

BEFORE
HERBERT FISHGOLD
ARBITRATOR

In The Matter Of Arbitration)	
Between)	
SCREEN ACTORS GUILD)	AAA Case No. 13 L 300 0083700
And)	
PUBLICIS/BLOOM)	

OPINION AND AWARD

The instant grievance is one of a number of cases submitted to arbitration as a result of the Screen Actors Guild (SAG) "stunt spotting project," which involved viewing numerous vehicle commercials for review for instances of driving which allegedly met the Stunt Driving Guidelines under the Commercials Contract.

The issue presented herein is whether Publicis/Bloom (the Agency) violated the Contract by failing to consider Mike Ryan as a stunt driver for his driving in the 1997 BMW commercial that is known as "Sonic Boom". In particular, SAG alleges that Ryan's driving therein involved three separate elements of the Stunt Driving Guidelines in the Contract: tire traction is broken; vision is substantially impaired by dust; and high speed or close proximity of any vehicle creates conditions dangerous to the driver, film crew, or the vehicle.

RELEVANT CONTRACT PROVISIONS

This case primarily implicates two sections of the Contract. The first involves the definition of "principal performer" and provides in relevant part the following:

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 term "principal performer" if such driver satisfies the Stunt Driving Guidelines set forth in subsection 9 of Section EE of Working Conditions (Schedule A, Part I);

Contract, Section 6, Subsection F at page 3.

The second section of the Contract primarily implicated here is the Stunt Driving Guidelines, which provide in relevant part that:

When any of the following conditions occur, a vehicle driver shall qualify as a stunt performer:

- * * *
- (b) When tire traction is broken, i.e., skids, slides, etc.;
- (c) Impaired Vision – when 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 visions;
- * * *
- (g) Whenever high speed or close proximity of any vehicle creates conditions dangerous to the driver, passengers, film crew, other people, or the vehicle;
- * * *

Contract, Schedule A, Part I, Section EE (Protection of Principal Performers and Stunt Performers – Stunt Driving Guidelines), Subsection 9 (Stunt Driving Guidelines) at page 96.

By way of background, Mike Ryan has been a professional stunt driver in the industry since 1996, and has filmed over 500 national commercials.

On September 9, 1997, Ryan entered into a SAG standard employment contract for principal performers wherein it stated he was to be employed as a "Performance Driver". It is undisputed that, at the time of hire he was told that he would be doing a BMW commercial, and that there would be no stunt driving. The record also shows that Ryan's own company, which does car preparation work, was also retained to arrange the pick-up, preparation, and delivery of two identical vehicles, BMW model 323is, to the filming location.

The BMW "Sonic Boom" commercial began production in September 1997 at the Cuddy Back dry lake bed, about 35 miles from Los Angeles. The production and shooting lasted for a total of two weeks on the dry lakebed, which was an "expansive flat surface about 6 miles long." Ryan's involvement with the production lasted for two days.

There is no dispute that in the pre-production meetings, the Agency, in the person of Mary Ann Kurasz as Producer, advised Ryan that, due to budget constraints, he was to avoid doing any stunt driving. Ryan acknowledges that he participated in such planning meetings. Moreover, on the first day of rehearsal, the BMW display model provided by Ryan for the filming became inoperable when Ryan "cooked the clutch", Ryan obtained another BMW and, when the actual filming began, Kurasz specifically told him to drive safely, "since there was now only one vehicle available for the shoot."

SAG's POSITION:

The commercial, as broadcast, has a running time of 30 seconds. Ryan testified that the filming and subsequent broadcast involved three of the criteria under Contract's Stunt Driving Guidelines. He testified that during his driving the BMW 322is, which is a rear wheel drive auto, the car's back end would come out – slide around, causing him to counter steer to bring the car under control and regain rear traction.

Ryan further testified that he reached speeds he estimated to be between 70 – 100 miles per hour in some shots when he passed within a foot or two of the stationary camera. On shots involving the moving camera car, he would slow to between the 35 – 45 miles per hour that camera cars typically travel. On the overhead shots with the camera car, he testified that the camera was approximately 18" above the hood.

