

SAG v. Foote, Cone
and Belding

AMERICAN ARBITRATION ASSOCIATION, Administrator

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between
SCREEN ACTORS GUILD, INC., a non-
profit corporation, on behalf of
George Mayon, Mark Russell, Tim
Taylor, Gary Wright, George Hoag-
land, and Jim Drake.
vs.
FOOTE, CONE & BELDING
Case Number: 72 30 0019 68

Award of Arbitrator(s)

THE UNDERSIGNED ARBITRATOR(S), having been designated in
accordance with the Arbitration Agreement entered into by the above-named Parties, and
dated November 16, 1966
and having been duly sworn and having duly heard the proofs and allegations of the Parties,
Award as follows:

1. George Mayon, Mark Russell, Tim Taylor, and Gary Wright are "players" in the Master Charge commercial and shall be paid for their performance and the re-use of said commercial in accordance with the pertinent provisions of the Screen Actors Guild 1966 Commercials Contract.
2. The claims of George Hoagland and Jim Drake are denied.

By the Arbitrator

Paul F. ...
Paul F. ...
by the Arbitrator

DATED: May 6, 1968
STATE OF
COUNTY OF

} EL:

On this day of 19 , before me personally
came and appeared
to me known and known to me to be the individual(s) described in and who executed
the foregoing instrument and he acknowledged to me that he executed the same.

1 In the Matter of Arbitration

2 between

3 SCREEN ACTORS GUILD, INC., a non-
4 profit corporation, on behalf of
5 George Mayon, Mark Russell, Tim
6 Taylor, Gary Wright, George Hoag-
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8 and

9 FOOTE, CONE & BELDING

10 Case No. 72 30 0019 68

OPINION

11 This arbitration arises under the Screen Actors Guild
12 (hereinafter referred to as the Guild) 1966 Commercials Contract
13 (Jt.Exh.1) to which Foote, Cone & Belding (hereinafter referred
14 to as the Company) is a party. Pursuant to said contract, an
15 Arbitration Board was constituted as follows:

16 Paul P. Selvin, member appointed by the Guild.
17 Edward Rubin, member appointed by the Company.
18 Leo Kotin, Chairman designated by agreement of
19 the parties.

20 A hearing was held in the offices of the National
21 Broadcasting Company in Burbank, California on February 7, 1968,
22 and the Arbitration Board met in executive session on April 16,
23 1968.

24 Appearing for the Company: Liebman, Williams,
25 Bennett, Baird and Minow
26 By: George J. McLaughlin, Jr., Esq.

27 Appearing for the Guild: William Berger, Esq.

28 The parties participated fully in the presentation of
29 oral and documentary evidence. Pursuant to stipulation, post
30 hearing briefs were submitted by each of them.

31 I.

32 The issue is posed in a "Statement of Claim and Demand
for Arbitration" (Jt.Exh.2). It involves the proper compensation
for six individuals who appeared in a television commercial for
"MasterCharge" credit card. The six claimants are George Mayon,

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1 Mark Russell, Tim Taylor, Gary Wright, George Hoagland, and Jim
2 Drake. All of the claimants were paid as "extras" in accord-
3 ance with the labor Agreement between the Company and the Screen
4 Extras Guild. The claim here being adjudicated is for com-
5 pensation for the claimants pursuant to the pertinent provi-
6 sions of the Screen Actors Guild 1966 Commercials Contract here-
7 inafter referred to as the "Actors Contract". The amount of
8 the claim which involves compensation for the initial appear-
9 ance of the claimants and for the re-use of the commercial is
10 not in issue before this Board. Substantively, the sole question
11 posed is whether the compensation provided for in the Actors
12 Contract is applicable to the claimants.

