



OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

Arbitrability Issue

CAMILO COSTA, BERNARD
FERNANDES, AND MENINO
D'ACOSTA,

CLAIMANTS,

And

CELEBRITY CRUISES, INC.

RESPONDENT

APPEARANCES

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CAMILO COSTA, BERNARD FERNANDES,
AND MENINO D'ACOSTA

And

CELEBRITY CRUISES, INC.

RULING ON CELEBRITY CRUISES, INC'S. MOTION TO DISMISS

Celebrity Cruises, Inc. (Celebrity) has moved for the entry of an order or award dismissing Claimants' claims on the grounds that they are non-arbitral due to their failure to submit timely grievances.

I. INTRODUCTION

1. Nature of the Claims

The claimants are former employees of Celebrity who worked as Stateroom Attendants aboard Celebrity's cruise ships. Their duties involved cleaning passengers' staterooms. Claimants Costa and Fernandes submitted their demand for arbitration on October 21, 2009. Claimant D'Acosta submitted his demand on December 9, 2009. The demands seek to arbitrate claims brought by the claimants on their own behalf and on behalf of a putative class of stateroom attendants who worked aboard Celebrity's cruise ships from August 31, 2002 through May 27, 2005. The demands for arbitration, which are virtually identical, read in pertinent part as follows:

"This firm represents the above named seafarer. Demand is made for your client, Federazione Italianan Transporti, to resolve the issues explained hereunder and to, in the event that the issues are not resolved, proceed to arbitration pursuant to the Collective Bargaining Agreement ("CBA") Article 26, effective during the above named seafarers' employment and subject incidents.

The employment contract, which incorporated the CBA, required Celebrity to recommend its passengers that they pay gratuities to Claimants in accordance with the pay scale in the CBA. Cabin stewards are designated as Group C within the CBA. Under the agreement, the above-named claimants, as Cabin Stewards, were entitled to \$3.50 per passenger per day. The CBA also provided that each claimant had the right to receive, as wages, the full amount of the gratuity received from all the passengers for their service.

Despite these provisions and while the contracts and CBA were in full force, between August 31, 2002 and May 27, 2005, Celebrity: 1) unlawfully forced the above-named claimant to pay assistant stateroom attendants on the ships a share of their earned wages, at a rate of \$1.20 per passenger per day; 2) required claimant to also pay the Chief Housekeeper from their own earned wages, at a rate of \$0.50 per passenger per day (when passengers did not provide themselves such gratuities); and, 3) unlawfully directed its Hotel Manager to enforce that the claimants share their earned wages with the assistant stewards. All in all, Celebrity's actions constituted serious violations of Articles 5 and 33 of the CBA.

Claimants' base losses, therefore, amount to \$1.70 per passenger per day.

Additionally, pursuant to the Seaman's Wage Act, U.S.C. § 10313, Claimant is entitled to be paid "two days wages for each day payment is delayed." The wage losses suffered Claimant is identical to those suffered by Inacio Lobo, a similarly situated seafarer. Due to the Union and Celebrity's involvement with Mr. Lobo's case, including active participation in legal and arbitral proceedings since July 29, 2004, at all material times the Union, its agents and representatives (including yourself and Mr. DiFiore), have been intimately familiar with the claims of the above named

seafarer. In fact, these individuals have had notice of Claimants' losses for over a 5 year period, giving the Union and Celebrity, as parties to the Collective Bargaining Agreement, an exorbitant amount of time to investigate and process the aforementioned claims.

In accordance with the Collective Bargaining Agreement, upon notice of a dispute the representatives of the cruise line and the Union "shall promptly confer to resolve the grievance or dispute or refer the matter to arbitration."

Each Stateroom Attendant aboard Celebrity ships is paired with an Assistant Stateroom Attendant and together they clean the passenger staterooms to which they are assigned. In their demands for arbitration the Claimants allege that from August 31, 2002 through May 27, 2005, Celebrity required them to share with the Assistant Stateroom Attendants a portion of the gratuities that the passengers left in appreciation for their cleaning services provided by the Stateroom Attendants and Assistant Stateroom Attendants. The Claimants allege that this sharing of gratuities constituted a failure by Celebrity to pay Stateroom Attendants the full amount of wages to which they were entitled under the applicable collective bargaining agreements. The Claimants also allege that Celebrity also required them to pay the Chief Housekeeper fifty cents per passenger per day if a passenger did not leave a gratuity for the Chief Housekeeper. The Claimants allege that this too constitutes a failure by Celebrity to pay

Stateroom Attendants the full amount of wages to which they were entitled under the applicable collective bargaining agreements.

