AMERICAN ARBITRATION ASSOCIATION

IN RE INDIVIDUAL ARBITRATIONS, Claimants, v. CENTRAL REFRIGERATED SERVICE, INC., et al, Respondents.

CLAIMANTS' BRIEF ON CENTRAL ARBITRATION MANAGEMENT PANEL ("CAMP") AGREEMENT PROPOSALS

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INTRODUCTION

There is a very real problem to be addressed: how can 307 individual arbitrations be held before 29 separate arbitrators, implementing the well-established arbitral goals of speed and efficiency. Claimants submit this brief pursuant to the CAMP's March 5, 2015 order directing the parties to provide briefing on their proposals for how these cases should be managed by CAMP. During the parties' initial conference with the CAMP on February 25, 2015, the CAMP expressed that it believes that some of Claimants' proposals are outside the scope of the CAMP agreement. Accordingly, Claimants withdraw those proposals (*see* Section I.F. *infra*).[1]

The AAA has no rules similar to a federal Multi-District Litigation (MDL). The parties' experience with trying to litigate these cases thus far has shown that the need to streamline is paramount. For example, the parties were buried by trying to brief two introductory motions in just 30 preliminary cases. The decisions on rules and joinder took approximately 6 months before the parties agreed to stay all individual arbitrations pending formation of the Central Arbitration Management Panel ("CAMP"). In fact, some decisions on these preliminary motions are still pending. The parties recognized that a central coordinating body would be necessary to process these cases through to an orderly, expeditious, and just result. The CAMP stipulation was the result.

The Claimants set forth their proposed rules for the CAMP, without briefing, on February 24, 2015 merely to facilitate the initial conference between the CAMP and the parties scheduled for February 25, 2015; Respondents then set forth their proposed rules, along with extensive unauthorized briefing responding to Claimants' proposed rules, on February 25, 2015. Respondents thus had an opportunity to respond to Claimants' proposals, but Claimants had no

[1] Claimants reserve the right to raise those issues with the individual arbitrators.

reciprocal opportunity. The initial conference was held on February 25, 2015. An Order issued on March 5, 2015 directing the parties to discuss and brief any differences in proposals for how these cases should be managed by CAMP.

As directed by CAMP, the parties held a meet and confer on March 9. Neither side presented alternative proposals to those previously submitted to CAMP. During the conference, Claimants asked Respondents to indicate how long their proposed schedule would take to complete all arbitrations. Respondents refused. We stated that our calculation of their proposal would not see a resolution for approximately 3 years.[2] Respondents disagreed but refused to speculate as to just how long their proposal will take.

During the conference, Respondents also stated that they believe CAMP's responsibilities do not include making the individual arbitration process as quick and efficient as possible. Yet efficiency is the very reason both sides agreed to form CAMP. Avoiding duplication and unnecessary expense is a central purpose of CAMP, as it is for every arbitrator under the AAA's Rules. Claimants would never have agreed to CAMP if it simply served to add another layer of bureaucracy, without coordinating and streamlining the process of hearing 307 arbitrations. AAA Rules enshrine the oft-touted benefits of arbitration – speed and efficiency. *See* Introduction to 2009 AAA Empl. Rules ("The development of the Employment Arbitration Rules and Mediation Procedures… are the most recent initiatives of the Association to provide private, efficient, and cost-effective procedures for out-of-court settlement of workplace disputes."); 2009 AAA Empl. Rule 28 and 2009 Commercial Rule R-30 ("The arbitrator, in exercising his or her discretion, shall conduct the proceedings with a view toward expediting the resolution of the dispute…").

[2] In fact, it appears that Respondents' proposal will likely take more than 3 years, as Claimants' calculation using Respondents' proposal made the unlikely assumption that, during the periods when arbitration hearings were taking place, the hearings would occur uninterrupted during those periods.

