Zumas #3

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

BACKGROUND

This is an arbitration proceeding involving a grievance filed pursuant to the grievance and arbitration provisions of the collective bargaining agreement (hereinafter "Agreement") in effect between the Union and the Employer. A hearing was held on October 20. 1999, during which time sworn testimony was taken, exhibits were offered and made part of the record and oral argument was heard. The hearing was stenographically reported and a transcript (numbering 126 pages) was provided. The parties filed Post-Hearing Briefs, which were received on December 27, 1999.

STATEMENT OF THE CASE

This is a contract interpretation case involving the overtime provisions of the Agreement.

The Union contends that the Employer violated Article 6(E) of the Agreement when it disqualified the Employee, a Stock Clerk, from working overtime on an Aircraft on Ground ("AOG") trip.

The Employer contends that its methodology for making overtime eligibility determinations is reasonably based, of long-standing duration and is not in conflict with any provisions of the Agreement.

ISSUE TO BE DECIDED

The issue to be decided is whether the Employer violated the Agreement by disqualifying the Employee from working overtime on April 27-28, 1997 for an AOG trip; and if so, what should the remedy be?

APPLICABLE CONTRACTUAL AND REGULATORY PROVISIONS

ARTICLE 4. CLASSIFICATION AND WORK REQUIREMENTS

(H) STOCK CLERK
When AOG parts or material are transported by ground from a station where a Stock Clerk is located on a regular basis, such transport of parts and material will be performed by the Stock Clerk classification.

ARTICLE 6. OVERTIME AND HOLIDAYS

(E) Overtime shall be distributed as equally as possible among all qualified employees of a shop or shift where overtime is required...

> 2. The supervisor who authorizes the overtime will contact the respective committeeman and advise him of the job to be performed, the approximate duration of the job and the number of men needed...
>
> 3. On Form 0M-87, the committeeman will furnish the supervisor with the names of the men who are lowest on overtime. The supervisor will initial the list of accepted names and rejected names in duplicate. Those disqualified by the supervisor will not be contacted. However, any such employees may file a grievance if they feel that an error has been made...
>
> 4. The committeeman will, by Employer telephone, contact the men lowest on overtime (who have been approved) to procure acceptance, non-acceptance, or no contact...

FEDERAL MOTOR CARRIER SAFETY REGULATIONS

395.2 Definitions.

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Driving Time means all time spent at the driving controls of a commercial motor vehicle in operation.

On duty time means all time from the time a driver begins to work or is required to be in readiness to work until the time he/she is relieved from work and all responsibility for performing work. **On duty time** shall include:

(1) All time at a carrier or shipper plant, terminal, facility, or other property, or on any public property, waiting to be dispatched, unless the driver has been relieved from duty by the motor carrier;

(2) All time inspecting equipment as required by Sections 392.7 and 392.8 of this chapter or otherwise inspecting, servicing, or conditioning any commercial motor vehicle at any time;

(3) All driving time as defined in the term driving time in this section;

(4) All time, other than driving time, in or upon any commercial motor vehicle, except time spent resting in a sleeper berth as defined by the term sleeper berth of this section;

(5) All time loading or unloading a commercial vehicle, supervising, or assisting in the loading or unloading, attending a commercial motor vehicle being loaded or unloaded, remaining in readiness to operate the commercial motor vehicle, or in giving or receiving receipts for shipments loaded or unloaded;

(6) All time repairing, obtaining assistance or remaining in attendance upon a disabled commercial motor vehicle;

(7) All time spent providing a breath sample or urine specimen, including travel time to and from the collection site, in order to comply with the random, reasonable suspicion, post-accident, or follow-up testing required by part 382 or part 391, whichever is applicable, when directed by a motor carrier;

(8) Performing any other work in the capacity of, or in the employ or service of, a common, contract or private motor carrier, and;

(9) Performing any compensated work for any non-motor carrier entity.

