ARBITRATION DECISION AND AWARD

In the Matter of Arbitration Between: Screen Actors Guild, Claimant, and Young & Rubicam, Inc. Hidalgo.	7Up "Rhythms" (Hidalgo & Hendricks)

Arbitrator

Louis M. Zigman, Esq.
8306 Wilshire Blvd., Ste. 596
Beverly Hills, CA 90211

Dated: March 6, 1999

Appearances

For the Claimant

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Introduction

This matter was heard before Louis M. Zigman, Esq., neutral arbitrator, on November 14, November 25 and December 30, 1998. The claimant was represented by Alison R. Platt, Esq. and the respondent was represented by Barbara Meister Cummins, Esq.

Both parties were afforded an opportunity to present evidence and to examine witnesses. After the close of the hearing both parties filed written closing briefs. The matter stood as submitted as of February 20, 1999.

Based on the evidence and contentions of the parties, I issue the following decision and award.

Nature of the Claim

This dispute represents a claim by the claimant (SAG) on behalf of performers Allen Hidalgo and Tracie Hendricks. This claim arose when the respondent, Young & Rubicam, (Y&R), decided to downgraded Hidalgo and Hendricks from their original status as principals in the 7Up commercial "Rhythms". According to Y&R, Hidalgo and Hendricks were downgraded because their faces were not seen in the final edited version of the commercial.

SAG, on the other hand, maintained that neither Hidalgo nor Hendricks should not have been downgraded from principal status as they were both entitled to that status. As such, according to SAG, Y&R's decision to downgrade violated the collective bargaining agreement.

As a remedy, SAG sought an order requiring the payment of residuals for both Hidalgo and Hendricks as a result of their performances in the commercial.

Material Facts

The evidence disclosed that Young & Rubicam Advertising, the advertising agency arm of Y&R, was engaged to produce three television commercials for 7Up in August, 1996. Ms. Kim Lowell was Y&R's executive producer for the "Rhythms" commercial. Lowell hired Sheila Manning Casting as casting director.

After receiving directions from Lowell as to the type of performers (actors) which wanted, Sheila Manning distributed a breakdown notice dated July 11, 1999 stating:

> "Men & Women....interesting, young, hip, contemporary as well as real and natural. People who dance either well or badly. They will bring music and dance ballet to Latin and everything in between..."

On July 15, another breakdown notice with respect to the 7Up commercials was distributed. That notice stated:

> "Re Dancers: [They're not just club dancers; submit various types, like ballet & tap, etc.-- Also to reiterate, we want either good or bad dancers"

Shelley Pang, an agent for professional dancers received the breakdown notices and she advised several of her clients, including Hidalgo, of the audition to be held by Sheila Manning Casting. Hidalgo and many others appeared at the addition. Hidalgo prepared and performed a musical routine, a Latin number.

Sheila Manning video-taped the auditions and she sent copies of the video-tapes to Lowell for their consideration.

Lowell and her creative team reviewed the video-tapes and Hidalgo was amongst those who were given a "callback". Hidalgo was told to come back for a second audition and to bring a partner. Since Hidalgo basically worked alone Pang suggested that he team up with Hendricks, another professional dancer, and client and so they did.

Since Hidalgo and Hendricks were going to appeared together at the audition they prepared a short routine which they performed. Their routine was an outgrowth of the Latin routine that Hidalgo had danced earlier.

Lowell eventually hired Hidalgo and Hendricks as a team and they were hired as "principal performers".

Y&R also hired Leslie Dektor as the director for the "Rhythms" commercial. The "shoot" was made on August 13, 1996. The shoot that Hidalgo and Hendricks performed in was characterized as a vignette and the purpose of the vignette was to advance the plot of the commercial.

The vignette was shot on a set and the performers were wardrobe and they had make-up.

Hidalgo and Hendricks met Dektor for the very first time the same morning that they arrived on the set. Dektor's "style" was to meet the performers fresh, without benefit of rehearsals and he would explain what he wanted them to do. According to Dektor, his method gave his works an overall feeling of freshness and spontaneity.

When they arrived on the set, in make-up and in costume, Hidalgo and Hendricks were told to stand behind the window frame and that they were to move back and forth across the window frame while the camera would get a shot of Hidalgo holding the can of 7Up "on" Hendricks' rear-end (can)...thus naming the vignette as "can-can".

Hidalgo and Hendricks danced to music moving back and forth, side to side, behind the window frame. While doing this, Hidalgo was holding the can of 7Up and swinging his arm and hand as close as possible on Hendricks' rear end.

The evidence it took a number of "shoots" to get what Dektor wanted. In order to get what he wanted, Dektor called Hidalgo and Hendricks over to the monitor several times to see what they had just done. As they watched, Dektor would make suggestions as to what he wanted. As for example, Dektor told them that they had to remain inside the window frame and he made suggestions as to how he wanted Hendricks' hips to move, how Hidalgo should hold the 7Up can, in order to ensure that the can could be seen, and he explained how he wanted the can to move, along and beside, Hendricks' rear end.

After listening to Dektor's comments, Hidalgo and Hendricks would take a little time to digest what Dektor wanted and Hidalgo worked on dance steps to assist both of them in achieving the "pendulum" movements that Dektor wanted. As noted above, it took a few times looking at the monitor, and listening to Dektor's instructions before Hidalgo and Hendricks achieved the effect that Dektor wanted.

After the vignette was completed, Lowell oversaw the editing and completion of the advertisement for airing on television. As part of Lowell's duties, she reviews the final edited commercial for purposes of accounting for all talent booked for the commercial. In this respect, Lowell assesses whether the individual performers should be paid as booked or differently, including downgrades.

