BEFORE TRIPARTITE ARBITRATION TRIBUNAL

CHRISTOPHER DAVID RUIZ CAMERON, CHAIR

In the Matter of Arbitration Between SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, Employer, - and - AMALGAMTED TRANSIT UNION LOCAL 265, Union. Regarding Holiday Pay for July 18 Memorial.	)	OPINION AND AWARD BY TRIPARTITE TRIBUNAL VTA File No. 2021-ATU-0043

Tripartite Arbitration Tribunal
Christopher David Ruiz Cameron
Neutral Chair

Union Representative	*Employer Representative*
Zac Bodle	Sommer Gonzalez

Advocates

For the Union	*For the Employer*
Benjamin K. Lunch Neyhart Anderson Flynn & Grosboll	Paul D. Ahn, Assistant General Counsel* Santa Clara Valley Transportation Authority

Hearing Date+
June 1, 2023
In Person

Opinion and Award Issued
August 9, 2023
Los Angeles, California

* With whom General Counsel Evelynn Tran was on the brief.

+ Reported by Kate Charpentier, CSR No. 13319.

O P I N I O N

INTRODUCTION

This contract grievance ("Grievance") is brought by Local 265 of the Amalgamated Transit Union ("Union") against Santa Clara Valley Transportation Authority ("Employer" or "VTA") (collectively "Parties"). The Grievance challenges the manner in which the Employer compensated employees who volunteered to work during a memorial service held on July 18, 2021 ("July 18 Memorial") for VTA employees who were killed in a tragic mass shooting that occurred in the Guadalupe Yard on May 26, 2021 (JX4). It came before me in my capacity as the neutral chair of a tripartite arbitration tribunal, which included Union Representative Zac Bodle and Employer Representative Sommer Gonzalez, pursuant to a mutual appointment by the Parties under the terms of a collective bargaining agreement ("CBA") effective September 9, 2019 through September 8, 2022 (JX 1).

On June 1, 2023, a hearing was held in the auditorium of the Employer's offices at 3331 North First Street in San Jose. The Parties appeared in person and offered witness testimony and documents that were marked and admitted into evidence as discussed below. They were well-represented by the following advocates: the Union, by Benjamin K. Lunch of Neyhart Anderson Flynn & Grosboll in San Francisco; and the Employer, by Paul D. Ahn, Senior Assistant Counsel, with whom Evelynn Trann, General Counsel, was on the brief, both of the Employer's Office of the General Counsel in San Jose.

On or about July 17, 2023, the Parties submitted closing arguments by filing written briefs directly with me. Afterward, the briefs were cross-served by me. No rebuttal or reply briefs were filed. These arrangements were made by stipulation.

The closing arguments, together with any and all admitted exhibits and other documents referenced therein and submitted therewith, are hereby made part of the record. The record having been completed, I hereby declare it closed. The Grievance is now ripe for resolution.

JURISDICTION

The Parties stipulated that the Grievance is timely and properly before me and that I have the jurisdiction to decide it and the Issues Presented, as well as the remedy, if there is a remedy.

ISSUES PRESENTED

The Parties stipulated the Issues Presented to be as follows:

1. Did the Employer violate the CBA when it paid the holiday rate of double time-and-a half[1] (2½ time) for the day off work on July 18, 2021?

2. If so what should the remedy be?

STANDARD APPLIED

The Parties stipulated that the Union shoulders the burden of proof, including the burden of proving the material facts by a preponderance of the evidence.

EVIDENCE SUBMITTED

The Parties called a total of two (2) witnesses: one (1) witness called by the Union and one (1) witness called by the Employer.

The Union called the following witness: Rajvinder (Raj) Singh, coach operator, Union recording/financial secretary, and Union shop steward. The Employer called the following witness: Lisa Vickery, operations manager.[2] At all relevant times, each of these witnesses was

[1] For the sake of clarity and consistency, I amended Issue Presented No. 1 to read "the holiday rate of double time and-a-half (2½ time)" instead of "two-and-a-half (2½) time," which is how the original stipulation read. In my view, there is no substantive difference between the two descriptions.

