PACIFIC MARITIME ASSOCIATION

Arbitration Award 06/07/1939 Direct Cargo Movement

IN THE MATTER OF A CONTROVERSY BETWEEN

THE WATERFRONT EMPLOYERS ASSOCIATION,
COMPLAINANTS

AND

THE INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION DISTRICT NO. 1, RESPONDENTS

Involving the alleged duty of longshoremen in the Port of Seattle to handle cargo in direct movement between truck and ship.

ARBITRATOR'S AWARD

Mr. Gregory Harrison

Mr. Edward G. Dobrin

For Complainants

Mr. Clifford O'Brien

Mr. Matt Meehan

Mr. H.P. Melnikow

For Respondents

WAYNE L. MORSE

Coastwide Arbitrator

Eugene, Oregon

June 7, 1939

ARBITRATION AWARD

1.

Facts

On May 5, 1939, Mr. Gregory Harrison, in behalf of the Waterfront Employers Association, requested an arbitration of a controversy which had arise in the Port of Seattle involving the alleged refusal of longshoremen to handle cargo in direct movement between truck and ship. In view of the fact that the employers' request for an arbitration of the dispute was made in accordance with the terms of the agreement of October 1, 1938, the arbitrator, on May 5, 1939, held a hearing on the question as to whether the dispute involved an emergency which entitled the parties to an immediate arbitration of the matter. After both sides had been given a full hearing on the question as to whether the dispute was of an emergency nature the arbitrator rules at a hearing on May 6, 1939, that the employers had established a prima facie case supporting their allegations that an emergency in the Port of Seattle existed as a result of the refusals or threatened refusals of longshoremen to load cargo direct from truck to ship. In support of his ruling the arbitrator cited Section 11 (b) of the agreement of October 1, 1939, which provides:

"The employees shall perform work as ordered by the employer in accordance with the provisions of this agreement. In case a dispute arises, work shall be continued pending the settlement of same in accordance with the provisions of the Agreement and under the conditions that prevailed prior to the time the dispute arose, and the matter shall be adjusted, if possible by the representatives of the International Longshoremen's and Warehousemen's Union and the Employers, who shall adjust the dispute as quickly as possible; in case they are unable to settle the matter involved within twenty-four (24) hours, then, upon request of either party, the matter shall be referred to the Labor Relations Committee."

The arbitrator ruled that a prima facie showing had been made by the employers, that it was the past practice in the Port of Seattle to load cargo direct from truck to ship, and that longshoremen had refused or threatened to reuse to conform to such past practice prior to arbitration. Therefore, the arbitrator ruled that a prima facie showing had been made by the employers of a violation of Section 11 (b) of the agreement by the longshoremen. The parties then proceeded with a hearing on the merits of the controversy.

The employers took the position at the hearing "that it is the right of the employer to move cargo or any other merchandise that may be moved direct from truck to ship without the necessity of placing any such merchandise on the dock before it is moved into the ship". The

parties to the dispute agreed that a coastwide issue was involved in the dispute and, therefore, the case should be tried within the coastwide jurisdiction of the arbitrator.

The record of the case shows that on April 28, 1939, a disagreement was reached at a meeting of the Labor Relations Committee of the Port of Seattle over the following motion introduced by the employers:

"It is agreed that it is a violation of the Agreement for longshoremen to refuse to handle, as ordered, a direct transfer of cargo or dunnage from ship's gear to vessel, railroad car, barge, vehicle, or any other conveyance and vice versa."

It was alleged by the employers that following the disagreement over the motion there were several instances of refusal on the part of longshoremen to handle cargo direct from truck to ship and, for that reason, the employers had requested an arbitration of the dispute. At the close of the employers' case in chief, presented in San Francisco on May 6, 1939, counsel for the union moved for an adjournment of the hearing until May 8 or 9, 1939, and that it then be reconvened in Seattle. In making the request for a transfer of the hearing from San Francisco to Seattle counsel for the union stated, in effect, that on the basis of the union's theory of the case it would be necessary for the union to secure the testimony of several witnesses in Seattle relative to the past practices which had prevailed in the Port of Seattle. Further, counsel stated that Seattle witnesses would be needed to testify as to the alleged stoppages or threatened stoppages of work by the union.

