

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
 between
 SCREEN ACTORS GUILD
 and
 McCANN-ERICKSON, INC.

OPINION

and

AWARD

Re: The "Coach Commercial"

AAA Case No. 1330-0376-88

Before: Matthew A. Kelly
Arbitrator

Appearances:

For the Agency:

Elhanan E. Stone, Esq.
Robert G. Simon, Esq.
Marion Preston
Duane Schlichting
Nancy L. Schroeder

Attorney
Attorney
Witness
Witness
McCann-Erickson

For the Guild:

Eve I. Klein, Esq.
of Shea & Gould
Elinor London
Bridget Greco

Counsel
Assistant Executive Secretary
Executive Assistant

Stipulated Issue:

Whether any one or all of five performers (Thomas Kramer, Obie Story, Scott Eck, Jed Gillin, and Thom Zimerle) hired as "Extras" in the Mennen Speed Stick "Coach Commercial," are entitled to an upgrade to "Principal Performers," pursuant to the 1985 Commercials Contract, on the basis of their performance in the final edited commercial?

The parties agreed that if any of the five performers were found to be entitled to an upgrade to Principal Performer, he would be paid \$8,048.72 and be entitled to residuals as a Principal Performer if the commercial were to air in the future.

Procedure:

A hearing in the above matter was held on July 18, 1988 at the New York offices of the American Arbitration Association, 140 West 51st Street, New York, New York, before the undersigned who was selected to serve as arbitrator under the provisions of the Collective Bargaining Agreement between the parties and the procedures of the American Arbitration Association. At the hearing, both parties were given full opportunity to present their evidence, testimony and argument. A transcript was taken and Post Hearing briefs were filed by both parties with the Association on October 5, 1988. The record was declared closed upon receipt of the briefs and a videotape of the commercials which were viewed at the hearing in this matter.

Background Facts and Circumstances of the Dispute:

The five performers, Thomas Kramer, Obie Story, Scott Eck, Jed Gillin, and Thom Zimerle (hereinafter the "Performers") were engaged by the Agency as extras to perform in a Mennen Speed Stick Commercial, known as the "Coach Commercial" (hereinafter the "Commercial"). The Commercial was shot on July 22 and 24, 1986.

In December, 1986, the Union received complaints from three actors in the Commercial engaged as extras who believed that they should have been upgraded to principal performers (one of these complainants, the umpire in the Commercial, was upgraded to principal performer by the Agency on the basis of his spoken line, "Safe"). Two of the actors, Kramer and Story, complained that they were hired as extras, but they believed that they performed as "principal performers," as that term is defined in Section 6(C) of the Commercials Contract. This complaint forms the basis for the instant

arbitration.

The Union obtained a copy of the Commercial and screened it internally for its Commercials Department and executive staff. The Union believed that there were five valid upgrade claims based on Section 6(C) and decided to pursue claims for upgrade for the complainants and the three other named performers.

The upgrade claims were presented to an Industry/Union meeting. The Industry representatives disagreed with the claims and the matter was pursued to arbitration pursuant to the terms of the Commercials Contract between the parties. The matter being unresolved, it is properly before me for final and binding arbitration pursuant to the terms of the Commercials Contract and the rules of the American Arbitration Association.

Cited Contractual Provisions:

1. RECOGNITION AND COVERAGE

* * *

Compensation to principal performers in commercials is based both on the services which the principal performer renders in the production of such commercials and on the use which is made of the finished commercial in which the principal performer has rendered services. This dual basis of compensation springs from the unique nature of the services rendered by principal performers in commercials. The Union contended that a principal performer rendering services in a commercial performs, to a great extent, the duties of a demonstrator or salesman of a particular product or service.

The Union also contended that this identification

increases proportionately with the continued telecasting of a commercial. The Union further contended that advertisers and their agencies seldom approve the employment of a principal performer who has become identified with another product or service, especially if the product or service is competitive. These conditions and practices tend to reduce opportunities for further employment in this field.

The Producer, realizing the singular nature of this kind of service and that the reuse of a commercial may limit or curtail further employment opportunities for the principal performers appearing in the commercial, has agreed to this unique method of compensation.

* * *

6. PERSONS COVERED

The following classifications of persons are included in the term "principal performer" and are covered by this Contract:

* * *

C. 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 or commercial message;

Persons appearing in the foreground solely as atmosphere and not otherwise covered by the foregoing shall be deemed extra performers;

The Commercial:

The Coach Commercial consists of four segments. The first scene is set on a baseball diamond with fans in the background. A player slides into homeplate and the umpire calls him "safe". This ends the game and the team in blue and white shirts has won the game and starts to crowd around homeplate. The camera focuses on the Coach, the on-camera narrator. He says, "What a game! --What a team!" According

-5-

to the Union, "Player No. 18, Jed Gillin ("Gillin"), is standing right by the Coach; Gillin's full face and torso are visible and is shown reacting enthusiastically to the umpire's call."

