

AMERICAN ARBITRATION ASSOCIATION
OPINION AND AWARD

In the Matter of Arbitration]
Between]
]
Screen Actors Guild]
]
-and-] AAA Case No. 13 300 00411 97
]
Fallon McElliot and Magnavox]
]
_____]

BEFORE:
Herbert Fishgold
Arbitrator

APPEARANCES:

For the Guild:

Joseph R. Gagliano, Jr., Esquire
Squadron, Ellenoff, Plesent & Sheinfeld, LLP

For the Agency:

Elhanan C. Stone, Esquire
Hall Dickler Kent Friedman & Wood, LLP

The Instant grievance, filed pursuant to the Screen Actors Guild Commercials Contract, sought an upgrade for Ken Hoffman, and two John Does and two Jane Does, all hired as extras, on the basis of their performances in a Magnavox Television commercial produced by Fallon McElliot ("FM") and entitled "Hot Dogs Hot Dogs Free Speakers" (the "Commercial")

A hearing was held before the undersigned on September 15, 1997, at which time the parties entered into a Statement of Stipulated Facts, and, following the viewing of the commercial at issue, presented arguments and prior arbitration decisions in support of

their respective positions. Post-hearing submissions were filed and the matter is now ready for decision.

The grievance, as filed, identified five individuals for whom the upgrade was sought:

Ken Hoffman - man in red watch cap on right side of screen in the first scene and on the left in the second scene.

John Doe 1 - man in golf cap and blue shirt

John Doe 2 - man with blue painted face beside Hoffman

Jane Doe 1 - woman in yellow jacket and cap on left side of screen and behind John Doe 1.

Jane Doe 2 - woman in plaid shirt behind Jane Doe 1 and holding a hotdog.

Following the hearing, the individuals were further identified by name: Robert Clark was John Doe 1; Richard Cross in John Doe 2; Marlon Braccia was Jane Doe 1; and Nancy Barker was Jane Doe 2. It was also acknowledged that Robert Clark, although hired as an extra, was voluntarily upgraded by FM upon viewing the edited commercial.

Background: The Commercial

The five performers in question were engaged as extras by FM to perform in a Magnavox Television commercial known as "Hot Dogs Hot Dogs Free Speakers." Two separate versions of the Commercial were created, each running for approximately 30 seconds. Both versions were viewed repeated times during the course of the arbitration, and a copy was provided to the Arbitrator. The claims for all five are based on their performance in the first scene (version one), while an additional claim is made for Mr. Hoffman on the basis of his performance in the second scene (version two).

The first scene begins by seeing a football game on our television screen. It then cuts to a group of people, colorfully dressed, who appear to be fans watching the game from the stands, and nodding their heads in response to the motions of the game on the field. A person with his back to the camera passes in front of them. He is dressed as a vendor, and is saying, "hot dog, hot dog." The spectators bend around to see the game as he blocks their view.

Scene two is a cut back to the game and spectators from a side view. The hot dog vendor is now standing perpendicular to them. One of the spectators asks for a hot dog, and as the vendor passes it to him, the vendor asks for money. The spectator hesitates and says, "Harry, what are you doing charging for the hot dog." The camera pulls back, and we see the spectators in hat appears to be Harry's living room, all watching the game on a wide-screen Magnavox television. A voice over then says: "Magnavox, with a picture so real, you can charge for the hot dogs."

Since none of the five performers involved in this grievance speak or are alone on a stationary camera shot, the criteria to be applied are in Paragraph 6(c) of the Commercials Contract:

6. Persons Covered

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

X X X

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;

Accordingly, for purposes of reviewing these upgrade claims, the Arbitrator must determine (1) are they identifiable, (2) are they in the foreground, and (3) do they deliver a performance in the foreground that illustrates or reacts to the on or off camera commercial message.

Discussion

Before turning to the application of those terms to the instant commercial, it is helpful to review the three prior arbitration awards that were submitted involving other commercials wherein upgrades were sought.

SAG v. Foot Cohn & Belding dealt with the MasterCard credit card commercial, and, in particular, the scene therein showing several rows of bankers emerging from an elevator. The advertising agency hired the first row of bankers as principals. SAG sought upgrades for the second row of bankers.

