Arbitration Decisions

Labor Arbitration Decision, SSA Terminals, 2021 BL 506783, 2021 BNA LA 422

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Paul D. Roose
Arbitrator / Mediator
Golden Gate Dispute Resolution
510-466-6323
paul.roose@ggdr.net
www.ggdr.net
June 17, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

SSA Terminals, Employer

and

Machinists Lodge 190, Union

Mandatory Overtime

FMCS Case No. 211215-02336

June 17, 2021

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LABOR ARBITRATION

SUMMARY

[1] Mandatory overtime - Bargaining history - Burden of proof ►115.305 ►24.37 ►94.60509 [Show Topic Path]
Arbitrator Paul D. Roose ruled that SSA Terminals did not violate its CBA when, treating Saturday and Sunday as one overtime rotation, it assigned mandatory overtime on those days to five grievants, even though the union's interpretation of the agreement is correct. He found that bargaining history supported the interpretation that if "on any given day" there are insufficient volunteers for overtime, the reverse seniority rotation for assigning mandatory overtime must be determined on each weekend day. The grievance was denied, however, since the union failed to provide evidence that the grievants were improperly assigned to work out of rotation, such as the dates of violations, records as to who worked and who did not, or even a seniority list.

APPEARANCES:

For the Employer: David L. Miller

Longshore / Maritime Consultant

dlmillerconsulting@gmail.com

For the Union: Donald D. Crosatto, Assistant Directing Business Representative

Machinists Automotive Trades District Lodge No. 190

10260 MacArthur Blvd.

Oakland, CA 94605

PROCEDURAL BACKGROUND

The above-referenced matter was processed through the grievance procedure contained in the collective bargaining agreement (CBA) between the parties. Remaining unresolved, it was submitted to final and binding arbitration. The undersigned was mutually selected as the arbitrator from a list of arbitrators supplied by the Federal Mediation and Conciliation Service. The matter was heard on May 18, 2021, in Oakland, California.

The parties stipulated that the matter was properly before the arbitrator. The parties also stipulated that the arbitrator retains jurisdiction over the implementation of the remedy if the arbitrator grants a remedy.

Both parties were afforded full opportunity to present documentary evidence and to examine and cross-examine witnesses. Both parties were ably represented by their respective representatives. The parties concluded their presentation by oral closing statements. The transcript of the hearing was received by the arbitrator on June 4, 2021, and the matter was submitted for decision.

ISSUE

The parties did not reach agreement on a statement of the issue in this matter. The parties ceded to the arbitrator the authority to formulate a statement of the issue as part of his award.

The Union proposed the following statement of the issue in this matter:

> Does SSA Terminals have the unilateral right to change Section 7.18 of the Collective Bargaining Agreement as it has been both written and applied?

The Employer did not propose an issue statement.

The issue statement, as formulated by the undersigned arbitrator, is as follows:

> Did the Employer violate the CBA when it assigned mandatory overtime to Philip Mendoza, Patrick Fenisey, Carlos Palacios and Joe Adams in August and September 2020? If so, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS

Collective Bargaining Agreement Between SSA Terminals and Machinists Automotive Trades Lodge No. 190 - 2018 - 2023

Section 7 — Hours, Overtime and Guarantee

7.9 All work worked in excess of the regular eight hour work day on any shift shall be payable at time and one-half for the first three hours, with double time to prevail thereafter and double time after 48 hours worked in the work week.

7.18 It is understood that the Employer will make every effort to equalize work during overtime periods other than shift times, provided that the Employer shall have the option of assigning such work based upon the employee's skills and competency.

In the event an insufficient number of mechanics in a department volunteer for overtime on any given day, then the Foremen will be allowed to work overtime in the mechanics rotation. If there are still insufficient volunteers,[*2] then the Employer may force overtime[*2] by using inverse seniority in that department.

7.19 All overtime will be posted on a bulletin board. Whenever possible the Employer will endeavor to give employees advance notice of anticipated overtime shifts. Employees turning down overtime shall be charged as if the hours were worked, for the purpose of equalization of overtime.

7.20 The Employer shall not be allowed to work employees an excessive amount of overtime to avoid hiring new employees.

FACTS

Mechanics in the Power Shop Are Scheduled to Work Monday through Friday and Some Weekends: The Employer, a stevedoring company, employs mechanics at its facility at the Port of Oakland in the San Francisco Bay Area, California. The power shop is one of four company departments that utilize journey-level mechanics. At the power shop, the mechanics maintain tractors, forklifts, top handlers, side handlers, and pickup trucks.