As noted above, both Hidalgo and Hendricks had been booked as principals. After Lowell reviewed the commercial she downgraded both Hidalgo and Hendricks from principal status. As stated in Y&R's closing brief, Lowell made her decision to downgrade:

"...because they did not fit any criteria for Principal under Section 6 of the Contract...She added that she did not consider Agreed Interpretation No. 13 because she knew the grievants had not been choreographed..."

Hidalgo and Hendricks did not agree with the downgrade. According to them, they were both professional dancers, specialty dancers, and therefore they could not be downgraded. They contacted the union and business representative Arlene Worcester eventually protested the downgrade on their behalf.

Worcester, herself a relatively new business representative, supported Hidalgo and Hendricks' claims that they were "specialty dancers" and therefore should not have been downgraded. Worcester also asserted that Y&R's decision to downgrade Hidalgo and Hendricks was also in violation of the Agreed Interpretations language in the contract by stating that they had performed choreographed material.

As noted above, Y&R denied SAG's claim and Y&R maintained that the downgrades were in conformance with the collective bargaining agreement. As such, Y&R denied that its decision constituted a violation of the agreement.

Issues

Whether Allen Hidalgo and/or Tracie Hendricks were specialty dancers under the 1994 commercials contract?

If so, what should the remedy be?

Whether Allen Hidalgo and/or Tracie Hendricks performed choreographed material under Agreed Interpretation No. 13 of the contract?

If so, what should the remedy be?

Pertinent Contractual Provisions

Section 6. Persons covered - Principal Performers

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

...

G. Specialty dancers and specialty acts are included in the term "principal performer" if the requirements of this Section 6 are otherwise fulfilled.

Section 27. Downgrading and Outgrading

A. Downgrading

2. If a performer is engaged as a principal performer but his/her face does not remain in the commercial as exhibited, the principal performer shall be notified of such downgrading within 60 days after the completion of his/her employment, but in no event later than 15 working days after the first use of the commercial...

AGREED INTERPRETATIONS OF CONTRACT

13. Any performer performing choreographed material, as a solo, duo or a member of a group (whether recognizable or not) shall be treated and paid under the applicable principal performer or group dancer conditions and rates.

Positions of the Parties

Claimant's Position

Putting aside the question of whether Hidalgo and Hendricks should be considered as specialty dancers under Section 6, the claimants pointed out that both Hidalgo and Hendricks were hired as principal performers. The claimants then pointed to Agreed Interpretation No. 13 which provides that performers who perform choreographed material are entitled to be paid at the principal performer rate.

In pointing to the evidence, the claimants maintained that the testimony demonstrated that Hidalgo and Hendricks did in fact, perform choreographed material. As such, according

to the claimants, neither should have been downgraded.

As support for this position, the claimants pointed to Hidalgo's testimony that he is a choreographer and that he has done choreography in the past. The claimants also pointed to Hidalgo's testimony, and corroborated by Hendricks, that Hidalgo choreographed the Latin routine that they performed at the callback, that they used much of the Latin routine at when dancing through the window frame the shoot, and that Dektor conferred with them several times during the shooting of the vignette giving them feedback as to what he wanted. Both Hidalgo and Hendricks also noted that they had to spend a few minutes working out their steps to ensure that they would be in sync with each other and that they had to work out their steps to ensure that the 7Up can would move in the manner desired by Dektor.

The claimants also noted that Dektor, in his testimony, acknowledged that he reviewed their performance on the monitor with them several times, and that he did tell them things that he wanted to see.

According to the claimants, all this work constituted choreography and therefore Hidalgo and Hendricks were entitled to be paid as principal performers.

In noting the respondent's characterization of Dektor's words as constituting the mere giving of "directions" and that Hidalgo was merely "lining up the shot" and not engaging in choreography, the claimants disagreed. According to the claimants, Hidalgo had to use his skill and expertise both as a choreographer and as a dancer, to create steps and movements for both he and his partner, Hendricks, in order to give Dektor the look and feel that Dektor wanted. Again, in

pointing to Hidalgo's testimony, the claimants noted that Dektor had given certain specific instructions concerning Hendricks' "hip movement", the manner as to how the can should be held, and moved, how the can should be moved in concert with Hendrick's body. Dektor also explained that he wanted their bodies to remain inside the window frame and that he wanted to see an overall free form movement.

Here again, according to the claimants, all these instructions required trained dancers along with someone who could choreograph material for these two performers.

While noting the respondent's contention that a choreographer must be *expressly hired* in order for a performer to perform choreographed material, the claimants disagreed. In this respect, the claimants maintained that there is no requirement in Agreed interpretation No. 13 requiring the hiring of a separate choreographer. Moreover, according to the claimants, there was a choreographer involved who did choreograph material and the choreographer was Allen Hidalgo. In other words, Hidalgo self-choreographed the material and, according to the claimants, self-choreography is permissible under Agreed Interpretation No. 13.

As additional support for the self-choreographed argument, the claimants pointed to Elinor London's testimony that when break dancing was "hot" break dancers were considered as self-choreographers and they were paid as principal performers.

While noting the respondent's arguments that Hidalgo's efforts did not constitute choreography, the claimants stated:

"As discussed in detail in (B) below, they were asked to perform a routine or series of body movements that could not have been successfully executed by persons without relevant training and experience...it is clear that the

requirements of the vignette went beyond what could have been successfully performed by untrained extras...

SAG contends that the performance rendered her by Hidalgo and Hendricks was in fact choreographed - i.e. it was a pattern of dance movements created, arranged and executed - by them...

