PACIFIC MARITIME ASSOCIATION

Arbitration Award 08/29/1939 San Pedro Partial Tie-up

IN THE MATTER OF A CONTROVERSY BETWEEN

WATERFRONT EMPLOYERS ASSOCIATION OF THE PACIFIC COAST,
COMPLAINANTS

AND

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

Involving the dispute over the penalty clauses of the agreement of October 1, 1938, said dispute resulting in a partial tie-up of the Port of San Pedro on August 29, 1939.

ARBITRATOR'S AWARD

Mr. Gregory A. Harrison

Mr. James L. Adams

For Complainants

Mr. H.P. Melnikow

Mr. Charles J. Katz

For Respondents

WAYNE L. MORSE

Coast Arbitrator

Eugene, Oregon

September 11, 1939

ARBITRATION AWARD

I.

Facts

The Arbitrator is convinced, after a very thorough study of the voluminous transcript of record of this case, consisting of some 1341 pages, plus numerous exhibits, that the operative fact most controlling in this case is the legal meaning of the pertinent provisions of the agreement of October 1, 1938, rather than the acts of the parties which led to the partial tie-up of the Port of San Pedro on August 29, 1939. However, it is necessary to set forth a brief resume of the history of this case in order to make clear how it came to pass that the dispute was finally submitted to the coast arbitrator for decision.

The record shows that on May 5, 1939, a group of 61 longshoremen refused to load scrap iron on the SS MEIU MARU, said scrap iron being consigned for shipment to Japan. The longshoremen explained their refusal to load the scrap iron on the ground that if they attempted to load it, they would have to pass through a demonstration picket line of Chinese people, who were demonstrating on the dock in protest of the shipping of scrap iron to Japan.

On May 6, 1939, the dispute was submitted to arbitration before the local arbitrator for the Southern California area. On May 12, 1939, the local arbitrator ruled that "in failing to load the cargo of scrap iron on the SS MEIU MARU on May 5, 1939, under the conditions prevailing, the four gang of men so offending have violated the provisions, spirit, and intent of the contract of October 1, 1938."

On May 17, 1939, the employers filed a complaint with the union against the four gangs of men in accordance with the provisions of Section 11 (e) of the agreement of October 1, 1938, said complaint requesting that the union take disciplinary action against the men concerned. An exchange of letters between the union and the employers which followed made clear that the parties were in disagreement as to the implications of the award of May 12, 1939. Therefore, on May 20, 1939, the employers served notice that a complaint would be filed with the Labor Relations Committee, said complaint requesting that the committee should be exercise jurisdiction in the matter and penalize the men.

On May 31, 1939, the matter was presented by the employers at a meeting of the Labor Relations Committee, but the committee became deadlocked over a series of motions submitted by the employers. In substance the motions sought to subject the 61 longshoremen to discipline and penalties. Following the deadlock in the Labor Relations Committee, the employers again referred the matter to the local arbitrator, praying the arbitrator to penalize the men.

An arbitration hearing was held on June 29, 1939, and July 3, 1939; and on July 17, 1939, the local arbitrator handed down an award which provided that the men involved in the illegal stoppage of work on the SS MEIU MARU on May 5, 1939, be "suspended and their names removed from the registered list of longshoremen in the hiring hall at San Pedro, for a period of one week, commencing July 24, 1939."

The union then filed a motion for a rehearsing of the case. Pending arguments on the motion for a rehearsing, the local arbitrator ordered that the award of July 17, 1939, should be held in abeyance. On August 14, 1939, the local arbitrator granted each side an opportunity to present arguments on the motion for a rehearing. On August 23, 1939, the local arbitrator handed down an award denying the motion for a rehearsing, and ordering "that the award of July 17, 1939, be and the same hereby is reinstated, put into force, and is to become effective August 28, 1939."

However, on August 28, 1939, the union authorized and supported the dispatching of the 61 men who were affected by the penalties imposed by the award of July 17, 1939. These so-called "penalty-men were scattered among a large number of gangs, and when the employers refused to permit anyone of the penalty men to go to work, the entire gang to which a penalty man had been assigned would refuse to continue on the job. As a result, work ceased in many hatches on a considerable number of ships in the San Pedro harbor.

It is true that those longshore gangs to which penalty men had not been assigned proceeded to work hatches, but they refused to work any hatch to which a longshore gang containing a penalty man had been dispatched but quit after the employers discharged the penalty man. It became obvious to the employers that it was only a matter of time before all of the ships in the harbor would be tied up, because the penalty men were being redispatched at regular intervals.