Other departments are the crane shop, the chassis shop and the refrigerator shop. Altogether, over one hundred mechanics are employed. The mechanics involved in the instant dispute are all power shop employees.

Power shop mechanics work Monday through Friday, either day shift or night shift. In 2020, weekend overtime was often available. It was made available to the power shop mechanics on a volunteer basis and sometimes assigned on a mandatory basis when insufficient volunteers stepped forward.

The Parties Have a History of Bargaining Over Rules for Mandatory Overtime: A previous agreement between the parties was in effect from July 2006 through June 2015. Section 7.18 in that agreement, addressing assignment of overtime, consisted solely of the first paragraph in the current applicable agreement as follows:

> It is understood that the Employer will make every effort to equalize work during overtime periods other than shift times, provided that the Employer shall have the option of assigning such work based upon the employee's skills and competency.

During negotiations for a successor agreement, the Union proposed adding a second paragraph. The Union's proposal was identical to paragraph two in the current agreement, except for the change of a single word. The Union proposed the word "pool" as the last word in the first sentence. During negotiation, the word "pool" was modified to "rotation," and the second paragraph of Section 7.18 was incorporated into the agreement.

Walter Willis II is a mechanic in the crane shop. He has been employed by the Employer for eight years. For the past five of those years, he has served as the Union's chief shop steward for the mechanics. He served on the negotiating committee for the Union in 2015.

Mr. Willis described the Union's motivation for proposing the second paragraph in Section 7.18, as follows:

> So this is us trying to...define through the CBA how the rotation is interpreted...Even though that was the past practice, we wanted to firm it up, because certain individuals in the rank[*3] and file didn't have a good understanding how the rotation worked.[*3] Certain individuals didn't agree with the way the rotation worked.

Another round of negotiations took place when the CBA was set to expire in 2018. Both parties proposed changes to Section 7.18. The Union proposed to add two sentences as follows:

> A mechanic who "Passes" (refuses an offer of overtime) during the day, shall not be able to claim overtime later in the same day.
>
> Foreman shall not be allowed to do the work of shops which they do not oversee.

The Company rejected both Union proposals, and neither was incorporated into the agreement.

The Employer proposed the addition of the following sentence in Section 7.18:

> If there are still insufficient volunteers for weekend, [sic] opportunities then the process of reverse seniority will be used to assign unfilled work opportunities until the necessary manning is achieved. Saturday and Sunday would be scheduled as one rotation.

Management's proposal on this section, passed to the Union across the bargaining table, included the following explanatory note:

> Management needs to prevent forcing mechanics to work 7 days

The Union rejected this management proposal. It was not incorporated into the CBA.

In July 2020, Union Representatives Met with Management About Proposed Changes to the Mandatory Overtime Rotation: Chief Steward Willis recalled the meeting as follows:

> I was approached last year in approximately middle of July, late July, by the power shop managers, Grant Merz[1] and Daniel Andrade. They presented to me that they were having an issue with the double time costs at the terminal, and they requested for me to figure out corrective measures to reduce the double time costs.
>
> And on top of that, they're going to implement, going forward from that date, a new way of appropriating the overtime during the weekend rotation, which it was an idea of combining both Saturday and Sunday as one collective day to appropriate the overtime.

Mr. Willis' assessment of the meeting, which took place in Mr. Merz's office, is that the managers were seeking his suggestions and also informing him of their plan. He also recalled Mr. Merz stating in the meeting:

> I understand that I'm going to be getting grievances over this because of the change I've made.

Mr. Willis stated that, after the meeting in Mr. Merz's office, no general announcement was made to the mechanics. Mr. Willis testified as follows:

> ...in a meeting approximately a week later, I actually did my best to compel Grant Merz to present to the men the changes and what the financial situation of the company was so they would have a better understanding coming from their manager instead of hearsay through me, and he refused to talk to the men and address them.

Daniel Andrade is the power shop manager. He testified at the arbitration hearing but was not asked on direct or cross-examination about the July 2020 meeting in Mr. Merz's office.

In August and September 2020, the Union Filed Several Grievances on Behalf[*4] ***of Members Alleging They Were Improperly Mandated to Work Weekend Overtime:*** The

first[*4] grievance was filed on August 21, 2020, by unit member Brian Pon on behalf of power shop unit member Philip Mendoza. The grievance alleges that Mr. Mendoza was "mandatory to work weekend out of rotation." The grievance alleged a violation of section 7.18. The grievance does not specify the date of the violation, nor recite any other facts regarding the alleged violation.

