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Labor Arbitration Decision, Kerry, Inc., 2020 BL 467261, 2020 BNA LA 1277

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Decision of Arbitrator

In the Matter of: TEAMSTERS LOCAL UNION NO. 662, Union, KERRY, INC., Employer.

October 19, 2020

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Case Summary

LABOR ARBITRATION

SUMMARY

[1] Overtime work - Back pay or make-up overtime ►117.3271 ►117.3279 ►24.356 [Show Topic Path]

The proper remedy under a first contract between Kelly Inc. and Teamsters Local 662 for erroneously skipping a senior employee for an overtime assignment is back pay, not the provision of make-up overtime hours that have not been taken, even though there was a past settlement providing a make-up overtime remedy, Arbitrator Lee Hornberger ruled. He found that one prior event did not establish a past practice, as there was no longevity and repetition, and mutuality was also lacking since the settlement did not involve the union above a steward on the shop floor. The majority view is that payment of lost wages is the appropriate remedy when an employee's contractual right to overtime work has been violated, and requiring that a senior qualified employee work unclaimed overtime hours is inconsistent with the CBA, which provides that such overtime "will be assigned to" qualified junior employees.

Kyle A. McCoy, Soldon McCoy, LLC, 5502 Upland Trail, Middleton, WI 43562, for the Union.

Andrew S. Goldberg, Laner Muchin, Ltd., 515 North State Street, Suite 2800, Chicago, IL 60654, for the Employer.

LEE HORNBERGER, Arbitrator.

DECISION AND AWARD

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Teamsters Local Union No. 662 (Union) and Kerry, Inc. (Employer). The Union contends that a person who was skipped in the overtime assignment should receive overtime pay as the remedy. The Employer contends that an error in assigning overtime is remedied by providing make up work to the individual who was skipped.

Pursuant to the procedures of the Federal Mediation and Conciliation Service, I was selected by the parties to hear and consider the evidence and render a final and binding arbitration award. The Joint Stipulated Facts and the Exhibits were received by me on August 31, 2020. The dispute was deemed submitted on October 8, 2020, the date the post-hearing submissions were received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

The advocates did an excellent job of presenting their respective cases.

3. ISSUE

The parties agreed that the issue is:

> What is the remedy when an employee is skipped for overtime assignment?

4. RELEVANT CONTRACTUAL LANGUAGE
ARTICLE 25: OVERTIME

> Section 25.3 Overtime will be awarded to senior qualified volunteers on the overtime sheet within the classification where the overtime exists. If the Employer is still in need of employees, overtime will be assigned to the qualified, junior employees where the overtime exists.

5. REVIEW OF THE FACTUAL PRESENTATIONS

Kerry, Inc. (“Kerry”) and Teamsters Local No. 662 (“Local 662”) jointly submitted the following stipulations of fact:

1. Kerry and Local 662 are parties to a CBA effective September 28, 2018 through September 28, 2021, recognizing Local 662 as the exclusive collective bargaining representative for all non-supervisory employees at Kerry’s Rothschild, Wisconsin facility. The CBA is Joint Exhibit A.

2. This CBA is the first between the parties.

3. On or about November 9, 2019, unit employee Todd Jisko filed a grievance regarding Kerry’s assignment of overtime to a junior employee (the “grievance”). The parties agreed that the assignment did not follow the procedure agreed to by the parties. The grievance is Joint Exhibit B.

4. The Company’s position is that an error in assigning overtime is remedied by providing make up work to the individual who was skipped.

5. The Union’s position is that a person who was skipped in the overtime assignment should receive overtime pay as the remedy.

6. In this case, the Company has offered to provide Todd Jisko with overtime work to make up for the error in assignment.

7. The Union requests that Jisko receive pay for the time worked.

8. The Company contends, and the Union disputes, that the Parties have an agreed upon method of resolving skipped overtime and that such agreement is illustrated and controlled**[*2]** by the resolution of an error in assigning overtime involving bargaining unit employee Michelle Degner. Specifically, on August 19, 2019, Ms. Degner reported to a Union Steward, Randy Myer, that the Company assigned overtime improperly and that Ms. Degner should have received the overtime assignment.

