

National
Bargaining Council
for the
Road Freight Industry



NBCRFI

RULING

Commissioner: P. Heather
Case Reference No.: PERFBC 27379
Date of ruling: 16 December 2013

In the arbitration between:

PTAWU obo Workforce _____ **Union/Employee party**

and

Xinergistix _____ **Employer party**

Union/Employee's representative: R. Baloyi _____

**Union/Employee's address: PO Box 31415
Braamfontein
2017**

Telephone: 011 3330904 fax: 086 691 7873

Employer's representative: M. Chenia

**Employer's address: Propmet Park
Riet Street
Deal Party
Port Elizabeth**

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DETAILS OF HEARING AND REPRESENTATION:

1. The matter was unsuccessfully conciliated on 20 October 2013, resulting in the arbitration taking place on 5 December 2013. During the arbitration the applicant, PTWU, was represented by R. Baloyi, whereas the respondent, Xinergistix, was represented by M. Chenia, an attorney.

ISSUE IN DISPUTE:

2. Prior to the arbitration commencing, the parties agreed that the terms of reference would be as follows:-
 - a. Interpretation and application of the RFBC Main Collective Agreement, in that:-
 - i. Does double manning comply with the Collective Agreement of the RFBC?
 - ii. Is double manning a substantive issue that can be negotiated at plant level and therefore a matter of mutual interest?
3. The parties considered the following to be common cause and not in dispute:-
 - a. The RFBC Main Collective Agreement is silent with regards to the system of double manning.
 - b. The respondent uses a double manning system. This system is understood by the parties to be as follows:-
 - i. There are 2 drivers on a vehicle – one driver and a co-driver whom swap functions during the trip.
 - ii. Each driver is paid 9 hours at normal wages and 3 hours at overtime rates on a 24 hour cycle.
4. The parties agreed to forgo opening statements due to the discussions and terms of reference that were agreed to prior to the arbitration commencing.

BACKGROUND OF THE DISPUTE:

5. The parties had met at plant level to discuss the issue of double manning. These discussions were inconclusive and no agreement was reached.
6. The above meeting did not take the form of negotiations.

7. The parties agreed that although the applicant retains the onus to prove their dispute, the respondent would lead their evidence first.
8. The parties both presented me with a bundle of documents as well as a copy of the Road Freight Main Collective Agreement as evidence.

SURVEY OF ARGUMENTS & EVIDENCE:

9. The following is a summary of the proceedings and does not reflect all the evidence and arguments heard during the proceedings.
10. The only witness by the respondent was N. J. Badenhorst, an office bearer and part-time employee of the Road Freight Association. His involvement was due to the respondent being a member of the Association and the implications that the dispute could have on the entire industry.
11. The witness testified that he had been involved with the Road Freight Association since 1/1/1996. At that stage the council consisted of different regions all with their own agreements. He had been involved in the negotiations which eventually resulted in National Road Freight Main Collective Agreement as it is known in the industry today.
12. Due to his involvement in the above negotiating he has a very good knowledge of the agreement and as a result (and being an office bearer of the Road Freight Association) he has assisted many members by providing advice and participating in litigation.
13. When asked whether the current Agreement allowed for bargaining to take place at plant level, the witness quoted clause 57 of the Road Freight Main Collective Agreement.
 1. The Council is the exclusive forum for the negotiation and conclusion of agreements on substantive issues between employers' organisations, on the one hand, and trade unions on the other hand.
 2. Despite sub-clause (1), employee representatives or representative trade unions may negotiate with an employer at company level on non-substantive conditions of employment, operational procedures, bonuses or incentive schemes that are directly related to profit or productivity, or both. Mater contemplated in this sub-clause may not be negotiated in the Council.
 3. In the event of a deadlock in negotiations on an issue contemplated by sub-clause (2), the provisions of the Council's Exemption and Dispute Resolution Agreement may be invoked.