395.3 Maximum driving time.

(a) Except as provided in [citations omitted] no motor carrier shall permit or require any driver used by it to drive nor shall such driver drive:

> (1) More than 10 hours following 8 consecutive hours off duty; or
> (2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

STATEMENT OF FACTS

The underlying facts in this case are not in dispute. On April 27, 1997, the Employee was working on his regular 3 PM to 11 PM shift as a Stock Clerk in the Stores Department at the Employer's City 1, State 1 facility. At approximately 8:20 PM, an overtime call was made for an AOG trip to deliver a slat to a grounded aircraft in City 2, State 2. Article 4(H) of the Agreement reserves AOG trips to the Stock Clerk classification. The estimated driving time for the trip, which eventually was launched at 0001 on April 28, was 10.5 hours.

The Federal Motor Carrier Safety Regulations ("Regulations"), which are binding on the Employer, provide that an employee cannot legally drive an Employer vehicle after the employee reaches 15 hours "on duty" without first having a rest period of eight hours. Stores Manager Person 1 testified that supervisors make overtime qualification decisions for AOG trips by applying a formula based on these regulatory time limits. The supervisor adds the expected duration of the trip to the amount of time each employee on the overtime list will have been "on duty" at the time the trip is expected to depart. If the total is 15 hours or less, the employee is deemed qualified for the trip; if the total is more than 15 hours, the employee is deemed disqualified.

The trip to City 2 departed at 0001 on April 28, meaning that the Employee would have already been on duty for eight hours, and would have had an additional hour of waiting time before the trip was launched, for a total "on duty" time of nine hours. Since the driving time from City 1 to City 2 was 10.5 hours, the Employee was disqualified by Foreman Person 2 because the total of driving time and "on duty" time was 19.5 hours. The trip was made instead by two employees who were higher on the overtime list than the Employee.

The Employee testified to his belief that he should be deemed qualified for AOG trips if he has any time left during which he can legally drive:

> Q. Let's make one more assumption and that's that the trip was delayed and didn't get out until 5:00 in the morning. At that point you've worked your regular eight hours and you had six hours of waiting time; is that correct?
>
> A. Yes.
>
> Q. So that puts you to a total of 14 hours on duty by the time the trip left: is that correct?
>
> A. Yes.
>
> Q. But you're still legal to drive under the DOT regulations for one hour; is that correct?
>
> A. Yes.
>
> Q. So in your view you're qualified to drive for that one hour?
>
> A. I am legal to drive up until 15 hours of being on duty.
>
> Q. And under those circumstances the Employer, in your view, is obligated to deem you qualified for that trip?
>
> A. Strictly DOT rules, I am qualified for that trip.

POSITION OF THE UNION

The Union contends that the testimony and evidence shows that the Employer violated Article 6(E) of the Agreement when the Employee was disqualified from working overtime. On the day of the grievance, Sunday, April 27, 1997, at approximately 8:20 PM, stores foreman Person 2 instructed Person 3, the stock clerk shop steward, to call the stock clerk overtime sheet to get two stock clerks to transport a slat to aircraft 279 in an Employer vehicle. The first stock clerk contacted, Person 4, declined the trip. The next eligible stock clerk, the Employee, was disqualified by Person 2 from making the trip. At the time of the overtime call, the Employee was on duty on his regular 3 PM to 11 PM shift.

Throughout the processing of this grievance, the Employer has been vague and inconsistent in its attempts to justify the disqualification of the Employee. Person 1 made statements such as, "I wanted two fresh drivers." "I did it in case one driver got sick." And, "The Employee will be out of hours."

The Employer also referred to the Federal Motor Carrier Safety Regulations as a reason to disqualify Employee. However, at the time of the overtime call, the Employee had been on duty for approximately five-and-a-half hours. At the time the trip actually began, the Employee had been off the clock for one hour after completing eight hours on duty. According to the Regulations, the Employee would have been within the guidelines and could have driven until 6 AM on Monday, April 28, whereupon he would have been on duty for 15 hours and would simply have switched positions with the second stock clerk and continued on as a passenger, which would have been in compliance with the Regulations.

