

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration of a
Dispute Between:

AAA Case No. 65 300 00141 12
Grievance No. 040312-2

IBEW LOCAL UNION 110
The Union

Subject: Compensation for Out-of-
Town Assignments - Travel Time

and

Heard: December 19, 2012
Briefs Received: January 18, 2013
Award Issued: February 19, 2013

ADT SECURITY SERVICES, INC.
The Employer

Sherwood Malamud, Arbitrator

Appearances:

Cummins & Cummins, LLP, Attorneys at Law, by Brendan D. Cummins, Esq., 1245 International Centre, 920 Second Avenue South, Minneapolis, Minnesota 55402, appearing on behalf of the Union.

Ogletree Deakins Nash Smoak & Stewart, PC, Attorneys at Law, by Martin C. Brook, Esq., 34977 Woodward Avenue, Suite 300, Birmingham, Michigan 48009, appearing on behalf of the Employer.

ARBITRATION AWARD

International Brotherhood of Electrical Workers Local Union 110, hereinafter the Union, and ADT Security Services, Inc., hereinafter the Company or the Employer, are parties to a Collective Bargaining Agreement that provides for the final and binding arbitration of disputes. The parties selected and the American Arbitration Association appointed Sherwood Malamud to determine this grievance concerning compensation for travel/commuting to and from hotels on out-of-town assignments. Hearing in the matter was held on December 19, 2012, at the offices of the American Arbitration Association in the US Bank Plaza, Suite 700, 200 South Sixth Street, Minneapolis, Minnesota 55402. A verbatim transcript of the hearing was not made. The parties elected to limit written arguments to the filing of original briefs. The Arbitrator received the briefs directly from the parties on January 18 and through the auspices of the American Arbitration Association on January 22, 2013, at which time the record in the matter was closed. The Arbitrator issues this Award based on his recollection of the testimony and evidence presented at the December 19, 2012 hearing and on the basis of the written arguments submitted by the parties.

ISSUE

The parties were unable to stipulate to the formulation of an issue to be determined by the Arbitrator. The Union suggests the Arbitrator address the following issue:

Did the Employer violate the Collective Bargaining Agreement by misapplying a one-hour pay deduction intended for home commute to hotel commute pursuant to Article 15, Section 3 of the contract? And, if so, what is the appropriate remedy?

In its brief, the Employer sets out the issue as follows:

Does the Collective Bargaining Agreement (CBA) require pay for non-working hotel to job site commuting times in a Company vehicle while on an out-of-town assignment when federal law defines the time as unpaid and the CBA does not contain a specific provision requiring that the Company pay wages for this non-working time?

Both the Union and the Employer's formulations of the issue characterize the nature of the activity performed by employees in a manner consistent with their respective arguments. The Arbitrator sets out the issue in neutral terms and addresses this issue in the Award that follows:

Did the Employer's action violate the Collective Bargaining Agreement? If so, what is the appropriate remedy?

PERTINENT LANGUAGE EXCERPTED FROM THE DECEMBER 6, 2011- DECEMBER 5, 2014 COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1

MUTUAL RECOGNITION OF RIGHTS

. . .

SECTION 2: The operations of the Employer's business and the direction of working force including, but not limited to, the making of and enforcement of reasonable

rules and regulations relating to the operation of the Employer's business, the establishment of reporting time, the right to hire, transfer, lay off, promote, demote, discharge for cause, assign or discipline employees, to relieve employees from duties because of lack of work or other legitimate reasons, to plan, direct and control operations, to determine the amount and quality of work needed, to introduce new or improved methods, to change existing practices, and to transfer employees from one location or classification to another is vested exclusively in the Employer, subject, however, to the provisions of this Agreement.

...

ARTICLE 5
ARBITRATION

SECTION 1: In the event that an agreement cannot be reached between the Union and the Employer with respect to a grievance involving and limited to the interpretation and application of any specific provision of this Agreement, it may be submitted, on the request of either party, to arbitration, pursuant to the Labor Arbitration Rules of the American Arbitration Association, provided such request is made within sixty (60) days after final decision has been rendered. The decision of the Arbitrator shall be binding on both parties for a period to be named in the arbitration decision, but in no event to antedate the period during which the Agreement is effective. The Arbitrator shall not have the authority to alter or modify any of the express provisions of the Agreement. The expenses, including fees and other necessary expenses of the Arbitrator, shall be shared equally by the Union and the Employer.

...

ARTICLE 15

PAY FOR USE OF EMPLOYEE-OWNED VEHICLES, TRAVELING TIME AND EXPENSES

...