The scene shifts to the locker room. The Coach and several of the players enter. The Coach comes through first saying, "Because we give 110 percent." As described in the Union brief:

Player No. 19, Thom Zimerle ("Zimerle"), is following the Coach and is shown removing his baseball cap. Zimerle then moves to the Coach's right where his full face and most of his body are visible; he is shown smiling. At this time, Player No. 24, Obie Story ("Story"), is standing to the Coach's immediate right. Story's entire face and body are fully visible. Story is smiling as he kids around with the other ball players in the locker room. The Coach then states, "Give 110 percent and expect it from everyone and everything," while turning and looking at the players.

The next segment is in front of a mirror in the locker room, at first focused solely on the Coach. He says, "Speedstick antiperspirant gives 110 percent -- Why? -- it's the most powerful protection you can get." Player No. 12, Kramer then walks up to a mirror behind the Coach and combs his hair. He is clearly identifiable in the mirror. Kramer then turns toward the camera and he is smiling. At this point, Story appears next to Kramer. During this, the Coach says, "nothing fights wetness and odor better."

The last segment has the Coach standing outside the locker room. The players file out of the locker room

The concept of "foreground," however, is more difficult than that of identifiability and, as conceded by both parties, is not readily definable. The distance a performer is standing from the camera is not necessarily controlling as to whether the performer is foreground. Whether a performer is foreground must be judged in relation to the entire scene.

The concept of "foreground" was aptly characterized in Foote, supra [SAG v. Foote, Cone & Belding (Kotin, 1968)] as "where the action is."

The Union contends that in each scene one or more of the Performers are the focus of the camera and attention and, thus, in the foreground. The Union relies on the Foote case and the National Car Rental Commercial (aired at the hearing).

The Union further submits that the five Performers are all, at one time or another, illustrating the commercial message. According to the Union, the theme of the Commercial is:

[That Mennen Stick Antiperspirant, like the team, gives 110 percent. In other words, the commercial message is that the product gives 110 percent effectiveness against wetness like the members of the team give their all -- a 110 percent effort -- to win a baseball game.

The players or members of the team are the illustrators of the commercial message throughout every segment of the Coach Commercial. The players illustrate the 110 percent effort of the team with their enthusiasm and comradery. Without the team, there would be no purpose to the 110 percent message.

Here, the Union relies on the arbitration award in SAG v. Lawrence Butner Advertising, Inc. (Nicolau, 1987).

The Agency, on the other hand, asserts that the

immediately behind him one at a time. Story, Eck and Kramer are identifiable. During this, the Coach says, "glides on dry -- lasts all day. That's 110 percent protection."

The Commercial concludes with a picture of the product and an off-camera narrator states, "Speedstick antiperspirant -- the Wide Stick." The Coach is shown again alone and says, "That's your edge." The off-camera narrator intones, "By Mennen."

Positions of the Parties:

The parties agree that Sec. 6(C) sets forth a three part test for whether a non-speaking performer is a principal. They agree that each part of the test must be met by the performer in the final edited version of the commercial. The test requires that a performer:

1. Have his face appear silent and identifiable;
2. Perform in the foreground of the commercial; and
3. Illustrate or react to the on-camera or off-camera narration or commercial message.

If the performer appears in the foreground "solely as atmosphere." he is not considered to be a principal.

The parties agree that the five Performers are silent and identifiable. They disagree on the issues of whether they are performing in the foreground and whether they are illustrating the commercial message.

The Union argues that each of the Performers performed in the foreground of the Commercial.

performers not only do not perform in the foreground, but, that even if they do, they do not illustrate the commercial message by their specific performances and are only atmosphere. As to the commercial message, the Agency argues that:

The criterion must be whether the commercial message is seen or heard at a particular time during the broadcast of the commercial. In this case, at the time we see the softball game in which the actors, the commercial message is that the team gives 110% effort. Later, when the coach/spokesman is talking about the product, the message is that Mennen Speed Stick gives 110% protection. The foreground performance that illustrates a commercial message must be given at the time that the commercial message is being given. That is simply not the fact in this commercial (emphasis in original).

The Agency further disputes that any of the Performers gave a foreground performance, as that term is defined by industry practice and usage. The Agency relies on the fact that the Union withdrew a wage claim for an actor in the Holiday Inn commercial entitled "Promises." The actor in dispute in that commercial was sitting behind the bartender and the Agency asserts was in the background. According to the Agency:

The only time any one of them [the Performers] appears both identifiable and in the foreground is in the final scene showing the baseball players leaving the locker room. The commercial message at that time is "That's 110% protection -- the wide stick -- that's your edge." Clearly the players are not illustrating that message. They appear solely as atmosphere and thus are excluded under Paragraph 6, Section C of the Contract.

The actors are not foreground in any of the rest of the commercial. . . . SAG has failed to submit evidence that has any probative value that "foreground"

means anything other than what common sense and ordinary usage denotes. The factors in question were not in the foreground no matter how the word may be tortured. (Cf. Foreground is ... "The part of a picture ... that is represented as nearest to its viewer" - American Heritage Dictionary)

OPINION

The parties agree and the Contract is clear that the test for whether an actor is to be considered a principal performer under Section 6(C) is three-fold. To be a principal performer under that section, the actor must meet all three elements: i.e., be identifiable (as all five Performers are), perform in the foreground, and that his performance illustrate or react to the commercial message. The parties have a serious disagreement over whether the Performers were performing in the foreground and whether their individual performances illustrate the commercial message.