[2] Ms. Vickery has since been promoted to deputy director of transit operations on the bus side.

employed by the Employer in the capacity indicated; in addition, Mr. Singh served the Union in the capacities indicated.

The Parties offered a total of twelve (12) exhibits: eleven (11) joint exhibits offered by the Parties; zero (0) exhibits offered by the Union; and one (1) exhibit offered by the Employer. Each of these exhibits was received into evidence.

RELEVANT CBA PROVISIONS

The relevant provisions governing compensation are found in two separate Parts of the CBA: Part B, which applies to operators, and Part C, which applies to maintenance employees.

Regarding operators, Part B, Section 4 governs overtime and Part B, Section 5 governs work on days off. Specifically Part B, Section 4.1 of the CBA provides, "Time and one-half shall be paid for all work in excess of eight hours per day." Part B, Section 4.2 of the CBA adds: "An Operator shall be paid for actual time worked . . . in excess of [the] regular scheduled run or shift." And Part B, Section 5 of the CBA provides, "An Operator called to work on their day off shall receive . . . pay for actual time worked . . . in accordance with Section 4 of this Part B" – which is time and one-half (JX 1, p. 76).

Similarly, regarding maintenance employees, Part C, Section 2 governs overtime. Specifically, Part C, Section 2.1 provides, "Overtime shall be paid at the rate of one and one-half (1½) times the employee's hourly rate" (JX 1, p. 108).

Although holiday pay at the rate of double time and-a-half is authorized for work on holidays by Part A, Section 10 of the CBA, neither Sunday in general nor July 18 in particular is identified as a holiday (JX 1, pp. 20-22).

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POSITIONS OF PARTIES

Union's Position

The Union takes the position that the Grievance is meritorious because the Employer unilaterally modified the relevant compensation provisions of the CBA.

On Sunday, July 18, 2021, the July 18 Memorial was held for VTA employees who were killed in a tragic mass shooting that occurred in the Guadalupe Yard. Employees represented by the Union were encouraged to either attend the July 18 Memorial or mark the occasion as they saw fit, such as by covering the shifts of other employees who wished to attend. To these ends, the Employer adopted the following compensation plan for the July 18 Memorial:

- For those scheduled to work, but who wished to attend the July 18 Memorial, request time off and be paid at the administrative time rate for up to eight (8) hours. No such requests were denied.

- For those not scheduled to work, but who planned to cover the shifts of others who wished to attend the July 18 Memorial, work and be paid at the holiday rate of double time and a half (2½). These employees were so paid.

- For those scheduled to work, and who planned to stick to their shifts, work as scheduled and be paid straight time at the regular rate. These employees were so paid.

(JX 5, 8, 9, 10.)

There were two problems with the July 18 Memorial compensation plan.

First, it plainly violated the relevant compensation provisions of the CBA, at least as to employees who were not scheduled to work, but who were paid the holiday rate of double time-and-a half for covering the shifts of others who wished to attend the July 18 Memorial. These relevant compensation provisions are found in two separate Parts of the CBA: Part B, which applies to operators, and Part C, which applies to maintenance employees.

Regarding operators, Part B, Section 4 governs overtime and Part B, Section 5 governs work on days off. Specifically Part B, Section 4.1 of the CBA provides, "Time and one-half shall be paid for all work in excess of eight hours per day." Part B, Section 4.2 of the CBA adds: "An Operator shall be paid for actual time worked . . . in excess of [the] regular scheduled run or shift." And Part B, Section 5 of the CBA provides, "An Operator called to work on their day off shall receive . . . pay for actual time worked . . . in accordance with Section 4 of this Part B" – which is time and one-half (JX 1, p. 76). Nowhere in these provisions does it say that an operator is to be paid the holiday rate of double time-and-a-half for working overtime or extra time.