It was then, on August 28, 1939, that the employers, in accordance with the arbitration provisions of the agreement of October 1, 1938, appealed to the coastwide arbitrator to take jurisdiction in the premises on the ground that an emergency dispute of a coastwide nature existed. Following a preliminary hearing held in San Francisco on August 28, 1939, the arbitrator handed down the following oral decision:

"The arbitrator will rule on the issue presented to him this morning in connection with the San Pedro case.

"The arbitrator is sure that both parties to this agreement recognize that the question is one which, so far as this arbitrator knows, is being submitted to an arbitrator under this agreement for the first time. The procedural ramifications connected with it. If the arbitrator approaches it from one theory, the issue raises the question as to whether or not he has the right under the agreement of October 1, 1938, to review the decision of another arbitrator acting under the agreement. The arbitrator is very much in doubt as to whether or not he has such a right, but he is not passing judgement on that point at this time.

"When the issue is approached from the standpoint of Section 9 of the agreement of October 1, 1938, one cannot escape the fact that under that Section it is provided, so far as the powers of a coastwide arbitrator are concerned, that:

"In the event that any Labor Relations Committee or the parties hereto fail to agree on any question involving a basic interpretation of this Agreement or any other question of mutual concern not covered by this contract relating to the industry on a coastwide basis, such question, at the request of either party shall be referred for decision to such coastwide arbitrator.

"As the arbitrator views this situation at the present time, the parties certainly are confronted with a question of great mutual concern to the parties, and a question which is not clearly and literally covered by the agreement of October 1, 1938.

"The question is, What are the powers of the coastwide arbitrator insofar as passing judgement upon a decision rendered by another arbitrator is concerned. In other words, what are his powers insofar as attempting to force the union to abide by a decision of another arbitrator when the union believes that that decision is beyond the scope of the agreement of October 1, 1938?

"The arbitrator is not going to pass judgement on that problem at this time either.

"The arbitrator is satisfied, however, that there is implied within Section 9 of the agreement of October 1, 1938, the clear intent of the parties that when they come to an impasse, such as apparently prevails in San Pedro now, something can be done and should be done under the agreement, other than a resort to economic action on the part of the parties.

"In the Portland situation involving the port closure case, this arbitrator ruled that a port closure involved a coastwide issue because it was bound to affect all ports on the coast. The arbitrator is not satisfied at this time that there is a port closure in San Pedro.

"Neither is he satisfied that there is an emergency existing at San Pedro which necessarily requires taking jurisdiction over the dispute upon the ground that it is a coastwide dispute within the terms and meaning of Section 9. However, he is satisfied that, if there is anyone under the agreement of October 1, 1938, who is bound to make an investigation of the facts and issue findings and orders based thereron in regard to what the parties shall do in respect to that issue, it must necessarily be the coastwide arbitrator.

"It is clear that because the procedural problem here is such a vital one, not only to the parties but to the future of arbitration under this agreement, the arbitrator must be sure of all his facts before he issues a ruling. Therefore, it is the decision of this arbitrator that this hearing shall be removed from San Francisco to San Pedro, and that it shall reconvene in San Pedro tomorrow at ten o'clock, at which time the arbitrator will make an inspection of the dock and listen to any further evidence that counsel for each side wishes to present in respect to the issue, as to whether or not this arbitrator has any jurisdiction to proceed in the premises.

"The arbitrator regrets that he does not feel that he is in a position to make a final ruling on the matter this afternoon. He has endeavored to indicate to counsel for each side, however, what the issues are as he views them, and he wishes to assure the parties that he will not hesitate tomorrow morning in San Pedro to issue a final ruling after he has had an opportunity to view the situation for himself. If necessary, he will call before him witnesses whom he may wish to examine.

"That is the decision. If there are any questions in regard to its meaning or its import, the arbitrator will do his best to explain the decision to counsel for the parties."

On August 29, 1939, following an inspection of the San Pedro harbor, and after hearing further argument by counsel for each side, the arbitrator rendered an oral decision in which he held that an emergency situation involving a dispute of coastwide significance existed, and that, therefore, under the circumstances the coastwide arbitrator had jurisdiction over the matter. In view of the fact that the oral decision of August 29, 1939, may be of precedential value in future cases involving jurisdictional issues, and also because of the fact that it is important to any understanding of the procedure and steps which led to the instant award, it is quoted herewith in full:

"The Arbitrator recognizes that in rendering this decision he is really plowing new fields under the Agreement of October 1, 1938. He is frank to confess that he proceeds with dragging feet, but with a very clear view as to what his obligations are under the Agreement and a very clear view as to what furrow lies ahead.

