SCREEN ACTORS GUILD, INC.	x	AAA Case No. 1330-0344-87
- and -	x	"Passing" Commercial
BIEDERMAN & CO., INC.	x	

Appearances:

Screen Actors Guild, Inc. by:

Shea & Gould, Esqs.
Eve T. Klein, Esq.

Biederman & Co., Inc. by:

Hall, Dichler, Lawler, Kent & Friedman, Esqs.
Jeffrey Edelstein, Esq.

Before:

Professor Thomas G.S. Christensen
Arbitrator

O P I N I O N

This proceeding arose as a result of a dispute between Screen Actors Guild, Inc. (hereinafter called S.A.G) and Biederman & Co., Inc. (hereinafter called the Employer) as to whether or not certain fees were payable to Sandy Richman, Frank Ferrara, Harry Madsen, Phillip Neilson, James Lovelett, Harold Corby, Cliff Cudnew, Katherine Flush, Lisa Loving and Ken Herman (hereinafter called the Grievants). The Parties having failed to

resolve the dispute, it was submitted to arbitration under the terms of a collective bargaining agreement (hereinafter called the Agreement) between S.A.G. and certain producers of television commercials, including the Employer herein.

Under the provisions of such Agreement, the undersigned was designated as sole arbitrator of the controversy. On call of the undersigned, a hearing was held on March 11, 1988, at the offices of the American Arbitration Association in New York City, N.Y., at which both Parties were represented by counsel as shown by the above appearances. Such counsel was afforded full opportunity to present evidence, both oral, written, or in the form of television film, examine and cross-examine witnesses under oath and otherwise to set forth in full their positions and proofs. After the close of such oral hearing, counsel for both Parties presented written, letter summations on behalf of their clients.

This Opinion and its accompanying Award are based upon the record as thus constituted.

THE ISSUES[1]

The Parties were unable to stipulate as to the precise issues presented herein. However, during the course of the hearing and in the text of their letter memoranda, it became clear that the dispute herein basically presents the question as to whether the Grievants' performances during the commercial qualified them as "stunt performers" and "principal performers" under the terms of the Agreement and that, accordingly, they were due various extra compensation over that which they received. A less major issue also present is what, if any, compensation is due the Grievants for alleged showing of the commercial beyond the single cycle and area limitations agreed to originally.

DISCUSSION

The central focus of this case is the deceptively simply one of whether the driving of certain automobiles by the Grievants made them "stunt performers" included within the contractual term of "principal performer" under the terms of the Parties' contractual arrangements. The dispute arose in the course of

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[1]A further issue as to whether the Grievants were entitled to extra overtime compensation as set forth in the Demand for Arbitration was settled in the course of this proceeding and was withdrawn from arbitration.

preparation of a commercial directed and produced by the Employer in the interests of "Tri-State Cadillac" dealers. "Tri-State" dealers are located in New York, New Jersey and Connecticut and there is, at least, no disagreement between the Parties that it was this area which was targeted for at least the primary objective of the commercial message.

Section 6.F of the Agreement provides that:

> "F. Stunt performers are included in the term 'principal performer' if they perform an identifiable stunt which demonstrates or illustrates a product or service or illustrates or reacts to the one or off-camera narration or commercial message. Stunt performers need not be identifiable per se; only the stunt performed need be identifiable.
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> "A vehicle driver is included in the term 'principal performer' if such driver satisfies the Stunt Driving Guidelines set forth in subsection 9 of Section EE of Working Conditions Schedule A, Part I."

The aforementioned subsection 9 of Section EE states, inter alia, that an indicia of such Guidelines is "(g) Whenever high speed or close proximity of two or more vehicles create conditions dangerous to the driver, passengers, film crew, other people or the vehicle." Such a classification, perhaps needless to state, brings additional compensation to those so classified.