When the grievance was originally submitted, the Union demonstrated, through the creation of a driver's long book sheet using actual times and locations of the stock clerks sent on the trip, how The Employee could have made the same trip, getting the part to its needed location at the same time. The argument can also be made that had the Employer not disqualified the Employee, it is likely that the trip would have been on the road earlier since the Employee was already on duty at the time of the overtime call, and the aircraft would have been returned to revenue service sooner.

On October 26, 1997, a similar situation arose concerning a stock clerk trip when two stock clerks were needed to drive an auxiliary power unit to an aircraft. Person 5, a stock clerk on duty on first shift, was disqualified by foreman Person 6. Stock clerk Person 7 accepted the trip, although he was higher on the overtime list than Person 5, A grievance was filed, and the

Employer agreed to pay Person 5 for the lost overtime. As recently as August 21, 1999, on a similar trip from City 3 to City 4, a much longer road trip than from City 1 to City 2, the stock clerks on duty were not disqualified from making the trip.

The Employer claims that it used a method which it has consistently followed for a considerable period of time, and which was well understood by employees and Union officials. This claim is inaccurate and false.

Person 1 testified that he knew of no Side Letter of Agreement between the Employer and the Union concerning the Employer's method of disqualifying employees for overtime. Person 8, the grievance committeeman at the time of this grievance, stated that the grievance was pursued because the practice had always been that the combination of the two employees lowest on overtime gave the Employer the necessary resources to move the part and get it to the aircraft on time. Person 8 also stated that this was such a huge departure from practice that it resulted in the filing of the grievance. He also knew of no understanding between the Employer and the Union of a 10 or 15 hour rule to disqualify. As a matter of fact, Person 8 heard that for the first time at the arbitration hearing.

In conclusion, the Union has shown that the Employer violated Article 6(E) of the Agreement by disqualifying the Employee for overtime. The Employer's argument that a long-established method was used to determine the Employee's qualification for the AOG road trips, one which was understood and accepted by the employees and the Union, is simply not true. Accordingly, the Union requests that the grievance be sustained.

POSITION OF THE EMPLOYER

The Employer contends that its method of determining whether an employee is qualified for AOG overtime calls is not prohibited by the Agreement. There is no Agreement provision that either specifies who is "qualified" for an AOG trip, or prohibits the Employer's method of making that determination. Except to specify that AOG driving is Stock Clerk work, the Agreement is silent on how such work is to be assigned. Likewise, Article 6(E) of the Agreement specifies only that overtime will be distributed as equally as possible among "qualified" employees, but does not supply a definition of "qualified." The Union could point to no other provision of the Agreement that has a bearing on the issue at hand.

Article 6(E) does, however, set forth a sequence of events for overtime calls that renders the Union's position untenable. In the contractually specified sequence, the supervisor must make qualification decisions before the committeeman begins making, calls to determine who will accept the assignment. When the supervisor makes qualification decisions, he has no idea who will accept the trip and how many "on duty" hours they may already have. If the Employee's method was followed, and employees with any amount of legal driving time left were deemed qualified, the supervisor would have no way of avoiding the risk that the trip could be staffed with two employees who would both run out of legal driving time well short of the destination. This approach would defeat one of the key goals of an AOG trip - to get the part to the aircraft as quickly as possible.

Absent contractual limitations, the Employer is entitled to adopt any reasonable manner of determining overtime qualification as a matter of management judgment. In a previous case involving the Union's challenge to Employer overtime qualification decisions under Article 6(E), in re: Pizzulo. Gr. No. 93-00455 (November 30. 1995), Arbitrator Richard L. Ross ruled that the

Employer is entitled to broad deference, so long as the determination of qualifications is not "arbitrary, capricious, discriminatory or unreasonable."