While Dektor denied that he asked for a routine or any particular steps or execution, and denied that he gave the performers any time on the set to work up any kind of routine, he admitted that Hidalgo and Hendricks were required to 'be in sync', that Hidalgo was required to 'move the can left and front-left and right as (Hendricks') backside went left and right so that they were in counterpoint to one another' that 'as the can went to the right, I wanted [Hendricks'] backside to go to the left, and vice versa. And as that happened, they had to kind of move through the frame left to right. So I might have told them to move through, exit frame, or hold the center of the frame for a moment or two before exiting..."

In view of the foregoing, the claimants maintained that the "can-can" vignette required Hidalgo and Hendricks to not only execute Dektor's particular requirements, but to do it together in a synchronized style.

In view of the foregoing, and in pointing to the definition of the word choreography in Webster's New Collegiate Dictionary, the claimants maintained Hidalgo and Hendricks' performance "must be considered choreographed within the meaning of Agreed Interpretation No. 13".

As such, the claimants seek a finding and an award stating that Hidalgo and Hendricks shall be retained as principals; that they should be restored to the cast list and that they be paid all residuals due for the use of the commercial to date, with appropriate pension and health plan contributions thereon.

Respondent's Position

The respondent maintained that its decision to downgrade Hidalgo and Hendricks was permissible under the terms of the collective bargaining agreement. In this respect, the respondent pointed to Section 27(A)(2) which

permits the downgrading of any principal, if he or she fails to meet the criteria of a visible face in the commercial as shown. As such, given the fact that neither Hidalgo nor Hendricks' face was visible in the commercial, the respondent maintained that it acted properly in making the downgrade.

With respect to the claimants' contention that Hidalgo and Hendricks should not have been downgraded because they were specialty dancers under the language in Section 6, the respondent disagreed. In pointing to the evidence and to Joanne Kessler and Marion Preston's testimony, the respondents asserted that a specialty dancer is someone whose act is so unique that they are identified with it. Conversely, as articulated by Kessler and Preston, professional dancers do not, and have never been considered as specialty dancers. And, the fact that Hidalgo, Hendricks and Worcester believe that they are specialty dancers under the contract does not make it so.

And finally, with respect to that argument, the respondent pointed to the 1997 contractual negotiations and to the union's proposal to delete the word "specialty" from reference "specialty dancer" in Section 6, claiming that all professional dancers were covered anyway. In noting that the employers rejected that proposal and the union withdrew it, the respondent maintained that the union shouldn't be able to obtain in arbitration that which it was unsuccessful in obtaining in negotiations.

In this regard, the respondents noted that neither Hidalgo not Hendricks have any experience or expertise as to the meaning of the collective bargaining agreement and that Worcester herself was a new and inexperienced business

representative at the time she filed this complaint.

And, with respect to the claimants' contention that Hidalgo and Hendricks performed choreographed material, the respondent maintained that neither performed choreographed material under the accepted meaning of that term as contained in Agreed Interpretation No. 13.

While noting Hidalgo and Hendricks' testimony as to how they performed in the vignette, the respondent maintained that Dektor simply gave them "direction" as he does with all actors. With respect to the few minutes of practice that they undertook for themselves, the respondent maintained that practice does not constitute choreography.

The respondent maintained that it is quite clear that it was never looking for either trained dancers of for the use of choreographed material. As support for this position, the respondent pointed to Lowell and Dektor's testimony that they were seeking to employ actors and actresses, *good or bad*, and that their only criteria was that the actors/actresses be interesting when they moved and that they looked like they were having fun and were expressive through body language.

Furthermore, according to the respondent, the breakdowns also demonstrated that they were seeking actors and actresses who could dance either *well or badly*.

If the respondent was really looking for professional dancers, as alleged by the claimants, it would have used a casting agent for dancers, rather than the Sheila Manning Agency, which specializes in casting actors and actresses.

As yet additional evidence demonstrating that it wasn't looking for professional dancers, the respondent noted that it never asked any of the performers who auditioned to prepare

choreographed material either for the original audition or for the callback. The respondent also noted that the evidence was undenied that neither Hidalgo nor Hendricks was specifically asked to prepare choreographed material for the vignette and that neither was asked to choreograph any material while on the set.

As added support for its position, the respondent noted that the engagement contracts signed by Hidalgo and Hendricks designated them as actors/actresses and not as dancers nor as a duo. Additionally, the evidence was undisputed that despite Hidalgo's contentions that he performed choreographed material he never made a claim for, nor did he ever receive pay as a choreographer. According to the respondent, if Hidalgo really believed that he prepared choreographed material then he would have surely made a claim for payment.

While noting Hidalgo's testimony that he prepared a "Latin routine" for his audition and callback, the respondent again noted that Hidalgo acknowledged that no one at Y&R ever asked him to do that.

While also noting Hidalgo's testimony that he was qualified to create choreographed material, the respondent noted that no one at Y&R knew that nor were interested in that inasmuch as they were seeking to employ actors and actresses.

With respect to the claimants' contention that Hidalgo and Hendricks performed choreographed material during the shooting of the vignette, the respondent again denied that assertion. While acknowledging that Dektor spoke to Hidalgo and Hendricks during the shoot and that he looked at monitors with them, the respondent pointed to Dektor's testimony that he was giving them "direction", much in the same way as he

would with any other performer. As noted above, the respondent maintained that these directions were akin to "lining up the shot" and nothing more. Again, in pointing to Dektor's testimony, the respondent noted that Dektor invited Hidalgo and Hendricks to view the monitor as:

> "... a courtesy to them so that they could see on film what he had just asked them to do and also to make sure that they knew what he wanted with the can swinging the right way...not for the purpose of 'working something up' or orchestrating anything."

