Arbitration Decisions

Labor Arbitration Decision, J & J Worldwide Servs., 2021 BL 506788, 2021 BNA LA 427

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May 12, 2021

OPINION AND AWARD

IN ARBITRATION PROCEEDINGS

PURSUANT TO A

COLLECTIVE BARGAINING AGREEMENT

In the Matter of a Controversy Between

J & J Worldwide Services, Employer

and

Stationary Engineers Local 39, Union

EMCS Employee Meal Breaks

FMCS Case No. 200811-08942

May 12, 2021

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LABOR ARBITRATION

SUMMARY

[1] Meal breaks - Plain meaning - Overtime ►115.213 ►24.15 ►115.501 [Show Topic Path]
Arbitrator Paul D. Roose ruled that J & J Worldwide Services violated its CBA by requiring that electronic monitoring control systems (ECMS) technicians take a half-hour off-duty unpaid lunch break and work an eight and one-half hour shift, ending a longstanding practice of allowing them to take a paid break and work for eight hours. The agreement clearly provides that ECMS personnel, who monitor and dispatch engineers to fix various systems at a DOD hospital, “will take a paid meal break as their duties allow” for any shift of five hours or longer, and due to the contract breach, ECMS employees, although properly paid, lost free time when they were required to stay longer. The employer must pay eligible ECMS employees one-half hour of overtime pay for each time they took a half hour unpaid meal break during a shift of five hours or longer, for the five months running from a week before the grievance was filed to the date the employer lost the government contract.

APPEARANCES:

For the Employer: Terrence Johnson, Employee Relations Manager

J & J Worldwide Services

7710 Rialto Blvd., Suite 200

Austin, TX 78735

For the Union: Gary Provencher, Attorney

Weinberg, Roger, & Rosenfeld

1375 55th Street

Emeryville, CA 94608

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 April 7, 2021 on the Zoom videoconferencing platform.

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 April 14, 2021 and the matter was submitted for decision.

ISSUE

The parties stipulated to the following statement of the issue in this matter:

> Whether the employer violated section 12.4 of the parties' MOU by requiring EMCS employees to take a half an hour off-duty meal break. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS AND RULES

Collective Bargaining Agreement By and Between J & J Worldwide Services and International Union of Operating Engineers Stationary Engineers Local 39 — Effective 1 October 2017

Article VII — Grievances

Section 8.2 Any grievance not presented and carried forward within seven business days of the alleged occurrence complained of...shall be deemed waived unless such time limits are extended in writing by mutual consent of the Company and the Union...

Section 8.3 In order to be considered, any grievance must be reduced to writing and signed by the Union business agent. Such grievance must state specifically the employee or employees covered by the grievance, the application of the Agreement complained of and the remedy sought.

Article XI — Severability

Section 11.1 If any provision or part thereof of this Agreement is found to be in conflict with applicable federal or state law or regulation, or Air Force contract requirement, such provision shall be deemed to be in effect only to the extent permitted by such law, regulation, or contract requirement. In the event any provision of this Agreement is thus rendered inoperative, the remaining provisions shall nevertheless remain in full force and effect, and the parties shall resume negotiations solely on the issue of said provision.

Article XII — Hours of Work and Overtime

Section 12.2 All work performed in excess of[*2] forty[*2] hours in a work week shall be paid for at a rate one and one-half times the regular rate of pay...

Section 12.4 Employees shall take an unpaid meal break (except for Energy Plant / EMCS personnel who will take a paid meal break as their duties allow) for any shift of five hours or longer.

FACTS

Electronic Monitoring Control Systems (EMCS) Technicians Work from a Call Center in the David Grant Medical Center (DGMC) at Travis Air Force Base in Fairfield, CA: The U.S. Department of Defense, operates a hospital on its base in the San Francisco Bay Area. Engineering services for the hospital are contracted out. At the time of the events triggering this grievance, the Employer was the contractor. The Union represented the stationary engineers and other related classifications under a CBA.

Makayla Glazier is an EMCS tech working at the DGMC. She works in a communications center at the hospital. Her job is to monitor various systems at the hospital, such as fire alarms, HVAC, and medical gas systems. EMCS techs dispatch engineers to fix problems with these systems. She and the other EMCS technicians are responsible for "pretty much anything that entails in a hospital as far as maintenance," she testified.

Ms. Glazier began with the Employer part-time in 2018, then started working full-time 40 hours per week in January 2019. At the time of the events underlying this grievance, there were four full-time EMCS techs, two part-time EMCS techs, and one lead EMCS tech.

In the Fall of 2019, the Union Began Raising Concerns with Management About EMCS Meal Periods: Joseph Klein is a business representative for the Union. He first represented bargaining unit members at DGMC in 2005 and did so continuously until 2016. That year, he was reassigned to other duties. In the fall of 2019, he began representing DGMC unit members again.