In devising its AOG qualification method, the Employer arrived at a reasonable method of achieving compliance with the Regulations, while at the same time achieving the business need of staffing AOG trips so that the truck can operate continually to the destination and deliver a part that enables an aircraft to be put back into service as expeditiously as possible. The Employer reasonably concluded that the best way to achieve that goal was to have two drivers who could both legally drive for the duration of the trip, so that one could serve as backup to the other in case of unforeseen delays or difficulties. There is nothing in the Agreement that prohibits the Employer from taking this approach or any other approach that the Employer, in its discretion, deems reasonable to achieve its business needs.

The Employer's practice in this case deserves particular deference, because it is designed to make sure that assignment of AOG drivers is in compliance with the Regulations. The Regulations protect highway safety by ensuring that drivers of large commercial vehicles get sufficient rest. It is beyond dispute that every Employer must comply with the laws and regulations that affect its business.

The Employer has applied its method consistently for over ten years to a circumstance that arises with some frequency. Every time a trip of long duration has been called, employees on the overtime list who worked the previous shift have been disqualified for the same reasons the Employee was disqualified. Yet these disqualifications have gone unchallenged by the Union until the instant grievance.

The Union is not at liberty to second-guess the Employer's judgment about how to devise a business practice that is not limited by the Agreement, yet that is precisely what it is trying to do. The Union's position would result in trips staffed by two employees who could not complete trips within regulatory time limits and would have to stop enroute. It would also result in many employees receiving overtime pay when they are doing nothing but riding as a passenger, providing no service of value to the Employer.

Neither of the examples that the Union presented to show that the Employer treated the Employee differently from other employees withstands examination. In Person 5’s case, she had been "on duty" on first shift for four hours when the trip departed at 11 AM. When added to the trip duration of nine hours, the total under the formula was 13. Person 5 should have been deemed qualified, but was disqualified in error. The Employer corrected the mistake and paid her the overtime she would have earned.

In the case of the City 4 trip, Person 1 testified that, due to significant delays in the launch of a trip whose duration was already long, the employees exceeded regulatory limits. He testified that the supervisor made an error of judgment in allowing the original employees to go, and should have made another overtime call when he became aware of the delays. The issue was not the fact that the employees were on duty when the trip left, but that they had been on duty for too long because of the delays. He counseled the supervisor about his handling of the matter.

Neither of these examples reflects an inconsistent application of policy. Rather, both involved mistakes that were corrected contemporaneously. Occasional errors in the application of a consistent policy do not undermine its effectiveness.Nor does Person 1's initial misunderstanding about one aspect of the regulations mean that the Employer's underlying rationale has changed. Even absent his mistaken belief, the Employee would still have been disqualified because he

could not legally serve as a backup driver for six hours of the trip at issue. Under those circumstances, the Employer would be paying premium rates for time when the Employee was providing the Employer with no economic value.

Based on the foregoing considerations, the Employer requests that the grievance be denied.

FINDINGS AND CONCLUSIONS

Alter a review of the entire record, and having had an opportunity to weigh and evaluate the testimony and credibility of the witnesses, a majority of the Board finds that the Employer is not in violation of the Agreement, and that the grievance must accordingly be denied.

In order to prevail in this dispute, the Union has the burden of proving that the Employer violated the Agreement when it disqualified the Employee from working overtime for the AOG trip. It can demonstrate this by showing that the Employer violated the express terms of the Agreement. or, if the language is ambiguous, can show by reference to external factors what the intentions of the parties were in agreeing to the Agreement language in question. .

This can be done by producing evidence as to the negotiating history concerning the language, by showing what the past practice has been between the parties, by drawing conclusions in the light of other provisions of the Agreement, by introducing previous arbitral awards construing similar provisions, or by demonstrating by other generally accepted norms of contract interpretation that the language in dispute should be given the meaning the Union contends it has.

The standard for determining whether discretionary management decisions should be overturned was set forth by Arbitrator Richard L. Ross in Gr. No. 93-00445 (November 30. 1995), between the parties:

> The determination of qualifications for a particular job is a function of management. The right to determine qualifications must rest with the Employer. So long as the determination of qualifications is not arbitrary, capricious, discriminatory or unreasonable, the Employer's decision must stand.