Similarly, regarding maintenance employees, Part C, Section 2 governs overtime. Specifically, Part C, Section 2.1 provides, "Overtime shall be paid at the rate of one and one-half (1½) times the employee's hourly rate" (JX 1, p. 108). Nowhere in this provision does it say that a maintenance employee is to be paid the holiday rate of double time and-a-half for working overtime.

Although holiday pay at the rate of double time and-a-half is authorized by Part A, Section 10 of the CBA, nowhere in this provision does it say that Sunday in general or July 18 in particular is a holiday (JX 1, pp. 20-22).

Whatever motives the Employer had for adopting the July 18 Memorial compensation plan, such motives are irrelevant to determining whether the plain terms of the contract were violated.

Second, the July 18 Memorial compensation plan constituted a unilateral change in wages that was adopted and implemented without giving proper notice to the Union or

bargaining to agreement with the Union.[3] It is undisputed that the first any Union official learned of the Employer's July 18 Memorial compensation plan was July 9 – nine days before the event – when Rajvinder (Raj) Singh, the Union's recording and financial secretary and shop steward, received a telephone call from Jaye Bailey, the Employer's chief people officer. Ms. Bailey called in response to Mr. Singh's text message sending a screen shot of one or more notice(s) that VTA had circulated to employees (JX 5, 7). During the phone call, Ms. Bailey advised Mr. Singh that the Employer's compensation plan was non-negotiable; "they made it pretty clear to us that they were not going to negotiate" (R.T. 26). Accordingly, no bargaining over the decision or its effects was attempted and no agreement was reached. This amounted to an assault on the Union's status as exclusive bargaining representative, which constitutes an unfair labor practice.

Unilateral midterm changes in wages or other terms and conditions of employment without notice, bargaining, and agreement are prohibited by both contract and statute.

As to contract, Part A, Section 22 of the CBA governs the duty to bargain as well as management prerogatives. It provides, "Any new conditions pertaining to wages, hours or working conditions which may arise during the term of this Agreement and which are not covered or provided for by the terms of this Agreement should be subject to the grievance procedure" (JX 1, p. 48). According to the Union, this provision means that any unilateral change that otherwise would constitute an unfair labor practice can be grieved. Therefore, to the extent that the July 18 Memorial compensation plan is a unilateral wage change, it is properly targeted by the Grievance.

[3] Although the Employer circulated more than one written notice of the July 18 Memorial compensation plan to supervisors (JX 8, 9) and rank-and-file employees (JX 10), no such written notice was given to Union officials.

As to statute, the Public Utilities Code governs labor relations at the VTA. It grants rights to employees and imposes obligations on employers similar to those found in the in the California Labor Code and the National Labor Relations Act (*see, e.g.*, *Rae v. Bay Area Rapid Transit Supervisory & Professional Ass'n*, 114 Cal. App. 3d. 147, 152 (1st Dist. 1980)). Included are the right of employees to form and join labor organizations for the purpose of collective bargaining and the obligation of the employer to bargain in good faith (*see* Calif. Pub. Util. Code § 100300). In the case of the VTA, the latter includes the obligation to refrain from making midterm changes to an existing CBA absent notice, bargaining, and agreement by the Union.

Therefore, the Grievance should be sustained and the Employer ordered to cease and desist from violating the relevant compensation provisions of the CBA, and to post appropriate notice thereof.

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Employer's Position

The Employer takes the position that the Grievance is not meritorious for at least two reasons: first, the CBA could not have been violated because the VTA paid affected employees "more" than what the contract called for; and second, the Union offered no evidence that a mandatory duty to bargain over "additional payments" to employees was "necessary" (Employer's Closing Brief at pp. 3, 5).

As to the first reason, no contract violation occurred because the VTA paid affected employees more than what the CBA required. No ATU member suffered any harm. In fact, operators and maintenance employees were paid at least as much or more than what the contract required. According to the Employer:

> The parties' agreement sets the minimum pay (i.e., the floor, not the ceiling) that the VTA is required to compensate its employees. ATU cannot provide any basis to support the faulty premise that the VTA was required to re-negotiate these terms that were already outlined in the CBA.