The respondent also noted that Dektor denied that he asked Hidalgo to arrange any dance or any specific steps. Rather, according to Dektor,

> "...his goal was simply to have Mr. Hidalgo's arms around Ms. Hendricks, and then have Mr. Hidalgo move the 7up can left and right to counterpoint her rear end."

In view of the respondent, "such direction was not choreography" and therefore Hidalgo and Hendricks did not perform choreographed material "as contemplated by Agreed Interpretation No. 13".

To make this point even more clearly, the respondent pointed to Dektor's testimony wherein he stated that he did not need dancers for the vignette and he could have easily used "any actor with a comic flair".

As additional support for this position, the respondent noted that Hidalgo never asked for payment for his purported choreographic services. According to the respondent, if Hidalgo had really felt that he choreographed material for the commercial then he surely would have sought pay for his services. Therefore the absence of any such claim fatally weakened the claimants' assertions in this regard.

While noting the claimant's insistence that Hidalgo choreographed their dancing, the respondent asserted that the

bargaining history with respect to the language in Agreed Interpretation No. 13 demonstrates that this language was intended to apply to situations where an *independent* choreographer was hired and where that choreographer would be creating specific routines and where the choreographer would be involved in the selection process of the particular performers.

As support for this position, the respondent pointed to the testimony of Lowell, Kessler, Preston and Martin Maurice, all of whom have had extensive experience in this industry and/or who have had experience in the labor management negotiations.

In view of the foregoing, and in view of several other arguments made in its closing brief, the respondent maintained that the union failed to establish the burden of proof necessary to demonstrate that the respondent violated the collective bargaining agreement and/or any past practice in the decision to downgrade Hidalgo and Hendricks.

Analysis and Conclusion

Initially it appears that the respondent viewed the union's primary argument as centered around the claim that Hidalgo and Hendricks, as professional dancers, and as specialty dancers, were entitled, by contract, to be considered as principal performers and therefore could not be downgraded. Indeed a great deal of testimony and evidence was presented at the hearing on that issue.

Having considered the evidence in this hearing, I found the respondents' contentions are persuasive. In this regard, I found the witnesses proffered by the respondent as credible in their testimony and I found that London's testimony

appeared consistent with respect to the commonly accepted definition of the term "specialty".

In addition, the respondent's arguments based on the 1997 negotiations adds strong evidence to this conclusion.

And finally, I agree that the Hidalgo and Hendricks' opinions to the effect that professional dancers by virtue of their professional status alone automatically qualify as principal performers was not persuasive. In the same vein, given Worcester's relative inexperience at that time, I could not give much weight to her opinion either.

In view of the foregoing, I found the respondent's position as persuasive to the effect that professional dancers do not qualify as "specialty dancers" and therefore, in terms of this particular situation, neither Hidalgo nor Hendricks were entitled to principal status simply because they appeared and performed in the vignette.

However, having said all this, I found the union's position persuasive that its claim/complaint/grievance was not limited to the narrow argument that these two performers were specialty dancers. To the contrary, in the claim of August 8, 1997, Worcester specifically referred to the claimants position that the performers performed choreographed material and that under the Agreed Interpretations they were entitled to the principal performer rates. And, while the respondent devoted considerable time in refuting the union/claimants' contentions that Hidalgo and Hendricks were specialty dancers, nevertheless the parties did present evidence and arguments as to the applicability and/or non-applicability of Agreed Interpretation No. 13 to this case.

In analyzing the argument concerning the applicability

of Agreed Interpretation No. 13, a critical factor is to decide whether the performers performed choreographed material. And, in determining that issue one must come to a decision of just what constitutes choreography and/or choreographed material. Since I am not a dancer or particularly well versed in the "arts", I am left to an evaluation of the evidence and opinions as presented in this hearing. Of course, that is exactly what an arbitrator is constrained to consider; i.e. the evidence presented at the hearing.

But, before dealing with that issue, I must deal with the respondent's contention that Agreed Interpretation No. 13 does not preclude downgrading, "even if the performers in question were performing choreographed work".

In support of this argument, the respondent relied on the language in Section 27A2.

Having considered the evidence, I didn't find that argument persuasive for a number of reasons, including my review of the language in each of these provisions along with the fact that three "industry experts", Maurice, Preston and Kessler, were all in agreement that if Hidalgo and Hendricks did in fact perform choreographed material that they would have been entitled to principal status and that they should not have been downgraded.

As for example, Maurice testified that he was asked to view the vignette/commercial because of the claim filed on behalf of Hidalgo and Hendricks. Having watched the vignette, Maurice wholeheartedly agreed that Hidalgo and Hendricks weren't even "remotely" specialty dancers. As such, he agreed that they had no claim for principal status based on the claim

that they were *specialty dancers*.

Maurice then went one step further. When asked if he considered whether Hidalgo or Hendricks met the criteria under Agreed Interpretation No. 13, Maurice replied that he did consider that question. In fact, Maurice stated that he asked the producer if they had been choreographed and the producer replied no. As such, Maurice stated that Hidalgo and Hendricks didn't qualify under Agreed Interpretation No. 13.

Equally significant was Maurice's testimony that if Hidalgo and Hendricks had been choreographed then he, Maurice, would have agreed that they would have been entitled to principal status and should not have been downgraded.

As noted above, Kessler and Preston's testimony appeared quite similar in that they too agreed, that if performers perform choreographed material that they are entitled to principal status.

Based upon the foregoing, and upon my consideration of the contractual language, I did not find the respondent's arguments *persuasive* to the effect that Section 27(A)(2) supersedes Agreed Interpretation No. 13. I also did not find respondent's arguments persuasive that based on Section 27(A)(2) Hidalgo and Hendricks could be downgraded.

