ARBITRATION AWARD

In the Matter of the Arbitration	Grievance No. SMF-R-0226/17 (Agent A - Protected Sick-Leave)
Between	
SOUTHWEST AIRLINES	
"Company"	
And	
TWU LOCAL 555	
"Union"	

BEFORE: Joshua M. Javits, ARBITRATOR

APPEARANCES:

For the Company: Adam P. KohSweeney
O'Melveny & Myers

For the Union: Courtney Thomas Heywood
Amye Thompson-Hollins

Place of Hearing: Dallas, TX

Date of Hearing: May 10, 2017

Date of Briefs: June 30, 2017

Date of Award: August 9, 2017

ISSUE:

Did the Company violate the Collective Bargaining Agreement when it used more than eight (8) hours of sick time in a day, or must it use more than eight (8) hours per day to comply with California law?

BACKGROUND AND FACTS:

The Grievant, Agent A, a Ramp Agent employed at the Company's Sacramento, California, base, was scheduled to work his regular work shift of 1:30pm – 10:00pm on January 8, 2017. In addition to his regularly scheduled work shift, the Grievant also picked up an early morning shift from 5:15am – 1:30pm that same day. In total, the Grievant was scheduled to work a total of 15.7 hours on January 8, 2017 – 8 hours of regular work shift and 7.7 hours that the Grievant voluntarily picked up.

Prior to the start of his work shift that day, the Grievant, however, called in sick on January 8 in order to care of his ill son, thereby missing the entire 15.7 work hours he had been scheduled to work that day.

It is undisputed that the Grievant's absence from work on January 8, 2017 was a protected reason under Section 233 of California state's Kin Care law. As a result of the Grievant's absence on the day in question, the Company charged the Grievant's sick leave bank for the full 15.7 hour absence.

The Union subsequently filed a grievance on behalf of the Grievant on January 15, 2017, alleging that the Company had excessively charged the Grievant's sick leave bank with 15.7 hours of protected absence when, in fact, it should have only charged eight (8) hours of sick leave (i.e. the Grievant's regularly scheduled work hours).

According to the Union's grievance, the Company's actions violated Article 13.B of the parties' Collective Bargaining Agreement, which provides that the maximum sick leave to be charge for an employee absence is one 8-hour shift.

In its grievance, the Union requests that the Grievant have 7.7 hours of sick leave time (the difference between the 15.7 hours of sick leave he was changed and the 8 hours that he should have been charged under the parties' CBA) reimbursed to his sick leave bank.

Article 13 of the CBA provides

A. Accumulation. Employees are protected by a sick pay plan provided by the Company. Except as otherwise expressly permitted by this Agreement or required by law, sick pay is used only in instances of actual illness or non-occupational injury which prevents the employee from performing his assigned duties. *Sick pay is accrued at the rate of (i) eight (8) hours of sick pay for full-time Employees and (ii) six (6) hours sick pay for part-time.* Sick pay begins accumulating on the date of employment

but cannot be used until the Employee has completed thirty (30) days of his probationary period. The Employee will accrue sick pay to a maximum of two thousand four hundred hours. All Employee's accrued sick days of any part thereof may be used in the event of a prolonged illness.

B. Charges Against Account. Charges against sick pay credit will be made only for those days on which an Employee is scheduled to work, including days scheduled as a result of shift trades or voluntary overtime assignments as started in Article 7.I.1. *The maximum for which an Employee will be paid is one shift on any day.* Normal attendance rules will apply. (Emphasis added).

At the hearing, Company Senior Labor Relations Manager Bob Watkins testified that the 15.7 hours the Grievant was scheduled to work on January 8, 2017, was protected sick leave under California's Kin Care law. California state law required that an employee be provided with sick leave not only for personal illnesses, but also for the situation where the employee was absent in order to provide care for a family member. In contrast, the CBA only considered an employee's personal illness to be eligible for sick leave protection.