13 In the course of the hearing, the Arbitration Board,
14 counsel for both parties, and the witnesses present, viewed the
15 commercial a number of times. The commercial has several
16 scenes which are intended to demonstrate the advantages of
17 having a MasterCharge credit card. In each of the scenes, one
18 performer is depicted utilizing the MasterCharge credit card
19 for such purposes as payment for a restaurant meal, the cashing
20 of a check, and the purchase of some items in a department store.
21 In several of the scenes, a number of individuals are depicted
22 as stereotypes of "bankers" reflecting a substantial number of
23 banks which constitutes the backing of the MasterCharge credit
24 card. The "bankers" are identically garbed in conservative grey
25 suits, wear dark fedora hats, and carry black brief cases at
26 their sides. The "bankers" are shown emerging from an elevator
27 in a column of fours, marching with military precision, behind
28 a user of the MasterCharge credit card. The narrative emphasizes
29 the financial strength and backing reflected in the column of
30 "bankers", each one of which is intended to symbolize one of the
31 banks backing the MasterCharge credit card.

32 The four "bankers" constituting the first row of the

1 entire column were paid as "players", as defined in Section 3,
2 "Persons Covered", of the Actors Contract. All of the other
3 "bankers" were paid as extras. Of the six claimants in the
4 instant case, four constituted the second row in the column of
5 "bankers" and the two others appeared as pivot men as their
6 rows of "bankers" wheeled out of the elevator.

7 Controlling, here, is Section 3 of the Actors Contract
8 which reads in pertinent part as follows:

9 3. PERSONS COVERED

10 The following classifications of persons are
11 included in the term "player" and are covered by
12 this contract:

13 A. Anyone who is seen and who speaks a line
14 or lines of dialogue, whether directly employed
15 for such work, or after being hired as an extra
16 player, as provided in paragraph 25 of Schedule
17 A of the Producer-Screen Actors Guild Codified
18 Basic Agreement of 1952.

19 B. Anyone whose face appears silent, alone in
20 a stationary camera shot, and is identified with
21 the product or service.

22 C. Anyone whose face appears silent and is iden-
23 tifiable and whose foreground performance demon-
24 strates or illustrates a product or service, or
25 illustrates or reacts to the off-camera narration
26 or commercial message. Persons appearing in the
27 foreground solely as atmosphere and not otherwise
28 covered by the foregoing shall be deemed extra
29 players. (Jt.Exh.1)

30 The core of the issue are conflicting positions as to
31 whether the tests set forth in the language cited are met by the
32 claimants. The principal divergence in the parties' interpreta-
33 tions attaches to "identifiable" and "foreground performance",
34 as they are used in Section 3C.

35 On the basis of his observation of the commercial, the
36 Chairman finds that the four claimants, who constitute the second
37 row of "bankers", are visible to the extent that they can be dif-
38 ferentiated from each other. The degree of visibility diminishes
39 in each succeeding row of "bankers". The front row of "bankers"
40 are visible in their entirety from head to foot. The faces and
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1 upper torsos of the second row of "bankers" are plainly
2 visible.

3 In support of their positions, each of the parties
4 advances a definitive interpretation of "identifiability" which,
5 it is claimed, can have uniform and consistent application to
6 all commercials. According to the Guild, "identifiable" must
7 be given its common meaning. In substance, it equates the word
8 with "visible". The test to be applied is whether a sufficient
9 portion of the individual can be seen as to permit his recogni-
10 tion as that individual. Under this interpretation, the context
11 in which such "visibility" occurs is not significant. Applied
12 to the instant situation, all six of the claimants meet the
13 test of "identifiability" as provided for in Section 3C of the
14 Actors Contract.

15 The interpretation advanced by the Company requires
16 that "identifiability" be defined in a context. This context,
17 it is argued, is established by the considerations which, ac-
18 cording to the Company, prompted the incorporation of the term.
19 These considerations are set forth in Section 1 of the Actors
20 Contract. This section makes reference to the impact on the
21 performer's future earning prospects, of his identification with
22 a particular product or service. In view of this intent,
23 "identifiability" must be assessed in terms of the effect of
24 the performer's appearance on his future earnings. It is urged
25 that controlling, here, is the extent to which a performer ap-
26 pearing in one commercial would be "identifiable" in a subse-
27 quent commercial. This assessment, according to the Company,
28 derives from the reaction of "the reasonable man". "The reason-
29 able man" theory is applied to the average viewer. It contem-
30 plates that some "reasonable" finding can be made as to whether
31 the "average" viewer will remember when watching a commercial,
32 that he has seen one of the performers in another commercial.