The next grievance was filed on August 24, 2020, also alleging a violation of 7.18. It was filed by or on behalf of Patrick Fenisey, a power shop mechanic. The grievance cites no date of violation, nor specifies any other facts about the alleged work out of rotation.

The next grievance was filed on August 27, 2020, by and/or on behalf of power shop mechanic Carlos Palacios. The grievance alleges a violation of sections 7.18, 7.19 and 7.21. It includes no facts.

The next grievance was filed on August 28, 2020, by and/or on behalf of power shop mechanic Joe Adams. Citing a violation of section 7.18, 7.19 and 7.20, the grievance gives no specifics.

The final grievance was filed by / on behalf of Patrick Fenisey on September 25, 2020. Alleging a violation of section 7.18, the grievance states that the Grievant was "forced to work weekend overtime."

None of the Grievants testified in this matter.

Chief shop steward Willis was asked on cross-examination about the particulars of the grievances. Mr. Willis did not recall the dates of any of the violations. But he assumed the violation dates all preceded the grievance dates because "whenever I handle a grievance personally or a grievance that's submitted to me, it's not a grievance until it actually happens," he stated. He added the following:

> So if the issue was the Saturday, until that Saturday had passed, there is no issue. So going into it preemptively there is no "Hey, this might happen." We don't accept things like that.

Michael Wood is presently a union committeeman and was formerly a shop steward for the Union. He testified that he was familiar with the grievances in question but could not recall the details without his notes in front of him.

Guillermo Perez works on the night shift in the power shop and is a Union committeeman. He also expressed familiarity with the grievances. He testified that he wrote Mr. Fenisey's August grievance. When asked about the date of the violation, he stated "I believe it was August 24th."

Mr. Perez also testified that "we cannot write a grievance until it actually happens and we have up to five days to file the grievance."

Through its sole witness Mr. Andrade, the Employer introduced a spreadsheet time record purporting to show when the Grievants did or did not work during the weeks in question. The records included a designation of "m" to indicate mandatory overtime.

The grievances went to a Board of Adjustment and the board deadlocked. The Union asserts without contradiction by management witnesses that the issue of the dates of the[*5] violations was not discussed during the grievance[*5] meetings.

The parties agreed to consolidate the five grievances into a single arbitration hearing. It is those grievances that are now before the arbitrator.

UNION'S POSITION

The Union argues that the Company is attempting to achieve through arbitration what it was unable to obtain in bargaining. Management "unilaterally imposes its preferred method of handling the overtime rotation without offering to bargain over it," the Union alleges.

The Union claims that the issue of the inexact dates is a "red herring. The overall nature of these grievances relates to the company changing the policy, not on its impact on any one particular mechanic on any one particular day," the Union stated in its closing argument.

"At no time during that six-month plus period was anything said about the accuracy of the complaints," the Union contends.

"Between the language in the CBA, the witness testimony you heard, the bargaining history, [and the] unilateral nature of the Employer's change, we believe that we've proven our case and that the grievances should be sustained," the Union contends. The Union is not seeking back pay, only to have "the policy changed back to what it was."

EMPLOYER'S POSITION

The Employer argues that "the Union has failed to prove their burden of proof which is upon them as the moving party."

The Employer "has addressed each and every one of these five complaints," the Employer contends in its closing argument. "We did it as sensibly as we could when we didn't even know what the dates were of the alleged violation." The Union's case was based on "hearsay."

The Union's theory that a low seniority worker may be required to work mandatory overtime 52 weeks a year is "completely asinine and far-fetched," the Company argues. The Employer's goal in applying the overtime language is to "be fair" and to "defend equalization among workers."

The Employer asks that the Union's grievances "in totality be denied."

DISCUSSION

The Contract Language Has Inconsistencies but the Most Logical Interpretation is that a Mandatory Overtime Rotation Cycle Begins Each Day: It is understandable that the parties have been tied up in knots over interpreting Section 7.18 and how it applies to mandatory overtime. The internal contradiction within the section resides in the juxtaposition of the "equalize work" phrase in the first paragraph and the "on any given day" clause in the second paragraph.

If, indeed, the parties' goal is to "equalize work" using the ordinary meaning of the phrase, then it would be exceedingly difficult to do so if the rotation is begun anew each "given day." As the Employer has pointed out, this daily assignment by seniority will result in the low seniority worker being mandated much more frequently, and mandatory overtime will not be "equalized."