14. The witness explained that the levels of bargaining were agreed in 1996 to avoid two-tier bargaining which had been agreed to be crucial to all parties. At Council level both minimums and actual are negotiated and thereby all conditions of service are fix. The current agreement was concluded last year (2012) and will be in place for the next 3 year. All amendments were agreed upfront to be implemented in March. It was agreed that there will be no other negotiations and what is in the agreement must therefore be applied by the parties.
15. The witness explained clause 57 (1) by testifying that the council is the exclusive and only forum for negotiating substantive issues.
16. In Schedule 2 on page 58 of the Main Collective Agreement, substantive issues are defined as “all issues involving costs and affecting the wage packets of employees”. There is no differentiation between rights and interest. This had been tested in the courts i.e. Unitrans v TAUSA that was upheld by the Labour Appeal Court.
17. The witness explained clause 57 (2) as issues not covered in the Main Collective Agreement such as loading allowance, bonuses and incentives. Such issues could be negotiated at company level.
18. When asked about the implication of the request by the applicant to stop double manning, the witness testified that this would have major cost implication. The reasons being:-
 - a. A driver could not work longer than 15 hours a day. This would impact costs due to overtime.
 - b. Vehicles would have to stop after 15 hours as the driver must rest for 9 hours. Vehicles would therefore stay out longer and increase costs and subsistence allowances. Or the organisation could take another driver to the truck which would also have an impact on cost.
19. Stopping of double manning would therefore result in additional costs to the employer and would be considered a substantive issue. Such a request would result in a new condition of service which can't be negotiated at company level and as a result the dispute is not a valid dispute. Section 57 of the RFBC Main Collective agreement.
20. The double manning system was explained as; in a 24 hour operation, there are two drivers per vehicle. The RFBC Main Collective Agreement only allows for a driver to work a maximum of 15 hours per day followed by a 9 hour rest period. The two drivers therefore split the shift with one driver being on duty for 12 hours where after the other driver takes over and works for 12 hours while the 1st driver rests. Due to requirement all vehicles have sleeping berths. During their rest period the resting driver, although on the vehicle, is not required to perform any work. This is in accordance with section 4.1 of the Main Collective Agreement – “working day – regular daily working day times will be set and regulated by individual employers.” The employers therefore determine the starting and ending times.

21. Page 77 of the Main Collective Agreement deals with hours of work.

“Hours of work include all periods of driving and any time spent by a driver, security officer or any other employee on other work connected with the vehicle or load and all periods during which the employee is obliged to remain at his post in readiness to work when required to do so, but does not include any meal interval prescribed in terms of clause 5 or any period in respect of which a subsistence allowance is payable to an employee in terms of clause 36, if during such interval or period the employee does no work other than remaining in charge of the vehicle and its load, if any, guarding the vehicle and its load, if any;”

22. The witness explained that this section dealt with activities that were regarded as work and that this must be read in the context that the employer decides when work starts and stops. The driver is therefore “in readiness” when on duty. Work time is therefore regulated by the employer to protect the drivers and would include time waiting for loading and unloading, etc. During these times the driver is “in readiness” to work.

23. When asked about the claim by the respondent that the second driver is on the truck and unable to leave, the witness explained that that was the nature of the business, vehicles move and as a result the driver is required to sleep out. The definition of “working hours” excludes meal intervals and periods when a subsistence allowance is paid. The subsistence allowance is paid for periods the employee is not on duty and can include the functions of guarding the truck and its content. The second driver is not “in readiness” to work, but is never the less expected to be with the vehicle.

24. Page 28 of the Main Collective Agreement, section 36 (3) (a) stipulates that subsistence allowance “must be paid to employees who, in performance of their duties, are absent from their place of residence and their employer’s establishment for any period extending over compulsory rest interval of nine consecutive hours prescribed in clause 6 (1).”