2. The Collective Bargaining Agreements Require the Timely Filing

The Claimants seek relief for conduct occurring from August 31, 2002 through May 27, 2005 that, according to their allegations, violated the Collective Bargaining Agreements governing their employment with Celebrity. Three Collective Bargaining Agreements covered that period.

Article 26 of each Collective Bargaining Agreement sets forth the grievance and arbitration process for disputes arising from or otherwise related to the Agreements. Under Article 26 of each Agreement the timely submission of a grievance is a condition precedent to arbitration. Thus, if a grievance is not timely submitted, by operation of the Collective Bargaining Agreement the "dispute" is withheld from and cannot proceed to arbitration.

Article 26 of each Agreement also establishes clear deadlines by which grievances must be submitted in order to be deemed timely. The Agreements that, in combination, applied during the period from August 31, 2002 through December 31, 2004 provide:

Unless extenuating circumstances exist justifying delay, no grievance shall be recognized if raised more than thirty (30) days after the seafarer has left the vessel."

The Agreement that applied during the period from January 1, 2005 through May 27, 2005, provides:

"Unless extenuating circumstances exist justifying delay, no grievance or dispute will be recognized if raised more than thirty (30) days after the seafarer has left the vessel at the end of a contract. Regardless of the circumstances, in order to be recognized, any dispute regarding a seafarer's wages must be delivered to the Master or to the Company in Miami, Florida no later than thirty days after the dispute arose.

3. Claimants Never Submitted Grievances

As Stateroom Attendants, Claimants would spend approximately seven consecutive months working on the ships then they would leave (or "sign-off") vessels for at least two consecutive months of vacation. According to the demands for arbitration, May 27, 2005 was the latest possible date upon which claimants alleged wage disputes could have arisen.

To the extent the claimants claims related to conduct occurring from August 31, 2002 thorough December 31, 2004, the Collective Bargaining Agreements in effect during that time required them to submit grievances no more than thirty days after they left the ship. Assuming for the sake of argument that any of the claimants began work exactly on December 31, 2004, they would have left the ship seven months later in July, 2005, and would then have thirty days to submit a grievance alleging that Celebrity, by requiring them to share gratuities with Assistant

Stateroom Attendants and to pay the Chief Housekeeper \$.50 per passenger, per day, failed to pay them the full amount of wages to which they were they entitled.

Under the Collective Bargaining Agreement in effect from January 1, 2005 through May 27, 2005, claimants were required to submit grievances no more than thirty days after their wage dispute arose. In light of the claimants admission that May 27, 2005, was the latest possible date upon which their wage dispute could have arisen, they had until June 26, 2005 (thirty days after May 27) to submit grievances alleging that Celebrity, by requiring them to share gratuities with Assistant State Room Attendants and to pay the Chief Housekeeper fifty cents per passenger, per day, failed to pay them the full amount of wages to which they were entitled under the Collective Bargaining Agreements.

The Claimants, however, never submitted grievances to Celebrity or to the Claimants' Union making such allegations or making any allegations relating to the payment of wages. Instead, in October and December, 2009, more than four years after May 27, 2005 (the latest possible date on which their wage dispute could have arisen) Claimants submitted demands for arbitration.

II. THE ISSUE

The issue to be resolved herein is whether the claimants' claims should be dismissed as non-arbitral on the grounds that they were not

filed within the time limit set out in the applicable Collective Bargaining Agreements.