(*Id*. at p. 3.)

As to the second argument, the Grievance relies on another "faulty premise": that the VTA had a duty to bargain over what it paid its employees on July 18, 2021. But the Union "cannot meet its burden to show that any such duty to bargain was triggered in this case, as those terms were already bargained for and established in the CBA" (*id*. at p. 5).

Therefore, the Grievance should be denied and the Union should take nothing by it. Indeed, if this tribunal rules for the Employer, then affected employees should be required to return any excess compensation (*see id*. at p. 5).

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SUMMARY OF FACTS

About the Parties

The Employer, the VTA, is an independent special transit district that provides bus, light rail, and other transportation services throughout the County of Santa Clara. The Union represents the Employer's coach operators and maintenance employees on both the bus and rail sides of the agency. At all relevant times, the Employer and the Union were each signatory to a CBA in effect during the period September 9, 2019, through September 8, 2022 (JX 1).

About the Tragic Event of May 26, 2021

On May 26, 2021, a disgruntled, heavily-armed employee of the VTA appeared in the Guadalupe Yard, where he shot and killed nine (9) other employees. It was the largest mass shooting in Bay Area history. This tragic event had a profound effect on operations as well as employee morale. A police investigation shut down rail operations. The deaths of the nine (9) employees, many of whom held key positions, made it difficult to manage the light rail system. Beyond these operational challenges, employees on both the bus and rail sides of the VTA suffered deep psychological wounds. Their fallen friends and co-workers were like family and had to be mourned. Some of the survivors feared for their own safety at work. It did not help that this tragic event came on the heels of two other crises: the Covid-19 pandemic, which still gripped the Bay Area, and a recent cyberattack on the agency's online network.

The sentiments that accompanied these profound effects were embodied in a notice posted to VTA-related blogs and emails; it read, "Our Hearts Are Broken" (JX 2). The notice was posted on the same date as the mass shooting: May 26, 2021.

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About the July 18, 2021 Memorial

On Sunday, July 18, 2021, the July 18 Memorial was held for the VTA employees who had been killed. Employees represented by the Union were encouraged to either attend the July 18 Memorial or mark the occasion as they saw fit, such as by covering the shifts of other employees who wished to attend. To these ends, the Employer adopted the following compensation plan for the July 18 Memorial:

- For those scheduled to work, but who wished to attend the July 18 Memorial, request time off and be paid at the administrative time rate for up to eight (8) hours. No such requests were denied.

- For those not scheduled to work, but who planned to cover the shifts of others who wished to attend the July 18 Memorial, work and be paid at the holiday rate of double time and a half (2½). These employees were so paid.

- For those scheduled to work, and who planned to stick to their shifts, work as scheduled and be paid straight time at the regular rate. These employees were so paid.

(JX 5, 8, 9, 10.)

It was undisputed that the July 18 Memorial compensation plan was adopted and implemented without giving notice to the Union or bargaining to agreement over either the decision or its effects.[4] The first any Union official learned of the Employer's July 18 Memorial compensation plan was July 9 – nine days before the event – when Union Recording and Financial Secretary Raj Singh received a telephone call from Chief People Officer Jaye Bailey. Ms. Bailey called in response to Mr. Singh's text message sending a screen shot of one or more notice(s) that VTA had circulated to employees (JX 5, 7). During the phone call, Ms. Bailey advised Mr. Singh that the Employer's compensation plan was non-negotiable; "they made it

[4] Although the Employer circulated more than one written notice of the July 18 Memorial compensation plan to supervisors (JX 8, 9) and rank-and-file employees (JX 10), no such written notice was given to Union officials.

pretty clear to us that they were not going to negotiate" (R.T. 26). Accordingly, there was no bargaining of any type and no agreement was reached.

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DISCUSSION

About Merits of Grievance

The Union takes the position that the Grievance is meritorious because the Employer unilaterally modified the relevant compensation provisions of the CBA. For the reasons that follow, we must agree with the Union.