Person 1 testified about the background for the methodology used by the Employer in determining employee qualifications for AOG trips:

> ...Let's look at what's shown on pages 344 of that copy of the regulations. Are these regulations applicable to the AOG driving done at Employer?
>
> A. Yes.
>
> Q. Could you please identify under Section 395.3 the limit of time that an employee can drive without taking eight hours off duty?
>
> A. He can only drive 10 hours.
>
> Q. Under that same provision, how many hours can an employee be on duty before the regulations prohibit him from driving anymore?
>
> A. 15 hours.
>
> Q. After an employee has been on duty for 15 hours, what has to happen before that employee can drive again?
>
> A. Before he can drive again, he has to have eight hour's of rest.
>
> Q. Could you please explain the methodology that the store supervisors use when they're looking at an overtime list and deciding whether any given employee on the overtime list is qualified or not qualified for a trip?
>
> A. He would look at the amount of time that the road trip would take. And then the amount of time, if any, that the employee had accumulated. And if the trip was -- if that total would be less than 15 hours, he would dispatch that person. If it would be more than 15 hours, he would disqualify that person.

Q. What is your reason for having a formula that draws the line at 15 hours, as you just testified?

A. We have to have some means of backup in case something happens out there. To have the trip grounded on the side of the road is not going to help out our AOG situation. We have to have -- if the other driver gets sick, we have to have some means of the other driver to take over.

Q. How long have you used this formula in deciding whether an employee is qualified for an AOG trip or not?

A. 15 hours has been used ever since we started abiding by these DOT regulations.

Q. Approximately how long has that been?

A. I would say approximately 10 years, probably.

Q. Have you ever approached the qualification decision any other way?

A. No.

Some of the problems inherent in using the qualifications method urged by the Union were evident in Employee's own testimony:

Q. Let's suppose that the Employer had done the disqualification decisions your way and the other person who happened to accept the trip that day was somebody else who was on second shift and had six hours available to drive, just like you did.
That person would have to drive the first six hours of the trip to get their six hours in; is that correct?

A. Yes. ma'am.

Q. And if the two of you were paired, then it really doesn't matter who drove those six hours. You'd both hit 16 hours at 6:00 in the morning: is that correct?

A. In your hypothetical situation, yes.

Q. And then neither of you would be legally able to drive past 6:00 in the morning: is that correct?

A. Well, past 15 hours on duty.

Q. Yes, which in the hypothetical we're using now, would be 6:00 in the morning for both of you?

A. Yes.

Q. And you've testified, and it's established through the actual documentation that this trip was not over until 11:45 in the morning; do you recall that?

A. It was 10:45 at the airport.

Q. 10:45 in the morning. If both you and the other driver had hit your 15-hour threshold at 6:00 in the morning, you would have to pull over and rest for eight hours under the regulations; is that correct?

A. In your hypothetical, you would have to stop after being on duty for 15 hours.

Q. And that would mean the parts you were transporting wouldn't get there for at least another 15 hours; is that correct?

A. In your hypothetical, yes.

While the Union contends that it has never specifically agreed to accept the Employer's methodology, Person 1 testified that it had never been objected to by the Union:

ARBITRATOR ZUMAS: You were asked whether the Union ever approved the formula, and you indicated that the Union never approved either orally or in writing.
My question is: Did the Union ever object to the formula?

THE WITNESS: The only objection we see is here with this grievance.

ARBITRATOR ZUMAS: This is the first time?

THE WITNESS: Yes, sir.

The Employer's methodology for determining overtime eligibility qualifications for AOG trips appears to be reasonably based on binding regulatory requirements, and has been uniformly applied by the Employer over an extended period of time without objection by the Union, and it thus cannot be said to be "arbitrary, capricious, discriminatory or unreasonable." Under these circumstances, a majority of the Board concludes that the Union has failed to bear its burden of

proving that the Employer violated the Agreement, and the grievance must accordingly be denied.

AWARD

The grievance is denied.