AMERICAN ARBITRATION ASSOCIATION, Administrator

Labor Arbitration Tribunal

1994-17

In the Matter of the Arbitration between

Screen Actors Guild

and

Young & Rubicam

Case Number: 13 300 00206 93

Opinion and Award

of

Arbitrator

Arbitrator: Maurice C. Benewitz

Appearances:

For the Union: Laura Davidson, Esq., Attorney

For the Company: Leonard Orkin, Esq., Attorney

A hearing was held before the undersigned arbitrator on June 3, 1994, at New York, New York to consider the following controversy submitted by the parties:

> Was Ray Abbott a stunt performer in the Lincoln Mercury commercial produced by Young & Rubicam on June 22 and June 23, 1992 as provided for in Section 6 F of the SAG 1991 commercials contract? If so, to what compensation was he entitled?

A visit to the scene of the filming at Upper Cross Road, Greenwich, Connecticut was conducted on June 24, 1994.

The parties provided the arbitrator with a tape of the commercial in question (Ex. J-3) and another of outtakes of other shots of the car ride which were filmed. The arbitrator watched these tapes during the period when he prepared this award.

Subsequent to the hearings, briefs and reply briefs were submitted by the parties.

The Contract

At the time of this dispute, the parties were bound by the February 7, 1991 SAG commercials contract (Ex. J-1). (See Stipulation, Ex. J-2.)

Section 6 F reads:

> The following classifications of persons are included in the term "principal performer" and are covered by this Contract:
>
> . . .
>
> 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 on or off-camera narration or commercial message. Stunt performers need not be identifiable per se; only the stunt performed need be identifiable;
>
> 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 1);

Schedule A sets forth the following stunt driving guidelines at Section EE 9:

> 9. Stunt Driving Guidelines
>
> When any of the following conditions occur, a vehicle driver shall qualify as a stunt performer:

(a) When any or all wheels leave the driving surface;

(b) When tire traction is broken, i.e., skids, slides, etc.;

(c) Impaired Vision - when the driver's vision is substantially impaired by:

(i) Dust or smoke;
(ii) Spray (when driving through water, mud, etc.);
(iii) Blinding lights;
(iv) Restrictive covering of the windshield;
(v) Any other conditions restricting the driver's normal vision;

(d) If the speed of the vehicle is greater than normally safe for the condition of the driving surface, or when other conditions such as obstacles or difficulty of terrain exist or offroad driving other than normal low-speed driving for which the vehicle was designed occurs;

(e) When any aircraft, fixed-wing or helicopter, is flown in close proximity to the vehicle creating hazardous driving conditions;

(f) When an on-camera principal performer is doubled because the level of driving skill requires a professional driver, the driver double shall qualify as a stunt performer. This would also apply to doubling of passengers for the safety of the on-camera principal performer.

(g) Whenever high speed or close proximity of any vehicle creates conditions dangerous to the driver, passengers, film crew, other people, or the vehicle;

(h) When working in close proximity to pyrotechnics or explosives;

(i) When driving in other than the driver's seat or blind driving in any form.

Stipulation

In their June 2, 1994 writing (Ex. J-2), the parties adopted the further stipulation:

2. Ray Abbott is driving the car in the initial driving sequence, which features the exterior of the car, in the final edited version of the commercial.

The Dispute

On June 22 and June 23, 1992, Young & Rubicam filmed a Lincoln Mercury commercial in which Ray Abbott, the grievant, drove a Lincoln Continental as stipulated above. The parties disagree about whether Mr. Abbott performed an "identifiable stunt." If he did, as SAG contends, he would have become entitled to residuals as a principal performer. The company contends that Mr. Abbott was hired as, and performed as, a "precision driver" and was not entitled to residuals.

Several aspects of the dispute must be considered: 1) the testimony about what occurred; 2) contract history; 3) prior (Christensen) award.

The Location

The testimony shows that when the filming of this commercial occurred, the work area on Upper Cross Road in Greenwich, Connecticut was closed to other traffic. The visit to the location revealed that the road had a curve at the top and another at the bottom down a hill.

Union Testimony on the Filming

Ray Abbott, the grievant, testified that several days before the filming of this Lincoln Mercury commercial he was called by a woman whose identity he did not set forth. Mr. Abbott, a stunt man for 13 to 14 years and a member of SAG, was asked, according to this account, if he did stunt driving. He said he did. Then, after a discussion of grievant's physical appearance,

he was directed to White Birch Farm in Greenwich and was told when to appear.

Mr. Abbott testified that he was informed he would be a principal performer and that he would be doing stunt driving in a Lincoln.

Grievant went to the location on the day before he was directed to appear. He wanted to familiarize himself with the location. Mr. Abbott found that the directions he was given were incorrect.

On June 22nd, grievant drove the picture car to different locations around an estate. Later he went to a section of Upper Cross Road which has a downhill S-curve.

As grievant described the road in his testimony, the downhill section was narrow. The curve at the bottom was sharp. The road had a double yellow line, no visible speed sign, storm ditches but no shoulders, and a crown. At the S-curve at the top, a sign said "Slow, Winding Road."

Grievant performed at least 15 dry runs down the road on June 22nd. During the runs, he started slowly and then increased his speed to over 40 miles per hour. In the course of his practice, Mr. Abbott spoke to the director by walkie-talkie.

On the second day, June 23rd, grievant started out of the camera angle at the top S-curve. He increased his speed down the hill and was moving at 47 miles per hour at the bottom, according to this testimony. Then he backed up, spoke on the walkie-talkie with the director, and started again at 5 miles per hour for another run. During the second day, Mr. Abbott was concerned about the female principal performer who was in the car with him.

Grievant believed the filming occurred on the second day. The car was wiped down, the crew wet the road, flower petals were spread, and the double line was given a matte finish. The performers wore their seat belts, and the headrests were adjusted appropriately.

The driving was difficult on the very narrow road, Mr. Abbott testified. Because of the car's rate of speed while going down the road, grievant stated, the situation was dangerous for grievant and his passenger. Mr. Abbott had to start from a standstill position, and the director wanted him to come into the first left downhill turn "hot", according to this testimony. Grievant had to be moving at more than 20 miles per hour as he was coming into the camera frame. So he accelerated, with his foot on the gas pedal, to a speed of more than 40 miles per hour and to 47 miles per hour at the bottom. The on-camera principal performer read this speed to grievant. (A safe speed, Mr. Abbott testified, would have been 20 to 25 miles per hour.)

The female performer in the car asked why they had to drive so fast, Mr. Abbott testified. Grievant answered that the producer was probably working on some kind of effect. He told the woman she had a right to request a stunt double if she felt her life was in jeopardy, but she replied that although she was concerned, she felt safe with grievant. He told her "It's up to you."

The male on-camera principal was standing off to the side. He spoke with Mr. Abbott a couple of times when grievant was out of the car. According to Mr. Abbott, the on-camera performer said he was glad grievant was doing the driving because there was "no way he could do that kind of driving."