Since the argument based on Section 27(A)(2) is not applicable, I return to the question of whether Hidalgo and Hendricks performed choreographed material. For, if they did, they would be entitled to principal status and their downgrade would have been in violation of the collective bargaining agreement; more specifically Agreed Interpretation No. 13.

In the applicability of Agreed Interpretation No. 13, I note that any decision on that issue would have no bearing

on respondent's arguments concerning the 1997 negotiations. The reason being, because respondent's arguments based on the 1997 negotiations dealt with specialty dancer issue and I have already concluded that Hidalgo and Hendricks did not fall within the definition of specialty dancers. Furthermore, since I also conclude that professional dancers, per se, do not qualify automatically as specialty dancers, by virtue of their professional status, any decision with respect to the applicability of Agreed Interpretation No. 13 would have no bearing on the arguments as they relate to specialty dancers.

Before getting into the question of what constitutes choreography, I must deal with respondent's contention that an independent choreographer must have choreographed the material, in order for the material to be considered as choreographed under the language of Agreed Interpretation No. 13. That is because, if the respondent's contention is true, there would be no need to evaluate whether Hidalgo and Hendricks performed choreographed material since there was no other choreographer working on that vignette.

In this regard, I note the respondents' position that an independent choreographer is required to prepare the material in order for the material to be considered as "choreographed material" under the language in Agreed Interpretation No. 13. On the other hand, I note that the claimants disagree with that interpretation.

In evaluating the meaning of contractual language, the arbitrator's first responsibility is to look at the language in dispute. In doing so, I see no specific language stating that an independent choreographer is required. Indeed, the language merely says that "any performer performing

choreographed material...shall be treated and paid under the applicable principal performer...conditions and rates". The limitation/condition expressed by the respondent is simply not included in this language.

While I recognize the testimony of Kessler, Maurice and Lowell as to their "understanding" and opinions as to what this language means, I did not give the same weight to that evidence as the respondent suggests for a number of different reasons. Initially, I note that their interpretation and opinion was disputed by Elinor London, an equally experienced union official. Indeed London testified that self-choreography is permissible under the language and that self-choreography has been recognized in the past, as for example with break dancers.

While I note Lowell's opinion nevertheless I also note her testimony that her opinion is based on her experience. The fact that she indicated that she rarely, if ever used choreographers, implies that her practical and/or direct knowledge of the requirements of the contract may not be as much as others. With respect to Maurice's opinion, I note his testimony that in his 38 years he has never hired a dancer without a choreographer. As such it is readily apparent that never considered self-choreography even in the twenty-two years prior to the language first surfacing in the 1982 collective bargaining agreement. And, the fact that Maurice never hired a dancer without a choreographer doesn't mean that others have never used dancers who could self-choreograph.

In analyzing this testimony, it is rather obvious that the witnesses proffered by the respondent firmly and in good faith believe that the interpretation as understood by them is

accurate. While that is indeed some evidence, the fact that they believe that their interpretation is correct means that it is.

Again, in light of the fact that there is no specific limitation expressed in Agreed Interpretation No. 13, means that their opinions must be viewed extremely carefully and as against the totality of the evidence. Furthermore, in light of London's testimony that self-choreography has occurred and that performers were presumably paid as principals, one cannot ignore that there is *some* conflict in the record as to whether the language is as characterized and interpreted by the respondent is accurate.

Given the conflict, and given the absence of any specific testimony by those witnesses as to how they came to their opinions, except from their own experience and practice, while I did consider their testimony, quite frankly, I didn't give *as much weight* to their testimony as the respondent does.

The most *interesting* testimony on this point came from Preston inasmuch as she testified that she was at the negotiations in 1982 when this language was negotiated and included in the collective bargaining agreement. In her testimony she explained that Agreed Interpretation No. 13 was a union proposal as the union wanted choreographed dancers to be paid under principal's contract. As Preston pointed out, the language which was presented was the same language that was part already in the Screen Extras Contract. As Preston noted, both SAG and AFTRA, who were negotiating jointly with the "industry" wanted corresponding and matching language in their contract. And, as Preston acknowledged, the employers

agreed to that proposal.

In referring to her notes of the 1982 negotiations, Preston recalled that AFTRA's spokesman's comments were relatively brief in that he stated that SAG wanted the same language so that dancers performing choreographed material would have principal status. Preston's notes also indicated that the language proposed appeared to be "boiler plate".

Other than this, Preston gave no further explanation nor testimony as to what was said, if anything, about this proposal. As such, from the evidence in this hearing, it appears that there was very little actually discussed as to the meaning of this language, i.e. Agreed Interpretation No. 13, other than the fact that SAG wanted the same language as appeared in the 1979 SEG contract and because they wanted the dancers performing choreographed material to have principal status and compensation.

More specifically, Preston didn't indicate that the parties specifically discussed exactly how choreographed material was to be defined; whether independent choreographers had to be employed and/or whether self-choreography was even mentioned. As such, other than the language which was adopted in 1982, as Agreed Interpretation No. 13, which has continued in all of the subsequent agreements, there apparently was no discussion at the bargaining table by which one could ascertain if the limitation as suggested by the respondent was agreed upon by both parties.

Again, it appeared from Preston's testimony that when this language was proposed during the 1982 negotiations that the employer association accepted the proposal because this language was already a part of the "industry" as it was

negotiated into the SEG contract a few years earlier.

To be fair, when asked what the term "choreographed" means, Preston replied, "you hired a choreographer to do the choreographing, the routine, the design...of the dance routine."

When asked if the term included times when an actor claimed to have choreographed him or herself, Preston replied, "No, it did not." When asked *why*, Preston stated that if someone did self-choreography then the employer would have to negotiate with the dancer for a special rate to cover choreography because the dancer could not, under the terms of the collective bargaining agreement, render services as a choreographer without additional compensation. Preston explained that the collective bargaining agreement does not cover compensation rates for choreographers and therefore that compensation would have to be negotiated separately between the employer and the choreographer.

So, in looking at Preston's testimony, it appears that her understanding and opinion as to the meaning and interpretation of the language in Agreed Interpretation No. 13 first came about either in 1979 when this language first appeared in the SEG collective bargaining agreement or during the 1982 SAG/AFTRA joint negotiations.

It also clear that in her capacity as the individual supervising the administration of talent contracts for the J. Walter Thompson Company that her company followed the understanding as she expressed it.

It is also clear that as a member of the Joint Policy Standing Committee and as a member of the Industry Union Standing Committee that she did have an understanding and an

opinion as to the meaning of the language in Agreed Interpretation No. 13.

It is also clear that the other witnesses proffered by the respondent shared the same opinion as Preston as to the meaning of the language in Agreed Interpretation No. 13.

Based on their testimony I would agree that their testimony is *some evidence* to support the respondent's assertion that Agreed Interpretation No. 13 would not include Hidalgo and Hendricks' performance because Hidalgo was not employed separately as a choreographer.

However, I didn't find that evidence as *persuasive* in reaching that conclusion.

Again, as noted above, while the language does not expressly define exactly what constitutes choreographed material, I again note that there is no limitation in Agreed Interpretation No. 13 as to any particular individuals who would be *precluded* from doing the choreography. Just "who" can do choreography is a different question from "what" (choreography) actually is.

When Preston gave her rationale as to her understanding that a choreographer must be hired in order to perform choreographed material she didn't reference any such discussion "at the bargaining table". In fact, as noted above, Preston made no reference to any such discussion. Therefore, while I accept Preston's opinion as her understanding of the language, I do not know exactly where her understanding and opinion came from...her fellow management representatives, union representatives or from comments by others. Preston's understanding, along with Maurice, Kessler and Lowell's does not automatically mean that their

interpretation is the correct interpretation of the language in Agreed Interpretation No. 13, although their opinions are certainly some evidence that must be considered.

Preston's explanation and rationale as to why self-choreography is not covered under Agreed Interpretation No. 13 is also particularly interesting because her explanation would not automatically preclude an actor from choreographing material. As for example, when questioned about her explanation, Preston replied that if self-choreography was at issue that:

> "... the employer would negotiate with the dancer for a special rate to cover choreography. Because a dancer could not, under the terms of the collective bargaining agreement, render services as a choreographer without additional compensation."

As such, Preston's testimony does not preclude self-choreography, but merely indicates that the employer would have to negotiate and pay the dancer additional compensation for those services. Thus, if an employer negotiates additional compensation, the dancer would be doing choreography, i.e. self-choreography.

Quite frankly, Preston's explanation seems to weaken considerably, the respondents' contention that the term choreographed material as it appears in Agreed Interpretation No. 13, is limited to only material prepared by a separate individual choreographer. For, as Preston explained, in order to constitute choreographed material, an employer must hire someone to do the choreography. As such, if the employer pays the self-choreographer compensation for those services, the material surely would constitute choreographed material.

Therefore, under Preston's explanation, if the respondent had paid Hidalgo for choreographing services while

shooting this particular vignette, then Hidalgo's material would have constituted choreographed material; and thus Hidalgo and Hendricks would have been entitled to the principal status.

In view of the foregoing, I note that Preston's testimony and *explanation* that self-choreography would be within the Interpretations if paid for, is not necessarily inconsistent with the union's position that self-choreography can indeed constitute choreographed material under the terms of Agreed Interpretation No. 13.

Because Preston was at the negotiating table in 1982 when this language was placed into the contract I found her testimony as more relevant and more persuasive than the opinions of the other industry witnesses proffered by the respondent as to the meaning of the language in Agreed Interpretation No. 13.

And, since the hiring of an independent choreographer is not a requirement to have choreographed material, the next question is whether Hidalgo was paid separate compensation for his purported choreography. Clearly he was not.

Just as clearly, the reason why he was not paid for choreography is because the respondent didn't believe that he prepared choreographed material and therefore there was no reason for the respondent to have paid Hidalgo separate compensation, unless Hidalgo demanded it. Just as clearly, Hidalgo did not.

In this regard, Hidalgo testified that he although he believed that he did prepare choreographed material, that he didn't feel that it would be appropriate to have stopped in the middle of the vignette to ask for, and/or to demand,

additional compensation for those services. Quite frankly, I found his testimony and explanation as credible in that regard.

As such, while there is some logic to the respondent's contention that because Hidalgo made no demand for compensation for choreographic services that Hidalgo didn't consider his performance to have been choreographed, nevertheless, I found Hidalgo's explanation persuasive for why he didn't make an *immediate* demand. I also note that Hidalgo did testify that he told his dance agent, Pang, after the shoot, that he felt that he was entitled to compensation for his choreographing services. The fact that Pang may not have followed up, or the fact that Hidalgo chose not to force the issue, does not, in the opinion of the undersigned change the fact *of what he actually did*. For, if he did perform choreographed material, whether he waived a claim for those fees would not, in the opinion of the undersigned, invalidate his and Hendricks' claim to be paid as principals under the language of Agreed Interpretation No. 13. The fact that he might have some *other claim*, separate and apart from the SAG agreement should have no bearing of whether he and Hendricks performed choreographed material.

Again, the important and critical issue is not whether Hidalgo neglected to seek compensation for choreographic services but whether the services he actually provided constituted choreography.

And so, now finally, I arrive at the issue of whether Hidalgo and Hendricks performed choreographed material as contemplated under Agreed Interpretation No. 13 and to make that determination I must determine to some degree, what

constitutes choreographed material.

At the outset, and after having considered all of the testimony, it appears that neither the respondent/Y&R, nor the director, Dektor, had any special or particular desire to have professional dancers. Nevertheless, the two breakdown sheets do mention that respondent was looking for either good or bad dancers; people who dance either well or badly. Clearly both Hidalgo and Hendricks would fall into the categories of "good dancers" and "people who dance well".

In addition, I note that the July 15 breakdown specifically uses the word "dancers".

As such, while Y&R may not have necessarily wanted professional dancers, the fact remains that the breakdowns were broad enough to have attracted professional dancers to the audition, which they did.

Dektor and Lowell's testimony that they were looking for actors and actresses as opposed to dancers was probably accurate, but again, the breakdowns leave the impression that respondent was seeking dancers too.

While there was some question as to who told Hidalgo to bring a partner, the evidence was undisputed that he was told by someone to bring a partner. I also found Hidalgo's testimony persuasive that once he was told to bring a partner that it was perfectly logical that he had to prepare some type of dance routine for the both of them. Furthermore, it was undisputed that the respondent hired Hidalgo and Hendricks *as a team* and after they saw them at the callback.

So, at that point in time, while I accept the respondents' position that they weren't necessarily seeking professional dancers, nevertheless it was perfectly reasonable

for Hidalgo and Hendricks to believe that they had been selected because of their talent and their ability.

While the engagement contracts listed Hidalgo and Hendricks as actors/actresses was indicative of respondents' intent, the important element is not necessarily what was intended but *what in fact happened*.

As for example, irrespective of whether Hidalgo and Hendricks were hired as specialty dancers, which they believed but were not, the fact remains that they were indeed hired as principal performers. Indeed the respondent concedes that. And, but for the decision to downgrade, Hidalgo and Hendricks would have been paid as principal performers.

So, the question is not necessarily what was intended, by either party, but rather what actually happened.

So, if Hidalgo and Hendricks did not perform choreographed material then the decision to downgrade would be proper. If, on the other hand, they did perform choreographed material, then they should not have been downgraded. Indeed, after putting aside all of the contentions and arguments addressed above, that's exactly what Maurice stated when he was called to view the commercial. And, as he testified, he specifically asked the producer if the material which Hidalgo and Hendricks performed had been choreographed. Maurice recalled that the producer told him that the material had not been choreographed and based on that representation Maurice gave his opinion...that the downgrade was proper.

On cross examination, Maurice agreed that if the material had been choreographed that his opinion would have been just the opposite; i.e. that neither Hidalgo not

Hendricks should have been downgraded.

So, the question boils down to whether what Hidalgo did constituted choreography or not. I agree that merely because an actor/dancer/performer says that they choreographed material the performer's opinion is not sufficient by itself. To the contrary, the issue would be determined by whether the performer has presented sufficient evidence to sustain the burden of proof. If yes, the performer would be entitled to principal status under Agreed Interpretation No. 13 and if not, then the performer may be downgraded if they don't meet the other criteria for principal status.

As such, respondents' assertion that to grant the grievance would open the gates for others, based on their subjective self-serving opinions is not given much weight. The fact is, the decision isn't made by the individual performer but by the employer first and by others later, if necessary.

Turning to the testimony and evidence with respect to the question of whether Hidalgo choreographed the material that he and Hendricks performed, I note that there was considerable disagreement between the witnesses as to how they would characterize the "work product" and/or their performance. Inasmuch as the burden of proof rests with the claimants to establish a contract violation, I have taken a look at the evidence as presented by the claimants first.

In doing so, I have applied the preponderance of the evidence standard of proof as that is the accepted burden in these types of cases.

Before deciding if the material constituted choreography, I must first determine if Hidalgo is qualified

to do choreography. In this respect I note his testimony that he is a professional dancer. I also noted that his vita demonstrates quite a number of performances in the theater and on television and in commercials. I also noted his testimony that he has choreographed material in the past.

As such, I find and conclude that he had sufficient qualifications to create choreographed material.

In turning to the question of whether the material constituted choreographed material, I did consider Hidalgo and Hendricks' testimony, as to what he and they did. Quite frankly, I found their testimony was persuasive in creating a rebuttable presumption that what Hidalgo did did constituted choreography.

In considering their testimony, I noted such things as the fact that Hidalgo and Hendricks were expected to dance together as a team and the fact that they were given certain specific instructions by Dektor. As for example, Dektor told them to keep their movement within the parameters of the window frame, that they were to move in sync with each other, that Hidalgo was to hold the can in his hand in a particular way and that they were to ensure that their movements were coordinated between themselves and along with the 7up can. In addition, the evidence disclosed that Dektor conferred with both of them several times at the television monitor and that he gave them his input and instructions. As such, these objective facts, coupled with Hidalgo and Hendricks' testimony that they took time to ensure that their design and routine comported with Dektor's desires demonstrated, in the view of the undersigned, that Hidalgo did in fact prepare choreographed material as contemplated in the language of

Agreed Interpretation No. 13; i.e. as Preston testified, a routine and a design.

Turning next to Dektor's testimony, as noted above, I accept his testimony that he was not necessarily interested in professional dancers or in choreography. From his testimony and others, it appears rather obvious that Dektor, a highly experienced and respected director has his own "style", i.e. his own method of directing commercials. It is also obvious that Dektor feels perfectly comfortable in getting the "feel" he wants, based on his ability to interact and to give directions to others, i.e. the performers.

The question comes down Dektor and Lowell's opinion that Dektor merely gave "directions" while Hidalgo and Hendricks maintained that it what they did constituted more than mere direction but choreographed material.