The arbitrator therein noted, at the outset, that the pertinent provisions of the Commercials Contract are, of necessity, couched in language whose definition cannot be disassociated from judgement:

“...It is patently clear that all of the relevant language takes on meaning only in context and that each case must be determined by its own context.” (p.5)

And since the audience for these commercials is the average viewer, he went on to note that he cannot conceive of any consistent rule by which the average viewer’s prospective recollection of a performer seen in a prior commercial can be assessed:

“...Performers in a commercial may be extras or ‘players.’ The differentiations between them are to be established on the facts as they appear in the commercial, and on the interpretation of such general concepts of identifiability, appearance, and foreground performances as may best serve the intent of the parties.(p.9)

Finding that “identifiable” means more than being visible, and that “foreground” is where the action is, the arbitrator concluded that, with respect to the “bankers,” the commercial as a whole is obviously intended to draw attention to the entire group, and that the second row of “bankers” is entitled to the same treatment as was afforded the first row.

The Trans America Insurance commercial involved a question of whether the wife’s foreground performance demonstrated or illustrated a product or service or illustrates or reacts to the on or off-camera narration or commercial message. Although she was viewed briefly only at outset and spoke no words, the arbitrator concluded that, rather than being there solely as atmosphere, she was illustrating the advertising message and she was reacting to the narration.

Finally, both parties relied upon the Mennen Speed Stick (“The Coach”) commercial to support their positions. That commercial, which was viewed at the instant arbitration, consisted of four segments, which were given separate consideration by the arbitrator. The first segment took place at the end of a baseball game; the second segment took place in the locker room; the third segment took place in front of the mirror in the locker room; and the fourth segment took place outside the locker room. In all segments. “The Coach” was the narrator and principal focus.

The arbitrator expanded on the working definitions of the terms previously addressed in the Foot Cohn & Belding commercial by noting that what constitutes a foreground performance is where the focus of attention is in a scene, wherever it happens to be physically. With regard to the commercial message, he found it was two fold; first, a winner gives 110% to win, and second, a product gives 110% protection.

In granting an upgrade to the person who was standing closest to the Coach at the end of the first segment, and was the only other individual facing the camera, the arbitrator concluded that his performance was analogous to the performance of the wife in Trans America Insurance, vis-à-vis the commercial message of “a winner gives 110% to win.” He regarded the other performers in question as being atmosphere in all four segments.

Inasmuch as there are two scenes which involve one or all of the claimants for whom the Guild is seeking upgrades, it is necessary to determine what is the commercial message and how do the individuals impact the commercial message.

Guild's Position:

The Guild argues that the commercial message – we are at a football game -- is encompassed in the entire running time of the commercial, and that anyone identifiable in the foreground at any point during that entire commercial should be paid as a principal. Thus, the commercial message is demonstrated by the five performers acting as though they are at a football game, watching the game. They are clearly in the foreground, because the activity is all of them watching the game, bending around the hot dog vendor to see what is going on at the stadium floor. The advertiser wants to call your attention to that fact that those people look like they are at a football game, both by their dress and their motions. In the second scene, the Guild argues that Mr. Hoffman appears in the foreground and is reacting to the exchange between the vendor and the recipient of the hot dog, and therefore is entitled to an upgrade.

Agency's Position:

The Agency argues that the dress and appearance of the individuals is to seek to establish an atmosphere that they are at a football game. The message and the focus of the message is narrower than the atmosphere; the message is the "the picture is so real you think they are at the game." The basis of that message is focused on the vendor and anyone who reacts to the vendor.

What the commercial is doing in the first scene is set the stage for the commercial message, and that message takes place in the interchange between the vendor and the person he is seeking to charge for the hot dog, both of whom were hired as principals. The third individual hired as a principal was the gentleman sitting next to the person "buying" the hot dog, and who is observed following the hot dog being passed, and raising his hand.