After grievant raised his claim, SAG asked him to take pictures at Upper Cross Road and to shoot a video tape at different angles. He did this.

On cross, Mr. Abbott stated that when he was called about the job, the woman said he would be a principal player and agreed with him that this meant he would receive residuals.

Grievant testified that he had discussed the car's speed with the director. But he did not discuss the maximum speed of the run prior to or during filming.

It was correct, Mr. Abbott stated, to say that as he came around the corner, he accelerated and continued to do so until the bottom. There had been times when he was told by the director to maintain a constant speed. And on other runs he had been told to accelerate and maintain a high rate of speed.

Despite the fact that the speedometer was in front of the driver and that the car was wide, the actress in a safety belt could read the speed, grievant testified.

Mr. Abbott spoke to the male principal player (Dennis Hutchinson) on the second day. This occurred at the top of the S-curve to the side of the car.

On redirect, grievant stated that he was given directions on how to drive, i.e., he was to back the car up at the top and then accelerate down the hill. It was hard to say how long the downhill drive took, Mr. Abbott said at first. Then he gave a figure of 8 seconds.

Despite the acceleration, the car did not reach maximum speed because grievant could not accelerate as he drove into the first turn. He floored the accelerator thereafter and braked again at the right turn at the bottom. (This braking is not shown in the commercial.)

Company Testimony on the Filming

Barry Dukoff, who has done 60 to 90 other automobile commercials, was the director-cameraman of the Lincoln Mercury commercial at issue. Depending on the type of commercial, he has used stunt and precision drivers before.

The stunt driver is used in a performance-oriented commercial which features the performance and roadability of the vehicle. That was not the case in this commercial, Mr. Dukoff testified.

The precision driver is hired for efficiency of time. Good daylight is short for filming car commercials.

On the first day of filming, a partial crew constructed the camera dolly. The remainder of the crew went to another location to do other filming "at the crack of dawn."

Mr. Dukoff believed that on the second day in the morning, he performed photography at the other location. Then he went to the downhill area on Upper Cross Road.

The witness asked Mr. Abbott to take a couple of practice runs while the camera was being mounted on the dolly. In strong contract to the testimony of grievant, Mr. Dukoff testified that there had been no practice runs on the first day. The practice runs after the return to the S-curve location were the first ones which occurred.

The director-cameraman told grievant where the shot would begin and where it would end. Mr. Abbott was directed to become comfortable with the location and to tell the producers if there were any problem areas. There was no discussion of speed, the witness stated. Neither face-to-face nor through the associate director on the walkie-talkie was Mr. Abbott told to continue to accelerate.

The filming was done at over-cranked speed to give a form of slow motion effect. And the maximum and minimum speeds the car was moving could be estimated. Mr. Dukoff testified:

> I would drive that speed on the road if it was closed off as it was.

Mr. Abbott was used rather than Mr. Hutchinson to economize on time. There was a small window of opportunity for the filming. The light was at the edge of what the lens could do in terms of exposure.

There were a number of takes, the witness said. The first five or so were use to fine tune what Mr. Dukoff wanted to correct. He desired to maintain a certain frame size and to fill the frame with the car. During the initial takes, the witness may have told Mr. Abbott to speed up or slow down. But after matters were straightened out, "the speed down the hill looked consistent through the lens." Mr. Abbott never was asked to accelerate.

The decision to shoot over-cranked and to cause a slight slow motion effect was a joint decision of Mr. Dukoff and the creative team. The intent was to give a romantic effect with the light playing on the surface of the car. Rice paper leaves were put down on the road because they would be held in the air longer.

Since the camera was far away, a very long zoom lens was needed. The lens zoomed back as the car approached. The camera also was zooming back on the dolly, and the dolly was moving laterally.

On cross, Mr. Dukoff testified that the associate director and not he himself did all communication including that on the walkie-talkie.

The agency producer Gregory Marsh decided on the Abbott hire, the witness said.

Mr. Abbott was used for efficiency, Mr. Dukoff reiterated. Grievant's skill level got the job done faster than Mr. Hutchinson could have done it.

The film was shot at 36 to 42 frames per second and was transferred to video tape at 24 frames per second.

Mr. Dukoff did not know whether at some point Mr. Abbott was instructed to start back so that there would be more time to accelerate. The associate director and the grievant had discretion. However, the witness said on redirect that Mr. Abbott did not tell the associate director the speed was too high, and the speed instructions which were given came from the director.

Mr. Dukoff did not believe the car speed varied a lot. There was variation in the first 5 or 6 takes but the attempt was to take the shot when the driver was "in the groove."

Gregory Marsh is an executive producer for Young & Rubicam. He was the producer of the commercial in question and had done 90 to 100 previously. Mr. March has hired both stunt and precision drivers in the past.

On June 22, 1992, this witness presented Mr. Abbott with a standard SAG contract for completion and signature (Ex. C-8). Mr. Abbott checked the box

for "stunt player." Mr. Marsh told grievant this was incorrect, crossed it out, and had grievant initial the deletion. Under "compensation", Mr. Abbott wrote in "scale - buyout." Mr. Marsh had grievant cross out "buyout" and both men initialled the change. Then under "part to be played", the witness wote in "precision driver".

[It is interesting to note that although Mr. Dukoff testified there were no practice runs and no shooting at the S-curve on June 22, 1992, this contract form shows that Mr. Abbott worked from 6:00 a.m. to 6:00 p.m. with an hour for lunch on that day and that grievant worked from 5:30 a.m. to 5:30 p.m. with an hour for lunch on June 23, 1992. The form does not show what Mr. Abbott did during the hours he was recorded as working on June 22nd.]

Mr. Marsh's functions for the shoot were to draw specifications for the job and solicit bids. After the job was awarded and production began, he was on the set to answer questions which arose. Mr. Marsh stationed himself near the camera. He overheard the associate director on the radio but could not hear the director. The witness could see the camera framing on a monitor.

Mr. Marsh testified that he observed the car driven on the road and would have no hesitancy driving the car on that road at that speed.

When asked on cross if the speed was 30 to 35 miles per hour, the producer replied "Even faster."

At the time Mr. Abbott objected to the instruction to cross out "stunt player", Mr. Marsh gave grievant his business card and told him that if he had any problems he should call and they would work it out.

Mr. Marsh did not decide to hire Mr. Abbott in particular. The decision was "to hire a precision driver." The witness knew before the shoot that he wanted a professional driver "for time, efficiency and safety."

Bargaining History

Union Testimony

John McGuire, the SAG associate national director, is one of the two chief union negotiators of the commercials contract.

In the 1988 negotiations, this witness testified, the joint policy committee representing the industry proposed to add the following interpretation to Section 6, Subsection F (Ex. U-3):

> AGREED INTERPRETATIONS OF CONTRACT
>
> Add as Agreed Interpretation 17:
>
> A stunt requires a degree of skill and involves some hazard or risk of bodily injury. When a stunt is seen on the screen and the viewer can tell it is a stunt, it is identifiable.
>
> The fact that stunt performers are infrequently or rarely recognizable is immaterial to the question of whether or not an "identifiable stunt" is involved in a commercial.
>
> Stunt work not falling under subsection F. does not entitle the stunt performer to residuals.