SECTION 3: Employees required to take home a company vehicle are responsible for up to one hour of unpaid commuting time from their home to their first job in the morning and up to one hour of unpaid commuting time from their last job to their home each day.

BACKGROUND

The Employer, ADT, Inc., installs security systems in residences and small businesses. In September 2012, the Employer split into Tyco and ADT. Tyco took the commercial installation work; ADT the residence and small business installations. Previously, there were 52 installers in this bargaining unit. After the split, there remained 25 Installers and Field Technicians at ADT. The parties stipulated that the division of the Company into two entities has no bearing on the resolution of this grievance.

The Union ratified the current December 2011 through December 2014 Agreement in February 2012. In March of 2012, Area Manager Lohman instructed Union Steward Wirkkala when Installers/Field Technicians were on out-of-town assignments, they should deduct the first and last hour of travel, commuting time, when staying over night at hotels. Lohman explained the reason for the deduction to Wirkkala. Hotels should be considered an employee's home, when calculating compensable time. Travel up to the first hour and up to the last hour should be treated in the same manner as commuting time from an employee's residence to the first job site and from the last job site of the day when, an employee is assigned installation work in and around Shoreview, Minnesota, the Company's offices in the Minneapolis area.

The Union Steward told Lohman that a hotel is not an employee's home. He argued that the Company should continue to pay for all travel time to and from a hotel, when employees were on out-of-town assignments.

Union Exhibit 7 lists the travel rotation schedule of bargaining unit employees from March through September 2012. Current Union Steward Oelrich testified that, on the first occasion he was assigned to work in North Dakota,

which appears on Union Exhibit 7 as March 26-31, 2012, he stayed at a hotel in Fargo. Some of the work assignments were in the Bismarck area approximately 3-3/4 hours from Fargo. Under the 2011-2014 Agreement, Field Technicians/Installers were paid an hourly rate rather than a piece rate. Under the example of the March 26-31 trip, the Company paid Oelrich for travel from his home in his assigned Company vehicle to the hotel in Fargo less one hour of "commuting time." The deduction of commuting time to and from a unit employee's residence or the Company's office in the Shoreview Minnesota area is not in dispute.

With regard to the March 26-31 trip, Oelrich deducted the first hour of travel on March 26 from his home to the hotel/first job site in Fargo. For March 27, he claimed all time for travel to and from the hotel. The Employer maintains that he should have been paid for travel time less one hour for commuting time both to the job site and from the job site to the hotel. Similarly, on March 28 and 29, Oelrich charged for all drive time from the hotel to a job site. The Employer maintains that one hour of the travel from the hotel to the job site and one hour of the travel from the job site back to the hotel should serve as unpaid commuting time and not compensable time. Both the Employer and the Union agree that the return trip on March 30 from the hotel/job site back to the Shoreview, Minnesota area, Oelrich's home, should reflect the drive time less one hour of commuting time.

After Lohman informed Wirkkala that employees should deduct one hour of commuting time for all travel to and from a hotel when employees were on out-of-town assignments, the Union Steward timely filed a grievance on April 4, 2012. The parties processed the grievance through the grievance procedure. It is properly before the Arbitrator.

POSITIONS OF THE PARTIES

The Union Argument

The Union urges the Arbitrator to follow the plain language rules for the

interpretation of a collective bargaining agreement. The Union focuses on the word “home” as used in Article 15, Section 3. The Union asserts that a hotel room for a two to four day stay is not an employee’s home. A home, particularly one of record as referenced in Article 15, Section 2 of the Agreement, is the permanent residence of an employee. A hotel is a temporary place to stay when on assignment away from the Company’s main office in Shoreview MN. The August 10, 2011 policies of Tyco (before the split) references the phrase “homes of record” and denominates them as “Home.” The current ADT policies continue to reference “home”(s) without any mention of hotel.

The Union states that historically the Employer paid for all travel time to and from a hotel and a job site, when employees were on out-of-town assignments. This is the practice in effect, the Union argues.

Although the language at issue has appeared in the predecessor agreement, the 2008-2011 contract, and continues without change in the 2011-2014 Agreement, nonetheless, the language that provides for the exclusion of the first hour of commuting time specifically refers to commuting time from home to job site. It does not reference hotel to job site.

In March 2012, the Employer instructed some employees to start deducting the first hour of drive time between a hotel and job site. Then on April 4, 2012 the Union filed the within grievance. The Employer has been inconsistent in that some employees were instructed to deduct the first hour of time spent in travel to and from a hotel to job site, whereas others have not. Those who were not informed of the policy continue to include on their time cards all time associated with travel to and from a hotel to a job site.