In the instant case, because the Grievant was taking sick leave for a reason protected under California's Kin Care law (to look after his sick son), the Company was compelled to provide him with sick leave for all work hours that were scheduled for that particular day. The Grievant was paid time for all of these work hours and his sick leave bank was deducted by 15.7 hours, Watkins noted.

Other employees at the Company's Sacramento, CA, station were treated in exactly the same way as the Grievant; if they were absent for work for a protected reason under the California Kin Care law, all work hours scheduled (i.e. even absences greater than eight hours) were considered protected sick leave by the Company and were paid in full. These sick leave hours would, however, be deducted from the employee's sick leave bank, Watkins testified.

At the hearing, Manager Bob Watkins accepted that Article 13.B of the parties' CBA provides that the "maximum" an employee will be deducted for a shift is eight (8) hours. He insisted, however, that California state law required that the entire period of sick leave absence (the 8 hours of regular work shift plus the 7.7 hours of voluntary overtime) is protected leave and the employee must be paid for all hours.

According to Watkins, the Company's obligations under California law superseded the contractual language contained in Article 13.B of the CBA. The Company would have been violating California state law if it had not provided the Grievant with protected sick leave for the full 15.7 hours of absence on January 8, 2017, Watkins argued.

Watkins noted that if, the Company were to have followed the sick leave absence provision of the CBA in the manner that the Grievant seeks, it would only have paid the Grievant for an 8 hour absence pursuant to Article 13B of the CBA, the maximum number of sick leave hours permitted under the CBA. Watkins testified that the Company would then have been required, under the attendance procedures of Article 23 of the CBA, to classify the remaining 7.7 hours of absence as a Reported Personal Absence (an absence for "other than [the Employee's] personal illness") as the absence was for a reason other than a personal illness.

According to Watkins, this would have resulted in the Grievant incurring one discipline point on his attendance record as per Article 23.II.A. Instead of adopting this approach, the Company paid the Grievant for all 15.7 hours of absence as protected sick leave under California law, Watkins explained.

To support its position, the Company submitted an email exchange between the Union and the DLSE (See Company Exhibit 3) wherein the DLSE informed the Union that “if the employee has a shift that exceeds 8 hours and the employee calls in sick, the paid sick leave is supposed to cover the entire shift if the employee has accrued sufficient hours” and “the employer may not have a policy that provides less than what the statute provides.”

At the hearing, Union Witness Amye Thompson Hollins testified that the Company violated Article 13.B of the CBA by deducting 15.7 hours of from the Grievant’s sick leave bank. Article 13.B clearly provides that the “maximum” that may be deducted from an employee’s sick leave bank is “one shift per day.” Given that the Grievant’s regular work shift was only 8 hours long, the Company should only have deducted 8 hours from the Grievant's sick leave bank.

Even though the Grievant had picked up an additional work shift for January 8, 2017, and was scheduled to work 15.7 hours that day, Hollins insisted that the Grievant should only have had 8 hours of leave deducted from his bank. Hollins acknowledged that the Grievant had taken leave that day to care for his ill son, a protected reason under Section 246 of the California state’s Kin Care law.

However, she denied that the Company was somehow compelled to pay the sick leave to the Grievant for all 15.7 hours (and in turn deduct all 15.7 hours from his sick leave bank). An employee should be permitted to choose how much sick leave he/she wishes to use during any period of absence, Hollins argued. In any event, the Company should not have been permitted to deduct more than 8 hours sick leave from the Grievant since that was the "maximum" amount that he could be paid under the CBA, Hollins insisted.

According to the Union Witness Thompson Hollins, the Company had never previously paid more than 8 hours of sick leave to employees when they called in sick. Employees were ordinarily paid for only 8 hours and this number of hours was then deducted from the employee's sick leave bank. Only recently had the Company begun to charge employees for additional work hours, Hollins testified.

Although the California Kin Care law had initially come into effect in July 2015, it was recently extended to provide additional reasons for protected sick leave. In fact, it was only in February 2017 that the Company informed the Union that it intended to change its policy with respect to sick leave following the change in the Kin Care law, Hollins explained. In the instant case, the Grievant was treated differently from other similarly situated employees. Prior to January 2017, other employees had not been charged more than 8 hours of sick leave, Hollins argued.