In 1985, the industry committee proposed adding to the agreed interpretation of Section 6 F. the words "and seen as a stunt" after "identifiable" (Ex. U-4).

Neither the 1985 nor the 1988 proposals were accepted by the union.

No change occurred in the contract or the agreed interpretations in 1988, Mr. McGuire testified (Ex. U-5).

The 1991 negotiations resulted in the agreement entered as Exhibit J-1. The joint policy committee proposed adding after the word "identifiable" at the end of the first paragraph of Section 6 F the underlined words (Ex. U-6):

> only the stunt performed need be identifiable as such to the ordinary viewer. (Emphasis in original.)

The union proposed adding a third paragraph to Section 6 F which would have read (Ex. U-7):

> A vehicle driver is also included in the term "Principal Performer" if such driver performs skilled driving which
>
> a) demonstrates product performance, or
> b) illustrates the sales message of the commercial, or
> c) is choreographed.

Neither proposal was adopted, Mr. McGuire stated.

The dispute concerning the meaning of the term "identifiable stunt" in Section 6 F has existed since 1988 at least, the witness stated. It has been raised in negotiations and was the subject of an arbitration.

Company Testimony

Marion Preston is the senior vice president for business affairs at J. Walter Thompson USA and director of broadcast labor relations. (The agency represents the Ford Motor Company.)

On December 5, 1967, Ms. Preston attended an industry-guild meeting held at SAG headquarters in Hollywood. Among the participants were SAG officers John L. Dales, Chester L. Migden, and Harold Hoffman. Ms. Preston

took notes of this meeting (Ex. C-1). (This industry-union standing committee had existed since 1953 pursuant to Section 53 of the contract.)

Paragraph 4 of the minutes read:

> 4. Stunt Players
>
> The question of what is meant by an "identifiable stunt" was discussed at length. Mr. Migden pointed out that a stunt consists of "hazard, risk and a degree of skill". When a stunt is seen on the screen and the viewer can tell it is a stunt, it is identifiable. The fact that stunt men are infrequently or rarely recognizable is immaterial to the question of whether or not an identifiable stunt is involved in a commercial.
>
> After an Industry caucus, Industry agreed to accept SAG's interpretation of an "identifiable stunt". However, Mr. Saz pointed out that we will probably continue to have problems as to what constitutes a "stunt".

By letter of December 29, 1967 (Ex. C-2), Ms. Preston sent a draft of the December 5, 1967 notes to Mr. Migden and asked for any "corrections or changes". The final paragraph of the letter read as follows (Ms. Bruce was Ms. Preston's assistant):

> After Mrs. Bruce has received your comments, she will have the necessary changes made and send everyone on the Committee a final approved set of notes.

In his January 2, 1968 response, Associate National Executive Secretary Migden wrote (Ex. C-3):

> We have but one suggested change and that is in connection with point 4 entitled Stunt Players. We propose that the last sentence of the first paragraph of 4 read as follows:

> The fact that stunt men are infrequently or rarely recognizable is immaterial to the question of whether or not an identifiable stunt is involved in a commercial.

While grievances, among other matters, are discussed at the standing committee, Ms. Preston said on cross, a committee decision is not binding on individual matters.

Nor is there any contract provision or understanding which authorizes the standing committee to reach or issue agreed upon interpretations. However, Ms. Preston thought that bulletins had been issued jointly by the industry and guild concerning decisions reached.

There was no joint bulletin issued concerning Section 6 F.

On redirect, Ms. Preston testified that the December 5, 1967 understanding on Section 6 F did not arise from consideration of a grievance but, instead, was the result of general discussion.

Richard Waldberger is senior vice president and associate director of business and legal affairs at Saatchi & Saatchi N.A., Inc. He has held that position since 1984. Prior to 1984, Mr. Waldberger was a vice president and attorney at Young & Rubicam, Inc. This witness handles automotive accounts.

Mr. Waldberger testified that he has participated in industry-guild negotiations since 1969.

In 1985, SAG proposed to amend the first paragraph of Section 6 F as shown by the capitalized words below. This proposal, which was not accepted by the industry, read as follows (Ex. C-4):

Amend Section 6.F. to read as follows:

> 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 on or off camera narration or commercial message. IF HIRED AS A STUNT PERFORMER AND PERFORMS AS SUCH, THE STUNT PERFORMER SHALL NOT BE DOWNGRADED. Stunt performers need not be identifiable per se; only the stunt or ANY PART THEREOF performed need be identifiable. EACH PASSENGER AS WELL AS THE vehicle driver is included in the term, "principal performer" if ANY OF THE CONDITIONS OCCUR AS set forth in PARAGRAPH 9 (STUNT DRIVING GUIDELINES), subsection EE of Schedule A, Section I., Working Conditions.

A 1988 union proposal to add words to Section 6 F also was not accepted, the witness stated. That proposal sought to add the words shown in capital letters (Ex. C-5):

> Revise the first paragraph of Section 6.F. to read as follows:
>
> Stunt performers are included in the term "principal performer" IF THEY PERFORM A STUNT, AND ANY PART OF THEIR PERFORMANCE IS USED IN THE COMMERCIALS AS EXHIBITED WHETHER OR NOT ANY PART OF THE STUNT IS USED IN SUCH COMMERCIAL.

In 1982, Mr. Waldberger testified, the union proposed a set of guidelines for stunt driving (Ex. C-6). The proposal's inclusion of the words "or passenger" and those reading "and be eligible for on-camera reuse payments" was not accepted by the industry. That proposal read in full:

When any of the following conditions occur, a vehicle driver or passenger shall qualify as a stunt player and be eligible for on-camera reuse payments.

1. When any or all wheels leave the driving surface.

2. When tire traction is broken, i.e. skids, slides, etc.

3. Impaired Vision - when the driver's vision is impaired by:
   a) Dust
   b) Spray (when driving through water, mud, etc.)
   c) Lights
   d) Restrictive covering of the windshield
   e) Any other conditions restricting the driver's normal vision.

4. If the speed of the vehicle is greater than normally safe for the conditions of the driving surface, or when other conditions such as obstacles, impaired vision or difficulty of terrain exist.

5. Offroad Driving - Any offroad driving other than normal low-speed driving for which the vehicle was designed and not involving categories 1 through 3 above.

6. Aircraft - When any aircraft, fixed-wing or helicopter, is flown in close proximity to the vehicle (anything other than a long establishing shot).

7. Doubling - When for safety reasons an on-camera player is doubled for driving purposes the driver-double shall qualify as a stunt player. This would also apply to doubling of passengers for the safety of the on-camera player.

