

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 24 2017

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

HOLSUM BAKERY INCORPORATED,

No. 16-16422

Petitioner-Appellee,

D.C. No. 2:15-CV-00925-SPL

v.

MEMORANDUM*

BAKERY, CONFECTIONARY,
TOBACCO WORKERS AND GRAIN
MILLERS, LOCAL 232,

Respondent-Appellant.

Appeal from the United States District Court
for the District of Arizona
Steven P. Logan, District Judge, Presiding

Submitted October 20, 2017**
San Francisco, California

Before: IKUTA and HURWITZ, Circuit Judges, and GWIN,*** District
Judge.

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision
without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable James S. Gwin, United States District Judge for the
Northern District of Ohio, sitting by designation.

Holsum Bakery Incorporated (“Holsum”) operates a wholesale bakery in Phoenix. Local No. 232 of the Bakery, Confectionary, Tobacco Workers and Grain Millers Union (“the Union”) entered into a collective bargaining agreement (“CBA”) with Holsum in 2009 on behalf of some of Holsum’s workers. In 2012, the Union filed a grievance to challenge Holsum’s termination of its historical practice of paying “lap time” (short for “elapsed time”) at one-and-one-half times an employee’s hourly rate for shifts worked on scheduled days off. Holsum denied the grievance and the Union initiated arbitration. The arbitrator issued an award in favor of the Union.

Holsum then filed a complaint in district court under § 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185(a), and moved to vacate the arbitrator’s award. The Union cross-moved to confirm the award. The district court granted Holsum’s motion. We have jurisdiction over the Union’s appeal under 28 U.S.C. § 1291 and reverse and remand with instructions to confirm the award.

1. The district court erred in concluding that the arbitrator’s award did not “draw its essence” from the CBA. *See Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1205 n.6 (9th Cir. 1989) (en banc). An arbitration award must be upheld “as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.” *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

This is true even if the reviewing court is “convinced that the arbitrator misread the contract or erred in interpreting it.” *Va. Mason Hosp. v. Wash. State Nurses Ass’n*, 511 F.3d 908, 913-14 (9th Cir. 2007).

The arbitrator in this case concluded that the use of the word “all” in § 4.C of the CBA “means that every hour that is scheduled or required to be worked by an employee that is not voluntary is to be compensated.” She also concluded that the specific language in § 4.C controlled over general language elsewhere in the CBA governing shift scheduling. And, the arbitrator found that, contrary to Holsum’s assertions, employees did have regularly scheduled days off. Finally, she concluded that Holsum violated the CBA when it refused to pay “lap time” to “all employees who were scheduled or required to work on their scheduled day off.” Because the arbitrator interpreted and applied the CBA in reaching these conclusions, the award, even if incorrect, drew its essence from the agreement.

2. The district court also erred in concluding that the arbitrator’s award was “so inconsistent and full of mistakes [that] any practical application of the Award is impossible” and therefore that “a final and definite award was not made.” An award is enforceable “even in the face of erroneous misinterpretations of law” unless it “exhibits a manifest disregard of law.” *G.C. & K.B. Invs., Inc. v. Wilson*, 326 F.3d 1096, 1105 (9th Cir. 2003) (citation omitted). At worst, the arbitrator in this case may have misinterpreted the CBA, but she did not disregard it, and the

plausibility of her interpretation is beyond judicial scrutiny. *Sw. Reg'l Council of Carpenters v. Drywall Dynamics, Inc.*, 823 F.3d 524, 531-32 (9th Cir. 2016). Nor is implementation of the award impossible; the award simply requires Holsum to award “lap time” pay to employees working on their regularly scheduled days off.

3. The Union requests attorney’s fees, citing Holsum’s “unjustified refusal to abide by an arbitrator’s award.” *See Int’l Union of Petroleum & Indus. Workers v. W. Indus. Maint., Inc.*, 707 F.2d 425, 428 (9th Cir. 1983). But, Holsum did not refuse to abide by the arbitrator’s award. Rather, it sought judicial review of the award, as was its right. Because Holsum’s arguments were not “frivolous,” *see United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382-83 (9th Cir. 1984), we deny the fee request.

REVERSED and REMANDED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

The Clerk is requested to tax the following costs against:

| Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1 | REQUESTED <i>(Each Column Must Be Completed)</i> | | | | ALLOWED <i>(To Be Completed by the Clerk)</i> | | | | |
|--|---|----------------------|-------------------------|-------------------------|--|----------------------|-------------------------|-------------------------|-------------------------|
| | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST | No. of Docs. | Pages per Doc. | Cost per Page* | TOTAL COST | |
| Excerpt of Record | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Opening Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Answering Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Reply Brief | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| Other** | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | <input type="text"/> | <input type="text"/> | \$ <input type="text"/> | \$ <input type="text"/> | |
| TOTAL: | | | | \$ <input type="text"/> | TOTAL: | | | | \$ <input type="text"/> |

* *Costs per page:* May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other:* Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk