

FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of the Arbitration

between)

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Amalgamated Transit Union)

Local 1338)

Grievant: Class Action

FMCS No.: 09-03046

-and-)

)

Transit Management of)

Denton County)

Before: Mareta Comfort Toedt, Arbitrator, duly selected by the parties through the procedures of the Federal Mediation and Conciliation Service.

Appearances:

For the Union:

Yona Rozen Advocate

For the Employer

Shirlyce Ammons Advocate

Make Whole Remedy

On May 17, 2010, I issued an award in which I sustained the grievance and stated as follows:

The Company did violate Article 37 B of the Collective Bargaining Agreement by virtue of not providing a weekly uniform cleaning service. The Company is directed to comply with Article 37 B by providing the Operators with five uniform changes per week. Such compliance should begin no later than thirty (30) days after receipt of this award.

As the Union's grievance requested a make whole remedy and I found that the Company violated Article 37 B, the Operators who are required to wear uniforms are entitled to relief from the effective date of the Agreement until the Company complies with Article 37 B. As there is insufficient evidence in the record regarding what the make whole remedy should be in respect of past violation, that aspect of the remedy is remanded to the parties for good-faith discussion with an eye toward resolution by agreement. Either party may notify me in writing (with a copy to the other party), during the five-business-day period beginning thirty (30) days after the date of this Award, that the parties have been unable to

agree about that aspect of the make whole remedy. If either party does so, then I will schedule an informal conference call with the parties to discuss what the next step in the arbitration should be; otherwise, the make whole remedy in respect of past violation will be conclusively deemed to have been finally resolved by agreement outside the arbitration.

Per agreement of the parties, I have retained jurisdiction of this matter in the event there is a question regarding the interpretation or clarification of the remedy ordered. Except as otherwise noted above, all relief not expressly granted in this Award is denied.

The parties advised me that they were unable to reach an agreement regarding the make whole portion of the remedy and have submitted briefs postmarked July 29, 2010 outlining their respective positions.

Union's Proposal: The Union has proposed that each Operator be awarded \$50.00 per month per employee for the period from March 31, 2009 until the Company's date of compliance. This amount is based on an informal survey in which the Union ascertained that the average cost for cleaning was as follows:

\$1.00 x 20 days per month = \$20.00 for cleaning shirts

\$1.50 x 20 days per month = \$30.00 for cleaning pants

Company's Proposal: The Company's brief states that the following actions have been taken since the arbitration award was issued. They are as follows:

1. Increased the number of uniforms given to each Operator from the CBA-required five (5) shirts and pants to eleven (11) shirts and pants, and from one (1) jacket to two (2) jackets, to facilitate the laundering of uniforms;
2. Installed 100 plus lockers to store the uniforms; and
3. Began providing weekly uniform cleaning service.

The Company has proposed a make whole offer based on the actual cost the Company is paying for the current weekly uniform cleaning service for the bargaining unit. This amount is \$130.00 total per employee based on the number of weeks in service. This amount reflects the cost the Company would have incurred in providing the uniform cleaning service for Operators over the time period in question (from April 2009 through June 2010 – 15 months).

Discussion and Conclusion: I ruled that the Company had violated the Article 37B of the CBA when it failed to provide the Operators with a weekly uniform cleaning service, which consisted of five uniform changes per week. Because the Company did not provide the weekly uniform cleaning service, Operators did not get the benefit of their bargain and were required to use other methods in order to obtain five uniform changes per week, such as paying for the cleaning of shirts and pants at their own expense, laundering these items at home, or simply not having clean uniforms regularly.

I acknowledge the actions that the Company states it has begun taking to provide more uniforms, lockers, and a cleaning service. This award does not address those going-forward actions; it is concerned with the make-whole actions that must be taken to remedy the *past* effects of the breach of Article 37B.

The Company contends that the Union's make-whole proposal is excessive because the Union has not provided any receipts for reimbursement for uniform cleaning. As the Company argued in its post-hearing brief:

...most Operators live paycheck-to-paycheck and because of this they did **not** take their uniforms to the dry cleaners for weekly laundry service. The reason is because it would have been too expensive for the Operators to afford the weekly charge for laundry or dry cleaning services that most dry cleaning shops charge. (bold in original – MCT)

While this may well be true, the issue here is not that most Operators laundered their own uniforms because they could not afford to do otherwise, but rather that they lost a benefit that the Union had bargained for them. Under general contract law, when a party fails to provide contractually-required services, the non-breaching party's measure of damages is typically "cover," namely, the market price of the services not provided plus incidental and consequential damages (where not contractually excluded), less any expenses avoided (a factor that does not apply here). The measure of damages in such cases is not merely the amount it would have cost the breaching party to provide the services.¹ It is true that, in some situations, the breach-

¹ This principle is reflected in the *Multiservice Joint Venture* award cited by the Company: Arbitrator Smith refused to award the amount of the insurance contribution the company would have made for health-plan coverage, instead awarding actual medical expenses incurred. NOTE: The Company did not provide a copy of the *Multiservice Joint Venture* award; my comments about it are based on the Company's quotation from the award in its brief.

ing party's cost might be equal to the market price of the services. But that would be the result of coincidence and does not appear to be the case here.

Looking at the question in labor-law terms: A make-whole remedy attempts to place the non-breaching party in the position it would have been in if the breach had not occurred. Thus, while the Company's negotiated cleaning price of \$130 per employee is considerably less than the roughly \$600 per employee estimate provided by the Union, it nevertheless represents the Operators' loss of the benefit of the bargain the Union struck for them.²

Concerning the computation of the amount of damages: In view of the unavailability of the bargained-for uniform exchange service, Operators had three choices, which over time were not mutually exclusive:

1. Pay for commercial laundering out of their own pockets; and/or
2. launder their uniforms themselves, using their own washing machines, dryers, detergent, electricity and/or natural gas, and on their personal time — I do not address here an issue neither party raised, namely whether Operators who laundered their own uniforms would have been entitled to be paid for the time they spent in doing so; and/or
3. do without a fresh uniform every day — while that might seem a *de minimis* type of harm, the parties evidently agreed otherwise in the CBA, and it is not my place to second-guess that mutual decision.

Certainly the damages analysis would have been simplest if all of the relevant Operators had made only the first choice, then in due course tendered their receipts for reimbursement. That did not happen — understandably, given that some Operators probably could not afford to send their laundry out, as the Company suggests — and so a precise computation of damages seems impracticable.

But the inability to establish a *precise* damages number does not mean that no number can be awarded. An established maxim for the proof of damages is that, once the existence of

² In the *Multiservice Joint Venture* award, instead of ordering reimbursement of each employee for the health care contribution that the company should have made, Arbitrator Smith required the company to reinstate coverage for the months that it had failed to do so, thus attempting to restore a benefit to the employees that had been lost as a result of the breach.

an entitlement to damages has been established, the computation of the amount of damages need be only reasonably precise.³ In that regard:

- I take notice that the Union's average estimated market cost of \$1.00 per shirt and \$1.50 per pair of pants is "in the ballpark" for consumer laundering services (not for dry cleaning, which is more expensive). The Company did not provide any evidence in the record contradicting the Union's claim that its estimates were reasonable. Granted, the Company might have been able to use its purchasing power to negotiate a lower per-unit price, as the Company suggests in its brief, but during the time in question the Company did not do so, and there is no evidence that Operators themselves could have done so.
- While the CBA calls for five uniform changes per week, not every Operator necessarily worked five days every week during the time in question. The Union's proposed computation of \$50.00 per month per Operator, for each month that he or she worked, based on an average of 20 days worked per month, is a reasonable way to take this into account.

In sum: On the preponderance of the evidence of record, the Union's proposed computation is a reasonable approximation of the "cover" damages here. I accept that computation as the basis for the make-whole award.

I have considered the prior arbitration awards cited by the Company but believe they are distinguishable. In the *Multiservice Joint Venture* case, it appears⁴ that the company's ultimate relevant obligation to a given employee, namely to cover certain medical expenses, was implicitly conditioned on the employee's actually having incurred such expenses; if a given employee or his family did not require medical treatment, he or she would have suffered no harm from the company's breach. It is therefore quite understandable that Arbitrator Smith limited the damage award to the proven out-of-pocket medical expenses actually incurred by employees, and declined to speculate about additional medical expenses that employees *might*

³ Another relevant maxim is that, other things being equal, any uncertainty in the amount of damages should be resolved against the breaching party, not the non-breaching party.

⁴ See note 1.

have chosen to incur if the company had not breached its obligation to provide insurance coverage. Here, in contrast, the contract expressly and unconditionally entitled every Operator to five uniform changes per week. It is as if the employees in the *Multiservice Joint Venture* case had been affirmatively entitled to one doctor visit per week and not merely to coverage of such medical expenses as they actually incurred.

In the *Columbia Pictures*, *Belcor*, *Storer Broadcasting*, and *Aztec Plumbing* cases, it appears that, unlike here, the employers did not breach an express, unconditional obligation to provide services. As a result, "cover" damages appear not to have been the appropriate measure of damages, whereas they are so here.

In *Columbia Pictures*, the breach involved the company's failure to hire a make-up artist from the industry roster and to give screen credits to make-up artists in accordance with a letter agreement. The company corrected the hiring violation by hiring two stand-by make-up artists and paying them, even though they performed no work. They also listed the stand-by make-up artists on the screen credits as "make-up artists," along with the non-industry roster make-up artist, who was listed as a "make-up consultant." The arbitrator noted that a contract breach will require "such relief as will reasonably approximately restitution to the injured party." Arbitrator Christopher was unable to determine damages that were "susceptible of ascertainment with a reasonable degree of certainty ..."; he held that the Union had failed to show that it or any employee had suffered any monetary loss whatsoever because of the screen credit violation, and that damages in that case would be purely punitive, not compensatory. In the instant case, on the other hand, the damages being sought are compensatory, not speculative nor punitive.

In *Aztec Plumbing*, Arbitrator Ross found that the employer in a multiemployer association had breached the CBA when it failed to use the hiring hall to hire two plumbers. The Union claimed payment of damages suffered by any plumber on the hiring hall work list who would have been entitled to employment, but no specific plumber was named as having been out of work during the period permitted by contract in remedy of this breach. Arbitrator Ross found that it was not possible to determine from the record whether or not the employees working for Aztec performed work as laborers or plumbers during the time period in question or their

exact number or identity. Had there been some proof as to number of employees working as plumbers, there may have been a basis to award damages, such as payment to these employees representing the difference between the contract scale and the wages paid or the payment of wages lost by any available plumber on the hiring hall list that lost a work opportunity due to the breach. The case before me is distinguishable as all of the Operators can be identified and were entitled to the uniform cleaning benefit.

In *Belcor, Inc. and Storer Broadcasting*, although both arbitrators found violations of the contract, they declined to award a remedy due to insufficient evidence in the record. Arbitrator McKay, while conceding that some employees may have suffered a loss in wages in violation of the CBA, did not deny the remedy request but found that the Union had not presented enough evidence to determine who suffered a loss in benefits and how much was suffered. Arbitrator Feldman found he was unable to order an appropriate remedy for the violation as the Union had offered no probative evidence of lost time. For reasons not explained, neither arbitrator remanded the issue to the parties to determine the appropriate remedy with more specificity. It is possible that there was no retention of jurisdiction by the arbitrator to determine an appropriate remedy for the violation. For all of the reasons discussed, these cases are distinguishable from the instant dispute.

Make Whole Award

Each Operator shall be awarded \$50.00 per month for each full month of employment⁵ as an Operator from April 2009 through June 2010.

Signed August 6, 2010 in
Houston, Texas



Marettta Comfort Toedt, Arbitrator

⁵ To illustrate: A hypothetical Operator whose employment as such began on April 10, 2009 and ended any time between May 9 and June 8, 2009, would have completed one full month of employment.