POSITIONS OF THE PARTIES:

The Union's Position:

The **Union** contends that the Company improperly charged the Grievant with 15.7 hours of sick leave under California State's Kin Care law. It believes that the Grievant should only have been charged eight (8) hours leave for his sick call on January 8, 2017. Although the Grievant was originally scheduled to work his regular eight (8) hour work shift that particular day, he picked up an additional 7.7 hours for that day, the Union notes.

According to the Union, the Grievant should have been charged with only eight (8) hours of sick pay to cover his regularly scheduled shift when he called in sick that day. Instead, the Company improperly charged the Grievant with 15.7 hours of sick leave for the date in question. The Union believes that the Company's actions were improper as they violated Article 13.B of the parties Collective Bargaining Agreement, which requires that employees will be paid a maximum of eight (8) hours of sick leave for any absence in a single day.

Article 13B of the CBA provides the following:

B. Charges Against Account. Charges against sick pay credit will be made only for those days on which an Employee is scheduled to work, including days scheduled as a result of shift trades or voluntary overtime assignments as started in Artcile7.I.1. *The maximum for which an Employee will be paid is one shift on any day.* Normal attendance rules

will apply. (Emphasis added).

The Union insists that the parties had a binding past practice whereby an employee was only charged a maximum of eight (8) hours of sick leave. It was only at the beginning of 2017 that the Company made a unilateral decision to charge employees more than eight (8) hours of sick leave under the California State Sick Leave Days laws, the Union contends. Not only did the Company make a unilateral decision to change this past practice, but it also failed to provide the Union with any notice of the proposed change in practice.

The Union notes that in no other scenario (regular sick days or FMLA) does the Company take more than one shift out of an employee's sick leave bank. Under no leave circumstances does the Company take more than one regular work shift out of an employee's sick leave bank, the Union notes. By charging the Grievant multiple shifts for his absence on January 8, 2017, the Company is essentially forcing employees to exhaust their protected sick leave as quickly as possible.

According to the Union, the Company is frontloading its calculation of what constitutes a work shift so as to reduce the employee's sick leave bank to the maximum extent possible. The Union believes that once the Grievant's regularly scheduled 8-hour work shift was covered by the California Kin Care law, there was no need to cover the other 7.7 hours the Grievant volunteered to work that

day. There is no reason why the Company should have charged the Grievant with 15.7 hours of sick leave for his absence on January 8, 2017. To support its position, the Union notes that the parties' mutually agreed CBA clearly states, "The *maximum* for which an Employee will be paid is *one shift* on any day." (Emphasis added). It is also clear from the CBA that a "shift" is defined as an employee's regularly scheduled 8 hour work period, the Union contends. The Company should not be permitted to deduct multiple work shifts from an employee's sick leave bank in the manner it has done in the instant case, the Union maintains.

The Union dismisses the Company's assertion that it is somehow compelled by California state law to deduct more than 8 hours a day from an employee's sick leave bank. Employees should be permitted to protect their sick leave bank so that they can use this time at a later date when it is required by them or their family members. If the Arbitrator were to accept the Company's argument in this case, this would permit management to prematurely exhaust an employee's sick leave benefit based on the fact he/she resides in the state of California. For that reason, the Union asks that the Company be directed to reimburse the 7.7 hours of sick leave (the number of hours above the Grievant's regular 8 hour work shift) that were deducted from the Grievant's sick leave bank.

The Company's Position:

The **Company** insists that the instant dispute is governed entirely by California state law – not the parties Collective Bargaining Agreement. It dismisses the Union's assertion that the CBA's provisions relating to sick leave entirely displace Section 233 of the California Kin Care law.