9. Production Supervisor Shawn Bridenhagen and Production Manager Justin Halbesleben decided that to remedy the situation Ms. Degner would be offered four hours of overtime work on a subsequent date as a resolution of the matter. Myer and Degner accepted this offer; no grievance followed, not from Degner nor any other employee.

10. The Parties did not reduce the resolution to writing.

11. The Parties did not make the resolution confidential, non-binding or non-precedent setting. Such issues were not discussed.

12. In the case before the Arbitrator, the improper overtime assignment occurred on November 8, 2019.

13. On November 13, 2019, Plant Manager Dean Zaretzke offered to Union Steward Jay Jaecks to resolve the error by having the person who should have been awarded the overtime work a four-hour time slot at some point during the following two weeks.

14. The Company has overtime slots that are not taken by employees and are, thus, open.

15. The Company proposed make up time slot would be an open and offered overtime slot that was not taken by another employee.

16. Mr. Jaecks was not certain who should receive the overtime and said that he would get back to Mr. Zaretzke.

17. On November 14, 2019, Mr. Zaretzke had a similar conversation with Union Steward Randy Myer.

18. During that conversation, Mr. Myer advised Mr. Zaretzke that Union Business Agent Tom Kanack's position is that an employee who should have been assigned overtime should be paid for that overtime and not offered the opportunity to work future overtime.

19. Mr. Zaretzke disagreed with that solution.

20. Mr. Kanack became the business agent for the facility in October 2019. Mr. Kanack was not involved in the negotiations over the CBA.

21. Mr. Zaretzke had a subsequent conversation with Union Steward Jay Jaecks on November 18, 2019.

22. The Parties did not reach agreement on the resolution and hereby submit the matter to the Arbitrator for a decision.

23. Kerry proposes that the Grievant, Jisko, be scheduled to work four hours of overtime. Kerry's December 11, 2019 correspondence in this regard is Joint Exhibit C.

24. Local 662 proposes that the Grievant, Jisko, be paid four hours of overtime.

25. The parties agree that the issue for arbitration is simply: "What is the remedy when an employee is skipped for overtime assignment?"

26. The parties agree that there are no procedural or substantive arbitrability issues and that the arbitrator has jurisdiction to render an award.

6. CONTENTIONS OF THE PARTIES

a. *For the Union*

The Union contends that the Employer admits that it violated a senior employee's right to overtime work; however, it balks at actually**[*3]** paying for its violation. The universally-accepted remedy, where a CBA allocates overtime work based upon seniority, is backpay

at the overtime rate. That is all the Union asks for, the standard remedy, but the Employer refuses. The Employer wants to suffer no penalty and instead simply foist some undesirable, rejected overtime hours onto the aggrieved employee. In other words, making the senior employee work overtime hours that, by the CBA, are supposed to be forced on junior employees. That is no remedy for violating a senior employee's right to desirable overtime hours; that would actually be punitive. The proposal violates the parties' CBA and creates a moral hazard because the Employer is left without reason not to violate seniority. The Union's proposed remedy is simple, wholly curative, and proactive, which is why backpay at the overtime rate has been the predominate view for remedial measures in these cases for decades. There is no reason to deviate from the standard solution in this case, where the parties' CBA allocates overtime by seniority and unit employees deserve an actual remedy

b. For the Employer

The Employer contends that the Union failed to meet its burden of proof to establish that the CBA requires payment as the remedy for a missed overtime opportunity. The Union failed to establish that working make up overtime will infringe on the rights of others. Indeed, the Union stipulated that open overtime opportunities exist and that the makeup opportunity will be in an open slot. Thus, the makeup opportunity will not deprive another employee of any rights or an employee's own opportunity to work overtime. The opportunity to work future overtime replaces what was lost, the opportunity to work overtime. There was no proof of malice or intent to justify the award of a penalty or punishment to the employer. There is no evidence of any past practice to justify a monetary award, but, instead, just the opposite a past event of an agreed-upon remedy to provide a makeup opportunity. Consequently, the grievance should be denied as to a request for payment and the Arbitrator should find that a makeup opportunity is the proper remedy.