Finally, SAG contends that there are scenes where Ryan's car is seen emerging from behind and through a cloud of dust, totally impairing the view of the roadway ahead.

SAG contends that two prior arbitration awards interpreting and applying the Stunt Driving Guidelines further support finding the involvement of three of the disjunctive elements of the Guidelines in the filming of the BMW Sonic Boom commercial.

AGENCY'S POSITION:

The Agency contends that Ryan was specifically hired as a "precision driver", not as a stunt driver, and was told this at the time of hire as well as during the actual filming of the commercial. Further, Ryan did not even consider whether that September, 1997 commercial involved stunt driving until he was contacted by SAG in January 2000.

As to his actual performance, a review of the commercial, both as seen when aired and in viewing the excerpted scenes as shot, show that Ryan's driving did not perform "stunt work" as defined in 6 (b), (c) and (g).

Various techniques were used by the Agency to create a dangerous effect, ranging from the location of the shoot (dry lakebed), numerous props (to have dust back-up), and editing techniques (to create "high speed effect"). Contrary to SAG's claim and Ryan's testimony at the arbitration, the dust apparent in the commercial was created by these various cinematic techniques, not traction breaking "spinning" of wheels alleged to have occurred.

The commercial showed no signs of substantially impairing Ryan's vision as a result of Ryan's driving through a cloud of dust created by the filming crew.

Finally, the Agency argues that the two prior arbitration awards relied upon by SAG are readily distinguishable from what happened on the instant commercial.

DISCUSSION:

In SAG & Brederman & Co., Inc. (AAA Case No. 1330-0344-87, May 11, 1988), Arbitrator Christensen found that drivers operating vehicles on a closed road (L.I. Expressway) at speeds between 40-50 mph, and where the cars were at times "only three to twelve inches apart," met (g) of the Guidelines. In so ruling, Arbitrator Christensen credited the testimony of the drivers, as confirmed by the stunt coordinator, over that of the Agency, as to both speed and distance "because [Agency witnesses] were not in the same immediate proximity to the stunt as those driving the car."

In SAG and Young & Rubicon (AAA Case No. 13 300 00206 93, Aug. 29, 1994), Arbitrator Benewitz found that the grievant was a stunt driver, where speeds reached were between 30 – 30 mph (Agency) and between 40 – 47 mph (Driver), and where the driving took place on a road with a sign saying "Slow Winding Road." In finding that the grievant therein was a "stunt driver", Arbitrator Benewitz further noted that Grievant was hired as a "stunt driver", and was told he would be doing stunt driving. Finally, determining that "identifiable stunt" does not mean a stunt "identifiable as such to the ordinary viewer," Benewitz concluded that "[t]o meet the criteria set in Sec. 6F and in the [Guidelines], it is not necessary for a stunt to be evident as such to viewers."

With all of the above background, the Arbitrator now turns to the instant commercial to determine whether, by applying the contractual and arbitral language to interpreting the Guidelines, Ryan, in fact, performed as a "stunt driver".

At the onset, the Agency's argument that Ryan was told he would not be doing any stunt driving, and so the employment contracted he signed shows, he was hired as a "Performance Driver", is without merit.

Arbitrator Benewitz had the opportunity to address a similar argument in Young & Rubicon, where the agency mentioned the driver therein was hired as a "precision driver". He noted that "precision driver" is not a contract classification, and that what determines whether a driver receives the upgrade in pay is whether the conditions in the first sentence of Sec. 6F are met, and if any of the Guidelines are satisfied. The Arbitrator herein finds that the same rationale and, therefore, conclusion is called for with regard to a so-called "Performance Driver."

Turning then, to the driving actually performed in the filming of the BMW Sonic Boom commercial, SAG argues that, based on the prior arbitration awards, vehicle speeds of 40 – 50 mph coupled with dangerous road conditions, or, as in the Sonic Boom commercial, close proximity of the vehicle to people or other things constituted the type of dangerous conditions mandated in the Stunt Driving Guidelines. And, in evaluating those conditions, it is the driver who is in the best position to judge speed, proximity, and the corresponding dangerousness that implicates the Guidelines.