First, the July 18 Memorial compensation scheme plainly violated the relevant compensation provisions of the CBA, at least as to employees who were not scheduled to work on July 18, but who volunteered to work anyway. These employees were paid at the holiday rate of double time-and-a half for covering the shifts of others who wished to attend the July 18 Memorial, but none of the relevant compensation provisions of the CBA supported this scheme.

The relevant compensation provisions are found in two separate Parts of the CBA: Part B, which applies to operators, and Part C, which applies to maintenance employees.

Regarding operators, Part B, Section 4 governs overtime and Part B, Section 5 governs work on days off. Specifically Part B, Section 4.1 of the CBA provides, "Time and one-half shall be paid for all work in excess of eight hours per day." Part B, Section 4.2 of the CBA adds: "An Operator shall be paid for actual time worked . . . in excess of [the] regular scheduled run or shift." And Part B, Section 5 of the CBA provides, "An Operator called to work on their day off shall receive . . . pay for actual time worked . . in accordance with Section 4 of this Part B" – which is time and one-half (JX 1, p. 76). Nowhere in these provisions, however, does it say that an operator is to be paid the holiday rate of double time-and-a-half for working overtime or extra time.

Similarly, regarding maintenance employees, Part C, Section 2 governs overtime. Specifically, Part C, Section 2.1 provides, "Overtime shall be paid at the rate of one and one-half

(1½) times the employee's hourly rate" (JX 1, p. 108). Nowhere in this provision, however, does it say that a maintenance employee is to be paid the holiday rate of double time and-a-half for working overtime.

Although holiday pay at the rate of double time and-a-half is authorized by Part A, Section 10 of the CBA, nowhere in this provision does it say that Sunday in general or July 18 in particular is a holiday (JX 1, pp. 20-22).

Second, the July 18 Memorial compensation plan constituted a unilateral change in wages that was adopted and implemented without giving proper notice to the Union or bargaining to agreement with the Union. It is undisputed that the first any Union official learned of the Employer's July 18 Memorial compensation plan was July 9 – nine days before the event – when Union Recording and Financial Secretary Singh received a telephone call from Chief People Officer Bailey. Ms. Bailey called in response to Mr. Singh's text message sending a screen shot of one or more notice(s) that VTA had circulated to employees (JX 5, 7). During the phone call, Ms. Bailey advised Mr. Singh that the Employer's compensation plan was non-negotiable; "they made it pretty clear to us that they were not going to negotiate" (R.T. 26). Accordingly, no bargaining over the decision or its effects was attempted and no agreement was reached. This amounted to an assault on the Union's status as exclusive bargaining representative, which constitutes an unfair labor practice.

Unilateral midterm changes in wages or other terms and conditions of employment without notice, bargaining, and agreement are prohibited by both contract and statute, as cited and discussed above. These textbook-style violations of the CBA and basic principles of labor relations hardly need further explanation.

Had proper notice and bargaining occurred, the Union may well have agreed to modify the CBA so as to pay certain employees at the holiday rate of double time and-a-half. Perhaps the Union would have demanded that other employees – such as those already scheduled to work on July 18 – receive the same premium pay, as a quid for some other quo. Certainly, the Employer had an obligation to engage the Union to find out, rather to take unilateral action having the effects of both modifying the contract and violating the duty to bargain in good faith.

Against the weight of the foregoing analysis, the Employer offers two reasons why the Grievance is not meritorious: first, the CBA could not have been violated because the VTA paid affected employees "more" than what the contract called for; and second, the Union offered no evidence that a mandatory duty to bargain over "additional payments" to employees was "necessary" (Employer's Closing Brief at pp. 3, 5). Neither argument is persuasive.

As to the first reason, the Employer's argument stands logic on its head. To suggest that no contract violation occurred because the VTA paid affected employees "more" than what the CBA required is to propose that the Employer is free arbitrarily to vary from the contract terms whenever it wishes. No authority is cited for such a proposition because the law of neither contract interpretation nor labor relations offers any authority, at least not in California. This is true whether the Employer arbitrarily varies from the contract by being more generous or less generous than the terms of the CBA would appear to dictate.