So, just what is the fair "characterization?

From the evidence on *this record*, I found the evidence persuasive that notwithstanding Dektor's opinion that vignette did involve *more than* just simple direction, more than the use of people with an "attitude", and more than a simple piece for people who could move freely.

Furthermore, Dektor's explanation that the dance steps weren't important because he was focusing on the body movement, not the feet, was somewhat difficult to accept and at best confusing. His explanation was difficult to accept and confusing because it appears that in order to have "movement" one needs to have steps. And, it also appears that those steps need to be in sync with the overall concept of the movement.

As such, it appears that Dektor was downplaying the significance of the dance steps and his explanation was not particularly persuasive, especially when considering Hidalgo and Hendricks' description as to what they had to do in order to create the effect that Dektor wanted.

Another explanation that I found somewhat confusing was Dektor's explanation that in bringing Hidalgo and Hendricks to the monitor that he was doing it merely as a courtesy and as a form of bonding. His explanation was confusing, and not particularly persuasive in light of his other testimony that he was in fact giving direction and that he was giving certain instructions as to how he wanted their bodies to move and how he wanted the can to be seen. Dektor's testimony that he was not trying to orchestrate their moves; that he was not interested in their dance steps; and that all that he needed was "an attitude" and rhythm is accepted but his opinion that the material was merely the result of direction and choreography was not persuasive.

Again, while I accept that Dektor's opinion was made in good faith and that this is his opinion, nevertheless his opinion does not automatically make it valid. On the other hand, his opinion, especially as an experienced and successful director, does constitute evidence and must be considered.

Having considered the evidence as presented in this hearing, and again in noting that the claimants' burden is merely by a preponderance of the evidence and not by a burden of clear and convincing evidence, it appears to the undersigned that Dektor simply got a little more than he thought he was getting. While Dektor may have thought that he

was getting inexperienced actors with rhythm, he actually got two professional dancers; performers which he and/or his creative team advertised, selected and hired.

In addition, and this is a critical element; the weight of the evidence disclosed that "what" Dektor wanted and "how" he wanted it performed, required more than "someone with an attitude", and that what Dektor "got", was an individual who had to perform choreography in order to create the "effect" and the "feel" that Dektor was describing. And, the bottom line is that the two individuals who performed the material, were hired as principals, and because the material they performed did constitute choreographed material under Agreed Interpretation No. 13, they were entitled to be treated and paid at the principal performer rates.

The fact that neither Dektor nor the respondent may have intended to have choreographed material prepared, the fact is that Hidalgo did do choreography for their performance the fact that Hidalgo didn't ask for additional pay as a choreographer was not sufficient to defeat their claim to be paid as principal performers. And, the fact that their engagement contracts didn't identify them as dancers or as a duo, was some evidence in support of the respondents' position, nevertheless because the weight of the evidence demonstrates that Hidalgo *did* in fact *choreograph* a substantial portion of the performance and the fact that Hidalgo and Hendricks *did perform* the choreographed material, I found the claimants' position *persuasive* to the effect that both Hidalgo and Hendricks were downgraded in violation of their rights under Agreed Interpretation No. 13.

As such, the downgrading decision shall be reversed and both Hidalgo and Hendricks should be paid any and all compensation and/or residuals, if applicable, as principal performers. Such compensation shall be reduced by the amount of compensation they already received on this commercial.

Respectfully submitted,

Louis M. Zigman, Esq.
Arbitrator

DOWNGRADES

SUBJECT MATTER: Commercial Downgrading

CASE NAME: SAG and Young & Rubicam, Inc.

DATE OF DECISION: March 6, 1999

ARBITRATOR: Louis M. Zigman

OUTCOME: In Favor of Young & Rubicam

FACTS

Producer was to make three television commercials for "7Up." Performers were two professional dancers cast as principal performers in a vignette to advance the plot of the commercial. After the vignette was completed, Producer downgraded Performers from principal status. SAG argued that Performers were specialty dancers so under the 1994 Commercials Contract could not be downgraded.

Producer countered that Performers did not fit any criteria for principal status under section 6 of the Commercials Contract (i.e., neither Performers' face was visible) and that there was no violation of Agreed Interpretation No. 13 because Performers had not performed choreographed material.

ISSUE

Whether Performers were specialty dancers under the Commercials Contract and whether they performed choreographed material under Agreed Interpretation No. 13 of the Contract.

DECISION

Performers were not specialty dancers but did perform choreographed material.

DISCUSSION

The arbitrator agreed with Young and Rubicam in holding that professional dancers, per se, did not qualify automatically as specialty dancers, by virtue of their professional status. However, the arbitrator agreed with SAG in holding that Performers performed choreographed material as contemplated under Agreed Interpretation No. 13. In arriving at this conclusion, the arbitrator applied a preponderance of the evidence standard of proof as to whether Performers choreographed the material themselves.

Performers testified that they were expected to dance together as a team and performed a routine in which they were required to move in sync with each other. Moreover, Director conferred with Performers several times at the monitor while reviewing their performance and then Performers would adjust their routine according to specific instructions given by the Director. Based on these

objective facts, coupled with Performers' testimony that their design and routine comported with Director's desires, the arbitrator held that the Performers did in fact prepare choreographed material. Thus, the Producer hired Performers as principals, and because the material they performed did constitute choreographed material under Agreed Interpretation No. 13, they were entitled to be paid at the principal performer rates.

The fact that Performers did not ask for additional pay as a result of self-choreographing their steps was not sufficient to defeat their claim to be paid as principal performers. The arbitrator ordered that Producer's downgrading decision was to be reversed and Performers were to be paid any and all compensation and/or residuals as principal performers.