According to the Company, the Union's position has been consistently rejected by federal courts, which have repeatedly found that CBAs entered into pursuant to the RLA cannot displace state minimum protection laws such as Section 233. Federal courts have consistently held that CBA terms do not supersede state laws that set "minimal substantive requirements on contract terms." State minimum protection laws such as the California Kin Care law coexist with federal law relations laws like the RLA and the RLA does not completely occupy the field of employment relations, the Company insists.

The Company contends that it has fully complied with Section 233 by protecting the Grievant's full absence on January 10, 2017. If the Company had followed the Union's interpretation of the CBA, it would have had to issue the Grievant with an attendance disciplinary point as the CBA's sick leave policy applies only to an employee's own illness (it would not have covered the Grievant's absence to take care for his ill child). It is undisputed that Article 13.B would result in a situation where the Grievant would be paid at most eight hours of his 15.7 hour absence and would then be issued a disciplinary point

Article 23.I.B provides that an employee who does not report to work for any reason other than his/her own personal illness shall be charged with a Reported Personal Absence, the Company notes. In contrast, the Kin Care law, allows an employee to take sick leave in order to care for a family member – not just for an employee's own personal illness. Had the Company adopted the Union's interpretation, it would have engaged in a violation of Section 233 of the California Kin Care law. Section 233 is not displaced by the parties' CBA as the Union claims, but rather it is a minimum protection that exists out of, and regardless of, the terms of the CBA. For that reason, the Company argues that its only option to comply with California law was to protect the full amount of the Grievant's 15.7 hour absence under Section 233.

The Company contends that the state of California did not intend for Section 233 to be waivable by collective bargaining. According to the Company, the text of Section 233 itself confirms that the California legislature did not intended for CBA terms to trump its provisions. Section 233(f) provides that the rights set forth by Section 233 are "cumulative" and "in addition to" any other rights afforded by contract. Consistent with the idea of minimum labor protections, the parties could only bargain for or otherwise agree to more protection than that provided by the Kin Care law, the Company contends. There is, the Company insists, nothing that would allow the parties to agree to less labor protections in the manner argued for by the Union.

The Company notes that the parties' CBA anticipates that any contractual provisions that might be rendered invalid by legislation. Article 25 of the CBA states that, in the event "any part or provision of this Agreement shall be rendered invalid by existing or subsequently enacted legislation," the balance of the CBA remains in full effect. As such, it is clear from the CBA itself that the California law must apply to the underlying dispute, the Company asserts.

If the Company were to have followed the sick leave absence provision of the CBA with respect to the Grievant, it would have paid the Grievant for an 8-hour absence pursuant to Article 13.B of the CBA, the maximum number of sick leave hours permitted under the CBA. Then, the Company would have been required, under the attendance procedures of Article 23 of the CBA, to classify the remaining 7.7 hours of absence as a Reported Personal Absence (an absence for "other than [the Employee's] personal illness"). This would have resulted in the Grievant incurring one discipline point on his attendance record as per Article 23.II.A.

The Company believes that these actions, however, would have violated Section 234 of the California Kin Care law, as it would subject the Grievant to discipline for taking an absence for a reason that is unquestionably covered by the legislation. According to the Company, the only option it had to comply with California law was to follow Section 233's requirement that it require an employee to use any available sick leave for a protected absence. The

Company insists that it was obligated to provide protected time to the Grievant once he informed it that he was going to be absent for a protected reason. Any suggestion that the Grievant could somehow choose to waive Section 233's protections and choose instead to be disciplined for a protected reason with protected leave available makes no sense, the Company asserts.

The Company rejects the Union's central argument in this case – that an employee should be able to choose whether or not to avail himself of section 233's minimum labor protections. This assertion is contrary to California state law and should, therefore, be summarily dismissed, the Company maintains. It is not possible for an employee to choose whether or not he/she wishes for minimum labor protections to apply to them or not.

The Company believes that the California legislature has made it clear that Section 233's provisions cannot be waived because labor code Section 219 clearly states that "no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

For the reasons outlined above, the Company requests that the Arbitrator find that California law applies and that the Company's actions in protecting the Grievant's full absence were lawful.