III. DISCUSSION AND DECISION

As a beginning point in analyzing the timeliness issue it should be noted that it is axiomatic that adherence to the time limits contained in a Collective Bargaining Agreement for the filing of processing of grievances is a condition precedent to arbitration. As I noted in *Yokohama Tire Corp. and United Steelworkers Local 1023*, 117 LA 509 (2002); "Arbitrators and the courts have repeatedly recognized that timeliness is a jurisdictional issue based on the fact that the parties have agreed to withhold from an arbitrator any jurisdiction or authority to consider grievances that are not timely filed. Therefore, where the contract specifies time limitations for the filing of grievances, a grievance submitted outside those time limits is not arbitrable, absent waiver, estoppel or fraud." As explained by authors Elkouri and Elkouri in their authoritative treatise, *How Arbitration Works*, (BNA 6th Ed., 1997) p. 276:

"If the Agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided."

Similar reasoning has been expressed by other authorities:

"When a grievance has not been filed within the time limits set forth in the Collective Bargaining Agreement, the arbitrator generally will dismiss the claim as non-arbitrable unless the opposing party has waived this procedural defect. Since the parties

have limited the cases which they agree to arbitrate according to the terms of their agreement, the arbitrator has no authority to hear a claim presented too late because it has not properly entered the procedure and hence and has not reached the arbitration "step". Arbitrators have supported dismissal not only on the grounds that the arbitrator must receive authority to hear the grievant's claim from the Agreement, but also on the ground that the establishment of a time limit reflects the parties' recognition that grievance matters should be heard promptly and not allowed to fester for long periods permitting evidence to be lost and recollections to be dimmed."

Fairweather, *Practice and Procedure in Labor Arbitration*, (BNA 2nd ed. 1982) p. 101.

Notwithstanding the deference and respect which must be accorded the time limits contained in a Collective Bargaining Agreement, arbitrators are frequently reluctant to dismiss a grievance without reaching the merits of the dispute where the procedural shortcoming is not clearly proved; where it results from innocent inadvertence or excusable neglect; where the alleged violation is continuing in nature; where it is unclear when the dispute arose; where the employee was unaware of the conduct giving rise to the grievance; and, where the delay in submitting the grievance is minimal and was not prejudicial to the opposing party, either in terms of its ability to present its case or in the extent of damages that are suffered. None of these circumstances exist in the present case.

First of all, the Claimants' argument that the violations alleged in the demands for arbitration were continuing violations which could be grieved any time is without merit, both as a matter of law and of common sense. While there is no question that the violations complained of

occurred continuously during the period between August 31, 2002 through May 27, 2005, the Claimants' explicitly concede in their demand for arbitration that the alleged failure to pay the proper wages ended as of May 27, 2005. Thus, by their own admission the alleged violation of the CBA was not a continuing violation for which a grievance could be filed at any time without regard for the time limits set forth in the CBA.

In addition, the Claimants' reliance upon 46.U.S.C. Section 10313 (g) as a basis for the creation of a continuing violation is not only misplaced but disingenuous as well. That Section quantifies the monetary remedy available to a Seafarer in the event the payment of his/her wages is not made on, or before, the deadline established in Section 10313 (f). As Celebrity has aptly noted, the Claimants' contention that this provision converts a discrete failure to pay wages on a specific date into a continuing violation is akin to saying that the availability of pre-judgment interest, back pay and front pay measured from the date on which an employee was wrongfully terminated converts a discrete wrongful termination into a continuing violation. Moreover, far from suggesting the existence of a continuing violation for which there is no urgency to submit a grievance, the availability and nature of penalty wages under Section 10313 (g) makes strict compliance with the jurisdictional prerequisite of submitting a timely grievance especially crucial.

Second, the Claimants cannot legitimately contend that any delay in submitting grievances was *de minimus* in the sense that they missed the deadline by only a short period of time. In this instance, the Claimants' failed to submit a grievance at any time and instead submitted a demand for arbitration more than four years after the latest possible date on which their claims could have arisen.

Third, the Claimants' argument that their failure to submit the grievances in accordance with the time limits set out in the CBA should be excused or ignored because they were unaware that they were subject to the CBA's and were not provided copies of the CBA's is without a basis in fact. It is undisputed that in the employment contracts they signed the Claimants explicitly acknowledged that they were subject to the terms of CBA's and that they received copies of the Agreements. In particular, the employment agreements which each of the Claimants signed provides in pertinent part:

"I further understand and agree that the Collective Bargaining Agreement between the Company and the Union is incorporated into and made part of this employment agreement and that I and the Company are bound by its terms and conditions. . . I acknowledge having received copies of (1) the Collective Bargaining Agreement referred to above effective on the date of this employment agreement, and (2) the Employee Handbook."