The motion of counsel for the union that the hearing be transferred from San Francisco to Seattle was opposed by counsel for the employers, chiefly on the ground that in the opinion of said counsel the controversy involved a question as to the meaning of the contract of October 1, 1938, relative to mutual obligations of the parties under said contract. Therefore, it was the contention of the counsel for the employers that the meaning of the contract, in so far as it was affected by the controversy, could be determined by the arbitrator in San Francisco without subjected the parties to the delay and costs involved in a transfer of the case to Seattle.

After a full hearing on the motion for a transfer of the hearing from San Francisco to Seattle, the arbitrator sustained the motion and ruled tha the hearing should reconvene in Seattle at 9:30 A.M., Tuesday, May 9, 1939, at which time the union would be expected to present its case in chief. In support of his ruling the arbitrator stated:

"The arbitration rules, in light of statements of counsel for the union that he is not prepared on the basis of the union's theory of the case to proceed at San Francisco, that we should proceed then at the earliest possible opportunity in Seattle. It is not for the arbitrator to pass upon the union's theory of the case until the union has presented its case. If it is the contention of the union that its particular theory, in a given case, requires the taking of evidence in another port and if there is a fair showing on the part of counsel for the union that such evidence may have some bearing upon his theory of the case, this arbitrator feels that doubt should be resolved in favor of the counsel asking for the change . . .

"I do not want either party to this agreement to assume that as a matter of course I am going to try these cases from port to port, depending upon the pleasure of counsel for one side or the other. Whenever I am satisfied, as I am in this case, that one party or the other in good faith actually believes that he can not adequately represent his clients unless the case is tried at a certain port where the issue first arose. . . . I shall grant the request."

The hearing was reconvened in Seattle on May 9, 1939, as ordered, and a full and complete record, which serves as the basis of this award, was made by the parties. At the close of the hearing counsel asked for permission to file briefs and such permission was granted. On Monday, June 5, 1939, the arbitrator received a brief from counsel for the union, dated June 5, 1939, stating that the union had decided not to file a brief but would rely upon the union's testimony and arguments presented by the union and contained in the transcript of record of the case.

II

Issue

Do the employers have the right under the agreement of October 1, 1939, to move cargo directly from tuck to ship or from ship to truck without first placing the cargo on the floor of the dock before it is loaded into the ship or placed in the truck in the process of discharging?

III

Decision

It is the opinion of this arbitrator that the employers do have the right, under the agreement of October 1, 1939, to move cargo directly from truck to ship or from ship to truck without first placing the cargo on the floor of the dock before it is loaded into the ship or placed in the truck in the process of discharging. The principal point at issue in this case involves an interpretation of Section 1of the agreement of October 1, 1938. The relevant portion of section 1 reads as follows:

"The provisions of this agreement shall apply to all handling of cargo in its transfer from vessel to first place of rest, and vice versa, including sorting and piling of cargo from vessel to railroad car or barge, and vice versa, when such work is performed by employees of the companies parties to this agreement."

When Section 1 is carefully analyzed as to its meaning it becomes clear that the parties to the agreement bound themselves to the understanding that all handling of cargo from vessel to first place of rest and vice versa should fall within the definition of longshore work as covered by the agreement. If a period rather than a comma had been placed at the end of the word "vice versa" and before the word "including", and the rest of the first paragraph of Section 1 had been omitted, the meaning of the first paragraph of Section 1, as far as its legal implications are concerned, would not have been changed in any respect.

The last part of the first paragraph of Section 1, starting with the word "including", consists of explanatory and illustrative language rather than restrictive and exclusive language. Therefore, the legal rules pertinent to the interpretation of restrictive language in contracts are not applicable in this instance. After a careful study of the record of this case, it is clear to the arbitrator that the reference in the first paragraph of Section1 to "sorting and piling of the cargo on the dock" was written into the section by the parties for the purpose of avoiding any possible misunderstanding as to whether sorting and piling of cargo on the dock should be considered longshore work under the contract.

The language certainly could not be interpreted to mean that all cargo must be sorted piled upon the dock when transferred "from vessel to first place of rest and vice versa". The rules of grammatical construction would not permit of such an interpretation, and, furthermore, the agreement, when read in its entirety, plus previous arbitration awards, show that such was not intended by the parties. Likewise, the language "the direct transfer of cargo from vessel to railroad car or barge and vice versa" does not mean that all cargo must be transferred directly from vessel to railroad car or barge or vice versa.