It is important to note at the outset, that the Arbitrator herein had the benefit of reviewing the commercial as aired, and the Agency's exhibit of a tape showing the comparison of specific scenes as aired and as actually shot. Both the Agency and SAG have relied upon this exhibit in support of their respective positions and, for ease of reference in the ensuing analysis, the Arbitrator has attached, as Appendix A, SAG's breakdown of each scene, with the approximate elapsed time, a description of what is shown, and the corresponding scene numbered on the Agency's exhibit tape.

As noted, SAG maintains that Ryan's driving in the instant commercial involves three separate elements of the disjunctive Stunt Driving Guidelines:

1. Tire Traction Was Broken

Tire traction was broken as that is defined in the Stunt Driving Guidelines because Mike Ryan lost rear traction in three scenes. The Stunt Driving Guidelines illustrate "[w]hen tire traction is broken" by citing as examples "skids, slides, etc." Contract, Appendix A, Section EE, Subsection 9(b), at page 96. Here, tire traction was broken in scene 7 where,

from a dead stop, the clutch was slipped and the tires spun and chewed up dirt before traction was restored. Tire traction was broken in scene 8 where the car slid sideways to its right while Mike Ryan oversteered. Tire traction was also broken in scene 10 when, in executing a hard left turn while approaching the camera, the car slid to its right. And tire traction was broken in scene 22, when the rear end of car becomes loose and slides to its right.

On its behalf, the Agency maintains that the dusts were created by various cinematic techniques, and were used to create the illusion of "spinning." Referencing to the explicit conditions in the Guidelines, the breaking traction involves "i.e., skids, sliding, etc." Skids and slides necessarily take place when a car is in motion and imply a degree of danger to the driver. Herein, the Agency points out, the dry lakebed, the use of fuller's earth, forms and special lighting doesn't contribute danger where it skids and slides. Finally, Ryan's reference to a "banana turn", does not equal a "banana stunt" or a "banana skid."

2. The Driver's Vision Was Totally Impaired

The commercial shows that in three scenes Mike Ryan's vision was totally, much less substantially, impaired. In each scenes 8, 18, 30, the car emerges from behind and through a cloud of dust. The car is either unseen until it emerges from the dust (scenes 8 and 18) or has to run through a large cloud of dust that totally impairs the view of the roadway ahead (scene 30).

The Agency mentions that Ryan was merely driving through a cloud of dust created by the crew, and, for a professional driver such as Ryan, hardly amounts to substantial impairment of vision.

3. The Car Was Driven at a High Speed and In Close Proximity To Create Dangerous Conditions for Mike Ryan, the Film Crew, and the Vehicle

There are six scenes implicating this guideline. In scene 20, the car approaches the camera at up to 50 miles per hour and comes within 1 to 2 feet. In scene 15, the car comes within 1 to 2 feet of the camera car. In scene 18, the car moves within 18 inches of camera. In scene 20, the car approaches under the boom of the camera car, which is less than 2 feet above the car's hood. In scene 24, the car passes within 1 to 2 feet of the camera car. And in scene 32, the car passes within 18 inches of the camera.

The Agency maintains that Ryan was not exposed to dangerous conditions. In the first instance, Ryan did not travel at excessive speed (50 –60 mph). Also, the apparent speed accelerated in the final commercial 300% to 814% compared to the actual speed of the vehicle, as is evident from the Agency tape. Moreover, as Ryan testified, the speedometer needle was altered to suggest a substantially greater speed than Ryan was actually driving, and, therefore, served as a prop.

Finally, the Agency contends that the conditions of the dry, isolated lakebed were not dangerous, and Ryan did not drive too closely to the camera car. One of the factors in measuring danger is the skill and experience of the driver. Regardless of the disparity in testimony as to the actual proximity of Ryan's car to the camera car, at no time, either during the shoot, after the shoot, or more importantly at the arbitration, did Ryan ever say that the proximity of his car to the camera car or any other vehicle was dangerous.