Since the Claimant's acknowledged and signed employment agreements which expressly provided that they were bound by the terms of the CBA's and that they received copies of those agreements, it is

disingenuous for them to now attempt to disavow those acknowledgements. This is especially true in light of the fact that the employment agreement containing those acknowledgements are the same agreements that create the Claimants' entitlement to receive wages, which is the subject of their claims. Moreover, even if the Claimants failed to read their employment contracts, they are nonetheless binding and enforceable under Florida Law.

Fourth, the Claimants' contention that based on the actions that were taken by Celebrity in defending a lawsuit that was filed against it in a Florida District Court by Seafarer Inacio Lobo as a proposed class action on behalf of himself and others, including the Claimants herein, Celebrity has waived its right to assert timeliness as a defense under the grievance procedure is clearly without merit.

The evidence shows that Lobo, a former employee, filed a proposed class action lawsuit against Celebrity. Although Lobo was the only named Plaintiff in that action, he purported to bring claims on behalf of himself and other Stateroom Attendants as a class action. After the case was moved to Federal District Court, the Judge granted Celebrity's motion to dismiss Lobo's claim with prejudice based on a finding that he was required to arbitrate his claims. Lobo subsequently submitted his claims to arbitration and in an award dated September 11, 2008, an

arbitrator ruled that the CBA's did not permit an individual employee such as Lobo to bring a class action.

It is important to note that at no time were the Claimants named Plaintiff's in Lobo's lawsuit or arbitration, nor were they otherwise identified in either the lawsuit or the arbitration. Thus, any reliance they have placed on the existence of the Lobo lawsuit and arbitration as a basis for excusing them from filing a grievance as required by the CBA is clearly misplaced. Indeed, the Claimants' position that the filing of Lobo's lawsuit constitutes the submission of a grievance for unnamed and unidentified individuals subverts the purpose and policy underlying the jurisdictional prerequisite of the timely submission of grievances. As the Arbitrator explained in *Kansas Highway Patrol*, 1997 WL 910347 (Berger, Arb.):

"Time limitations play an important role in the grievance/arbitration process. Most directly, they serve to ensure that disputes are promptly identified and processed. By setting a time period within which grievances must be filed, the parties can be assured that labor disputes will not fester as unresolved problems until someone eventually decides to pursue the formal grievance/arbitration machinery. In addition, time limitations help to prevent the parties from dealing with stale disputes. These present the risk that participants and witnesses will no longer recollect the events constituting the dispute, and that evidence or witnesses key to the grievance will disappear before a resolution of the problem can be achieved. Without question, these are extremely important goals."

In further support of its argument that Celebrity has waived its right to assert timeliness as a defense, the Claimant's rely on the fact that at the time the Lobo lawsuit was moved from State Court to Federal Court in 2005, Celebrity did not seek to compel the use of the grievance

procedure and did not raise or assert any defenses concerning "untimely filing of grievances" and instead moved the court to compel arbitration. This line of reasoning must be rejected for several reasons. To begin with, Celebrity had no standing to invoke the grievance procedure at that time as that is a right that lies within the exclusive province of the Claimants or their representative. In addition, since no grievances whatsoever were ever filed, Celebrity had no ground, and certainly no obligation, to assert any defense concerning untimeliness. Furthermore, there is no support for the proposition that decisions made and conduct undertaken in one proceeding constitutes a waiver in connection on separate proceedings involving completely different plaintiffs. Therefore, there is no legal or factual basis for the Claimant's assertion that Celebrity has waived its timeliness defense.