It is the Arbitrator's finding that there is an emergency existing in the Los Angeles Harbor. An emergency which at the present time is of coastwide significance. Under Section 9 of the Agreement of October 1, 1938, he can do nothing else but assume jurisdiction over the dispute on coastwide basis.

It is the Arbitrator's decision that his ruling laid down in the Portland closure case is applicable to this case so far as his taking jurisdiction in the premises is concerned.

Now, in taking jurisdiction in this case, the consequences differ materially, in the view of the Arbitrator, from what they appear to be counsel for each side.

Under the Agreement of October 1, 1938, providing for arbitration, it is to be remembered that the parties understood and agreed that arbitration shall be resorted to prior to resorting to economic action. However, there is nothing in that Agreement present moment, which makes it possible for an arbitrator to do anything about it if one or both of the parties take his decision and tear it up, refusing to abide by it, and then resort to economic force.

This Arbitrator has ruled in a jurisdiction matter in another case, and he will rule again, if the case is presented to him, that he believes that there is implied in the Agreement of October 1, 1938, certain inherent powers in the Arbitrator to find fault and fix damages if the proper petition and proof is presented to him. But the point I want to make at this moment is that the parties did agree that they would resort to arbitration before they resorted to economic action, and that neither party in the Agreement of October 1, 1938, signed away the right to resort to economic action if they want to follow that course of conduct with all of the consequences - and costly consequences - that go along with it.

As the Arbitrator views this situation, the Local Arbitrator in Los Angeles has handed down a decision. That decision has been challenged on various grounds which this Arbitrator is in no position to pass judgment on at this time. It has resulted in an emergency, which emergency, in turn, has raised a coastwide problem over which this Arbitrator under Section 9 must take jurisdiction. He is taking jurisdiction not over any dispute between this Union and Arbitrator Stalmaster; he is taking jurisdiction over a dispute that prevails in the San Pedro Harbor today. He is not in a position to say whether Arbitrator Stalmaster is right or wrong in that decision; whether the decision is within the power of the Local Arbitrator or is not within his power.

But it should be clear to every part in this dispute that the decision of Arbitrator Stalmaster now becomes one of the operative facts of the dispute now prevailing in the San Pedro Harbor. It is clear to this Arbitrator that the decision of Arbitrator Stalmaster and the basis for it and the surrounding facts and circumstances in which it is involved become operative facts in the present dispute. Therefore, in taking jurisdiction over this dispute on coastwide basis this Arbitrator is not in any position as suggested by counsel for the Employers to ignore or to refuse to consider the question as to whether or not the Award of Arbitrator Stalmaster is an erroneous award because of the allegation that the Award was rendered on the basis of an assumption of power on the part of the Arbitrator which he may not have had.

I cannot ignore that operative fact. I cannot take jurisdiction in this matter without taking jurisdiction over the entire dispute, which, of course, includes the Stalmaster Award and the basis for it.

As to the point as to whether or not this Arbitrator sits as an appellate court of arbitration, I do not see anything in the Agreement of October 1, 1938, that makes this Arbitrator an appellate court. However, maybe it can be shown that under Section 9 of the Agreement the parties intended by implication to give that power to a Coastwide Arbitrator when a situation, such as this, arises involving a problem of mutual concern to the parties and not covered by the Agreement.

Be that as it may, the matter will have to wait for final determination when we go into the merits of this case. But I do feel that, if any one is under obligations as far as the Agreement of October 1, 1938, is concerned to make an investigation and a report and to issue findings and orders in a dispute such as the one now prevailing in San Pedro, it must necessarily be the Coastwide Arbitrator. I do not see anything else in the Agreement that wold support any other finding, at this time. If these two parties to this Agreement are to be stopped in a resort to the use of economic force in a situation such as this, it would have to be by an order of the Coastwide Arbitrator . Irrespective of what my personal desire in the premises may be, I must necessarily confine myself to the record and to the law that governs the contract.

In so doing, I find that there has been presented to me a coastwide issue; that it is within my jurisdiction under Section 9 to take jurisdiction over that issue and to consider all of the evidence that led to the dispute; to weigh all of the operative facts, including the Stalmaster Award; and to issue a final ruling on the merits in respect thereto. In taking jurisdiction, I must do what I have always done in the past: I must issue a first ruling, or a first order. That order is that a situation in which economic force prevails in a port must first be removed before the Arbitrator proceeds on the merits. To me, arbitration is an empty gesture if, while the Arbitrator is sitting on a case, the work of a port ceases. That just does not make sense.