DECISION AND AWARD:

Essentially, the question before the Arbitrator is whether a California state law providing labor protections for employees to take sick leave for themselves or their family members (California Kin Care law) takes precedence over the Collective Bargaining Agreement between the Company and the Union.

Under the parties' CBA, the parties clearly agreed that employees can only be required to accept a "maximum" of eight (8) hours pay in any given day and cannot be required to take more time.

In contrast, the California Kin Care law and its amendments ("protections") require that employees working in the State of California be provided with sick leave so that they can take care of close family members (amended to allow employees to take sick leave for themselves or more distant family members such as grand-parents). When taking Kin Care Protection law sick leave, employees of SouthWest Air located in the State of California may take, for instance, eight (8) hours of sick leave if they are regularly scheduled to work eight (8) hours.

If, however, an employee, in this case, the Grievant, has traded or agreed to work an additional shift, that employee is actually scheduled to work a "double shift" or, at least, more than the regularly scheduled 8 hours. Where an employee is scheduled for such a "double shift" and calls in "sick" for the

purposes of the California Kin Care law (that is, to take care of oneself or a family member), the Company considers the full 15.7 hours to be protected sick leave under the state law.

As such, the Company pays the employee in question the full 15.7 hours of sick leave and deducts the full 15.7 hours of leave from the employee's sick leave bank. In effect, the Company is deducting the full amount of protected sick leave that an employee is entitled to under the California Kin Care law.

According to the Company, it acts in this manner as it is compelled to follow the California state law, which requires Southwest to grant and pay an employee for all protected sick leave as defined under the legislation.

There is no meaningful dispute in the instant case that the Grievant's reason for leave on January 8, 2017 (to take care of his ill 8-year old son) was protected sick leave as defined by the Kin Care law.

The Company insists that it had no alternative to provide the Grievant with the full 15.7 hours of protected sick leave and to then deduct the 15.7 hours from the Grievant's sick leave bank. Management was, in the Company's view, obligated to provide protected time to the Grievant once he informed it that he was going to be absent for a protected reason. There was no way that the Company could choose to waive Section 233's protections when the Grievant

was eligible for protected leave, the Company asserts.

This position is, however, strongly disputed by the Union, which insists that the Company improperly charged the Grievant 15.7 hours of sick leave under California state's Kin Care law. According to the Union, the Grievant should have been charged with only eight (8) hours of sick pay to cover his regularly scheduled shift when he called in sick that day. Instead, the Company improperly charged the Grievant with 15.7 hours of sick leave for the date in question.

The Union believes that the Company's actions were improper as they violated Article 13.B of the parties' Collective Bargaining Agreement, which requires that employees will be paid a "maximum" of eight (8) hours of sick leave for any absence in a single day.

The Union further argues that an employee should be allowed to choose as to whether or not to use protected sick leave. If an employee wishes to utilize protected sick leave under the California Kin Care law, he/she should be paid for the absence and then have the hours deducted from his/her sick leave bank. Alternatively, if an employee did not wish to have the entire period of absence considered protected sick leave (as the Grievant seeks in this case), then he/she should be permitted to choose how much of the absence he/she wishes to be deemed protected sick leave. The Company should not be permitted to

automatically deduct all potential protected sick leave from the employee's sick leave bank without the employee's consent or approval, the Union maintains.

In the instant case, the Grievant wishes to have only 8 hours of the 15.7 hours (i.e. his regularly scheduled work shift) classified as protected sick leave for the purposes of the Kin Care law. There was, in the Union's view, no need for the Company to cover the other 7.7 hours of work that the Grievant had volunteered to work on January 8, 2017. Under the Union's interpretation, Southwest should not be permitted to deduct multiple work shifts from an employee's sick leave bank in the manner it has done in the instant case.

It should be noted at the outset of this decision and award that the role of the Arbitrator is not to create new contractual provisions between the parties, but rather his sole function is to interpret and apply the CBA as written. The Arbitrator should not act in a way that will impose obligations or responsibilities on either party that is over and beyond what was agreed to in the CBA.