In order to analyze the performances of the individual Performers it is first necessary to derive some basic definitions. The first issue is what constitutes a foreground performance. On this issue, the Union is more persuasive. The Union asserts that the definition of foreground is, as stated by Arbitrator Kotin, "where the action is." Thus, the foreground is the focus of attention in a scene, wherever it happens to be physically. If, for example, the first scene of the Commercial had been shot from behind the stands the Coach and the players would still be in the foreground despite the fact that the fans would be physically in the front of the picture. In fact, this is one of the definitions in the American Heritage Dictionary: "The

most important or prominent position." This is common usage in everyday society and in the Industry. Based on the record, the Agency's definition is too strict and is not accepted.

On the issue of the commercial message, the Agency is more persuasive. The Union contends that the commercial message is that, "Mennen Stick Antiperspirant, like the team, gives 110 percent."

The players or members of the team are the illustrators of the commercial message throughout every segment of the Coach Commercial. The players illustrate the 110 percent effort of the team with their enthusiasm and comradery. Without the team, there would be no purpose to the 110 percent message.

Based on the script of the Commercial, the commercial message in the Commercial is two-fold; first, that a winner gives 110 percent to win and secondly that the product gives 110 percent protection. While there is definitely a connection between the concepts, they are sufficiently separate to mark a differentiation in the actions of the actors in the Commercial. The Agency is persuasive that the actors must illustrate the commercial message being given.

With these principles in mind, the only Performer entitled to an upgrade is Jed Gillin. The Agency asserts that: "In the first scene, Mr. Gillin is seen well in the background, wearing number 8." The Union describes his performance in that scene as follows:

Gillin, a red haired man, is standing adjacent and to

the left of the Coach, both of whom are positioned near homeplate. The action is centered around homeplate where the Coach is speaking about the game ["What a game! What a team! We've got fans."] and many of the players are gathering. The viewer's attention is riveted to the players milling around homeplate congratulating each other now that they have won the game. Gillin is the player standing closest to the Coach and the only one facing the camera. The viewer has a sharp view of Gillin's face and upper torso as he jumps up and down enthusiastically reacting to the news that the team has won the game. At this time, Gillin is positioned in the midst of the action and is clearly identifiable to the viewer.

The Union description is more accurate. Gillin is the only Performer whom the Union claims is a principal in the first scene.

As conceded by the Agency, the commercial message at this point is "that the team gives 110% effort." Gillin's foreground performance illustrates that message and, accordingly, it meets the three-fold test under Section 6(C) for a principal performer. His performance is analogous to the performance of the wife in the case decided by Arbitrator Nicolau and cited by the Union in which he held that she was entitled to an upgrade.

As to the other performers, their performances, whether in the foreground or not, do not specifically illustrate the commercial message. In the commercial, their presence is of the nature of atmosphere. In the second scene in the locker room, the players form a backdrop for the Coach as he delivers the message. The Coach has stepped forward, distancing himself from the players. The players meanwhile

are reacting to winning the game, not to the Coach's message to the viewer. The commercial message is not that it is satisfying to win a game.

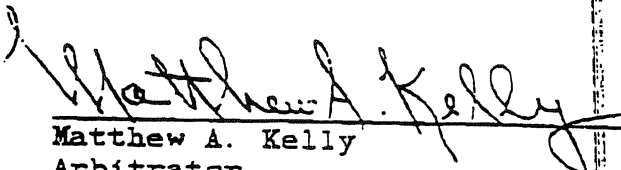
In the next scene in front of the sinks and mirrors, the actions of Kramer and Obie have nothing to do with the team giving 110 percent or the product. They are atmosphere. And, in the final scene outside the locker room, the players are again atmosphere as the Coach and the off-camera announcer give the message about the product. Thus, only Gillin is entitled to the claimed upgrade.

AWARD

I, the undersigned, to whom was submitted a certain issue between the parties hereto, having duly heard the proofs and allegations and after due consideration, do hereby award as follows:

1. That for reasons set forth herein, Jed Gillin, hired as an "Extra" in the Mennen Speed Stick "Coach" Commercial, is entitled to an upgrade to "Principal Performer," pursuant to the 1985 Commercials Contract, on the basis of his performance in the final edited commercial;
2. That Jed Gillin is to be paid \$8,048.72 and is entitled to residuals as a Principal Performer under the Commercials Contract if the Coach Commercial airs in the future; and
3. That Thomas Kramer, Obie Story, Scott Eck, and Thom Zimerle, hired as "Extras" in the Mennen Speed Stick "Coach" Commercial, are not entitled to upgrades to "Principal Performers," pursuant to the 1985 Commercials Contract, on the basis of their performances in the final edited commercial.

Signed this 21st day of November, 1988


Matthew A. Kelly
Arbitrator

