

to which Respondent is signatory. The Commercials Contract, a collective bargaining agreement, contains the minimum wage scales, working conditions and use compensation to professional persons ("actors") covered thereunder for services in the production and use of advertising and commercial messages (herein "commercials") intended for showing over television. Paragraph 55 thereof provides for arbitration of all disputes between an actor and a producer signatory thereto with respect to the making and use of commercials and the employment of actors therein.

Claimant claims that in or about January, 1978, Respondent produced or caused to be produced a television commercial on behalf of its client Merrill, Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") in connection with the production of which Respondent engaged eight (8) non-professional persons, employees of Merrill Lynch, to perform services in the commercial in breach and violation of Paragraph 12 of the Commercials Contract which incorporates by reference Section II of Schedule B of the Commercials Contract, as a result of which employment Respondent is liable to Claimant in the amount of \$300. for each breach, or a total of \$2400.

Subsection B of Section II provides in pertinent part:

"The obligation of Producer to give preference to qualified professional actors shall require the employment of a qualified professional actor...".

Respondent denies the validity of the claim in reliance upon the exception to the requirement for professional actors set forth in subsection D.1. of Section II which provides:

"D. There shall be automatically excluded from the provisions of this Section the following:

1. Persons who portray themselves who by words or actions participate in the giving of a testimonial or endorsement;".

The Issue

The pertinent facts (with due regard for the lapses of time between hearing dates and the absence of a precise stenographic record) are adequately recognized in the briefs of both parties, and do not require repetition in this opinion.

The issue between Claimant and Respondent is whether employees of Merrill Lynch appearing in the commercial and espousing, as set forth therein, certain attributes of that company and its operations can be said to be engaged thereby in a testimonial or endorsement (interchangeably "testimonial") so as to fall within the exception provided by subsection D.1.

Opinion

At the hearings, the collective bargaining history concerning the introduction and development of the automatic exclusion provision was sparse and at best tangential on its applicability and intent. Prior to the 1975 Contract, Commercial Contracts did permit the use of non-professionals under a succinct exemption from preference of employment, reading:

"2. Persons who portray themselves".

Screen Actors Guild, allegedly concerned with practices thereunder, proposed the elimination of that exemption; producer representatives opposed that suggestion. An ultimate compromise took the form of the present language, i.e., a person must portray himself and participate in the giving of a testimonial. The obvious

purpose of the addition was to limit the right of a producer to hire non-professionals. As a result Screen Actors Guild gained something of substance; producers lost something in custom or practice which can be regained only if it is clearly established that the non-professionals portrayed participated in fact in the giving of a testimonial. The nub of the controversy between the parties is whether that has been established by the commercial in dispute.

Here, the following named eight (8) persons (not qualified professional actors) employees of, and introduced as account executives of, the advertiser, Merrill Lynch, chosen selectively by the producer, were portrayed in, -and made the following statements in, the commercial:

John Fedyck:	"The training program here is by far the most comprehensive."
Pam Dantzler:	"I think the training program is like a mini-MBA."
Darden Livesay:	"And our research today I feel is truly number one."
William Fay:	"We have access to opinions on over 1000 securities within two minutes."
John Novell:	"This is the place to go for the large investor and the small investor."
Norman Miller:	"This billion dollar corporation is the most financially sound in Wall Street."
Edward Bond:	"The firm is only as strong as the people in it and we like to think we have the best."
Roy Swenson:	"I put my customers' interest first as well as its integrity-that's why we are number one."

Query: Are these statements or any of them testimonials within the contemplation of subsection D.1.?

The intended meaning of the term "testimonial" as used in that provision was neither expressly agreed upon nor otherwise arrived at during negotiations. An effort at that time by the producer representatives to relate it to FTC guidelines then in a proposed stage of formulation was eliminated from consideration. Nor was it then suggested, no less agreed upon, that standards and procedures of the networks (inherent in their responsibility as FCC licensees) carried out by, and sufficient to satisfy their clearance departments for airing commercials, would be determinative as fulfillment of the requirements of the exemption provision in the Commercials Contract.