What the language does mean is that whenever there is a direct transfer of cargo from vessel to railroad car or barge, and vice versa, such handling of cargo shall be recognized by the parties as longshore work under the agreement. There is nothing in the language that even intimates that the parties intended to restrict themselves, as far as the direct transfer of cargo is concerned, to those situations in which cargo is directly transferred from vessel to railroad car or barge. Rather, the language which refers to direct movements when read in connection with the entire section is clearly illustrative language, instead of exclusive. It simply means that direct transfers of cargo, such as transfers from vessel to railroad car or barge, are also examples of longshore work and are within the terms of the general definition of longshore work as set out in the language of the section, which reads:

"The provisions of this agreement shall apply to all handling of cargo in its transfer from vessel to first place of rest and vice versa."

The fact that the term "truck" is not included in Section 1 does not justify the conclusion that a transfer of cargo from vessel to truck is not a direct transfer of cargo and, therefore, not longshore work. Neither does it justify the conclusion that the employers do not have the right to transfer cargo directly from vessel to truck and vice versa.

What Section 1 does mean is that the agreement of October 1, 1939, shall apply to all handling of cargo in its transfer from vessel to its first place of rest and vice versa, including sorting and piling of cargo and including the direct transfer of cargo to a conveyance, be that conveyance a railroad car, barge, other vessel, truck, or what not.

It seems to this arbitrator that counsel for the union, in his argument over the meaning of Section 1, overlooks the fact that the dominant purpose of Section 1, when it is read in connection with the entire agreement, was to set out a definition of longshore work. The parties proceeded to define longshore work in the general terms of "all handling of cargo in its transfer from vessel to first place of rest and vice versa." Then they proceeded to give examples of what they apparently recognized as more mooted types of labor operations as far as the general definition of longshore work was concerned, such as "sorting and piling of cargo on the dock and the direct transfer of cargo from vessel to railroad car or barge and vice versa."

If the parties had intended to restrict themselves in the direct transfer of cargo to only two types of conveyances, namely, railroad car an barge, they would undoubtedly have done so in clear unambiguous terms set out in a sub-section of the agreement.

Be that as it may, the union can not expect the arbitrator to interpret the subordinate, explanatory, and illustrative language of Section 1, said language relating to the general definition of longshore work contained in the first part of the Section, to be restrictive and exclusive in nature. The language of Section 1, standing on all fours, is not subject to such a restrictive interpretation and, furthermore, when read in connection with other arbitration awards and in connection with other parts of the agreement it becomes even more clear that it is not subject to such an interpretation.

An arbitration award handed down by Albert A. Rosenshine on July 26, 1938, is of some value as a precedent in this case. In the case decided by Arbitrator Rosenshine there was a request on the part of the employers to move cargo on liftboards directly from one vessel to another without unloading the cargo onto the floor of the dock and then reloading it onto liftboards for transfer onto the second vessel. In the decision Arbitrator Rosenshine stated:

"The men justified their refusal to work on the ground that the movement in question was an indirect movement from ship to ship. They claimed further that the cargo had not come to a point of rest , and that a cargo on liftboards placed on the dock is not at a point of rest. The employers contend that since in Seattle there is no division between dock work and longshore work and no difference in wages, hours, and working conditions, it is immaterial whether or not the cargo did come to a "point of rest", but that in any event, the work in question is longshore work as defined under the agreement of February 4, 1937, namely: "all handling of cargo in its transfer from vessel to first place of rest and vice versa . . .

"The procedure insisted upon by the men in the instant case of removing the merchandise from the liftboard, placing it on the dock, and placing it on another liftboard does not seem reasonable. It would be tragic if such insistence lead to the cessation of labor. Fortunately, it did not in the present case. It did, however, lead to the adoption of the method of transferring cargo as insisted upon by the union. In so insisting and in refusing to do the work in the manner in which it had theretofore been done and as directed, the union violated its contract.

"I therefore find:

That the employers are not required in either the direct or indirect movement of the cargo on liftboards from ship to ship to unload the cargo onto the floor of the dock or warehouse before continuing the transfer of the same on liftboards."

If, as was pointed out by Arbitrator Rosenshine "The procedure insisted upon the men . . . of removing the merchandise from the liftboard, placing it on the dock, and placing it on another liftboard does not seem reasonable" it is equally true that the request of the union in the instant case that cargo must first be unloaded from trucks and placed on the floor of the dock before being loaded on ship is not reasonable.