II.

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2 The conflicting positions of the parties seek their
3 justification in the establishment of a "rule" in a situation
4 which does not lend itself to a "rule". The pertinent pro-
5 visions of the Actors Contract are, of necessity, couched in
6 language whose definition cannot be dissociated from judgment.
7 The rigid rules advanced by both parties seem untenable as the
8 only basis for interpreting the language in question. Any
9 attempt to so interpret leads to inconsistency. As an example,
10 the Guild argues that Paragraph C in Section 3 must be inter-
11 preted in terms of the meanings commonly given to the language
12 stated therein. It argues this with particular emphasis on
13 the word "identifiable". However, in the same sentence the
14 word "foreground" is indisputably defined in terms contrary to
15 the common meaning. The common meaning of "foreground" refers
16 to that area closest to the viewer. Both parties in this case,
17 and in a prior case heard by this Chairman, agree that distance
18 per se, is not controlling in applying the term. "Foreground",
19 as used in the Actors Contract, refers not only to an area, but
20 denotes that place in the entire scene, not necessarily closest
21 to the spectator, which has been aptly characterized by one of
22 the witnesses as "where the action is".

23 Consistent with the discussion above, the Chairman
24 finds that the application of the language to the instant
25 situation cannot be determined by the application of either of
26 the "rules" propounded by the parties. It is patently clear
27 that all of the relevant language takes on meaning only in a
28 context and that each case must be determined in its own con-
29 text. This difficulty was apparently contemplated by the parties
30 when the language was negotiated. Company witness, Richard
31 Zimbert, who participated in the negotiation of the relevant
32 language here, testified to the difficulty that the parties

1 faced in devising language that would constitute a rule which
2 would lend itself to uniform, consistent, and objective appli-
3 cation. Such a rule, he said, in effect, was unattainable and
4 the parties "did the best they could".

5 The Chairman does not rely on either of the principal
6 contentions of the parties as they relate to the interpretation
7 of "identifiability". The Guild's definition makes this synony-
8 mous with visibility. The facts are that in this case no
9 claims were made for a number of performers who would qualify
10 purely on the basis of visibility. It would appear further
11 that reliance solely on visibility poses problems in defining
12 "Persons appearing in the foreground..." who, under the second
13 sentence of Section 3 are considered extras. In the absence of
14 qualifying factors, the term "appearing" contemplates at least
15 some degree of visibility. It is obvious, then, that the ex-
16 clusion from the "player" coverage, as provided for in the
17 second sentence of Paragraph C, may include some individuals
18 who are visible. Identification must be made in context. It
19 involves the element of differentiation. In a mass of humans,
20 one individual is identified as a female among males. In a
21 group of males, one individual is identified as dark-skinned or
22 light-skinned. Absent the context, identifiability becomes
23 purely subjective. A picture of a male human may be identified
24 by one as a cruel individual; by another as a strong individual;
25 and by another as a stupid individual. In each of these situa-
26 tions, the common element that the object viewed is a human being,
27 does not satisfy the requirement of "identifiability" where this
28 quality constitutes a test for the determinations of individual
29 status in a situation which establishes several statuses.