Fifth, the Claimants have argued that the timeliness defense should be rejected on the grounds that Celebrity has not met its burden of proving that the delay interfered with its ability to present its case. This argument, like many of the others, is without merit because it has no basis in fact. By not submitting their claims via grievances on a timely basis as required by the CBA and by instead submitting claims for arbitration four years after the latest possible date on which their claims had arisen, the Claimants deprived Celebrity of the opportunity to investigate and research the claims and circumstances surrounding them

at the time the claims arose. For example, the Claimants' failure to submit timely grievances made it impossible for Celebrity to, among other things, contemporaneously interview the grievant's supervisors, co-workers and assistant stateroom attendants. In addition, it is obvious that the Claimants' failure to submit grievances has potentially serious financial implications because it deprives Celebrity of the opportunity to investigate and properly resolve claims, which is critically important here where grievants seek to recover penalty wages under 46 U.S.C. 10313 (g). Title 46 U.S.C. Section 10313 (f) establishes a deadline by which a Seafarer must be paid his/her wages and Section 10313 (g) quantifies the monetary remedy available to a Seafarer in the event the payment of his/her wages is not made on or before the deadline. Specifically, 10313 (g) provides that a Seafarer is entitled to recover as damages (or "penalty wages") two day's wages for each day that the payment is not made. Under the circumstances of this case the reasoning that was applied by the District Court in *Fanos v. Maersk Line, Ltd.*, 246 F. SUPP. 2d. 676, 683 (S.D. Tex. 2003) in dismissing a case is apropos:

"Given the double penalty mandated by the seamen's wage statement, this very long delay would cause extreme prejudice to Defendants if the case were allowed to go forward."

Under the clear and unambiguous language contained in the Collective Bargaining Agreements the Claimants were required to submit grievances no later than thirty (30) days after the date on which they

alleged they were not paid the full wages to which they were entitled. Celebrity bargained for that time limitation precisely for the reason that any wage issue could be resolved promptly and not be allowed to linger. The Claimants, however, did not timely submit their grievance, preferring instead to wait four years to say nothing all while allowing the "penalty wage meter" to keep running. This is precisely why parties insert into Collective Bargaining Agreements provisions requiring the timely submission of grievances, and why arbitrators are required to enforce those provisions.

Finally, the Claimants assert that the timeliness defense should be rejected on the grounds that Celebrity has not proven that it was prejudiced as a result of Claimant's failure to submit grievances. To support that argument it relies in part on my decision in *Air Force Logistics Command* 85 LA 1168 (BNA, 1985) (Sergent, Arb.) where I reasoned that, ". . . [E]ven assuming that the Union has technically violated the Agreement, the Employer has failed to show that it has been harmed in either its ability to present its case or in the damages it has suffered."

What the Claimants have failed to recognize is that *Air Force Logistics* is inapposite because that award involved compliance with the time limits for selecting an arbitrator, not the time limits for complying with the jurisdictional prerequisite for submitting grievances. This distinction, which the Claimants have overlooked or ignored, is crucial because in the

context of compliance with the jurisdictional prerequisite of submitting grievances, the principles enunciated in my decision in *Triangle Construction & Maintenance, Inc.*, 120 LA 559 (BNA, 2004) (Sergent, Arb.) must be applied:

"While there is no evidence that the Employer suffered any significant prejudice by the late filing and processing of the grievance, it is nonetheless entitled to rely upon the express terms of the Collective Bargaining Agreement and *is not required to show that it suffered any prejudice in order to insist upon strict adherence to the time limitations contained in the Agreement.* To impose such a requirement would exceed the Arbitrator's authority because it would add an additional term to the Agreement, to which the parties did not agree, and it would render meaningless the terms that the parties have agreed to. Moreover, if such a requirement were imposed, the Union could then file and process grievances anytime after the expiration of the agreed upon time limits and simply cry "no harm no foul". (Emphasis added)

In sum and in short, the applicable provisions of the CBA's require the timely filing of grievances as a condition precedent to arbitration. Those provisions, which are jurisdictional, and which cannot be ignored or rewritten by the Claimants or an Arbitrator, clearly and unambiguously mandate that the Claimants submit their grievances within thirty days after the alleged contract violation occurred. Contrary to that requirement, it is undisputed that the Claimants never submitted any grievances, much less timely grievances, to Celebrity and never even raised the issue concerning their wages until four years had elapsed from the last day they could have submitted timely grievances. Accordingly,

the Claimants' claims must be dismissed because they are untimely and non-arbitral.

AWARD

In accordance with the foregoing opinion and for the reasons set forth therein, the Claimants' claims are dismissed as untimely and non-arbitral.



Stanley H. Sergent, Arbitrator

Sarasota, Florida
August 28, 2010

STANLEY H. SERGENT
ATTORNEY • ARBITRATOR