through my upper body which would attribute to the position I was in. . . . This particular play, you know, it shouldn't have happened that way. I should have been able to stay lower than him."

The Industrial Commission found that Palmer's injury was the result of an abnormal strain or "accident." The

Missouri Court of Appeals has reversed, however, on the grounds that his injury was not the result of an "accident" within the meaning of Missouri worker's compensation statute. The court ruled that Palmer's injury was not an unexpected occupational event, but rather was an expected incident of a usual task done in the usual way. Since the right to worker's compensation under Missouri law depends on the existence of an "accident," the court's finding meant that Palmer was not entitled to compensation after all. According to the court, Missouri's worker's compensation statute "simply does not contemplate that the deliberate collision between human bodies constitutes an accident. . . ."

The Chiefs also prevailed in an unrelated case filed against them by Bill Gambrell as a result of a back injury suffered by him in a pre-season game in 1974. The NFL's Standard Player Contract provided that a player who is injured in practice or in a game is entitied to his

salary so long as he is disabled (though not beyond the expiration of his contract). After his injury, Gambrell continued to receive his regular salary from the Chiefs until the team doctor said that Gambrell had recovered and was physically able to resume play. Gambrell disagreed, complaining that his back injury persisted. Soon thereafter, the Chiefs released him from his contract and stopped paying him.

In the breach of contract suit that followed, Gambrell charged that the Chiefs should have continued to pay him until his contract expired. The Chiefs answered that they had properly released him pursuant to a provision in his contract which gave them the right to do so whenever the coach determined that he no longer had sufficient skill and capacity to perform with the skill required.

Though the contract did in fact contain such a provision, it was not disputed that NFL teams may not use

the provision to cut off their salary obligations to injured players. Thus, the jury was asked to determine whether Gambrell's injury still prevented him from playing professional football as of the date the Chiefs released him. By its verdict, the jury indicated that Gambrell's evidence of his continuing disability had not been persuasive, and that therefore the Chiefs were entitled to release him without further liability for his salary.

A Missouri Court of Appeals has affirmed that judgment. It rejected Gambrell's argument that the verdict was not supported by the evidence, because the Chiefs had failed to prove that he had recovered from his injury. The court pointed out that the burden of proof had been on Gambrell to establish that he was physically incapable of resuming play at the time of his release, and that the Chiefs were not required to introduce evidence to support a verdict in its favor.

Palmer v. Kansas City Chiefs Football Club, 621 S.W.2d 350 (Mo.App. 1981); Gambrell v. Kansas City Chiefs Football Club, 621 S.W.2d 383 (Mo.App. 1981) [ELR 3:19:7]

Briefly Noted:

Labor Relations.

When James Cox, a news reporter at WJKW-TV in Cleveland, was terminated, the reason given for his termination was "just and sufficient cause." At an arbitration hearing concerning the discharge, evidence was presented regarding the alleged harassment of government officials while Cox was pursuing a news story, and regarding Cox's alleged tardiness, absenteeism and misconduct. The arbitrator denied a grievance filed by Cox,

finding that his termination was based in part on "unsuitability for staff or program requirements" as well as for the stated ground of just and sufficient cause. A Federal District Court remanded the matter to the arbitrator for a determination based solely on the presence of just and sufficient cause. This decision has been reversed by a Federal Court of Appeals which has upheld the arbitrator's interpretation of the bargaining agreement's ambiguous language and has ordered the confirmation of the arbitrator's award.

American Federation of Television and Radio Artists, Cleveland Local, AFLCIO v. Storer Broadcasting Company, 660 F.2d 151 (6th Cir. 1981) [ELR 3:19:7]

Labor Relations.

A union's request that it be compensated by Nolan Scenery Studios, a union employer, because it used prefabricated props supplied by Theater Techniques, Inc., a non-union contractor, to complete a scenic design project was ruled a secondary boycott by the National Labor Relations Board. The Board found that a monetary assessment by the union based on an estimate of the time it would have taken Nolan's employees to fabricate the props for the show "Stop The World I Want to Get Off," was "unlawful pressure to claim work" and an attempt to influence Theater Technique's method of doing business. (ELR 1:20:6)

However, the Federal Court of Appeals in Washington, D.C., has reversed the decision of the NLRB and has remanded the matter for further proceedings on the question of whether the union was aware of the contractual

relationship between Theater Techniques and Nolan. The NLRB apparently assumed that the union was acting with knowledge that Theater Techniques possessed absolute control over the disputed work and that the union's demands were therefore directed, secondarily and illegally, at Theater Techniques. However, a union representative (whose credibility was found unreliable by the NLRB) testified that he believed that Nolan held the painting contract for the show and that the union's demands were concerned only with the preservation of work for Nolan's employees.

On remand the NLRB may consider the court's "note in passing" that "allowing a good faith but mistaken belief that the pressured employer had the contractual right of control ... [might] constitute a defense to an alleged violation of section 8(b)(4)(ii)(B) ..."

United Scenic Artists, Local 829, Brotherhood of Painters and Allied Trades, AFL-CIO v. National Labor Relations Board, 655 F.2d 1267 (D.C.Cir. 1981) [ELR 3:19:8]