In the brief recess that I took I tried to weigh the relative merits of two possible orders which I feel I can render in the situation:

The first question that I put to myself was this: should I say to the Union that under the circumstances they should proceed without the use of the fifty men or the sixty-one men, or whatever the number is, (the so-called "penalty" men) on an assurance that, if I finally found on the merits that they were right in the premises, I would order pay to be given to them on a retroactive basis?

I weighed that, and it seems to me that a ruling to that effect would be beyond my power. I do not feel that I would have any right to order the Employers under such circumstances to pay men for work which , in fact, was not performed.

MR. HARRISON: We shall be perfectly willing to stipulate to that, Mr. Arbitrator.

THE ARBITRATOR: I wish to finish the decision because I have reached a decision on the matter.

Secondly, I put to myself the same question as I have in the other cases presented to me: What should the status quo be pending a final decision on the merits in this case?

I gave it the best thought of which I am capable, and I have come to the conclusion that there is only one thing which I can do under the premises, and that is to order both sides in this dispute to proceed to work the ships in the Harbor, because, after all, that is the matter of greatest concern at the moment. We must get the cargo moving, the harbor must be entirely opened, and the ships worked by men dispatched from the Union hiring hall. Therefore, it is ordered that men on the registered longshore list, including the so-called "penalty" men, shall be dispatched until I can determine this case on its merits.

In issuing that order I want it clearly understood that I am not setting aside Judge Stalmaster's Award. I am not referring to Honorable Stalmaster's award from the standpoint of passing any judgement upon it whatsoever. Neither is my temporary order to be interpreted as sustaining the Union's claim that the Arbitrator does not have the power under the Agreement to fix a penalty. That power will undoubtedly be established or proved non-existent when the case is heard on its merits. All I am saying is that as I take jurisdiction over a coastwide dispute in San Pedro Harbor I order that all parties proceed to handled the cargo of this Port. In doing so they shall make use of all members of the longshore Union as dispatched who are on the registered lists, including the so-called sixty-one penalty men. We shall then proceed immediately on the merits of this case.

It seems to me that that can be done rather quickly. When the case is heard on its merits there should be introduced in evidence all previous transcripts in the case. Possibly from that time on the question can be handled on its merits by way of argument, although counsel certainly will be allowed the privilege of introducing witnesses if they care to. But, pending a decision on the merits, it is the order of this Arbitrator that work in the Port be resumed with the longshore lists of registered longshoremen in operation as they were prior to the so-called suspension of the sixty-one men.

It is so ordered."

After it was ruled that the dispute was one subject to the jurisdiction of the coast arbitrator, an arbitration hearing on the merits of the dispute was held August 29 and 30, 1939. A decision based upon the record made at that hearing is submitted herewith.

II.

Issue

Did the union violate the agreement of October 1, 1938, when it failed to remove from the registered list of longshoremen for one week the names of the longshoremen who refused to load scrap iron on the SS MEIU MARU on May 5, 1939?

III.

Decision

It is the opinion of this arbitrator that the union was not legally obligated to remove the names of the so-called "penalty" men from the registered list of longshoremen for one week. It is also the opinion of the arbitrator that the union had the right under the agreement of October 1, 1938, to dispatch the 61 men involved in this dispute as they were being dispatched on August 28, 1939, when the emergency situation developed in the Port of San Pedro.

The arbitrator wishes to state frankly that he has reached his final decision in this case most reluctantly, because he holds the highest respect for the distinguished local arbitrator who, in effect, reached a contrary conclusion in the earlier stages of this dispute. The coast arbitrator wishes to have it distinctly understood by all parties concerned with this dispute that he ahs the utmost confidence in the professional standing and arbitration services of the local arbitrator of the Southern California area. Not one word of this decision is to be interpreted as supporting any allegation in the voluminous record of this case that the local arbitrator demonstrated either bias or prejudice in his adjudication of the dispute.

Also, it is to be clearly understood that the coast arbitrator is not purporting in this case to function as an appellate court of review. The coast arbitrator's jurisdiction over the case, as he ruled in the oral decisions of August 28 and 29, 1939, rests entirely upon Section 9 of the agreement of October 1, 1938. That section provides in part that

"In the event that any Labor Relations Committee or the parties hereto fail to agree on any question involving a basic interpretation of this agreement or any other question of mutual concern not covered by this contract relating to the industry on a Coastwide basis, such question, at the request of either party, shall be referred for decision to such Coast arbitrator.

"In the event that any Labor Relations Committee or the parties hereto fail to agree upon any question of local application within twenty-four (24) hours after it has been presented, such matter, at the request of either party, thereupon shall be referred for decision to the local

arbitrator for the district in which the matter in dispute arises.

"The Coast arbitrator shall have the power to determine whether any question in dispute involves a basic interpretation of the agreement and if the dispute in question is one of mutual concern relating to the industry and not covered by the agreement, whether it is of Coastwide or local application."