After a thorough study of the record of this case the arbitrator can not escape the conclusion that one of the purposes of the union in objected to direct transfers of cargo from truck to ship and vice versa is to crate more work for longshoremen. Viewed from the selfish standpoint of the union such a purpose is entirely understandable. However, when viewed from the impartial position of an arbitrator and of the public such a purpose is neither reasonable nor right. It necessarily involves an economic waste and tends to impose an unreasonable increase in cost upon the employers When looked at from the standpoint of a longtime labor policy it is unfair both to labor and to the public, as well as to the employers. Unnecessary creation of work at the expense of the employers is not contemplated by the agreement of October 1, 1938, and can not be countenanced by any arbitrator who seeks to fulfill his obligations under that contract.

Furthermore, it appears to this arbitrator that another section of the agreement, in addition to Section 1, contains language which clearly rebuts the union's position in this case. That section is 11(d) which read as follows:

"The employer shall be free, without interference or restraint from the International Longshoremen's and Warehousemen's Union to introduce labor saving devices and to institute such methods of discharging and loading cargo as he considers best suited to the conduct of his business, provided such methods of discharging and loading are not inimical to the safety or health of the employees."

In this case the employers have established by a preponderance of the evidence that there are many instances in which a direct transfer of cargo from truck to vessel and from vessel to truck is best suited to the conduct of their business. The record shows some of these instances to be those involving heavy lifts, steel, pipe, dunnage, and on occasion lumber, frozen eggs, and other type of cargo.

Furthermore, the record is convincing that the employers have established, by a preponderance of the evidence, that it has been the past practice in the Port of Seattle to lad some types of cargo directly from truck to ship and vice versa. Under Section 11 (b) of the Agreement of October 1, 1938, the longshoremen were obligated to perform work in accordance with the past practice of the port as ordered by the employers pending a settlement of the dispute. The record is not clear as to the extent to which the union absolutely refused to handle cargo directly from truck to ship and vice versa. It appears that when the union threatened to refuse to handle the cargo the employers acceded to the union s claims in the premises pending an arbitration of the issue. Nevertheless, it should be stated that if the union did, in any case, absolutely refuses to handle cargo directly from truck to ship, or vice versa, it violated Section 11 (b) of the agreement.

It was contended by counsel for the union on the basis of testimony presented at the hearing by union witnesses that handling cargo directly from truck to ship and vice versa is exceptionally hazardous and, therefore, should not be required of longshoremen because of the safety factor. The arbitrator weighed with great care this contention of the union and the testimony offered in support of it. He did so because he fully appreciates the importance of the fact that the agreement of October 1, 1938, seeks to give a maximum of protection to the longshoremen as far as safe working conditions are concerned.

However, this arbitrator is satisfied on the basis of the showing made in the record by the employers that the preponderance of evidence in this case bearing upon the safety issue substantiates the employers claim that direct transfer of cargo from truck to ship and vice versa is not exceptionally hazardous or unsafe to the degree of justifying a denial to the employers of the right to use trucks in direct transfers of cargo. The arbitrator wishes to point out that most any operation in the industry can become unsafe if safety rules are ignored or violated. If, in individual cases, a direct transfer from truck to ship or vice versa is, in fact, unsafe the agreement provides an orderly procedure for the handling of such grievances. The record of this case does not support or justify a ruling by this arbitrator that all direct transfers of cargo from truck to ship and vice versa are so inherently dangerous that the employers should not be allowed to use such methods of loading and discharging cargo.

Counsel for the union and union witnesses admitted that direct transfers of cargo from truck to ship and vice versa are permissible under the agreement when heavy lifts are involved. The arbitrator gained the impression from the testimony of the witnesses and from the record that as far as the safety factor is concerned heavy lift transfers are probably more dangerous than transfers of dunnage, lumber, and other types of cargo which it is the practice in the Port of Seattle to handle, at least occasionally, by way of a direct transfer from or to trucks.

Incidentally, it should be noted that if direct transfer of heavy lifts from truck to ship and vice versa, are permissible under Section 1 of the agreement of October 1, 1938, and it is admitted that such is the case, then the direct movement of other types of cargo is likewise permissible. Undoubtedly, the extend to which such direct movements of cargo can or will be used in the Port of Seattle is limited in many respects. This observation is brought out clearly by the testimony of Mr. W. F. Varnell, one of the witnesses for the employers, as set forth on pages 90, 91, and 92 of the transcript. Part of Mr. Varnell's testimony, in answer to questions by employers' counsel, was as follows:

"Q Now, from the standpoint of a shipowner, is the direct handling of cargo and dunnage from trucks to ships an operation which is desirable, so far as an operating standpoint is concerned?