As such, the Arbitrator is ordinarily limited in considering the language in Article 13 of the CBA. Looking at the mutually agreed language of Article 13.B, it appears that the Union makes a strong and compelling evidence that the "maximum" sick leave that the Company may deduct from an employee is equal to "one shift." Article 13.B of the CBA expressly states, "The ***maximum*** for which an Employee will be paid is ***one shift*** on any day." (Emphasis added). The

parties' CBA goes on to define the term "shift" as the employee's regularly scheduled 8-hour work period, the Arbitrator notes. As the Grievant's regularly scheduled work period on January 8, 2017, was for only 8 hours, the Grievant's regularly scheduled work hours that day was only 8 hours in length – not 15.7 hours.

The Union has made a persuasive argument that the Company should, therefore, not have been permitted have only to deduct multiple work shifts from the Grievant's employee's sick leave bank in the manner it has done in the instant case.

The Arbitrator notes, however, that the parties have agreed to a further contractual provision in their CBA which requires the Arbitrator to consider whether or not external legislation. Typically, Arbitrators are strictly limited to considering only the rights and responsibilities contained in the CBA – legislation that is not incorporated in to the CBA by reference is typically not to be considered or interpreted by the Arbitrator.

The problem in this case, however, is that the parties have agreed to language that anticipates that any contractual provisions that might be rendered invalid by legislation. Article 25 (Savings Clause) of the CBA states that, in the event "any part or provision of this Agreement shall be rendered invalid by existing or subsequently enacted legislation," the balance of the CBA remains in

full effect.

This language foresees certain instances where rights created by external legislation might affect the rights contained in the CBA, the Arbitrator notes. One could argue, and the Company certainly has, that the California Kin Care law and its provisions have introduced new and enhanced employee rights that extend over and beyond the employee rights contained in the parties' CBA. Under the California Kin Care law, employees now have the right to take sick leave not only for their own personal illnesses, but they may also take sick leave in order to care for an ill family member.

The Arbitrator notes that this external legislation introduces rights and protections that extend beyond the sick leave provisions of the CBA, which limits sick leave to when an employee is personally ill. As such, it is undisputed that the California Kin Care law permitted the Grievant to receive sick leave pay for an absence that he would not been protected against under the CBA.

Under the parties' CBA, if the Grievant had taken leave in order to take care of his ill son, he would not have received sick leave for that absence and would likely have incurred an attendance point for his absence. Therefore, the Arbitrator is satisfied that the Kin Care law enhances employees' sick leave rights relative to what had been available in the CBA.

Strangely this has created a situation where the Grievant is arguing that he did not wish to avail himself of these extended sick leave rights under the Kin Care law. Instead of being granted 15.7 hours of sick leave for his absence on January 8, 2017, hours that were subsequently deducted from the Grievant's sick leave bank, the Grievant wishes to have only been granted 8 hours of sick leave for that day.

In effect, the Grievant is asking that the Arbitrator rule that he – or any other employee - should be permitted to choose whether to avail of these extended sick leave rights under the Kin Care law or, alternatively, whether to avail of the lesser sick leave rights under the CBA.

The problem in the instant case is that there appears to be a conflict between the parties' CBA and the state's Kin Care law. Thus, the Arbitrator is forced to determine whether or not the external law, a law which introduces enhanced employee rights, should prevail over what the parties agreed in their CBA.

Unfortunately, this question raises a myriad of difficulties for both parties to this underlying dispute. The Union quite understandably is uncomfortable that a single state's law can render a mutually agreed contract provision invalid for a subgroup of its bargaining unit members (i.e. California employees).

As the designated and certified representative of the entire bargaining unit, the Union does not wish to see a provision in a nationwide contract declared invalid for one its constituent subgroups. Inevitably this results in certain bargaining unit members being treated in a different manner to other bargaining unit members, a position the Union is uncomfortable with. All employees should be treated in exactly the same manner as they are covered by the same generic CBA, the Union believes.