25. This section was explained as hours the employee spends away from home and the employer’s premises during which the employee is expected to stay with the vehicle. This period is not regarded as being “in readiness” to work. The second driver who is not “in readiness” to work is between shifts (his rest period) and qualifies for the subsistence allowance.

26. When asked about the annexure, pages 7 to 10 of the respondents bundle, the witness explained that page 8, point 8 (1), is the definition of a driver and does not determine the hours of work. The witness disagreed with the state point 8 (111) as it contradicts the definition of “hours of work” – section 4.1 of the Road Freight Main Collective Agreement.

27. A driver is paid a minimum of 45 hours per week (excluding unpaid leave and unauthorised absence) and has 9 hours rest period between shifts. The double manning system allows for 12 hours work and 12 hours rest period.

28. When asked about the exemption stated on page 9, point 8 (1V) of the employers bundle, the witness stated that he is unaware of the purpose for which the document was written and was of the opinion that the purpose of the document has been taken out of context.
29. With regard to the last section of the above document the witness stated that a driver is paid 9 hours at normal rates, and that the overtime statement is incorrect. The only time exemption is required is if the employer is in contravention of the Road Freight Main Collective Agreement and this would be for a specific application and specific clause of the agreement.
30. When asked about page 6 of the employers bundle, the witness explained that in 2008 the Road Freight Association was asked to clarify the system of dual drivers. This letter was written by the National Secretary and confirms that the Road Freight Main Collective Agreement allows for this system.
31. Page 14 of the employers bundle confirms that no exemption is required to double man a vehicle and that this system is allowed for in terms of the Road Freight Main Collective Agreement.
32. The witness believed that the document written by Deon Koen, pages 7 to 10 of the respondents bundle, must have been written for a different context and is not relevant to the double manning system.
33. The witness testified that the double manning system was in compliance with the Road Freight Main Collective Agreement as it complied with the working hours, the rest periods between shifts, the subsistence allowance and the payment of overtime.
34. Under cross examination the witness confirmed that the document written by Deon Koen (pages 7 to 10 of the respondents bundle) was not a ruling but an opinion. Whereas the letter from the National Secretary (page 6 of the employers bundle) was a ruling and still valid, and the letter by Harold Booysen confirms the ruling made by the National Secretary. These letter would supersede the document written by Deon Koen.
35. When asked why the respondent did not get clarity from the Road Freight Association, the witness stated that the system of double manning was discussed with and confirmed by Harold Booysen.
36. The applicant called David Sandt, a designated agent with the Road Freight Bargaining Council as a witness. He testified that he had been invited by the union to attend the meeting between the parties on 4 July 2013. The purpose of the meeting had been to discuss the double manning system. The union believed that drivers must be paid for the entire 24 hours as they send on the vehicle.
37. The witness confirmed that the Road Freight Main Collective Agreement allowed for drivers to work for 9 hours per day at normal rates and a maximum of 6 hours overtime per day.

38. He testified that the document on pages 7 to 10 of the respondents bundle was written by Deon Koen the operations manager of the Road Freight Bargaining Council. He had taken this document to the meeting on 4 July as he was of the opinion that the document would assist the meeting.
39. The witness confirmed that the Road Freight Main Collective Agreement was silent with regards to the double manning system and that one could not apply for exemption of something that was not in the agreement.
40. When asked the mean of the page 16 of the applicants bundle, clause 57 of the Road Freight Main Collective Agreement, the witness testified that non-substantive issues could be negotiated at company level, these he termed operational procedures.
41. Under cross examination the witness confirmed that as a designated agent he worked according to the Road Freight Main Collective Agreement and not according to guidelines. He confirmed that the document written by Deon Koen was not a guideline.
42. The witness testified that prior to the meeting on 4 July 2013 he had not consulted with the respondent and was unaware of their operational procedures.
43. He confirmed that a 12 hour shift made up of 9 hours normal time and 3 hours overtime would be compliant with the Road Freight Main Collective Agreement.
44. When informed that the double manning system required driver 1 to work 9 hours normal time and 3 hours overtime and the driver 2 to work 9 hours normal time and 3 hours overtime and when not working they would receive the subsistence allowance, the witness testified that double manning would then be a substantive issue.
45. Under re-examination the witness testified that should the maximum hours be exceeded, both parties would be contravening the Road Freight Main Collective Agreement and the parties would have to apply for exemption which would be considered by an independent council.
46. The witness confirmed that two drivers could be used on condition that the limitations are not exceeded.
47. In closing the applicant stated that in terms of clause 57 of Road Freight Main Collective Agreement double manning was an operational procedure and could be negotiated at company level. They require the respondent to stop the double manning system as it compelled drivers to for 24 hours.
48. The respondent undertook to provide me with their closing statements by no later than Wednesday 11 December 2013.