In finding that an emergency situation of coastwide significance existed in the San Pedro harbor on August 28, 1939, it automatically became necessary for the coast arbitrator to take jurisdiction over the case and pass judgement upon all of the operative facts involved in the dispute. It so happened that one of those operative facts was the contention of the union that under the agreement of October 1, 1938, the arbitrators are not vested with the power to suspend longshoremen from the registration list except for those specific offenses mentioned in the contract and then only in accordance with certain procedural steps. Thus, it is seen that it became necessary for the coast arbitrator to pass judgement on the legal meaning of the penalty provisions of the contract of October 1, 1938, because those provisions had become pertinent to the adjudication of the emergency coastwide dispute which the arbitrator found existed on August 28, 1939, said dispute involved a basic interpretation of the agreement.

This arbitrator has analyzed the lengthy record of this case with great care, and he has weighed the conflicting testimony, evidence, and theories advanced by the parties in support of their respective allegations, with the result that he has become convinced that the solution of the entire dispute hinges primarily upon a question of law, namely, the legal meaning of Section 11(e) of the agreement of October 1, 1938. The arbitrator must construe the contract as it was written by the parties. It is an elementary rule of construction that a court has no power to read into a contract meaning which was not intended in the language used by the parties when they signed the agreement. The arbitrator has no power to give a meaning to Section 11 (e) of the agreement of October 1, 1938, which one or both of the parties may have intended if the contract does not contain language which will support such a meaning.

It is true that when a contract contains ambiguous language a court may look to the surrounding facts and circumstances existing at the time the contract was signed in an endeavor to determine what the parties intended by the language which they wrote into the contract. However, when doubt exists as to what the parties intended, the language of the contract itself must be interpreted in accordance with its plain and usual meaning.

As was pointed out by counsel for the union, an arbitration agreement and the contract on which it rests are in general subject to the same rules of construction or interpretation as other contracts.

"While the words used in an arbitration agreement or submission are to be interpreted in accordance with their signification in common parlance, and not according to their strictly technical meaning, nevertheless the agreement is not to be extended by implication beyond its plain words, and if the language is plain and unambiguous in itself there is no room for construction, but it will be held to mean precisely what its terms imply.

"If the agreement or submission is ambiguous all the surrounding facts and circumstances may be considered in ascertaining the intention of the parties; and the construction placed on it by the parties and by the arbitrators considered to be the one intended to be incorporated therein, where such construction is apparently reasonable and equitable.

"As with other contracts, it is not permissible to separate portions of the agreement and construe parts most strongly against one or the other of the parties, but it must be considered and construed as a whole." (See C.J.S., page 166, for supporting authorities).

In view of the above mentioned and well established legal rules of construction it becomes necessary to construe the penalty provisions of Section 11 (e) of the agreement of October 1, 1938. That section reads as follows:

"(e) All members of the International Longshoremen's and Warehousemen's Union shall perform their work conscientiously and with sobriety and with due regard to their won interests shall not disregard the interests of their employers. Any International Longshoremen's and Warehousemen's Union member who is guilty of deliberate bad conduct in connection with his work as a longshoreman or through illegal stoppage of work shall cause the delay of any vessel, shall, upon trial and conviction by the International Longshoremen's and Warehousemen's Union be fined, suspended or for deliberate repeated offenses be expelled from the Union. Any Employer may file with the Union a complaint against any member of the International Longshoremen's and Warehousemen's Union and the International Longshoremen's and Warehousemen's Union shall act thereon and notify the Labor Relations Committee of its decision within ten (10) days from the date of the receipt of the complaint. If any local of the I.L.& W.U. fails to discipline a longshoreman in compliance with this provision, or if it is claimed tha the discipline is inadequate, the matter may be taken up by the Employers before the Labor Relations Committee, on complaint, and if necessary the arbitrator for decision.

"The Labor Relations Committee and, if necessary, the Arbitrator shall have power to impose specific penalties as follows:

"If any man shall be found guilty of pilfering or broaching or cargo, he shall be dropped from the registered list and denied further employment;

"If any man shall be found guilty of drunkenness on the job, he shall be suspended from the registered list for a period of one week."

In construing Section 11 (e) this arbitrator has reached the following findings and conclusions based upon the preponderance of the evidence as shown by the record of this case.

1. In the negotiations which finally resulted in the signing of the agreement of October 1, 1938, the parties thereto did not reach a meeting of the minds or an agreement on a proposal of the employers that the ultimate power to penalize longshoremen for all violations of the contract by them should be vested in the arbitrator