Mr. Klein testified that, when he did a site visit in November 2019, he heard from unit members and Union shop stewards that the EMCS techs were concerned about having to take an unpaid meal period. He learned that, between 2016 and 2019, the Employer had ceased a practice of many years of allowing the EMCS techs to take a paid lunch break and work eight straight hours. Under the new system, EMCS techs and lead techs were required to take a one-half hour unpaid meal period, ending their shift eight and a half hours after it began.

Ms. Glazier testified about the meal period practice during 2019 and 2020. "99 percent" of the time, she recalled, management sent someone to relieve them, and they clocked out for a half hour meal period. But occasionally, she stated, the technicians were too busy to take a meal break and no relief was provided. On those days, EMCS employees simply did not clock out for lunch. They were "automatically" paid "one hour" of overtime, she stated.

In November 2019, business representative Klein spoke with onsite Employer human resources representative Linda Clark about the issue.[1] Ms. Clark could not resolve the issue, so

Mr. Klein went "up[*3] the food chain."

In[*3] December 2019, Mr. Klein spoke on the phone to Denise Garza, an Employer representative located in Texas.[2] He brought to her attention the problem with the EMCS meal breaks at the DGMC. Mr. Klein recalled that Ms. Garza told him that she would consult with an attorney and get back to him.

The Employer Obtained a Letter from Counsel Defending the Practice of Requiring an Unpaid Meal Period for EMCS Employees: On January 27, 2020, Ms. Garza wrote an email to Mr. Klein in response to the concern he raised. The email states, in relevant part, the following:

> I have received the following feedback from our legal counsel regarding the EMCS meal breaks in question...J&J does agree that the risk is too high in allowing EMCS employees a [sic] "on duty" meal break. EMCS employees will continue to be provided an "off duty" meal break.

She includes excerpts in her email of a letter from an attorney Ross Boughton.[3] His letter cites the California Division of Labor Standards Enforcement (DLSE) guidance on the "nature of work" exception to the general rule that off-duty meal periods must be provided. Mr. Boughton added the following:

> While there are certain other positions at Travis that likely qualify for an "on duty" meal period (namely power plant employees), the EMCS employees do not clearly and unambiguously fall on the "on duty" side of the line. Therefore, in order to ensure compliance with the law, it is prudent under the law to provide the EMCS employees with "off duty" meal periods... The provisions of the CBA do not override the legal requirement to provide meal breaks.

Mr. Boughton's letter cites the savings clause in the CBA (Section 11.1) as justification for the Employer's stance. He concludes as follows:

> There is a high risk that the CBA will not be held to discharge J&J's obligation to provide EMCS employees with meal and rest breaks under California law.[4] Further, while the parameters around what qualifies for an "on duty" meal period in California has not been exhaustively explored, under the current guidance there is a meaningful risk that the EMCS employees will not qualify for "on duty" meal periods under the law.

In April 2020, the Union Filed a Grievance Against the Employer for Violating the Meal Period Rights of EMCS Employees: On April 7, 2020, the Union filed a grievance over the meal period issue. The grievance was filed on behalf of the EMCS techs and lead techs. The grievance cited Section 12.4 of the CBA and asked that "Members are to be allowed to work a paid meal break when working in the EMCS effective immediately or move to a Board of Adjustment."

The Employer denied the grievance and it was not resolved at a Board of Adjustment. It is that grievance that is now before the arbitrator.

In September 2020, the Employer Was Replaced as the Contractor Providing Engineering Services to the Federal Government at DGMC: Effective September 1, 2020, the federal government awarded the engineering services contract at the air base hospital to Facilities Services,[*4] Incorporated (FSI).[*4] The Employer's last day managing DGMC staff was August 31, 2020.

Business representative Klein testified that, on its first day running the facility, FSI reinstated the practice of EMCS technicians working eight hour shifts with no unpaid meal break. As of the arbitration date April 7, 2021, that practice continued. The Union negotiated a new modified CBA with the new employer, but Section 12.4 remained unchanged.

UNION'S POSITION

The Union argues that the severability clause in the contract does not apply in this situation. "[U]nder the contract, the severability portion of the contract, there has to be a finding. It can't just be an opinion of the employer's counsel because...that would swallow the whole contract," the Union stated in its closing argument.

The Union also contends, moreover, that the provision of the severability clause stating that the parties "shall resume negotiations solely on the issue of said provision" was not invoked by the Employer. "They never sought to strike it out of the contract," the Union points out.

As for the starting date of the proposed remedy, the Union asserts that the business agent first raised the issue with the company in October or November 2019. The remedy should be retroactive to that date and extend through August 31, 2020, when FSI took over. Alternatively, the arbitrator could award back pay beginning January 27, 2020, when the Employer first put its position in writing.

If the arbitrator finds that the record does not support payment prior to the filing of the grievance, the Union asks that the arbitrator award back pay beginning seven business days prior to the filing of the grievance on April 7, 2020.