The Union argues that to interpret the term “home” as used in Article 15, Section 3 to include a hotel would lead to an absurdity. The Union argues that the definition of the term should be interpreted in a consistent manner throughout the Agreement in each place in which that term is used. Article 15, Section 2, the Agreement provides as follows:

When the employer deems it necessary to board men near a job, such men shall be paid an allowance of forty-five dollars (\$45.00) per day, plus reasonable cost of room per employee (receipts required) when employee is required to be **away from home overnight**. [Bold In the original of Union's brief at page 11.]

If hotel means home, then the contract provision, at Article 15, Section 2, is a tautology. If "home" does not include hotel in Article 15, Section 2; it should not include the term in section 3 of Article 15.

Furthermore, the Union notes that employees are paid for driving time. The Employer pays for all other time other than the first and last hour of travel between a hotel and job site. The Company treats all other driving time other than the first hour as compensable time.

The Union argues that both bargaining history and past practice support its position. There was no discussion in bargaining either for the 2008-11 or 2011-14 Agreements concerning the deduction of the first and last hour of commuting time between hotel and job site, when employees were on out-of-town assignments.

With regard to the Employer's argument concerning the definition of compensable time under the Fair Labor Standards Act, the Union reminds the Arbitrator that neither the Employer nor the Union has asked the Arbitrator to interpret the FLSA or its regulations in the application and interpretation of the Collective Bargaining Agreement.

The Union concludes that the plain meaning of the contract language supports its position that commuting time to and from a hotel to job site should be compensable time. A hotel is not a home. The Union asks the Arbitrator to sustain the grievance and direct that any employees who suffered a loss as a result of the deduction of the first hour of commuting time between a hotel and the job site after the filing of the grievance on April 4, 2012 be reimbursed for the loss.

The Employer Argument

The Employer argues for employees to receive compensation they must be working. In order to claim pay for time not engaged in productive work, the Collective Bargaining Agreement must establish that employees be paid for time the employee is not engaged in productive work. The Agreement makes no provision for paying for the first hour of commuting time to and from a hotel, when employees are on out-of-town assignments. The time spent in travel is not compensable time. The employee is not under the Employer's control. Should the Employer assert that control during the first or last hour of travel between hotel and job site compensable time begins. For example, if the Employer contacts the employee with instructions concerning the employee's assignment during the first or last hour of a commute, under the October 1, 2012 ADT policy established after the split between ADT and Tyco and in evidence as Company Exhibit 1, the employee is instructed to go on the clock.

The Employer views the Union's claim, here, as a claim for pay for non-working time without any provision in the Agreement as a basis for such a claim. The Employer does not pay for lunch time. Accordingly, the Employer does not compensate employees while they are on their lunch break. The Employer reminds the Arbitrator that it is his job to interpret the Collective Bargaining Agreement, as written. Under Article 5, Section 1 of the Agreement the Arbitrator has no authority to alter the agreed to terms of the Agreement.

The Employer emphasizes that the Union argument is premised on a carve out provision. The Union's position is based on what the Agreement does not say rather than what it does say. However, for an employee to be paid, the Agreement must set forth that the employee shall be compensated for the time in question. The Union takes the non-reference to hotel as a basis for paying for unpaid commuting time between a hotel and a job site.

The Employer maintains that the Union failed to meet its burden of proof to establish a past practice. It notes that the split of ADT and Tyco occurred in 2012. The testimony with regard to what occurred prior to the split is at best

vague. The record reflects that out-of-town assignments only increased in recent times. The Union has not established that a practice exists.

Furthermore, the testimony is clear that the Employer had no knowledge as to how employees were computing their time on their time sheets. The Employer did not acquiesce to paying for commuting time. The Employer had no knowledge of it. The Employer maintains that the Union failed to meet its burden of proof in establishing the existence of the practice.

The Employer acknowledges that neither the Union nor it asked the Arbitrator to interpret the Fair Labor Standards Act and the regulations promulgated under that Act. However, the Employer notes that commuting time, be it from a home or a hotel, is denominated under the Fair Labor Standards Act as non-compensable time. There is no difference between commuting from home to the first and last job site and from the first and last job site to and from a hotel.

The Employer does not pay employees for commuting to and from home to company offices; similarly, the Employer should not pay for commuting time to and from a hotel, when an employee is on an out-of-town assignment. There is no dispute that the Employer does not pay for commuting time from home to the company office or from home to the first job site, when the employee at the end of the day returns to his home. There is no basis in the Agreement, the Employer argues, for treating hotel commuting any differently.