As the Arbitrator noted at the end of the hearing, it is apparent that the three issues raised by a comparison of Ryan's driving performance to the application of the Guidelines were: (1) when is tire traction broken; (2) when is a driver's vision substantially impaired; and (3) when does close proximity create dangerous conditions. (Emphasis added)

As for the applicability of the two prior arbitrator awards, it is important to note two significant differences vis-a-vis the instant grievance. First, there was a substantial amount of time elapsed between the actual driving performed (September, 1997) and the arbitration hearing (May, 2001). Second, the two prior awards were generated by drivers disagreeing with the classification/pay for their driving during the filming. Herein, the instant grievance was generated by a SAG "start spotting project" some 2 1/2 years after the September, 1997 commercial.

In fairness to Mr. Ryan, much of the recollection of the actual driving would have had to have been based on reviewing the commercial and discussing it with SAG representation. As he candidly acknowledged, it was not until he was approached by SAG after January 2000, that he thought about his performance in the context of the specific guidelines at issue.

Moreover, as both Arbitrators Christensen and Benewitz noted in their awards, the reviewing of the commercials as aired cannot really inform the arbitrator who has no expertise in judging the speeds shown; and as a rule in the context of those two awards, whether the speed was safe for the road is a matter of opinion, for which the driver would be in a better position to judge.

However, as already discussed, unlike in the prior two awards, in addition to reviewing the commercial as aired, the Arbitrator also had the opportunity to view a comparison of the scenes as aired with the scene as actually shot. That comparison clearly shows that for purposes of the airing, the speed was greatly accelerated from the actual speed during the shoot, and there was use of cinematic techniques to further create the illusion of speed, as well as dusty road conditions.

Turning then to the specific guidelines, it is significant to note that Guideline (c) refers to "vision substantially impaired," and Guideline (g) refers to "conditions dangerous to the driver... or the vehicle." While SAG alleges substantial impairment in three different scenes, at no time during or after the shoot, nor at the arbitration, did Ryan testify to such impairment. In that same regard, Ryan never alleged any dangerous conditions related to either speed or proximity.

To gauge whether or not danger has been created in this situation should be based on the perspective of one who is skilled in the art of driving, not of a lay person such as an arbitrator. Neither Ryan nor anyone else present during the shoot testified that the proximity of Ryan's car to the camera car or any other vehicle was dangerous. Therefore, in keeping with the guidance of the prior awards, after more than three years from the filming of the commercial, absent Ryan's specific testimony as to any risk or danger, the Arbitrator cannot find that the actual filming of the Sonic Boom commercial satisfied either Guideline (c) or (g).

As to the remaining Guideline whether tire traction was broken within the meaning of Guideline (b), requires a different analysis. While (c) and (g) set out requirements of "substantial" impairment vision of and "dangerous" conditions from high speed or close proximity, Guideline (b) as written merely requires the breaking of tire traction, with "skids" and "slides" being examples, since the "i.e." and "etc." clearly indicate that other situations could also satisfy that guideline. While one could argue whether such "breaking of traction" presented any such danger to Ryan, the Guideline as written, and in the absence of any past practice to the contrary, only requires that a driving maneuver resulted in the breaking of tire traction.

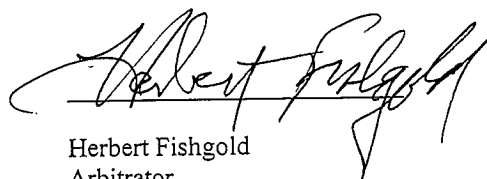
A review of the commercial, both as aired and in the comparison tape, convinces the Arbitrator that tire traction was broken in several scenes wherein a spinning of the wheels and sliding motion of the car is observed. Moreover, since "skids" and "slides" are examples of, and not the sole conditions for,

breaking tire traction, Ryan testified about a "banana turn" which, while perhaps not resulting in a "slide, satisfied the conditions of Guideline (b), and Ryan therefore should be classified a stunt driver for purposes of the Sonic Boom commercial.

Accordingly, based on all of the above, the Arbitrator issues the following award.

AWARD

Mike Ryan was a stunt driver in the Sonic Boom commercial produced by Pulicis/Bloom in September 1997 as provided in Section 6F of the SAG 1991 commercials contract. He shall receive residuals and any other payments to which this status entitled him.