The amount of back pay, the Union contends, should be calculated based on the following: each EMCS employee who worked over five hours in a shift and was required to clock out for lunch should be paid one half hour at the overtime rate for each occurrence.

EMPLOYER'S POSITION

The Employer argues in its closing statement that the Union did not give information to the company to "prove that our attorney and attorney recommendation was...wrong."

It was in the "best interest" of the Employer to follow California state law, the Employer contends. The Employer asks the arbitrator to deny the grievance.

DISCUSSION

The Employer Did Not Justifiably or Properly Invoke the Severability Clause in the CBA: The controlling contract language is unambiguous. Bargaining unit members working shifts of five hours or longer take off-duty meal breaks "except for Energy Plant / EMCS personnel who will take a paid meal break as their duties allow." The Employer honored the exception language for energy plant employees but breached the contract requirement for EMCS employees. The date when the Employer began doing so was not in the record. It is undisputed that, at least from fall 2019 through August 2020, the Employer was violating the agreement.

The Employer relies on the severability clause to defend its decision[*5] to assign unpaid meal breaks[*5] to EMCS unit members. Severability clauses generally require the parties to continue to honor the remainder of the CBA if one section or clause is found to conflict with external law. The unsupportable CBA section is hence "severed" from the rest of the agreement.

The parties, in this instance, have negotiated terms in Section 11.1 that set a high bar for severing a contract clause. The section in question must have been "found" to run contrary to "applicable federal or state law or regulation, or Air Force contract requirement." Implied in this sentence is that the finding must be by a court, regulatory agency, or contractor. An opinion from one bargaining party or the other is not sufficient to invoke the clause.

Moreover, the moving party in severing a clause must follow through on the procedural requirements specified in the section. The Employer, in this case, would have had to notify the Union and ask, or at least offer, to "resume negotiations solely on the issue of said provision." The Employer did not take this step in the instant case.

Both on substantive and procedural grounds, the Employer did not properly invoke Section 11.1 in its decision not to comply with Section 12.4 of the CBA.

The Formal Grievance Filing Notified the Employer of the Union's Allegation that the CBA Rights of the Unit Members Had Been Violated and Continued to Be Violated: The negotiated grievance procedure is quite specific on the procedures for grievance-filing. A grievance "must be reduced to writing and signed by the Union business agent." Strongly implied in this sentence is that, prior to the submission of that written form signed by the authorized individual, no grievance exists.

The time limits and deadlines are also clear. The grievance must be filed "within seven business days of the alleged occurrence." In the instant case, the violation was a continuing one,

occurring each day after the grievance was filed.

This reading of the grievance procedure informs the ordered remedy for this violation. The Union sought (as its first choice) a remedy retroactive to when business agent Klein first brought the problem to management's attention. However, the grievance procedure language does not support this interpretation. Mr. Klein signed and submitted a formal grievance on April 7, 2020. Therefore, the starting date for the ordered remedy is seven business days prior to April 7.

For Each Shift of Five Hours or Longer That the Affected Employees Were Required to Take an Unpaid Break Mid-Shift, They Are Owed One Half-Hour of Pay at the Overtime Rate: The affected employees must be made whole for the contract violation. Their rights were violated, and shifts extended unnecessarily for no additional pay.

No obvious way exists to craft a make-whole remedy in this award. The EMCS unit members were already paid for the hours they were on the clock during the relevant time frame of April — August[*6] 2020. In some instances, they were not able to take their[*6] half hour unpaid break and were already properly compensated for that additional half hour of work.

What the EMCS employees lost on most days, due to the contract breach, was not pay but free time. They were required to stay a half hour longer, cutting into their time off the job. Hypothetically, an award could order additional vacation time to compensate for this loss of personal time.

However, that prospective vacation remedy would penalize FSI, the successor contractor. It would not cost J&J Worldwide Services, the perpetrator of the contract violation.

Although it is imperfect, the remedy ordered will be a straightforward payment to be paid by the Employer. J&J Worldwide Services is ordered to review the relevant EMCS employee timesheets and make an initial calculation. The information is to be shared with and approved by the Union prior to payment, as specified below.

AWARD

1. The Employer violated section 12.4 of the parties' MOU by requiring EMCS employees to take a half an hour off-duty meal break.
2. The Employer is ordered to pay eligible EMCS employees one half hour of overtime pay for each time they took a half hour unpaid meal break during a shift of five hours or longer, beginning on March 27, 2020 and ending on August 31, 2020.
3. The arbitrator retains jurisdiction over the implementation of the remedy.

Paul D. Roose, Arbitrator

Date: May 12, 2021

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fn 1 Ms. Clark did not testify at the hearing.

fn 2 Ms. Garza did not testify at the hearing.

fn 3 Mr. Boughton did not testify at the hearing.

fn 4 Mr. Boughton's letter adds "rest breaks" to the discussion. This issue was not raised in the grievance or in the parties' arguments, so will not be addressed in this arbitration decision.