

1986 Matsushita/Panasonic

In the Matter of the Arbitration Between :
 SCREEN ACTORS GUILD, INC. : AAA Case No. 1330-1788-85
 - and - : ("Color TV Dancer Revised")
 TED BATES ADVERTISING :

Appearances:

Screen Actors Guild, Inc. by:

Shea & Gould, Esqs.
 Jerrold Goldberg, Esq.

Ted Bates Advertising by:

Elhanan C. Stone, Esq.
 General Counsel

Before:

Thomas G.S. Christensen,
 Arbitrator

O P I N I O N

This proceeding arose as a result of a disagreement between Screen Actors Guild, Inc. (hereinafter called the Union) and Ted Bates Advertising (hereinafter called the Employer) as to the pay scale assigned to five participants in a particular commercial produced by the Employer. Such pay scales are set by a collective bargaining agreement (hereinafter called the Agreement) between the Union and the Employer. The Parties having been unable to

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resolve their dispute, it was referred to arbitration and the undersigned as sole and exclusive arbitrator in the matter.

On call of the undersigned, a hearing was held on April 21, 1986, at the New York City offices of the American Arbitration Association. At such hearing the Parties were represented by counsel, as shown by the above appearances, and were afforded full opportunity to present evidence, both oral and written, examine and cross-examine witnesses under oath and otherwise to set forth their respective positions, arguments and proofs. A video tape of the commercial involved in the dispute was played repeatedly during the course of the hearing. At the close of such hearing, counsel for both Parties made oral summations in support of their respective positions.

This Opinion and its accompanying Award are based on the record in this case as thus constituted.

As will become clear in the discussion hereinafter, the Union and the Employer are not in basic disagreement as to most of the facts which form the background of the dispute. Indeed, at the commencement of the hearing a stipulation was entered on the record in this regard. Rather than indulge in paraphrases of its contents, I think it helpful to set it forth here in full:

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"STIPULATION OF FACTS

1. Claimant S.A.G. is a labor organization with offices at 1700 Broadway, New York, New York.
2. Respondent Ted Bates is party to and bound by the Screen Actors Guild 1982 Commercials Contract (hereinafter referred to as 'the Agreement') which is applicable to the dispute.
3. Paragraph 57 of the Agreement provides for arbitration of disputes between any Producer and S.A.G. regarding interpretation and breach.
4. Respondent engaged Alvin Porcellain, Rick Goldman, Fermin Goytisalo, William Ross and Jeff Kerk to perform in a commercial produced for Matsushita/Panasonic VHS entitled PMVS 7067 'Color TV Dancer Revised,' at a session on March 25, 1984. They were initially engaged pursuant to the terms of the American Federation of Musicians Collective Bargaining Agreement.
5. Alvin Porcellain, Rick Goldman, Fermin Goytisalo and William Ross were upgraded to the category of Group 3-5 Dancers, and were thus covered by the S.A.G. Commercials Contract. They are in the foreground, identifiable and illustrate the commercial message (Section 6(c) of the Agreement). Jeff Kerk, who was also upgraded to Group 3-5 Dancer, is foreground and illustrates the commercial message.

DISPUTED FACTS

1. S.A.G. contends that the five performers are not group dancers but rather individual on-camera principal performers; Ted Bates contends that they are group dancers.
2. S.A.G. contends that Kerk is identifiable; Ted Bates contends that he is not.

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ISSUES FOR HEARING

1. Are Porcellain, Goldman, Goytisalo, Ross and Kerk 'group dancers' for purposes of payments due under the Agreement, or should they be classified as on-camera principal performers under the Agreement?
2. Is Jeff Kerk 'identifiable' under Section 6(c) of the Agreement?

APPROPRIATE RELIEF

1. If Porcellain, Goldman, Goytisallo and Ross are not deemed group dancers, they shall each be paid the gross sum of \$1,172.06, and shall have pension and health and welfare plan contributions made on their behalf in the sum of \$117.20 per performer. Kerk shall also receive such payments if he is deemed 'identifiable' (as per Issue 2 above).
2. If Porcellain, Goldman, Goytisalo, Ross and Kerk are deemed group dancers, the relief sought shall be denied."

Counsel for the Parties also stipulated orally in the course of the hearing that the time limits under Paragraph 57 of the Agreement as relating to the arbitration process established in Paragraph 57 have been waived as to this particular case.

The "fact" central to this dispute, i.e., the commercial as actually performed, cannot, for obvious reasons, be reproduced here. Nor does any attempted description of its contents accomplish

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much more than provide some general background to what is contained in the Parties' stipulation.

As indicated in the stipulation, the commercial used six individuals on screen. One, a dancer whose performance is the centerpiece, is not the subject of dispute. The five musicians who are the eventual claimants herein appeared in portions but not all of the commercial. While appearing to play their instruments (which as professional musicians they were entirely capable of doing), they rather pretended to play music actually contained on a pre-recorded sound track.