"A Generally so I would say not.

"Q And why not?

"A Well, it is not always convenient for the consignee to place his truck alongside ship's tackle. The steamer may be loading other cars, may be discharging other cars. He may have difficulty getting his truck through the doorway. In many instances a truck cannot be put inside, or alongside, rather.

"Q So far as the operation is concerned, however, when it is possible to use it is it an economical operation as distinguished from discharging the cargo?

"A (Interposing) Decidedly so for the consignee and or the shipper.

"Q And I think you have testified that the requests for this type of movement come from either the shipper or the consignee?

"A Generally does, yes, sir. Very seldom anyone else when it is a movement of that kind.

"Q Now, I think you have described it as being a more or less incidental movement?

"A I think that is true.

"Q And by that what do you mean? What thought are you trying to convey by saying it is more or less incidental? You mean it is not happening all the time, every day, or throughout the day, or just what have you reference to?

"A Well, I could describe that by saying that, for instance, commodities - we know exactly how certain commodities are going to be handled , like canned goods, if they are being discharged will be put to a place of rest on the dock, because it is the general custom to do that.

"It would be impractical, for the most part, to have consignees have enough trucks down there to take it away as fast as the ship discharges it. And what might go to a truck might be a very small shipment or might be a heavy one. The consignee thinks it might want it delivered onto a truck, and maybe some other time he would want it into a car that would go to some place other than his own plant.

"A great many times the controlling factor is the fact that the consignee hasn't a facility for handling a railway car.

"What I mean by incidental is just one of those things that doesn't happen every day."

The last point to be discussed in this decision pertains to the rights of the parties relative to the loading and discharging of dunnage. The record show that dunnage consists principally of materials used in protecting, separating, and holding fast cargo. The type of dunnage chiefly involved in the instant controversy is lumber, which is used in the hold of the ship in protecting cargo from shifting and in separating layers of cargo, especially case cargo such as fruit.

Counsel for the employers took the position that "Strictly speaking, dunnage loaded on a vessel to be carried to another port is not cargo and hence it may be argued that it is not longshore work to load the dunnage either in the direct or indirect movement of cargo. The admitted practice however, is that although the crew handles it in many cases the longshoremen likewise do so and which to do so and have always done so in the past upon the same terms and conditions as other longshore work has been performed. So long as the longshoremen desire to and do perform the work of loading dunnage for movement to and use in other ports by the ship it is obvious that it is work which by common agreement is made subject to he agreement and is governed by its terms.

Mr. F.P. Foisie, president of the Waterfornt Employers Association, while on the witness stand, was asked to draw a distinction between dunnage and cargo. His answer, as set out on page 19 of the transcript taken on May 6, 1939, was as follows: "(It is cargo) when it is a matter of goods shipped by manifest for some person using the vessel as common carrier."

Counsel for the union took the position that dunnage loaded on a ship in one port for use on ships in another port is, in fact, cargo which the longshoremen, under the agreement of October 1, 1939, have the right to load and discharge. It is the opinion of this arbitrator that the distinction between dunnage and cargo which the employers sought to establish in this case involves an attempt to make a distinction when, as a practical matter of fact, there is no real difference. It appears to the arbitrator that dunnage which is to be loaded on a ship along with other types of cargo is as much a part of the cargo of that ship, s far as the loading or discharging process is concerned, as is any other part of the cargo. The fact that the dunnage is not being shipped by some person using the vessel as a common carrier is not material as far as the rights of the longshoremen in loading it or discharging it are concerned.

It does not appear to be reasonable for the employers to insist, for instance, that lumber shipped from Seattle to San Francisco by a lumber company using the vessel as a common carrier, is cargo, while a similar amount of lumber loaded on the same vessel for use on other vessels in San Francisco as dunnage is not cargo, and therefore, the longshoremen are not entitled strictly tot he right to load or discharge it.

The arbitrator fails to find anything in the agreement of October 1, 1938, that would support such a distinction. On the other hand, after a careful reading of the agreement, he is of the opinion that the term "cargo" as used in the agreement is intended to cover all materials, including so-called dunnage, which are stowed away on the ship, especially when ship gear is used in the loading process. That being the case, it follows that the longshoremen have the right under the agreement to load and to discharge the same.

Respectfully submitted,

(SGD) WAYNE L. MORSE

Coastwide Arbitrator