It is clear that no definition of "testimonial" appears in the Commercials Contract. Various criteria advanced since then and now by Claimant and others advanced here by Respondent for a determination of a testimonial lose sight of the fact that they are no more dispositive of "testimonial" as used in the provision than they or others were in Daniel and Charles Opinion and Award (A.A.A. Case No. 1330-0807-77, 1978).

Curiously enough, the problem here is the ambiguity of what each party asserts is an unambiguous term requiring, each urges, construction in its plain and accepted meaning. Yet to prove its position on the merits each party finds it necessary also to indulge in various adjuncts of interpretation of the term, enhancing, diluting or obviating the ordinary dictionary definition of the word.

Claimant's contention advanced ex parte, but not during collective bargaining, that employees cannot give testimonials is, at most, dictum. Nor is Respondent's contention, that statements by employees reflecting their rhetorical observations as to the nature and quality

of the training service and research facilities at Merrill Lynch per se constitute testimonials, conclusive on the issue. There is no basis on the record in this proceeding supportive of either contention.

In the absence of anything more definitive, what is left and what does appear controlling is, objectively considered, the nature and source of the statements in the commercial. In the case of Fedyck, Dantzler, Livesay and Fay, the statements are not those of users of the Merrill Lynch services but may very well reflect benefits that are made available by account executives to, and may be derived by, customers of Merrill Lynch. The statements of the other participant employees in the commercial are more in the nature of slogans than suggestions of personal experience.

Taken together and considering how the statements were developed and selected, they do remain statements of certain company employees related to the areas of their responsibility, not as investors or recipients of the overall services of the company, but primarily and understandably made to stir up interest in Merrill Lynch; accordingly complete objectivity by them (but not personal integrity) in such statements in a commercial for the company is not necessarily free from question.

For the foregoing reasons the Chairman concludes that the statements in the commercial are not in compliance with the requirements of subsection D.1. This is not to say that, as far as the Commercials Contract is concerned, under no circumstances may employees, as such, not fall within the purview of that subsection.

Dated: January 29 , 1980



MORTIMER WEINBACH, Chairman

AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Tribunal

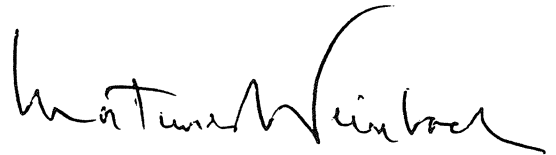
In the Matter of the Arbitration between
SCREEN ACTORS GUILD, INC. Claimant
-and-
OGILVY & MATHER, INC. Respondent

Case No. 1330-1341-78

AWARD OF THE PANEL OF ARBITRATORS

THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and designated the Screen Actors Guild 1975 Commercials Contract, and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

1. The claim of Claimant against Respondent that a contractual violation exists as to the Ogilvy & Mather commercial - the subject of this arbitration - is granted.
2. The Claimant is awarded \$2400.00 (twenty four hundred dollars and no cents) as damages as are provided for in the Screen Actors Guild 1975 Commercials Contract.