For all these reasons, the Employer concludes that the Arbitrator should deny the grievance in its entirety. The Employer adds that there has been no direct testimony establishing that any employee lost any pay as a result of the Employer's action. Accordingly, even if the grievance is sustained, the Arbitrator should not issue a back pay remedy.

DISCUSSION

The Union bears the burden of proof. It must establish its claim that the Employer violated the Agreement by a preponderance of the evidence. The factual

basis for this award was not the subject of conflicting testimony.

Tyco ADT divided into two entities in September 2012. Prior to the split, the parties negotiated a Collective Bargaining Agreement that carried over the language of Article 15, Section 3 from 2008 to the current 2011 Agreement. At the time the grievance was filed in April 2012, the August 2011 was the policy in effect. It provides as follows:

It is common practice that employees are normally not paid for their commute time or related expenses incurred for traveling from their homes of record (hereafter referred to as “home”) to their branch, district SSO or other assigned office location (“company location”).

The Field Technician drive time policy the Company adopted October 1, 2012, provides under the subheading Scope, as follows:

Team members normally are not paid for their commute time or related expenses incurred for traveling from their homes to their branch location. Their paid work day begins at the time they report to the branch and begin performing their work for the company. This would include any work performed at the branch, such as restocking vehicle and/or participating in safety or other work related meetings. All travel time from the branch to the team member’s first job site is also compensated work time. All further work time is compensated until the technician returns the vehicle to the branch and completes his or her assigned work. Like the team member’s commute time to the branch before the work shift, the team member’s commute time from the branch to his or her home is unpaid time.

With regard to Field Technicians who use assigned Company vehicles to drive directly to his or her home from their last job site and then, use their assigned vehicles the next work day to drive directly to their first job site from their home, the Company has adopted the following guidelines:

1. Because Field Technicians utilizing their Company vehicles under this policy are not under the control of the Company and are not engaged in any work-related activities, their commute

time is unpaid. However to insure our team members' continued safety, we permit use of cell phones only with hands-free device and as permitted by local/state law.

. . .

2. Except as otherwise provided by an applicable collective bargaining agreement, the Company will provide each SSO/Branch the maximum unpaid time for each direction of the commute ("Commute Time"). In no event will this maximum amount exceed one hour. Commute time reflects the amount of time required to travel a reasonable distance between home and any assigned job site and, therefore, is unpaid. Any time over the commute time will be compensated as part of the Field Technician's work day at the full amount of his/her regular rate of pay. If the first job site of the work day is the SSO/Branch, Field Technicians will not be paid for drive time from their home to the branch. Similarly, if the last job site of the work day is the SSO/Branch, Field Technicians will not be paid for drive time from the branch to their home. To receive payment for drive time as specified above, the Field Technician must record the drive time in excess of their commute time on their time card. Technicians will be asked to explain drive time if it significantly exceeds the drive time shown on www.mapquest.com or available via telematics reporting.

The October 1, 2012 policy was drafted subsequent to the ratification of the Collective Bargaining Agreement in February 2012 and the filing of this grievance on April 4, 2012. The policies are general in nature and apply not only to the Minnesota area unit, but to other ADT offices located in the United States.

The Arbitrator addresses the Employer's argument that the Collective Bargaining Agreement makes no provision to pay for the first hour of time an employee spends traveling from the hotel to job site. The Company policy may be read to identify that the first hour of travel between hotel and job site is commute time. The Employer argues there is no difference between that first hour of travel between the hotel and a job site and the first hour of travel between an employee's home and a job site.

The Employer's argument ignores the definition of commute time that

appears in its policy. The October 1, 2012 policy provides that commute time reflects “the amount of time required to travel a reasonable distance between home and any assigned job site.” The policy goes on to refer to travel between an employee’s home and the Company offices. Such travel is consistent with the common understanding of a commute from one’s home to an employer’s office location.

It is therefore appropriate to view the reference in the Collective Bargaining Agreement in the context in which the Company and the Union interpret the term “home.” The question before the Arbitrator is whether the term “home” should be given its common meaning. In Dictionary.com, a home is defined as, “a place of residence or refuge. When it refers to a building, it is usually a place in which an individual or a family can live and store personal property. It is generally a place to provide safety and is used as a center from which people or animals base their daily activities.”

The Employer argues that the term “home” should be used as a term of art in the context of the Collective Bargaining Agreement. It denotes where an employee begins his work day activities. The first hour represents the same reasonable distance traveled, when the employee travels from his home to a job site. Similarly, that same amount of time and travel prevails when an employee travels from a hotel to a job site.