The contractual tangle which this seemingly innocuous commercial produced, while referred to in the Parties' stipulation, bears some fleshing out.

While hired as musicians under the terms of a collective bargaining contract covering such talent, the five claimants role was changed to a visual but not audible supporting role to the central dance figure. As such their status came within the purview of Paragraph 6 (entitled Persons Covered). Paragraph 6(c) of the Agreement provides that, "Anyone whose face appears silent and is identifiable and whose foreground performance demonstrates or illustrates a product or service, or illustrates or reacts to the on or off-camera narration of commercial message" is a "principal performer" covered by the Agreement. The Parties agree that four of the five claimants fulfilled such requirements in this case.

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The fifth participant, Mr. Jeff Kerk, is challenged by the Employer as not satisfying the requirement of Paragraph 6(c) of being "identifiable."

Paragraph 20(a) sets forth the minimum compensation for principal performers. In so doing, an exception is made for "Group Singers," "Group Dancers" and "Group Speakers." These groups are paid on a lesser rate of compensation dependent on the number of performers involved. The claimants here were slotted by the Employer as "Group Dancers" in the three to five category performer rate of compensation. The central issue thus becomes whether the claimants fall within the classification of "dancers."

Careful review of the record yields little or no assistance as to what the Parties meant to encompass by the term "dancers." Paragraph FF of the Appendix to the Agreement contains a clause labeled "Definition - Dancers" but it specifies only that "The term 'dancers' shall be deemed to include both swimmers and skaters when the performance of the latter two is choreographed."

In this respect, the Employer leans heavily on the fact that a choreographer was on this set and worked with the principal dancer. The claimant "musicians" were told to simulate playing their instruments with movements that they would normally use. When this resulted in some bumping of each other on a television set used as a prop, the choreographer gave them some guidance in avoiding such collisions.

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Clearly instruction on movement on a set can be done by persons such as directors who have no connection with the world of dance. The movements of the five performers here, repeated review of the video tape made clear, were not a "dance" but rather were the supposedly necessary if somewhat frenetic gestures and postures which accompany present day pop music. To accept the Employer's position here would make all but the most staid symphony orchestra suspect as dance teams for the purposes of the Agreement. Accordingly, I find and conclude that the Employer misapplied the Agreement by its classification, for pay purposes, of this group as "group dancers."

There remains the separate issue as to whether Mr. Kerk satisfied the requirement of Section 6(c) that he be "identifiable" in his appearance. The challenge to his status is based upon the fact that his place within the group in its appearances on screen was one on the end with the result that his face and figure ducked in and out of the picture rather than remaining on screen at all times his colleagues appeared.

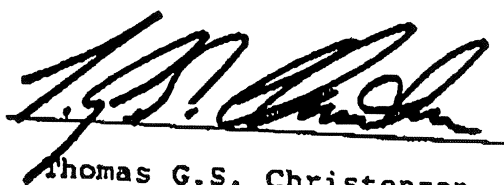
Neither the Agreement's terms nor the arguments of counsel, with due respect to the latter's competence and efforts, furnish solid evidence of what the Parties' draftsmen meant by "identifiable." In the context in which it appears, however, I believe the most plausible conclusion is that its usage was intended to distinguish those performers whose faces are separately seen rather than merging

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into a group. On this basis, I believe, Mr. Kerk's appearance, albeit in conjunction with four others, was separately "identifiable" as an individual. The separate factor of his appearance being "in and out" rather than constant is not, I consider, of consequence; his presence on screen was clearly sufficient to allow individual identification.

Accordingly, I find and conclude that he is entitled to compensation on an equal basis with the other four claimants.

On the basis of the foregoing, I shall, therefore, direct the payment of the sums stipulated to by the Parties as proper in the event the Union's position was sustained.



Thomas G.S. Christensen
Arbitrator

May 8, 1986.

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

SCREEN ACTORS GUILD, INC.

- and -

TED BATES ADVERTISING

CASE NUMBER: 1330-1788-85

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(X), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated _____ and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

Employment of Messrs. Alvin Porcellain, Rick Goldman, Fermin Goytisalo, William Ross and Jeff Kerk in the commercial "Color TV Dancer Revised" was as individual on-camera principal performers rather than "group dancers." The employer is directed to pay each of such five individuals the sum of \$1,172.06 and have pension, health and welfare plan contributions made on their behalf in the sum of \$117.20 each.



Thomas G.S. Christensen
May 8, 1986

STATE OF NEW YORK

COUNTY OF New York

} ss.:

I, Thomas G.S. Christensen

do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

5/8/86
(Dated)


(Signature of Arbitrator)