8. Danger - Whenever there are conditions dangerous to the driver, passengers, film crew or the vehicle.

Thereafter, in 1982, most of the language which now appears as Section 6 F and the guidelines was adopted (Ex. C-7). In 1991, paragraph 9 (i) was added to the Section 9 guidelines, the witness stated. [The arbitrator

notes that Section 9 (h) also must have been added after 1982. Neither 9 (h) nor 9 (i) are relevant to the present dispute, however.]

The Christensen Award

On May 11, 1988, Arbitrator Thomas G.S. Christensen issued an award concerning claims of certain drivers for payments as principal performers (Screen Actors Guild, Inc. and Biederman & Co., Inc., AAA Case No. 1330-0344-87). For reasons set forth below, the present arbitrator shall find the Christensen award distinguishable. Nevertheless, some issues raised did overlap part of what must be considered here.

The question submitted in that case was whether certain driving tasks made the grievants "stunt performers" and hence "principal performers." Arbitrator Christensen found that the assigned work was covered by Section 9 (g) of the guidelines:

> Whenever high speed or close proximity of any vehicle creates conditions dangerous to the driver, passengers, film crew, other people, or the vehicle;

The company had argued that no "identifiable stunt" was involved because there was neither high speed nor close proximity to other vehicles involved. As the Cadillacs involved followed other cars, they moved no faster than 45 miles per hour, maintained an interval of 15 to 25 feet from cars they were following, were instructed not to tailgate, and never were closer than 20 feet to the non-driving crew. SAG witnesses claimed the speeds were between 40 and 50 miles per hour and that at times the cars were 3 to 12 inches apart.

The arbitrator found that the SAG witnesses were in better position to judge speed and distance and that the stunt coordinator largely agreed with the union testimony.

What the drivers did, the arbitrator found, satisfied the contract requirement that

> they perform an identifiable stunt which demonstrates or illustrates a product or service or reacts to the on or off camera narration or commercial message.

Although the commercial did not refer to specific handling, mechanical or design aspects of the product, it was an invitation to buy and satisfied the requirements of Section 6 F. The grievants were sustained in their claims for principal player payments which were due to them and the funds.

The instant dispute does not deal with the conditions covered by Subsection 9 (g). To that extent, the Christensen award is not helpful in deciding this controversy. Nonetheless, the findings about the speed of the cars and about the greater ability of the grievants to judge the conditions which arose during the driving may be instructive and will be considered later.

Position of SAG

"The Contract provides that a vehicle driver is a stunt performer if any of the Stunt Driving Guidelines is satisfied", the guild submits. If the guidelines are satisfied, "no independent evaluation of whether a stunt was performed is permitted."

Mr. Abbott was not a "precision driver", the union claims. The term does not appear in Section 6 of the contract.

> Y&R implies...that a "precision driver" is a job classification conveying benefits below those normally afforded to a "stunt driver" and beyond those afforded to an extra.

The union asserts that Mr. Abbott satisfied stunt driving guidelines 9 (f), 9 (d) and 9 (g). Grievant allegedly satisfied 9 (f) because he doubled for the on-camera principal performer since "the level of driving skills requires a professional driver." Guideline 9 (d) was satisfied because grievant was driving at a speed "greater than normally safe..." And, pursuant to 9 (g), Mr. Abbott's driving was at high speed which created conditions dangerous to the driver and passenger, SAG submits.

SAG disagrees with the company position that it used Mr. Abbott for reasons of efficiency and not because the level of driving skill required such an action.

> It cannot be disputed that it is more efficient to have a professional driver drive a vehicle at a shoot than to have an extra or an on-camera principal drive. Y&R's argument, if accepted, would apply every time a professional driver were hired, thereby negating this guideline entirely.

The company decided to hire Mr. Abbott. And Messrs. Dukoff and Marsh admitted that grievant's level of skill was what made him efficient. The

company did not use the on-camera principal for the driving of the opening sequence, it is submitted, so Y&R must have decided that a professional driver was needed.

Prior to 1991, the guidelines required a driver double where the level of driving was difficult or dangerous. This was changed in 1991 to adopt guideline (d) [(f)?], as Mr. Waldberger testified. And Mr. Marsh "candidly" testified he wanted a professional driver because it was safer, SAG notes.

Both guidelines (d) and (g) would be satisfied, SAG contends, if a driver drove faster than a non-professional would do on Upper Cross Road. Allegedly, Mr. Abbott met this condition. He testified that he exceeded 45 miles per hour "repeatedly". The Dukoff and Marsh testimony about their willingness to drive the road - at grievant's speed in the case of Mr. Dukoff - does not contradict the Abbott testimony about the speed at which he was driving, SAG submits.

A number of elements of the commercial are said to support grievant's testimony that he was driving 45 miles per hour or faster: 1) the visible tilt of the car as it rounds the first curve; 2) the compression of the space between the tire and wheel well as the car rounds the curve; 3) the bounce of the tires show high speed; 4) the wind created by the car blew the leaves; 5) the blurriness of the background in the opening sequence.

As in the case decided by Arbitrator Christensen, the driver was in the better position to see and estimate speed. Therefore, grievant's testimony should be credited rather than that of the company witnesses, it is argued. Furthermore, as Mr. Abbott testified, both grievant and his female passenger

believed he was driving too fast for the road. Again, grievant was in the better position to judge. In light of the sign saying "Slow, Winding Road", it is reasonable to conclude SAG contends, that at speeds as high as 47 miles per hour, the speed was too great and the conditions dangerous. Thus guidelines (d) and (g) were satisfied, and Mr. Abbott's performance constituted a stunt.

The meaning of an "identificable stunt" has long been in dispute as Ms. Preston testified. The guild takes the position that the term means

> a stunt performance that is capable of being seen (and therefore is identifiable) in the final edited version of the comemrcial.

If no portion of the performance is used, Section 6 M establishes the performer's compensation. Because Section 6 M states that it applies to a person who performs a stunt which is not used "so as to qualify such person as a principal performer under the provisions of this Section 6...",SAG reasons from this that stunt performers whose work <u>is</u> used in the final edited version are the class of persons to whom Section 6 F applies. Principal performers are entitled to residuals while those covered by Section 6 M are not.

> It would be entirely consistent, and, indeed, rational, to interpret Section 6.F. as requiring that residuals be paid if the performance appears in the final version of the commercial.

As Section 6 F requires, the work performed by grievant "demonstrates or illustrates the product,"SAG submits.

There allegedly is no contract or past practice support for the Y&R contention

> that "identifiable stunt" means a "stunt performance that is identifiable as a stunt to the average viewer."

The guild notes that the contract words are "identifiable stunt" not "identifiable as a stunt."

The notes of the 1967 meeting (Ex. C-1) quote Mr. Migden explicitly and then go on to report an unattributed statement

> When a stunt is seen on the screen and the viewer can tell it's a stunt, it is identifiable.

The notes and the testimony do not indicate who said this, SAG asserts. And the meeting occurred before the stunt driving guidelines were added to the contract.