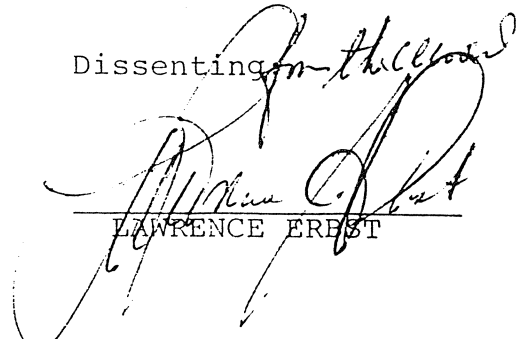
MORTIMER WEINBACH, Chairman

Concurring *with the above award*



HAROLD M. HOFFMAN

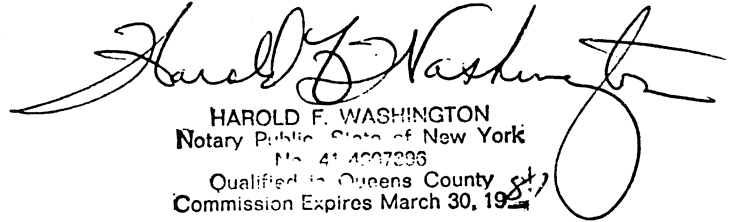
Dissenting *from the award*



LAWRENCE EREST

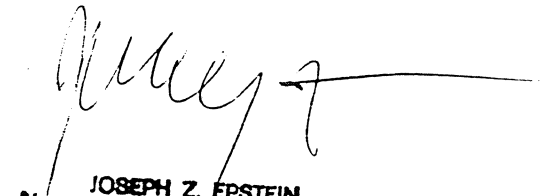
State of New York)
) ss.:
County of New York)

On this 29th day of January, 1980, before me personally came and appeared MORTIMER WEINBACH to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.


HAROLD F. WASHINGTON
Notary Public, State of New York
No. 41-4607395
Qualified in Queens County, NY
Commission Expires March 30, 1982

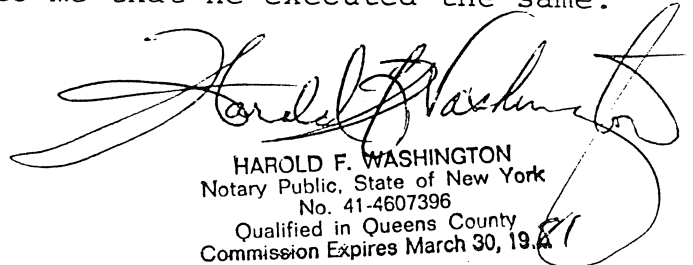
State of New York)
) ss.:
County of New York)

On this 4th day of ~~January~~ April, 1980, before me personally came and appeared LAWRENCE ERBST to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.


JOSEPH Z. EPSTEIN
Notary Public, State of New York
No. 60-6194910
Certificate filed in New York County
Qualified in Westchester County
Commission Expires March 30, 1982

State of New York)
) ss.:
County of New York)

On this 20th day of ~~January~~ February, 1980 before me personally came and appeared HAROLD M. HOFFMAN to me known and known to me to be the individual described in and who executed the forgoing instrument and he acknowledged to me that he executed the same.


HAROLD F. WASHINGTON
Notary Public, State of New York
No. 41-4607396
Qualified in Queens County
Commission Expires March 30, 1982

OGILVY & MATHER INC.

2 EAST 48 STREET, NEW YORK 10017
MURRAY HILL 8-6100

Client: MERRILL LYNCH

Title: "ACCOUNT EXECUTIVES :30"
Commercial No.: XMUM 7013
Date Approved: 1/26/78

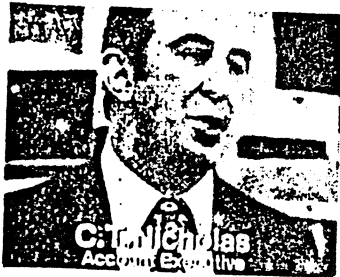


1. ANNCR: How good are the account executives at your investment firm?

2. Maybe it depends on the firm.

3. EDWARD BOND: Well, a firm's only as strong as

4. the people in it and we like to think we have the best.

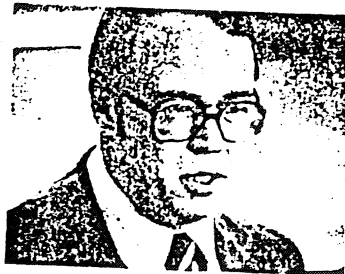


5. C. T. NICHOLAS: Our account executives are trained

6. in such a way that they care about their customers' needs.

7. ROY SWENSEN: I put my customers interest first and I know the firm

8. puts a customers interest first as well, and it's integrity.



9. That's why we are number one.

10. ANNCR: (VO) You know who backs up these account executives.

11. (SFX: BULLS) Sure there are lots of investment firms,

12. but there's only one Merrill Lynch.