There is nothing in the Company policy, either the August 2011 or the October 2012 policy, that suggests that the term “home” should be interpreted as a term of art rather than conforming to the dictionary definition of “home.” Although the specific language at issue has been in effect now in its second Collective Bargaining Agreement, there is no bargaining history to suggest that the parties identify the term “home” as a term of art. There is nothing to suggest that they intended any meaning other than the dictionary meaning of the term “home,” when they employed that term both in the 2008-2011 and 2011-2014 agreements. The Arbitrator concludes, therefore, that the language of Article 15, Section 3 references the dictionary use of the term “home.” The common definition of the term “home” does not include in its scope a “hotel” stay.

Furthermore, the Arbitrator finds the Union's argument concerning the use of "home" in Article 15, Section 2 compelling. If the Arbitrator were to include hotel within the penumbra of the definition of the term "home," the contractual provision would read as follows:

When the employer deems it necessary to board men near a job, such men shall be paid an allowance at the rate of forty-five dollars (\$45.00) a day, plus reasonable cost of room per employee (receipts required) when employees required to be away from home [if one substitutes hotel for home] overnight.

When home and hotel become synonymous, the entire provision of Section 2 is transformed into a nonsensical provision. The Arbitrator must not interpret contractual language to render it nonsensical. Furthermore, the Arbitrator cannot provide one meaning to a term in Section 2 of one article, Article 15, and provide another interpretation to that term in the very next section of the article, Section 3 of Article 15.

Nonetheless, the Employer argues that the Collective Bargaining Agreement does not direct that employees should be paid during that first hour of travel from the hotel to the job site. Article 15, Section 3 employs two terms: commuting time and home in defining when the first hour should not be paid. From the above analysis, commute time, as used in the Company's policy drafted subsequent to the ratification of the Agreement currently in effect, refers to time of travel from home to the Company location or offices.

The Employer uses the term "home" in its policies as that term is commonly understood in the phrase "home of record", the place on the Company's books that denotes where the employee resides. A hotel room is not on the Company's books where the employee resides. A hotel may be in one location, when the employee is assigned to North Dakota and at another location, when the employee is assigned to Wisconsin.

When an employee is not commuting from home to a job site, i.e., traveling a reasonable distance between home and any assigned job site, the Company

policy clearly indicates that the employee is engaged in travel time, compensable time. Since commute time is defined by Company policy as travel of a reasonable distance not to exceed an hour between home and a job site or the Company's office, what is not commute time is compensable travel time.

The language of the Agreement is clear. Travel between hotel and job site is not commute time. It is compensable time. In the example presented at the arbitration hearing, travel from Fargo, North Dakota, the location of the hotel, to the job site in and around Bismarck, North Dakota, some 3-3/4 hours distance from the hotel, there is no provision of the Agreement or in the Company's policies that identify any period of that time as commute time.

That contrasts with the time associated with travel in a Company vehicle from the employee's home to the initial destination–job site. In the Fargo, North Dakota example, the first hour of that trip that originates at the employee's place of residence should not be included as compensable travel time nor should the last hour of the trip from Fargo to the employee's "home" in Minnesota, upon the employee's return "home" several days later upon completion of the "out-of-town" assignment.

Remedy

For all of the above reasons, the Arbitrator concludes that the Employer's insistence that employees deduct up to the first hour of travel from a hotel to a job site and up to the last hour of travel from the job site back to the hotel violates the Agreement. Accordingly, any employees not paid for up to the first hour and/or the last hour of travel between hotel and job site from April 4 to the implementation of this award and who were instructed to deduct pay for up to that first hour or for up to the last hour shall be compensated for that hour of travel between a hotel to the job site and from the job site to the hotel. The Arbitrator directs that the Employer search its records to ascertain if any employees were required to deduct up to the first hour of travel from the hotel to a job site and from up to one hour from the job site back to the hotel from the date of the filing of the grievance on April 4, 2012 to the date that the Employer

complies with the terms of this Award.

Based on the foregoing discussion, the Arbitrator issues the following:

AWARD

The grievance is sustained. The Employer violates the Agreement when it directs employees on an out-of-town assignment to deduct up to the first hour of travel from the hotel to a job site and up to the last hour of travel from the job site to the hotel. The Employer shall implement the remedy described above in the Discussion-Remedy section of the Award.

The Arbitrator retains jurisdiction for the limited purpose of assisting the parties implement the remedy set forth in this Award.

Dated at Madison, Wisconsin, this 19th day of February, 2013.

A handwritten signature in cursive script, appearing to read "Sherwood Malamud".

Sherwood Malamud, Arbitrator