Similarly, the Company is in a difficult bind as it feels compelled to comply with legislation of California State. If the Company did not apply the California Kin Care law in the manner that it did in the Grievant's case there is a possibility the Company could be deemed to be violating its employees' rights.

The Arbitrator recognizes the positions of both parties and understands the difficult position that both parties find themselves in with respect to this complex issue. Nonetheless, the Arbitrator is compelled to address whether the external legislation of California State should take precedence over the parties' CBA.

In addressing this question, the Arbitrator notes that his central role is to preserve the parties' bargain. Almost all collective bargaining agreements – and this CBA is no different - expressly restrict Arbitrators to maters of "interpretation or application" of the contract and prohibit the "addition to or modification of"

contract terms.

Understandably, both parties wish to see the benefit of their bargain fully recognized, as much time and effort has gone in to agreeing their contract. Only in the most unusual circumstances should an Arbitrator intervene in the parties' agreement by striking down or voiding a mutually agreed contract provision. If an Arbitrator were to adopt an approach that did not faithfully adhere to the terms of the parties' contract, this would call in to question that role of the Arbitrator and the entire concept of arbitration as a way in which to resolve these disputes. The parties expect that Arbitrators will respect the primacy of their agreement and will strictly adhere to the terms of that contract. Any approach that seeks to alter or change the underlying contract should, and must, be rejected, the Arbitrator finds.

The prevailing view among Arbitrators is that external laws and legislation that are not expressly incorporated by reference in to the CBA should not be treated as part of the parties' CBA. Arbitration is generally considered a forum for interpreting and applying the contract - not a forum for enforcing statutory rights. Only in the most limited circumstances would the Arbitrator be prepared to void a contractual term in order to incorporate external legislation. To strike down a contractual provision, the Arbitrator would require compelling evidence that the external legislation was entirely incompatible with the parties' contract. The burden of proof for declaring a contract term invalid in this way is high and is

not easily met, the Arbitrator believes.

While the Arbitrator recognizes the potential incompatibility issue faced by the Company in the instant case, he nonetheless finds that there is not sufficient evidence that the California Kin Care law has rendered Article 13.B of the CBA invalid. What the Company has offered is its own interpretation of how the California Kin Care law has required it to provide protected sick leave to its employees.

However, the Arbitrator notes that this is only the Company's interpretation of how the Kin Care law is to be applied; there is no ruling from a state court/agency that definitively provides that the Company must enforce the Kin Care law in this manner. Absent such a ruling, the Arbitrator believes that he is compelled to follow the clear and express language of the parties' CBA. For Arbitrators to apply potentially 50 different state laws to a nationwide contract would result in a chaotic situation, one that was never contemplated by the parties, the Arbitrator finds.

Article 13.B of the CBA clearly states that, "The *maximum* for which an Employee will be paid is *one shift* on any day." (Emphasis added). The parties' CBA then goes on to define the term "shift" as the employee's regularly scheduled 8-hour work period. This language satisfies the Arbitrator that the Company was required to pay the Grievant sick leave only for the Grievant's

regularly scheduled work period on January 8, 2017. That is, the Grievant should have been received sick pay for only 8 hours, the Grievant's regularly scheduled work hours that day – not 15.7 hours (the Grievant's regular shift plus additional overtime he volunteered to work).

For all the reasons outlined above, the Arbitrator finds that the Company's actions in applying the California Kin Care law in the instant case over the contractual language in Article 13.B were improper. The Company's decision to provide the Grievant with 15.7 hours of sick leave on January 8, 2017, as required under California law rather than the 8 hours of sick leave provided for in Article 13.B was a violation of the parties' CBA. Therefore, the Company is directed to reimburse the additional 7.7 hours of sick leave it deducted from the Grievant's sick leave bank for his absence on the date in question (and to make whatever other adjustments to the Grievant's pay/leave that result from this change). The instant grievance is sustained.

Joshua M. Javits

8/9/17

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Joshua M. Javits, ARBITRATOR Date