ANALYSIS OF ARGUMENTS & EVIDENCE:

49. I am required to make a ruling as to the interpretation and application of the RFBC Main Collective Agreement, in that:-
- i. Does double manning comply with the Collective Agreement of the RFBC?
 - ii. Is double manning a non-substantive issue that can be negotiated at plant level and therefore be considered to be mutual interest?
50. The evidence of the respondent witness, Nico Badenhorst, was clear, unchallenged and could not be contradicted. His evidence demonstrated an in-depth knowledge of the Road Freight Main Collective Agreement.
51. The evidence of the applicants witness was of lesser value. He had attended a meeting between the parties as he had been informed that the respondent's drivers were exceeding the stipulated hours as per the Road Freight Main Collective Agreement. He acknowledged not having insight into the respondent's operational procedures. He confirmed that that two drivers could be used a vehicle as long as the parameters of the Agreement are not exceeded, namely 9 hours normal time and 3 hours overtime.
52. The system of double manning comprised one driver worked a normal 9 hour work day and 3 hours overtime and the other driver simultaneously take a compulsory rest period of 12 hours, for which he/she is paid a subsistence allowance. Thereafter the drivers swop and their roles change; the 1st driver takes a compulsory rest period of 12 hours and is paid a subsistence allowance, the 2nd driver then worked a normal 9 hour work day and 3 hours overtime.
53. Road Freight Main Collective Agreement (clause 4.1) states that the employer determines the time and hours of work, the starting and ending time of employees in any working day.
54. The definition of "hours of work" one driver "in readiness" to work (on duty) whilst the other driver would be paid a subsistence allowance. This subsistence allowance is payable for a "period the employee does no work other than

remaining in charge of the vehicle and its load, if any, or guarding the vehicle and its load, if any”.

55. Immaterial of the fact that both drivers are compelled to remain on the vehicle for the entire period of 24 hours, the system of double manning is in compliance with the provision of the RFBC Main Collective Agreement and is confirmed by the two rulings by the National Secretary of MBCRFLI as only one driver is “in readiness” to work at any given period.
56. Schedule 2 of the Road Freight Main Collective Agreement defines “substantive issues” as “all issues involving cost and affecting the wage packets of employees”. Clause 57 (4) states “No trade union or employers’ organisation may call a strike or lockout or in any way seek to induce or compel negotiations on issues referred to in sub-clause 1 at any level other than the Council”.
57. The claim that the drivers should be paid for the entire period (24 hours) that they spend on the vehicle is clearly a substantive issue as this would influence the wage packets of the drivers and involve additional cost for the employers. As this is clearly not an operational issue and as such can only be negotiated at Council level.
58. In conclusion, I find that the system of double manning is compliant with the RFBC Main Collective Agreement and that the system of double manning is not an operational issue but rather a substantive issue that can only be negotiated at Council level.

RULING:

59. The system of double manning is compliant with the Road Freight Main Collective Agreement.
60. The system of double manning is a substantive issue and not an operational issue and as such can only be negotiated at Council level.

Signed and dated at on.....

NBCRFI Arbitrator: P. Heather