In any case, the notes allegedly did not constitute an agreed interpretation of the words "identifiable stunt", it is argued. The notes show that Mr. Saz (from the industry) predicted future difficulties in defining a stunt. No joint bulletin was issued on the subject. And Mr. McGuire testified that the industry in 1988 (Ex. U-3) sought the adoption of the Y&R definition as an agreed upon definition. This did not occur, nor did SAG agree to similar language proposed by the industry in 1991. Thus there never has been a prior agreement on the language.

In the case before Arbitrator Christensen, the company argued that the drivers did not perform an identifiable stunt, the guild notes. Though the arbitrator found that the speed at which the cars were driven, and the distance between them, was not obvious when the commercial was viewed, he found on the basis of the performers' testimony about the speed and the distance between cars that the stunt guidelines were satisfied. The arbitrator found that a stunt does not have to look like a stunt to the viewer.

The argument that the action must be identifiable as a stunt to the average viewer allegedly is irrational since the producer seeks to "trick" viewers

into interpretations of what is shown. There is no ground to import the "reasonable person" standard into this area of the contract.

In its reply letter, SAG denies it is here asserting that all automobile drivers are stunt drivers. The guild's position is that a vehicle driver is a stunt driver if he/she satisfies one of the stunt driving guidelines and if the performance appears in the final version of the commercial.

The 1967 minutes allegedly do not add any conditions beyond the contract which must be satisfied in order for a performance to be an identifiable stunt. In 1967 the stunt driving guidelines had not been adopted, and the parties frequently were called upon to decide whether a performance was a stunt. The industry allegedly cannot establish that a prior agreement on the definition existed.

Nor did the parties include the words "hazard, risk and a degree of skill" into the eight commercials contracts negotiated since 1967, SAG submits. The minutes and the exchange of correspondence does not establish agreement on the meaning of "stunt". The 1991 contract in Section 6 F states that a person is a stunt driver if he/she satisfies the guidelines - which do not include the words "hazard, risk and a degree of skill."

SAG reiterates its reasons (set forth above) for contending that Mr. Abbott satisfied three of the guidelines: (f) (d) (g).

Contrary to the company contention, grievant did correctly state that the filming occurred on the second day. Furthermore, Mr. Dukoff did not say he could not have filmed the car at 47 miles per hour. The director-camerman said he wanted constant speed and did not testify whether or not 47 miles per

hour would have been too fast. Nor did Mr. Abbott ever say he was going down the road at full speed. Allegedly, Mr. Dukoff did not refute or discredit grievant's testimony.

Mr. Dukoff never said the car was driven at moderate speed of less than 47 miles per hour. Mr. Dukoff said it was really hard to say what the speed was. Through the lens, the director-cameraman could not know for sure whether and when grievant accelerated or braked.

Mr. Marsh's statement that he would not hesitate to drive the car down the road at the speed at which Mr. Abbott appeared to be moving was neither an estimate of speed nor a refutation of grievant's testimony, the guild insists.

Though the on-camera actress did not request a stunt double, she did ask Mr. Abbott, according to his testimony, why he had to drive so fast. No conclusion can be drawn from the performer's failure to ask for a stunt double, the guild contends.

The company brief calculated a speed of 25.56 miles per hour from grievant's estimate that the run took 8 seconds. The company conclusion that the distance was 100 yards was based on the premise of a straight road. The estimate allegedly was based on an inapplicable formula and was not correct.

Mr. Abbott did not understand that he was being hired as a "precision driver", the union contends. He checked the box for "stunt player" on the standard contract, and he testified that he was hired as a stunt driver. No testimony was offered by anyone about whether other drivers refused the offer to work in the precision driver title. In any case, grievant's title will turn on whether he satisfied the guidelines.

Y&R allegedly is attempting to sidestep the contract by insisting that Mr. Abbott was a "precision driver", SAG asserts. The title does not appear in the contract, nor is there any rate of pay for such a classification.

Guideline (f) does not require that "risk or danger" exist when a driver double is used. That requirement was dropped when (f) was adopted in 1991. As the guild reads the guideline, the safety condition arises under (f) only when passengers are doubled.

Y&R disputes that the level of driving skill needed "required" the hiring of a professional driver pursuant to guideline (f). But the company decided to hire a professional driver. Grievant testified he was told he would be paid as a stunt driver, and Mr. Marsh disputed this requirement only after the shoot location was chosen. Allegedly, in light of this, the burden is on the company "to establish the reason it hired a professional driver." Even if the reason was that grievant's skill level made the choice more efficient, "Y&R determined that a professional driver was required."

Nor, it is argued, did Mr. Dukoff's experience in making car commercials qualify him to determine whether the speed was greater than normally safe for road conditions [guideline (d)]. Mr. Dukoff, in fact, admitted that he could not estimate the speed at which Mr. Abbott was moving. In any case, Mr. Abbott's testimony should be credited over that of Mr. Dukoff. Grievant is a professional driver and a stunt driver who was actually driving the car.

> He is, therefore, the best person to make the determination whether or not his speed was safe.

Nor is it true that the road was a gentle downhill curve which posed no risk to driver, passenger and vehicle. When the area was visited, the driver

of the automobile in which the party travelled, allegedly applied brakes continuously.

The arbitrator is asked to find that Mr. Abbott was a principal performer entitled to residuals.

Position of Young & Rubicam

The company submits that no stunt was performed on June 22 and June 23, 1992. SAG allegedly has failed to show that a stunt was performed and that a stunt survived into the commercial.

Mr. Abbott was hired as a precision driver. The company alleges [although the arbitrator's notes do not show such testimony] that Producer Marsh testified to having offered the job to several other drivers before it was offered to Mr. Abbott. Allegedly, the other drivers refused to take the job when told they would not receive residuals. Mr. Abbott accepted but he

> checked off "stunt driver" on the scale employment contract in an effort to change the conditions under which he was hired...

Grievant was asked to delete his check mark and did so, it is noted. Under "part to be played", the words "precision driver" were entered although "there is no 'part' of a precision driver in the commercial".

The company contends:

> It was the clear intention of both Abbott and Marsh, and therefore of Y&R, that Abbott was not to be a stunt driver, but was always considered a precision driver. [Emphasis in the original.]

While the company does not dispute that Mr. Abbott had no power to accept less than the agreement requires, it disagrees

> with the Guild's implied assertion that the 1991 Contract makes every automobile driver whose automobile glides through a commercial a stunt driver by dint of his driving the automobile.

Allegedly, Mr. Abbott was definite about some facts, i.e., the speed of 40 miles per hour which rose to 47, but was incorrect in his alleged testimony that the filming occurred on the first day. Furthermore, the vehicle's speed was "much less than 40 or 47 mph."

Director/cinematographer Barry Dukoff testified, it is submitted, that

> in order for him to dolly the camera along the platform while simultaneously panning and changing focus, the automobile's speed had to be substantially less than 47 mph. His estimate was 25 mph.

The film was overcranked and the records of that overcranking were lost, so the evidence on speed is limited to the testimony of Mr. Abbott, Mr. Dukoff, and Mr. Marsh, the company states.