A handwritten signature in black ink, appearing to read "Herbert Fishgold", written over a horizontal line.

Herbert Fishgold
Arbitrator

Washington, D.C.
September 6, 2001

APPENDIX A

SCENE AS AIRED	DESCRIPTION OF SCENE	SCENE NUMBER ON AGENCY'S COMPARISON OF "FIRST ON SPOT/ SECOND AS SHOT"
1	Wind directional indicator and rotating wind velocimeter	
2	Mike Ryan in helmet and driving suit walking by parked van	
3	Mike Ryan approaching driver's side door	
4	Driver's side door being opened	
5	Steering wheel and ignition	
6	Speedometer and tachometer with needles rising	
7	Right rear of car as clutch is slipped, car accelerates from dead stop, loses and regains traction, producing lots of dust	1 (with change in speed only)
8	Long shot of car with headlights on and emerging from cloud of dust and then sliding to the viewer's left with dust under car and to viewer's right as Mike Ryan over steers	2 (with no change in speed)

SCENE AS AIRED	DESCRIPTION OF SCENE	SCENE NUMBER ON AGENCY'S COMPARISON OF "FIRST ON SPOT/ SECOND AS SHOT"
9	Tachometer showing descending dollar amounts with needle between \$70,000 and \$60,000	
10	Close shot of right of car approaching at between 30 to 50 miles per hour and within 1 to 2 feet of camera, with car leaning to its right on sharp left turn, with Mike Ryan counter steering to car's right as it slides to its right towards camera	3 (with no change in speed)
11	Hand on stick shift	
12	Car with headlights on moving from viewer's right to left as it follows camera car	4 (with no change in speed)
13	Tachometer showing needle going from \$60,000 to \$50,000	
14	Long shot of car moving from viewer's right to left	5 (with no change in speed)
15	Car with headlights on approaching camera car within 18 inches	6 (with change in speed only)

SCENE AS AIRED	DESCRIPTION OF SCENE	SCENE NUMBER ON AGENCY'S COMPARISON OF "FIRST ON SPOT/ SECOND AS SHOT"
16	Long shot of car moving from viewer's left to right	7(with change in speed only)
17	Shot of right rear of car with "323is" logo	
18	Car from passenger's side with headlights on emerging from behind cloud of dust, then moving from viewer's left to right and coming within 18 inches of camera	8 (with change in speed only) -
19	Tachometer showing needle moving between \$40,000 and \$30,000	
20	Car approaching under boom of camera car and coming within 1 to 2 feet of camera	9 (with change in speed only)
21	Long shot of passenger's side with car moving from viewer's left to right	10 (with slightly discernable change in speed)
22	Car with headlights on approaching and passing from viewer's left to right with rear of car loose as evidenced by dust from right rear tire	11 (with change in speed only)

SCENE AS AIRED	DESCRIPTION OF SCENE	SCENE NUMBER ON AGENCY'S COMPARISON OF "FIRST ON SPOT/ SECOND AS SHOT"
23	Tachometer showing needle moving between \$40,000 and \$30,000	
24	Car from driver's side passing within 18 inches of camera car and use of carnival mirror to distort shape of hood	12 (with slightly discernable change in speed)
25	Tachometer showing needle going below \$30,000 into redlined area	
26	Long shot of car from passenger's side moving from viewer's left to right	13 (with change in speed only)
27	Mountains, sky, and clouds in background with "\$29,270" superimposed	
28	Large boulder on viewer's left and sky and clouds on right with "\$29,270" superimposed	
29	Long shot of mountains, sky, and clouds in background with "\$29,270" superimposed	
31	"BMW 323is/\$29,270" with disclaimers, etc. in smaller print	

SCENE AS AIRED	DESCRIPTION OF SCENE	SCENE NUMBER ON AGENCY'S COMPARISON OF "FIRST ON SPOT/ SECOND AS SHOT"
32	Car with headlight on approaching from viewer's left and passing within 18 inches of camera	15 (with change in speed only)
33	"BMW" emblem and slogan "The Ultimate Driving Machine"	