The "extra" in the first scene who was voluntarily upgraded by the Agency is immediately behind the vendor and is seen peeking around him. According to the Agency, the movement of that performer, Robert Clark, tends to draw the viewer's eye to him, and it could be argued that he is thus part of the foreground (where the action is), and that his performance illustrates the commercial message

Opinion:

In addition to the criteria in Paragraph 6(c) of the Commercials Contract and the three arbitration decisions which involved their application to upgrade claims, the Agency, in its post-hearing submission, notes that the term "extra" is defined in another

document, the Theatrical and TV Programs Commercials, as a “performer of atmospheric business which includes the normal actions, gestures and facial expressions of the extra performer’s assignment.” This clarification of its role of an extra, coupled with the prior arbitration decisions, provides a reasonable basis for determining the context of the commercial message at hand, what constitutes “atmosphere,” and when, if at all, the performance of such an “atmospheric extra” can be viewed as “illustrating or reacting to the commercial message,” and thereby become entitled to an upgrade.

In the Magnavox commercial, the subject of this grievance, the individuals depicted as being at a football game were dressed in a manner consistent with fans sitting outdoors in a stadium. Indeed, the jackets, caps, and even the blue painted face, are typical of what can be seen in the stands. Moreover, their gestures and facial expressions were consistent with the creation of the atmosphere sought – fans in attendance at a football game.

This atmosphere was necessary to create the focus of the commercial message – the interaction between the “vendor” and the person getting the hot dog, and as would occur at a football game, being asked to pay for it.

Thus, both in the first scene, where the vendor blocks the view of the seated spectators, and in the second scene, where the hot dog is being passed to a spectator, who in turn is being asked to pay for it, that action constitutes the foreground, and only those individuals who are visible and reacting to or illustrating the commercial message at those two points in time could be considered entitled to an upgrade.

As already noted, the Agency gave a voluntary upgrade to the extra in the first scene (Mr. Clark), who was seated immediately behind the vendor, and is seen peeking

around him in order to see the playing field. At that point the foreground, the place where the action is, was the interaction between the vendor and the upgraded extra. Indeed, the Agency acknowledged that the motion of that actor tends to draw the viewer's eye to him and it could be argued that he is thus part of the foreground.

In the second scene, three of the individuals directly involved in the passing of the hot dog were hired as principals: the vendor, the recipient of the hot dog, and the individual in the cap sitting next to the recipient. That became the foreground and was the illustration of the commercial message. The only other individual who was arguably visible and arguably drawn into the foreground, was Mr. Hoffman, who was seated behind the recipient and man next to him, and who may appear to be watching the hot dog being passed, just as a spectator might do at a football game.

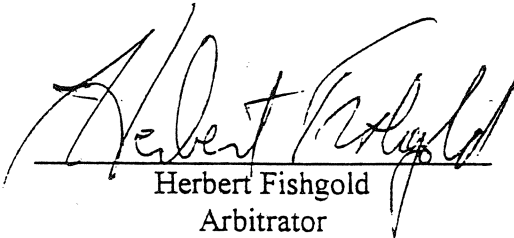
However, Mr. Hoffman's performance is not analogous to the performance of Mr. Clark in the first scene, for which the Agency gave a voluntary upgrade. Mr. Clark is full-face, and would be clearly observed by the average viewer. At best, there is a fleeting moment when part of Mr. Hoffman's face turns toward the passing of the hot dog, but it is a cropped shot. He only appears somewhat visible, because the wide angle captures the vendor, the recipient, and the man with the cap sitting next to the recipient. Further, there is a distant difference between the latter's performance which is an integral part of the message, and the happenstance appearance of Mr. Hoffman.

As to the other performers for whom the Guild seeks an upgrade, their performances, whether in the foreground or not, do not specifically illustrate the commercial message. Rather, in the context of the working definition of "extra," their

presence is of the nature of atmosphere, and there dress and gestures are consistent with creating the atmosphere being sought, to wit, spectators at a football game.

AWARD

1. For the reasons set forth herein, Ken Hoffman, hired as an "Extra" in the Magnavox Television "Hot Dog, Hot Dog" commercial, is not entitled to an upgrade to "Principal Performer," pursuant to Paragraph 6(c) of the Commercials Contract, on the basis of his performance in the second scene of the final edited commercial.
2. Marlon Braccia, Nancy Barker, and Richard Cross, hired as "Extras" in the Magnavox Television "Hot Dog, Hot Dog" commercial, are not entitled to upgrades to "Principals," pursuant to Paragraph 6(c) of the Commercials Contract, on the basis of their performances in scene one of the final edited commercial.


Herbert Fishgold
Arbitrator

October 23, 1997
Washington, D.C.