Mr. Abbott did not testify that he himself observed a speedometer reading of 47 mph, the company submits. Grievant said the actress in the passenger seat told him the speed.

Messrs. Dukoff and Marsh both stated that the car was being driven at moderate speed. It was going less than 47 mph.

The actress did not demand a stunt double. Allegedly, she "did not request one because the speed was moderate."

The road, as the arbitrator saw, is a "gentle downhill curve". That curve looks sharp in the finished commercial because of the fore-shortening of the

long lens. As was true during the visit, visibility was good, the road was dry, and the road was closed.

If, as Mr. Abbott testified, he had the pedal to the floor, the sway on the curve should have been visible in the commercial. It is not.

Mr. Dukoff, an experienced director of automobile commercials, estimated grievant's speed at 35 miles per hour. The flying leaves were artificial and very light. They were put down so that they would remain suspended. The "effect" was further enhanced by overcranking.

Grievant was used instead of the on-screen principal player, Mr. Dukoff testified, because a precision driver is

> experienced in "hitting the mark" so that he would steer and pace the car exactly as requested - to accelerate to a moderate speed and then maintain it down the curve.

Economy, efficiency and convenience dictated the choice of a professional driver. The reason was not risk or danger requiring a stunt driver. Allegedly Mr. Dukoff testified that if he had seen any risk or danger, he would not have permitted the on-camera female player to ride in the car.

Mr. Dukoff testified that he did not believe the speed to be greater than normally safe for the road conditions.

Given Mr. Abbott's estimate of 8 seconds for the 100 yard run, a simple equation shows that grievant was travelling at 25.56 miles per hour, the company calculates.

The 1991 contract does not use the term precision driver, it is agreed. But all the witnesses referred to the term.

> A precision driver, it appears, is understood in the Industry, but has managed to avoid the clutches of contract drafters.

In any case, industry negotiators never agreed, it is asserted, "that all drivers of automobiles in commercials are stunt drivers per se." That is why the stunt driving guidelines were negotiated.

SAG focusses on only two of the guidelines and must prove that one of them took effect in this filming:

> (d) If the speed of the vehicle is greater than normally safe for the condition of the driving surface...or difficulty of terrain exists...

and

> (f) When an on-camera principal performer is doubled because the level of driving skill requires a professional driver... [Emphasis in brief.]

The guild did not prove that the speed of the vehicle was greater than normally safe for the road conditions. Nor did SAG prove that the principal player was doubled because the skill of a professional driver was "required".

> Convenience and economic efficiency, not a requirement of skill, dictated the use of a professional driver.

In the December 5, 1967 meeting of the industry-guild standing committee, SAG officer Chester Migden said "a stunt consists of 'hazard, risk and a degree of skill'". The industry accepted this interpretation, and Mr. Migden made a change in the notes which did not pertain to it.

No other proposals altered this 1967 interpretation, it is submitted. This was the only agreement between the parties. The Migden statement, it is noted, was in the conjunctive.

Y&R submits that in succeeding negotiations the industry resisted attempts to expand the definition of stunt driver. Since the December 5, 1967 exchange was not expanded, it is contended,

> the parties to the contract intended and intent that a stunt driver must be at risk and hazard and require a degree of skill. Clearly, without risk or hazard there is no stunt.

In its reply memorandum, Y&R contends that in light of the facts and arguments developed at the hearing,

> [t]he truth remains that merely driving a car with care and skill does not create a stunt.

Certain of the SAG "facts" are disputed.

1) The production company retained Abbott not as a stunt driver, but as a professional car driver... a "precision driver". Y&R anticipated no stunt... and [its] witnesses said they saw none...

2) Mr. Abbott was told that Y&R was looking for a professional driver and not a stunt driver as Mr. Marsh [allegedly] testified.

   [The arbitrator's notes show Mr. Marsh testified on cross that he had decided to hire a professional precision driver. But the notes do not show testimony that Mr. Abbott ever was told this until he appeared in Greenwich.]

3) Messrs. Dukoff and Marsh testified that Mr. Abbott was going "much slower" than the 47 miles per hour that the passenger (who did not testify) allegedly reported to grievant.

4) If the on-camera principal said he could not have done the driving, why did he say that, the company asks. It is noted that the on-camera principal player was not called.

5) There is a difference between grievant and the company witnesses about whether the speed was excessive. Messrs. Dukoff and Marsh saw "no" risk or danger.

Mr. Marsh said he would have felt comfortable making the run. And grievant told the arbitrator that he had applied the brakes at each curve. The company concludes Mr. Abbott could not have been going very fast.

Mr. Abbott did not double because his driving skills were required. Mr. Dukoff testified that the reason was economic efficiency. Grievant was hired to steer and maintain a speed.

It is argued that the 1991 guidelines "clearly contemplated risk and danger." The SAG position that a stunt is performed when a driver drives is not what the guidelines say, it is asserted. And the facts do not support the claim that the speed was excessive and dangerous, Y&R contends.

The fact that a professional driver is "desired" is different from a hiring because his skills are "required".

Danger and risk allegedly is expressed or inherent in all nine guidelines. Guideline 9 (f) seems to omit reference to danger, but

> if the Guild's reasoning prevails, that will mean that any time a car is driven in a commercial when the storyline implies that the on-camera performer is driving, then driver will be deemed a stunt performer.

This would mean 9 (a) through (e) and (g) through (i) would be inoperative when there is doubling.

The testimony showed that the industry never intended to dub all drivers as stunt performers, it is asserted. This is what SAG also agreed to on

December 5, 1967. And SAG further agreed that a stunt is "identifiable"

> only if it "is seen on the screen and the viewer can tell it is a stunt..."
> [Emphasis in brief.]

The 1991 modification to 9 (f) had to imply danger, it is argued. Mr. Dukoff and Mr. Marsh did not testify that they wanted a professional driver for safety reasons. Their reasons allegedly were "economy and convenience."

Both company witnesses said the vehicle was travelling no faster than 30 to 35 miles per hour, the company submits - not the 45 to 47 miles per hour stated by grievant.

The commercial

1) shows no visible tilt at the curve

2) and 3) shows only slight adjustments of the space between the wheel well and tire. This is consistent with a luxury car's ride.

4) The flower petals rose in the air not because of speed but because they were artificial and very light and were spread so they would rise.

5) The background blurriness was caused by the long lens used.

Two experienced witnesses concluded that the speed was moderate on this closed-off road, it is noted. So the road sign loses significance. Whatever is shown on the outtakes allegedly is irrelevant because that material was not used. The road conditions did not meet the criteria set in guidelines (d) and (g), it is asserted.

The issue of "identifiable stunt" allegedly is a red herring. What was filmed was not a stunt.

> There was no risk, no special skill to avoid risk required, thus no stunt.

The company then examines a hypothetical, i.e., that under guideline (f) risk is immaterial, that Mr. Abbott qualified as a stunt performer if driving skill was required and he doubled.