The role of a grievance arbitrator is not to judge the fairness or efficacy of the negotiated contract language. Nor is it to determine if the current agreement**[*6]** results in excessive costs to the employer. It is to apply the contract**[*6]** language to the fact circumstances of the case and determine whether the contract has been violated. The first step in this analysis is to reconcile the contradictions within the language and determine the overall meaning of the contract section.

Two factors propel the undersigned arbitrator's interpretation of Section 7.18 in the direction favored by the Union. The first factor is that the second paragraph in the section, which includes "on any given day," was added to the contract more recently than the first paragraph. It was added in 2015, whereas the base language was in existence at least since 2006. The arbitrator must assume that the intent of the 2015 change was to clarify and/or modify the commitment of the parties to "equalize work" in the first paragraph.

The second factor also derives from the bargaining history. The Employer's proposal in 2018 to add the sentence "Saturday and Sunday would be scheduled as one rotation" is a clear indication that the Employer did not believe, or at least entertained significant doubts, that the current language about "any given day" allowed it to create a rotation that treated Saturday and Sunday as a single cycle.

The Employer's desire to make this change in 2018 is completely understandable and is spelled out in notes handed to the Union at the bargaining table — it sought to reduce the number of shifts paid at double time. The Union rejected this proposal and management ultimately dropped the proposed change to Section 7.18 as part of reaching an overall agreement.

Despite the inherent inconsistencies in Section 7.18, the undersigned arbitrator concludes that the provision requires the Company, if there are insufficient volunteers and

available foremen, to employ a separate mandatory overtime rotation by inverse seniority on each weekend day.

Intent to Violate the CBA Without Following Through on That Intention is Not Necessarily a Contract Breach: Chief Steward Willis gave unrebutted testimony about a meeting in July 2020 during which Company representatives Merz and Andrade outlined a new policy regarding overtime assignment. Mr. Willis' testimony was credible. His recollection of the meeting was relatively clear given the passage of time.

Mr. Willis also testified, without contradiction, that he asked Mr. Merz to follow up with a written memo and a meeting with the staff and that Mr. Merz declined to do so.

Perhaps this latter fact is an indication that management had second thoughts about changing the policy and did not want to risk grievances over a contract violation. Or perhaps no change of heart occurred, and management had every intention to change the policy and proceeded to do so.

Whichever the case, an intent to violate the CBA is not the same as violating the CBA. Much stronger evidence of a policy change than a meeting between the manager and chief shop steward[*7] would have to be in the record for a neutral to find a breach of contract.

The Union Failed to Establish by a Preponderance[*7] of the Evidence that the Aggrieved Mechanics Were Improperly Worked Out of Rotation: The Union expressed frustration that the Employer did not raise a factual objection to the five grievances until the arbitration hearing. The Union's concern is well-founded. The parties should exchange information and arguments to the greatest extent possible in the early stages of the grievance procedure to aid in resolving grievances at the lowest step.

Nonetheless, this communication gap at the Board of Adjustment does not relieve the Union of the basic burden of persuasion in a grievance involving an allegation of a non-disciplinary violation. The Union's grievances fall short of establishing even a basic factual foundation for a grievance.

Perhaps a failure to list on the grievance form, for example, the date of the violation could be overlooked if the Union followed up with a more detailed explanation at the first grievance meeting. No evidence was in the record that it did so.

Even assuming the parties could determine the dates of the alleged improper mandatory overtime assignment, other factual elements would be vital to proving a violation. Contemporaneous time records, with timeclock rings, if necessary, would be required to determine who worked and who did not work. For an allegation of improper mandating of a senior worker, a seniority list would be vital evidence in the grievance. The Union would have to name names, identifying unit members who were not mandated who it believes should have been mandated.

If the Union could establish a prima facie case of a violation, the burden would shift to the Employer to explain why it skipped over a junior available worker and mandated a senior worker instead.

The Union did not meet its burden on any of these counts. The hearing record was insufficient to establish whether the Employer had abandoned its plan to unilaterally change the interpretation of 7.18 or whether it proceeded to do so in the five cited cases.

The undersigned arbitrator's view of the meaning of Section 7.18 was made clear in the preceding section of this opinion and award. However, no finding of a violation is reached in this decision because the factual record was inadequate to support such a determination.

AWARD

The Employer did not violate the CBA when it assigned mandatory overtime to Philip Mendoza, Patrick Fenisey, Carlos Palacios and Joe Adams in August and September 2020.

Paul D. Roose, Arbitrator
Date: June 17, 2021

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fn 1 Mr. Merz did not testify at the hearing.