The commercial in question was shown several times at the hearing in this matter. Briefly described, it initially displayed a line of cars in the right hand lane of a segment of the Long Island Expressway which had been blocked off to other traffic. Weather and road conditions were, it is agreed, excellent. An unseen announcer's voice is heard stating the

following message as the cars move forward on the road:

> "Last year, in the Tri-State area, more Cadillacs were sold than Jaguars. More Cadillacs were sold than BMWs. And Cadillacs outsold Mercedes. In the Tri-State area last year, almost as many Cadillacs were sold as Jaguars, BMWs and Mercedes combined. Visit your Cadillac Tri-Statesmen and see why our '87 models should do even better than our '86s."

As the announcer made each reference to Cadillac outselling another brand of car, a Cadillac would move out of line alongside the other brand named.

Counsel for the Employer states that "a stunt performer is included in the term 'principal performer' and within the Stunt Driving Guildelines only if the performer performs an identifiable stunt and the stunt illustrates the commercial message." Counsel contends that in this instance the drivers not only did not perform identifiable stunts but also that the stunts did not illustrate the commercial message.

In this regard, the Employer offered, inter alia, testimony by the production company's producer and its production manager for the "shoot" that neither high speed nor close proximity of the vehicles involved was present. Under the Employer's witnesses' testimony, the speed of the vehicles was never more than 45 miles per hours on a highway with a speed limit of 55 miles per hour. Further, that the space between the vehicles involved was never less than an interval of 15 to 25 feet and the drivers were warned not to "tailgate." Finally, it is asserted that the production crew (aside from the drivers) was never less than 20 feet from the action in the "shoot" offering ample

protection for the non-driver crew.

The witnesses for S.A.G. assert to the contrary that the speeds involved were between 40 and 50 miles per hour and, at times, the cars only from three to twelve inches apart. S.A.G. witnesses' testimony were, of course, obviously in a far better position to judge speed and distance. Sandy Richman, the designated stunt coordinator, generally confirmed the drivers' estimate as to speed and distances. While the Employer emphasized that, at no time during the shooting did the safety coordinator raise a complaint as to speed and distance, the record does not demonstrate that she had the responsibility to do so during the filming. Finally, while the Employer contends that camera techniques were utilized to shorten the distances between the vehicles insofar as the viewer perceived, I cannot conclude that such assertions adequately disprove the sworn testimony of the drivers and the stunt coordinator.

The remaining major objection raised by the Employer is that the drivers did not satisfy the provisions of Section 6(f) of the Agreement in that they could not qualify as "principal performer" unless "they perform an identifiable stunt which demonstrates or illustrates a product or service or illustrates or reacts to the on or off camera narration or commercial message." The Employer bases this allegation on the ground that the drivers here in their handling of the cars did not make any claim or representation as to the "handling" specific attributes and

abilities of Cadillacs. I think it obvious that a "commercial" does not necessarily have to refer to specific handling, mechanical or design aspects of the product to be a "commercial." The message that "our product outsells competing products" is plainly just as much a matter of an invitation to buy it as is a claim of superiority in other respects.

In short summary, accordingly, I find and conclude that the record herein amply establishes the validity of the Union and the Grievants' basic claims. Accordingly, I shall award the remedy sought by the Union in that respect. I do not find, however, that the more minor claims that the commercial was aired outside the tri-state area or that it ran for more than one cycle.

Thomas G.S. Christensen
Arbitrator

May 11, 1988

American Arbitration Association

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

SCREEN ACTORS GUILD, INC.

- and -

BIEDERMAN & CO., INC.

CASE NUMBER: 1330-0344-87

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), 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:

Claims of Sandy Richamn, Frank Ferrara, Harry Madsen, Phillip Neilson, James Lovelett, Harold Corby, Cliff Cudnew, Katherine Flush, Lisa Loving and Ken Herman, for payments for performance as a "principal performer" in the commercial "Passing" are sustained. The Biederman Advertising Company is directed to make such employees whole for payments for any deficiency in the fee paid each of them for that commercial. This shall include appropriate contributions on each of their behalf to the Screen Actors Guild-Producers Pension and Health Plans for Motion Picture Actors. All other claims made are dismissed.

Thomas G.S. Christensen
May 11, 1988

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.

May 11, 1988
(Dated)

(Signature of Arbitrator)