If such was the case, Section 6 F provides that if one of the guidelines is satisfied, the vehicle driver is a "principal performer." Allegedly, the

> intention of the 1991 Contract is to make sure that the driver who may have been hired as an Extra is paid as a principal performer for the session... Section 6 (f) does not mean the driver necessarily gets residuals...Unless there is a stunt performed which is identifiable in the commercial, the driver is not entitled to residuals. [Emphasis in brief.]

In 1982, the guild sought to get automatic residuals for drivers who met the guidelines. The industry refused to accept this proposal. So the guild remained with the burden of showing not only that a stunt was performed but also that it was identifiable as such in the commercial. No such stunt can be identified in the commercial at issue, it is argued.

It is contended that the Christensen award is not apposite. That arbitrator determined that the cars in the commercial were three to twelve inches apart, admittedly a situation of risk and hazard.

SAG allegedly seeks to gain at arbitration an expanded definition of "stunt driver" which it could not achieve in bargaining. That should not be allowed, the company submits, and the grievance should be dismissed .

Discussion

Both of these parties seek to gain at this arbitration validation of demands they have failed to achieve at bargaining. Neither will be successful in having the arbitrator enlarge the meaning of the contract, and the decision will have to rest on the existing contract language - although obscure - and on the facts developed at the proceeding.

In 1982, the union sought to have anyone satisfying a set of stunt guidelines automatically become eligible for residuals (Ex. C-6). That demand was not won and the present situation is that residuals became payable if a guideline is satisfied and if certain conditions in the first sentence of Section 6 F are met. The suceeding SAG demands which also were not met during the 1980s were variations of the 1982 proposals.

On the other hand, the adopted guidelines in 1982 (Ex. C-7) show that at (f) there was an explicit statement that the doubling is "for safety reasons". That language was altered in 1991.

The industry also has presented proposals which sought to widen the language of Section 6 F. In 1988, the industry sought an agreed interpretation (Ex. U-3) which would have become an explicit interpretation of an "identifiable stunt". The failed proposal sought to adopt all of the elements of the statement appearing in the December 5, 1967 notes.

The 1988 proposal read:

> A stunt requires a degree of skill and involves some hazard or risk of bodily injury. When a stunt is seen on the screen and the viewer can tell it is a stunt, it is identifiable.

Compare this to the relevant language in the notes (Ex. C-1):

> Mr. Migden pointed out that a stunt consists of "hazard, risk and a degree of skill." When a stunt is seen on the screen and a viewer can tell it is a stunt, it is identifiable.

In this arbitration, the company asserts that the 1967 statement was an agreement between the parties about the meaning of an "identifiable stunt." It is unnecessry for the arbitrator to decide whether or not that is correct. When the industry proposed an identical interpretation in 1988 and failed to win it, the 1967 statement no longer could be referred to as a mutually accepted interpretation.

In 1991, the industry again sought to make explicit a part of the meaning of an "identifiable stunt." It was proposed that the first paragraph of Section 6 F end with the words "identifiable as such to the ordinary viewer." This suggested language was not adopted.

On the other hand, the union also failed in a 1991 attempt to widen Section 6 F. It sought to cover vehicle drivers as principal performers if they met certain criteria even if they did not perform a stunt (Ex. U-7). Had this been adopted, Mr. Abbott certainly would have been a principal player in the commercial at issue since what he admittedly did met several of the proposed criteria. But the proposal did not find its way into the contract.

What was changed, as already stated, was the requirement under guideline (f) that the doubling occur for safety reasons. The 1991 language reads "When an on-camera performer is doubled because the level of driving skill requires a professional driver..."

The question which is posed is whether or not, under the criteria adopted in 1991, Mr. Abbott was a stunt driver entitled to residuals. If he met the criteria, grievant would have been entitled to residuals regardless of what the company thought his title was. If he did not meet the criteria, grievant would not have been entitled to the residuals regardless of what he thought he was told on the telephone.

To meet the criteria set in Section 6 F and in the stunt guidelines, it is not necessary for a stunt to be evident as such to viewers. The industry demanded this condition in 1988 and failed to achieve it. In the same year, Arbitrator Christensen ruled that if an action satisfied the guidelines, it was an identifiable stunt even if it was not evident as a stunt on the television screen.

That does leave a question as to what an identifiable stunt might be. Since it need not be evident on the screen, it must be an act which satisfied one or more of the guidelines. Then to provide the driver with coverage, the event must meet the other criteria set forth in the first sentence of Section 6 F.

It is contended that Mr. Abbott was hired as a precision driver. The only testimony we have on the subject of the hiring conversation is that of grievant who said he was told he was hired as a stunt driver and further told he would receive residuals. Mr. Marsh did testify on cross that he intended to hire a precision driver, but he offered no testimony to show, even by hearsay information that he knew Mr. Abbott was told this before June 22, 1992. (While it is not necessary in reaching a decision, it is clear that Mr. Marsh did not testify

about other drivers refusing the job when informed it would not involve residuals. A hypothetical question about this was asked of grievant on cross, but the union objected to the question and was sustained. Mr. Abbott never answered the hypothetical, and no other testimony on this subject was received.)

In the absence of any contrary direct evidence about what grievant was told, the arbitrator finds that Mr. Abbott was hired as a stunt driver. His checking of that box when he filled the standard contract form confirms the fact that such was his understanding before Mr. Marsh insisted otherwise. The fact that Mr. Abbott may have been told he was hired as a stunt driver would not resolve the matter unless grievant met the Section 6 F and the guideline requirements.

Messrs. Dukoff and Marsh testified that they desired a precision driver for reasons of economy and convenience. Mr. Dukoff testified on cross that Mr. Marsh was the person who made the hiring decision. And Mr. Marsh testified in his final statement on cross that he knew before the shoot he wanted a professional driver "for time efficiency and safety."

"Precision driver" is not a contract classification. There does not appear to be any pay category specifically assigned to the title. It is not even shown as a possible hiring classification on the standard contract form (Ex. C-8). It is not clear what anybody would understand about the terms and conditions of employment either when offering the job or when accepting it. Indeed, none of the testimony showed what Mr. Abbott was paid as a precision driver or how he knew the amount. No matter what grievant and the company did, if he did accept a job as a precision driver and then worked at it, it would constitute a contract violation. Whatever Mr. Abbott was paid would have been compensation for a

different classification or else a rate of pay not set forth in the contract at all.

The company is correct in arguing that the classification "has managed to avoid the clutches of contract drafters." If the classification is used frequently or at all, the parties will have to bargain over it. An arbitrator cannot create new contract categories.

The difficulty of the problem is illustrated by the hypothetical discussion in the Y&R reply brief (at p.8). The company suggested that if risk is immaterial to satisfaction of guideline (f), then Section 6 F would provide that an extra who is assigned to drive is paid as a principal performer for the session but does not get residuals.

This is an attempt to explain what a precision driver would receive. But if the conditions in the first sentence of Section 6 F are met - demonstration or illustration of a product or service or illustration or reaction to a message - and if guideline (f) also is satisfied, why would not an extra upgraded to principal player receive residuals? Certainly no contract language provides that he would not receive residuals if the stunt (pursuant to guideline (f)) appears in the final commercial.

If guideline (f) is met, the issue of the speed of the car, which was the subject of much of the conflict of testimony, almost becomes irrelevant. In 1991, the parties removed the prior explicit language which specified that doubling under guideline (f) had to be for safety reasons. The remaining requirement of that guideline which is apposite here is that the doubling occur "because the level of skill requires a professional driver..." Where the parties have removed the specification of safety for that guideline, the arbitrator

cannot read it back into the language. [Thus, Mr. Marsh's reference to safety in his testimony might be relevant to the question of whether guidelines (d) and (g) were satisfied, but is not central to the question of whether guideline (f) was met.]

Arbitrator Christensen ruled before the contract change was adopted. In his case, he found that a real safety question was involved. But such a ruling would not be necessary in the instant dispute to find that guideline (f) was satisfied.

What would satisfy guideline (f)? The company is correct in arguing that simply driving a car and meeting the other criteria of the first sentence of Section 6 F would not mean that an identifiable stunt was performed. One of the stunt driving guidelines also would have to be satisfied.

The arbitrator finds that the testimony of Messrs. Dukoff and Marsh showed they wanted a professional driver who would satisfy needs of economy and efficiency, at least. The limitations of the lens meant that the properly lighted time had to be used well. (To the extend that Mr. Abbott backed up the hill after runs and that he could "hit the mark", the lighted time would be used as effectively as possible.) This economic use of time was more than desirable. It was required if the shoot was to be completed in the time allotted. A profession driver, as the Dukoff testimony showed, would be expected to meet this need better than the on-camera principal player could do it if he drove.

In the absence of any definition of the word "required" - except that in view of the 1991 change in language, safety was not a condition precedent to any requirement - the actions of the company would demonstrate what the word

"required" meant to the hiring party. The efficient use of time was a requirement in this case. Despite the question of why such efficiency should qualify as a stunt, the activity satisfied the guideline as it was rewritten in 1991. Where the language is satisfied, the arbitrator cannot go beyond it.

The further questions of whether the speed at which Mr. Abbott drove was greater than normally safe for the condition of the driving surface, and whether high speed created dangerous conditions for the driver and his passenger were the subject of conflicting testimony. Some of the testimony of Mr. Abbott and of the company witnesses must be discounted or disallowed in coming to any conclusion

The company is correct in arguing that the hearsay statements of the two principal players cannot be dispositive. If the female passenger indeed felt unsafe and if she saw a speed of 47 miles per hour, she could have been called to testify about her observation and feelings. If the male principal player believed he would not have wanted to do the driving performed by grievant, that player could have been called also. What they allegedly said will not be considered by the arbitrator.

And Mr. Abbott apparently was mistaken about who gave him instructions on the walkie-talkie and about whether he spoke to the director when he was driving. The company testimony, which the arbitrator accepts, is that all discussion on the walkie-talkie and all instructions given by walkie-talkie came from the associat director. Mr. Abbott did not speak to Mr. Dukoff during the runs.

But what instructions were given? Mr. Dukoff testified at one point that there was no discussion of speed. At another point this witness testified that he said he wanted moderate and constant speed. Company testimony estimated the

speed at 30 to 35 miles per hour though Mr. Dukoff estimated on the basis of what he saw through a lens. (The calculation of 25.56 miles per hour depended on grievant's estimate of how long each run lasted and on the distance covered. Such an estimate based on two measurements which cannot be validated - especially the length of run - cannot be dispositive.) Both Mr. Dukoff and Mr. Marsh believed they would have driven at the speed Mr. Abbott displayed.

Mr. Abbott testified that after braking around the top curve, he floored the accelerator and reached speeds of 40 and perhaps 47 miles per hour. He also testified that whoever spoke to him on the walkie-talkie said he should be "hot".

In evaluating the testimony, the arbitrator notes certain evident errors in other testimony which should be used in judging credibility (although all the witnesses attempted to be honest and all had interest in the outcome.) Mr. Dukoff said there were no test runs on June 22nd. The standard contract shows, however, that Mr. Abbott worked on that day from 6:00 a.m. to 6:00 p.m. (Ex. C-8). What was grievant doing and why was he being paid for a day when his skills were not needed? There was no company testimony about the precise speed and maneuvering instructions given to grievant although there must have been some. How he made the runs and reached his speeds and how he braked was not precisely described by grievant although he did provide some specificity.

The viewing of the commercial and of the outtakes cannot really inform the arbitrator who has no expertise in judging the speeds shown. The data on the overcranking and the subsequent transfer to tape would have been helpful, but it was not available.

It is hard to believe that the speeds attained on the short stretch of closed off road were dangerous to the driver and passenger and that he was able to drive the car at full throttle. But it is possible that the speeds were greater than normally safe for the road condition. If this latter criterion is to be used, grievant's estimate of the speed is more reliable than the observations of the company witnesses who were outside of the car. As Arbitrator Christensen found, the professional driver inside the car has greater knowledge of the speed than any observer outside of it. And whether the speed was safe for the road is a matter of opinion. The person more likely to know the speed would be better able to judge than would outside observers whether he was moving faster than was normally safe for the road conditions. In any case, though on balance one must conclude that guideline (d) was satisfied, risk and hazard are not requirements for an identifiable stunt after the words on safety were removed from guideline (f).

The arbitrator must find that the conditions in guideline (f) as it was rewritten in 1991 were met and that the conditions of guideline (d) were probably met although the finding on (f) is sufficient to meet the requirements of Section 6 F. Since the industry demand that a stunt must be seen as one by viewers of the commercial was not accepted, and since guideline (f) was satisfied, an identifiable stunt arose and Mr. Abbott met the requirement for being declared a stunt performer and a principal performer. (To find that a driver meets a condition for being a stunt performer in a specific situation and then to find that he did not take part in an identifiable stunt would not be logical. If the parties envision such a possibility, they should set forth with precision

the conditions under which this apparently contradictory situation could arise.)

The arbitrator shall find that Mr. Abbott was a principal player in the commercial at issue and that he was entitled to residuals.

In light of the foregoing discussion, I, the undersigned arbitrator, having been designated in accordance with the arbitration agreement executed by the parties and dated effective February 7, 1991, and having received the testimony and evidence of the parties at hearing at which all were ably represented by counsel, issue the following

AWARD

> Ray Abbott was a stunt performer in the Lincoln Mercury commercial produced by Young & Rubicam on June 22 and June 23, 1992 as provided in Section 6 F of the SAG 1991 commercials contract. He shall receive residuals and any other payments to which this status entitled him.

STATE OF NEW YORK)
ss:
COUNTY OF NASSAU)

> I, Maurice C. Benewitz, do affirm upon my oath as arbitrator that I am the individual described in and who executed this statement, which is my award.

Maurice C. Benewitz
Arbitrator

Dated: Manhasset, New York
August 29, 1994