30 "The reasonable man" theory, on which the Company
31 relies, presents the same defect in its applicability to the
32 instant situation. As argued by the Company, "the reasonable

1 man" theory is frequently resorted to in law. In most instances
2 such resort occurs in tort actions or in actions requiring a
3 finding as to negligence. It is submitted that the usage of
4 this theory in law does not establish it as an effective device
5 for applying the language which governs here. The Chairman can-
6 not conceive of any consistent rule by which the average viewer's
7 prospective recollection of a performer seen in a prior com-
8 mercial can be assessed. The value judgments possible are so
9 infinite in number as to preclude any common interpretation.
10 The Company here, by implication, reserves to itself the right
11 to unilaterally make this interpretation. To sustain this con-
12 tention is to divest the pertinent provision of the labor Agree-
13 ment of all mutuality. It would cede to the Company the un-
14 restricted right to determine the status of performers on the
15 basis of its unilateral determination of whether that performer
16 would subsequently be remembered by the average viewer in a
17 later commercial. The reservation of so broad an area of uni-
18 lateral authority requires specific expression here not present.

19 III.

20 The commercial in dispute constitutes a striking ex-
21 ample of the significance of context as heretofore discussed by
22 the Chairman. With respect to the "bankers", the commercial as
23 a whole is obviously intended to draw attention to the entire
24 group. The element of individuality has been deliberately
25 minimized. All of the "bankers" are dressed in identical garb,
26 move with military precision, and execute such motions as are
27 required, in unison. The narration presents a rationale for
28 the studied absence of individuality as between the "bankers".
29 Attention is drawn to the financial strength embodied in a
30 large number of banks, each of which is symbolically represented
31 by one of the "bankers". In this context, the determination of
32 who among them is "identifiable" poses one of the difficulties

1 in interpreting the relevant language.

2 Of greater significance than the Chairman's subjective
3 evaluation is his reliance on the actions of the parties.
4 Important, if not controlling, is the fact that the Company
5 paid the first row of "bankers" as "players". While there was
6 some allusion to considerations of expediency which prompted
7 the Company to make such payment to the four "bankers", the
8 Chairman, in the absence of clear reservations expressed by the
9 Company when payment was made, must conclude that the Company's
10 action reflects its interpretation of the relevant language.
11 Under these circumstances, the posture of the first row of
12 "bankers" provides the most reliable frame of reference for
13 assessing the posture of the second row. The repeated viewing
14 of the commercial persuades the Chairman that by all of the
15 tests advanced by both parties, the second row of "bankers" is
16 entitled to the same treatment as was afforded the first row.
17 The second row was as visible in terms of the full presentation
18 of their faces as was the first row. The fact that the lower
19 half of the bodies of the second row was obscured does not
20 detract from their visibility or, as the Guild characterizes it,
21 their "identifiability". Each succeeding row from the front
22 becomes less visible. However, in these rows beyond the second,
23 some individuals for whom no claims have been made, appear
24 visible. The line of demarcation requires an exercise of judg-
25 ment beyond the literal definition of the governing language.
26 With respect to the two claimants who are seen as "pivot men"
27 as the "bankers" emerge from the elevator, the Chairman finds
28 no valid basis for differentiating their statuses from the other
29 "bankers" who made up the entire row.

30 It is apparent from the preceding discussion that the
31 Chairman, here, does not rely on and does not establish a rule
32 to have unqualified application in future commercials. The

1 various paragraphs in Sections 1 and 2 of the Actors Contract
2 must be applied in each context in harmony with each other, so
3 as to give the fullest possible expression of their intent.
4 The intent here is clear. Performers in a commercial may be
5 extras or "players". The differentiations between them are to
6 be established on the facts as they appear in the commercial,
7 and on the interpretation of such general concepts of identifi-
8 ability, appearance, and foreground performances as may best
9 serve the intent of the parties. The evidence, in aggregate,
10 while reflecting sharply conflicting interpretations, has in
11 common the recognition by both parties that language, however
12 carefully drafted, may yet be inadequate to convey meaning in
13 situations where not only a meeting of minds, but a meeting of
14 highly subjective judgments is inevitably required.

15 On the basis of the record as a whole and for the
16 reasons heretofore stated, the Chairman finds that the claims
17 of the performers constituting the second row of "bankers"
18 should be granted and that the claims of the two performers
19 referred to as the "pivot men" should be denied.

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Leo Kotin, Chairman
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