7 DISCUSSION AND DECISION

The instant case involves a contract interpretation in which I am called upon to determine the meaning of some portion of the CBA between the parties. I may refer to sources other than the CBA for enlightenment as to the meaning of various provisions of the CBA. My essential role, however, is to interpret the language of the CBA with a view to determining what the parties intended when they bargained for the disputed provisions of the CBA. Indeed, the validity of the award is dependent upon my drawing the essence of the award**[*4]** from the plain language of the CBA. It is not for me to fashion my own brand of workplace justice nor to add to or delete language from the CBA.

In determining the meaning of the instant CBA, then, I draw the essence of the meaning of the CBA from the terms of the CBA of the parties. Central to the resolution of any contract application dispute is a determination of the parties' intent as to specific contract provisions. In undertaking this analysis, I will first examine the language used by the parties. If the language is ambiguous, I will assess comments made when the bargain was reached, assuming there is evidence on the subject. In addition, I will examine previous practice by the parties related to the subject. When direct evidence is not available, circumstantial evidence may be determinative.

This is a contract interpretation case. The issue is what is the remedy when an employee is skipped for overtime assignment. The Union contends that a person who was skipped in the overtime assignment should receive overtime pay as the remedy. The Employer contends that an error in assigning overtime is remedied by providing make up work to the individual who was skipped.

For the reasons that follow, I conclude that the remedy, when an employee is skipped for overtime assignment, is that the employee who was skipped in the overtime assignment should receive overtime pay as the remedy.

The CBA provides:

> Overtime will be awarded to senior qualified volunteers on the overtime sheet within the classification where the overtime exists. If the Employer is still in need of employees, overtime will be assigned to the qualified, junior employees where the overtime exists. CBA, Sec. 25.3.

Burden of proof

The Union bears the burden of proof in this CBA interpretation case. Elkouri & Elkouri, *How Arbitration Works* (8th ed.), pp. 8-104 to 8-107. The burden lies with the Union to identify a CBA provision which prohibited the Employer from acting as it did. Reynolds Metal Co., **62 LA 695** (Volz, 1974). As stated by Arbitrator Sears:

> ... in contract interpretation cases ... the grieving party has the burden of persuading the Arbitrator that its position is the correct one. Int'l Minerals & Chem. Corp., 62-1 ARB ¶ 8284 at p. 4074 (Sears, 1962).

Negotiations

There is no relevant negotiating history concerning the overtime assignment issue. The overtime assignment issue has to be resolved from the CBA and the totality of the circumstances. Elkouri & Elkouri, pp. 9-26 to 9-31.

CBA interpretation principles

Usually, all words used in the CBA should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning. *Id.* at 9-34 to 9-36. The CBA terms should be interpreted consistent with the parties' intent as reflected by clear and explicit terms. My construction should not make a provision a nullity.

The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole,**[*5]** the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., **7 LA 764** , 767 (Platt, 1947).

If CBA wording is clear and definite, clear language should be enforced. In cases where the language is clear and unambiguous, arbitrators are generally unlikely to consider extrinsic forms of evidence such as the intent of the parties, bargaining notes or history, or practices. Champion Int'l Corp., **85 LA 877** , 880 (Allen, 1985). Words should be given their ordinary and popularly accepted meaning in the absence of anything indicating that they were used in a different sense or that the parties intended some special or technical meaning.

It has been indicated that:

> Although [I] may use [my] expertise in interpreting and applying the contractual provisions, [I] cannot substitute [my] own sense of equity and justice but the award must be grounded in the terms of the agreement. To do otherwise would, in effect, be to change or alter the agreement through indirection. This [I] cannot, and should not do in the interest of *all* parties and the collective bargaining process. In other words, it is the [my] duty ... to interpret the contract as precisely as [I] can, and not to rewrite it. Johnston-Tombigbee Mfg Co., **113 LA 1015** , 1020 (Howell, 2000).

The CBA should be interpreted as a whole. When general provisions and special provisions concern the same thing, the special provisions will generally prevail. Elkouri & Elkouri, pp. 9-41 to 9-42. Written provisions imply the exclusion of everything not mentioned.

"Ordinarily, all words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning ... ." *Id.* at 9-35.

> The primary rule in construing a written instrument is to determine, not alone from a single word or phrase, but from the instrument as a whole, the true intent of the parties, and to interpret the meaning of a questioned word, or part, with regard to the connection in which it is used, the subject matter and its relation to all other parts or provisions. Riley Stoker Corp., **7 LA 764**, 767 (Platt, 1947).

Negotiating history

There is no evidence of negotiating history.

Past practice

The Employer maintains that the prior settlement via providing of overtime work in response to an overtime violation creates a binding past practice. The Union maintains that this one incident does not create a binding past practice. The party asserting a binding past practice bears the burden of proving the existence of the practice. Nolan, *Labor and Employment Arbitration* (1998), p. 250.

Elkouri & Elkouri, pp. 12-1 to 12-29, discuses past practice. *Id.* at 12-5 n 20, cites Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements,* Proceedings of the 14th Annual Meeting of NAA (1961). https://naarb.org/proceedings/pdfs/1961-30.pdf The Mittenthal**[*6]** article is a "famous and much-cited paper on past practices that has served as a template for parties and arbitrators for more than a half century." Abrams, *Inside Arbitration* (2013), p. 248.

According to Mittenthal, a practice is "the understood and accepted way of doing things over an extended period of time." Its elements are identified as clarity and consistency, longevity and repetition, and acceptability.

The dimensions of a practice are determined by the circumstances out of which it arose. Under proper conditions, past practice can be used to: (1) clarify ambiguous contract language; (2) implement general language; (3) modify or amend apparently unambiguous language; and (4) create a separate, enforceable condition of employment.

There are several prerequisites to create a past practice.

> "First, there should be *clarity* and *consistency.*" Mittenthal, p. 32.
>
> "Second, there should be *longevity* and *repetition.*" *Id.*
>
> "Third, there should be *acceptability.*" *Id.*
>
> "One must consider, too, the *underlying circumstances* which give a practice its true dimensions." *Id.*

A past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Another definition requires "clarity, consistency, and acceptability," with "clarity" speaking to uniformity, "consistency" speaking to repetition, and "acceptability" involving the sense of mutuality of the practice.

Clarity and consistency

It is undisputed that on the one prior occasion the situation at issue arose that overtime was subsequently provided to the employee rather than a monetary payment. To the degree that there can be clarity and consistency from a single prior event, the practice

might have clarity and consistency. On the other hand, the way the prior event was handled was inconsistent with the two sentence structure of CBA Sec. 25.3.

Longevity and repetition

One prior event does not create longevity and repetition. Most arbitrators insist on several instances of the conduct in question. Nolan, p. 251. "An event that only happened once previously is not a past practice." Abrams, p. 249.

Mutuality

The prior event of providing hours worked rather than payment did not involve a grievance. It did not involve the Union above the shop floor. I find that there is not mutuality. There is no evidence of the parties' mutual intent to revise the CBA Sec. 25.3 and establish new terms and conditions of employment. "The establishment of a practice requires both parties to be aware of the behavior in question." Abrams, p. 267.

Acceptability

The one prior event did not create acceptability between the parties for future conduct. The parties did not knowingly, voluntarily, and mutually agreed to new obligations.

There is no evidence that the parties had a meeting of the minds with respect to the past practice and that the practice was so prevalent**[*7]** and widely accepted that there was an agreement to modify the CBA. *Id* at 249.

CBA Sec. 25.3 wording

CBA Sec. 25.3 says:

> Overtime will be *awarded to senior qualified volunteers* on the overtime sheet within the classification where the overtime exists. If the Employer is still in need of employees, overtime will be *assigned to the qualified, junior employees* where the overtime exists. Sec. 25.3 Emphasis added.

This is the overtime paragraph of the CBA. There are two sentences in this paragraph. The first sentence says, "Overtime will be *awarded to senior qualified volunteers* on the overtime sheet within the classification where the overtime exists." Emphasis added. This sentence provides for how overtime will be *awarded* to *senior qualified volunteers.* The second sentence says, "If the Employer is still in need of employees, overtime will be *assigned to the qualified, junior employees* where the overtime exists." Emphasis added. This sentence says how overtime will *be assigned to qualified junior employees.* There is no sentence that says how skipped overtime for a senior qualified employee will be made-up. It would be inconsistent with the language of Sec. 25.3 to require that a skipped over senior qualified employee take overtime from a qualified junior employee overtime hours. To require the senior qualified employee to do second sentence overtime is inconsistent with the wording of Sec. 25.3.

This does not mean that the skipped over qualified senior employee is without relief. That relief would be payment to the employee to make up for the skipped time in question. Payment, rather than make-up time, has more fidelity to the wording of Sec. 25.3. Payment does not turn a first sentence "... awarded to senior qualified volunteer[ ] ..." into a second sentence "assigned ... qualified, junior employee[ ] ... ."

Based on the language of Sec. 25.3 an employee who was skipped in an overtime assignment should receive overtime pay as the remedy. Remedying an error in assigning overtime by providing make up work to the employee who was skipped would be inconsistent with the language of Sec. 25.3.

Arbitral case law authority

The Employer cites Allied Professionals and [Unnamed] Employer, Labor Arbitration Decision 150958-AAA, 2009 BNA LA Supp. 15098 (Long, 2009) (offering a makeup opportunity for overtime was appropriate because doing so would not violate any CBA provision); AFSCME Council ___, Union and [Unnamed] Employer, 199148-AAA, 015 BNA LA Supp. 199148 2 (Attordo, 2015) (in the absence of clear contract language, monetary award for lost overtime must be based on clearly established past practice or upon showing that the grievant actually suffered damages rather than temporary postponement of overtime work opportunity); and Frostbrite Brands, Inc., **131 LA 1746** (Szuter, 2013)(synthesizing the arbitral case law).

Elkouri & Elkouri states that:

> unquestionably the most frequently utilized remedy where an employee's contractual right to overtime work has been violated is a monetary award (generally at**[*8]** the overtime rate) for the overtime in question. Elkouri & Elkouri, p. 18-60.

As pointed out at *id.* at 18-62, Crown Cork & Seal USA, **130 LA 1015** , 1023-1024 (Gaba, 2012), held that the majority view that the appropriate remedy is payment of lost wages where an employee's contractual right to overtime work has been violated. See Haysite Reinforced Plastics, **137 LA 717** (Kobell, 2017)(ordered employer to pay grievant for lost overtime).

Given the wording of Sec. 25.3 there is no reason to deviate from the majority viewpoint in this case.

The crucial points in this case include,

1. the predominant mainstream of arbitral authority,
2. there is no past practice,
3. there is no negotiating history,
4. clear and unambiguous language of CBA Sec. 25.3,
5. the totality of the circumstances, and
6. the CBA.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, I grant the grievance.

The remedy, when an employee is skipped for overtime assignment, is that the employee who was skipped in the overtime assignment should receive overtime pay as the remedy.

I retain jurisdiction over this matter for sixty days from the date of this Award for the sole purpose of resolving any issue(s) pertaining to the order of rights and privileges contained in this Award.

Dated: October 19, 2020, Traverse City, Michigan.