It changes nothing that the holiday rate of double time and-a-half was paid, at least in part, to honor the memory of co-workers who killed under tragic circumstances. Whatever motives the Employer had for adopting the July 18 Memorial compensation plan, such motives are irrelevant to determining whether the plain terms of the contract were violated. The Parties

did not bargaining for a contract paying the holiday rate on July 18, and that is the end of the story.

Moreover, according to the Employer:

> The parties' agreement sets the minimum pay (i.e., the ***floor, not the ceiling***) that the VTA is required to compensate its employees. ATU cannot provide any basis to support the faulty premise that the VTA was required to re-negotiate these terms that were already outlined in the CBA.

(*Id*. at p. 3) (emphasis added.)

This argument too stands logic on its head. The CBA, like most collective bargaining agreements and memoranda of understanding outside the entertainment and sports industries, sets the "floor" as well as the "ceiling" when it comes to wages, hours, and other terms and minimum conditions of employment. The burden of proving otherwise rested on the shoulders of the VTA, not the Union. No attempt by the Employer to meet that burden was offered on the record before us.

As to the second argument – the "faulty premise" that the VTA had a duty to bargain over what it paid its employees on July 18, 2021 – the Employer has it exactly backwards. What the Employer was supposed to pay its employees on that date had already been set by the CBA; if the VTA wanted to modify that pay, then it had the duty to give notice and bargain over whether it could ***depart*** from the CBA in order to do so. Absent a bona fide financial emergency, which was neither raised nor proved on the record, a public employer in California violates the duty to bargain by unilaterally making midterm modifications (*see, e.g*., *Santa Clara County Correctional Peace Officers Ass'n v. County of Santa Clara*, 224 Cal. App. 4th 1016, 1033-35 (2014) (citing California Supreme Court authorities)). That is what happened here.

Accordingly, we find that the Grievance is meritorious and must be sustained.

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About the Remedy

The remedy sought by the Union is modest: an Award ordering the Employer to cease and desist from unilaterally modifying the compensation provisions of the CBA and requiring the posting of notice in a prominent place in each affected division of the Employer for at least sixty (60) days. The posting should include email notice to affected employees, because email was the means used by the Employer to communicate its offending compensation scheme regarding the July 18 Memorial. The remedy sought does not include requiring employees who were compensated at the rate of double time-and-a-half on July 18 to give back the difference.

The argument that, if this tribunal rules for the Employer, then affected employees should be required to return any excess compensation is unpersuasive. A Party who violates a contract by unilateral picking and choosing which terms it will honor does not thereby acquire the unilateral right to pick and choose the appropriate remedy for its violation.

Having found the Grievance to be meritorious, we shall issue an Award granting the modest remedy sought by the Union.

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AWARD

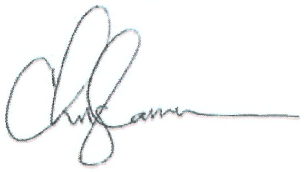
Wherefore, in light of the foregoing Opinion, we hereby make the following Award:

1. The Employer violated the CBA when it paid the holiday rate of double time-and-a half (2½ time) for the day off work on July 18, 2021.

2. The remedy is that the Employer shall cease and desist from unilaterally modifying the compensation provisions of the CBA and post appropriate notice in a prominent place in each affected division of the Employer for at least sixty (60) days. The posting shall include email notice to affected employees.

3. The Parties are ordered to meet and confer regarding the precise nature of the notice posting. In the event of any dispute relating to the remedy, including the notice posting, this tribunal shall retain jurisdiction for up to one (1) year from the date of this Opinion and Award to resolve such dispute.

It is so Awarded.



BY:
Christopher David Ruiz Cameron
Neutral Chair

X *I concur.* ____ *I dissent.*
BY:
Zac Bodle
Union Representative

____ *I concur.* X *I dissent.*
BY:
Sommer Gonzalez
Employer Representative

DATED:
August 9, 2023