These rules and these benefits underlie all arbitrations; they form the bedrock by which decisions are to be made in these cases; they are the very reason the parties set up the CAMP process. These goals cannot be dispensed with as Respondents now suggest.

The CAMP stipulation states:

> The CAMP shall only be authorized to make decisions in the individual arbitration cases referenced in Exhibit A hereto and only **on the following pre-trial and trial scheduling issues:**
>
> 1. Deadlines for the parties to add claims/counterclaims;
> 2. The scope of discovery and manner of resolution of discovery disputes;
> 3. Discovery cut-off dates;
> 4. Dispositive motion deadlines;
> 5. Trial length; and
> 6. Trial scheduling.

Emph. added. Claimants believe that this list is exhaustive in terms of the pre-trial issues that would be available to CAMP to review. Although Respondents' letter of February 25, 2015 to CAMP purported to suggest that CAMP's jurisdiction was limited only to "trial scheduling," that claim is belied by the literal language of the stipulation, which uses the specific words "pre-trial and trial scheduling issues." Furthermore, the two issues which Respondents pointed out to CAMP that they had refused to stipulate to CAMP deciding (during the negotiation process), dealt only with trial conduct issues which were to be left to each arbitrator:

> 7. number and length of witnesses
>
> 8. means of expediting the taking of proof

It was only these two CAMP topics as to which the parties did not agree. However, none of Claimants' proposals affects the number and length of witnesses that each individual arbitrator will permit. None implicates the "taking of proof" which is a trial conduct issue.

Since "the scope of discovery" is indisputably one of the topics committed to CAMP, we believe CAMP must make determinations on this issue and cannot leave that issue to the separate

arbitrators. The parties clearly conveyed this authority to CAMP in order to avoid an impossible burden of conducting and tracking conflicting discovery permissions and burdens in each of the 307 arbitrations.

It is important to note that each of the 307 arbitrations is brought by the very same class of lease-operators, leasing a truck from CLI and driving for Central Refrigerated Service, Inc. The Respondents are the same. The claims are the same. The drivers stand in the same relationship to Respondents. Most of the proof will inevitably overlap. And many witnesses will inevitably need to testify in many separate arbitrations. CAMP thus has a critical role in developing uniform pretrial procedures allowing for efficient discovery and trial scheduling. Clearly, the arbitrations cannot be scheduled for the same time. The parties and their attorneys cannot be in two places at the same time. Nor does either side have an interest in seeing the process be made more expensive than it needs to be.

ARGUMENT

I. CLAIMANTS' PROPOSAL

A. The One-Time Presentation of Common Evidence Promotes Efficiency

Claimants' proposal sensibly starts with the foundational principles of efficiency of resolution of all pending claims and avoidance of duplication of effort, in line with the very purposes of arbitration. There is no denying there will be common evidence that pertains to all individual arbitrations, *e.g.*, expert testimony on the trucking industry, policies and practices that applied to all Central lease operators, etc. Indeed, Respondents acknowledged in phone conferences with Claimants that there will be common evidence and consequently suggested in their CAMP proposal that after each arbitrator has heard one arbitration, the hearing times be reduced from four days to a single day. Accordingly, and as Claimants propose, common

evidence should be presented only once. There is absolutely no reason why the same exact evidence should be presented to the arbitrators over and over again. This would do nothing but add to the cost and length of proceedings. To further streamline the presentation of common evidence, Claimants propose that a central document bank be created and maintained where common documents and exhibits would be stored, usable by the parties and the arbitrators as they see fit.

B. The One-Time Production of Discovery and the One-Time Resolution of Discovery Disputes Promotes Efficiency

In order to further expedite the resolution of these hundreds of arbitrations, Claimants propose that all common discovery be produced just once, similar to the one-time presentation of common evidence to the arbitrators. This includes common documents, common interrogatory responses and common deposition testimony. Again, there is no reason why the parties should unnecessarily waste time and resources to provide the same exact information repeatedly. This will particularly benefit Respondents, whose corporate witnesses will only have to sit for one deposition. And it certainly falls within the CAMP's purview of deciding "the scope of discovery." Claimants have also proposed the types of discovery that they believe would be common to all arbitrations, *e.g.*, advertisements regarding the amount of money drivers would make as lease operators, form communications to lease operators regarding the termination of their leases, etc.

Claimants also propose that the parties present discovery disputes that the parties are unable to resolve through the meet and confer process to the CAMP and that the CAMP's rulings on those disputes will apply to all individual arbitrations. This is clearly within the scope of the CAMP's jurisdiction to decide "the manner of resolution of discovery disputes." While Respondents also propose that discovery motions be decided by the CAMP (see Respondents'

proposal at p. 9), they do not propose that discovery issues be presented only once. All Respondents' proposal does is take the decision-making power from individual arbitrators and give it to the CAMP. It does nothing, however, to streamline the discovery process, as discovery disputes in each of the 307 individual arbitrations would still have to be presented to the CAMP.

The parties have been litigating a collective Fair Labor Standards Act arbitration in front of Judge Patrick Irvine. Not surprisingly, the parties have been able to agree on very little regarding the discovery which must be provided by each party, necessitating no fewer than eight (8) motions to compel in a single proceeding so far. The parties and arbitrator have expended numerous hours and a great deal of resources litigating these motions. As previously stated, and as acknowledged by both parties, much of the evidence in all 307 individual arbitrations, and thus the discovery issues that will arise in each, are the same. It would be an absurd and unnecessary waste of time and energy for the parties to litigate, and the arbitrators to rule on, the same discovery disputes again and again for all 307 individual arbitrations. If the parties were to make eight motions in each of the 307 individual arbitrations, the parties would be submitting and the CAMP or arbitrators ruling on 2,456 motions. There is simply no reason for this to occur.

C. Claimants' Proposed Forms of Discovery Promote Efficiency

Claimants propose to streamline the discovery process by limiting interrogatories to the identification of witnesses and by limiting depositions of Claimants and Respondent employees to 2 hours each. The claims and defenses in this case can be shown mostly through documents and, to a lesser extent, testimony, making interrogatories on anything other than the identification of witnesses unnecessary. Because most of the evidence in this case will be documentary, depositions of 2 hours should be more than sufficient to elicit the needed testimony from witnesses.

Further, in order to keep costs down and for the convenience of the parties and arbitrators, Claimants propose that depositions of individual Claimants and Respondents' employees located outside of Utah (where Respondents' corporate headquarters are located) be taken by telephone or by video conferencing, with the expenses borne by the party taking the deposition (to encourage parties to take depositions in the most cost-effective manner possible). Depositions as to policies and practices generally, whether by 30(b)(6) corporate witnesses or Respondents' employees, would be taken in person in Utah for HQ staff, and either in person or by phone for people outside of Utah.

D. Claimants Proposed Scheduling Provides a Workable Yet Prompt Timeline for the Resolution of All Arbitrations

In order to ensure an organized and thus efficient resolution of the hundreds of individual arbitrations, Claimants propose that the CAMP create and maintain a master calendar for the scheduling of all cases so that deadlines and hearings may be calendared according to the schedules of the parties and arbitrators involved. As the parties saw at the outset of these individual arbitrations, the scheduling of initial conferences, briefing on rules and joinder issues, and hearings on those issues took a tremendous amount of coordination and unnecessary back and forth between the AAA, the parties and the arbitrators. A master calendar overseen by the CAMP would eliminate this inefficiency.

In terms of specific deadlines, Claimants propose the following:

- Deadline for the parties to add claims/counterclaims – motions not later than 3 months prior to close of discovery;
- Discovery cut-off - six months from commencement of discovery;
- Dispositive motion deadlines not later than 2 months after discovery cutoff.

Claimants' proposed schedule is feasible if common discovery is produced, and common discovery disputes are presented and ruled on, only once. It is also feasible if discovery is limited as Claimants propose in Section C supra. Claimants estimate that under this proposed timeline, the 307 individual arbitrations proceeding under the CAMP agreement will be resolved (including trials, which are discussed in Section E infra) in approximately two years.

E. Claimants' Proposed Trial Length and Scheduling is Reasonable

Claimants propose that trials in 10 arbitrations before a single arbitrator would be scheduled for 4 days total in a single week, subject to such additional time as the arbitrator sees fit to allow. Four days of trials is achievable if common evidence is presented to each arbitrator only once as Claimants propose, as two days per side is more than sufficient to present any remaining individual evidence. Claimants further propose that the CAMP set the date for the first set of approximately 10 arbitrations to be conducted by a single arbitrator selected by Claimants. Two weeks thereafter, the next set of approximately 10 arbitrations will be conducted by an arbitrator selected by Respondents. The trials will alternate every two weeks thereafter until all claims are scheduled. If the desired arbitrator is unable to accommodate the available slot for which they are chosen, the side proposing that arbitrator may select another arbitrator. Arbitrations shall be scheduled for 4 days per week per arbitrator, subject to such additional time as the arbitrator sees the need to allow. Arbitrations shall be scheduled two weeks apart (4 days per arbitrator with one week break between arbitrations before the next arbitrator). Building in a one-week break between arbitrations will allow the parties to sufficiently prepare and allow counsel to attend to other business that will be accruing in their respective practices. Under

Claimants' proposal, all 307 individual arbitrations will be resolved in 2 years.[3] This aspect of Claimants' proposal falls within the CAMP's authority to make decisions regarding trial length and scheduling.

Claimants' proposal that each arbitrator hear the approximately 10 arbitrations assigned to him or her within the same week is not consolidation of the cases in violation of the parties' arbitration agreement. The arbitrators will all hear individual evidence applicable only to a particular Claimant. They will render separate decisions for each Claimant based on the individual evidence applicable to each Claimant, and will also hear the common evidence the parties agree is applicable to all Claimants one time only. Respondents' quarrel with this aspect of Claimants' proposal is confounding as Respondents acknowledge that much of the evidence will be common to all Claimants and need only be presented once to each arbitrator. Moreover, each arbitrator will apply individual evidence to the particular Claimant it is applicable to, or such testimony may be allowed by each arbitrator to the extent that arbitrator finds it bears on other cases. But that decision is left to the individual arbitrator, as it is a trial conduct issue. Finally, if arbitrators are not presented with all the claims assigned to them during a single period, the 307 arbitrations will take an unreasonably excessive number of years to resolve, as the parties' schedules will have to be coordinated with each arbitrator multiple times. As the parties have already seen, this is no simple task. Under the Respondents' plan, the 309 arbitrations will take approximately 3 years, and again that is making some unreasonably optimistic and unlikely assumptions.[4]

[3] 6 months for discovery, 2 months for choice of law and dispositive motions, 2 months (or fewer) to decide motions, 14 months for arbitrations (10 per week every 2 weeks).

[4] 14 months for pre-arbitration discovery and motions, 4 months to try the first 16 arbitrations, 1.25 months for mediation, 3.25 months to try the second 13 arbitrations, 9 months for pre-

F. Claimants Withdraw Proposals That the CAMP Believes Are Outside the Scope of the CAMP Agreement

During the parties' initial conference with the CAMP on February 25, 2015, the CAMP expressed that it had made preliminary findings that some of Claimants' proposals were outside the scope of the CAMP agreement:

- Proposals regarding disclosures (Proposals 3.b. and c.)[5];
- Imposing page limitations on briefs submitted to individual arbitrators (Proposals 1.b.iii and 8.b.;
- Motions on choice of law issues (Proposal 7);
- Each arbitration shall be individually decided by separate decision (Proposal 9.c.);
- Parties may present deposition testimony at trial (Proposal 9.d.).

Accordingly, Claimants withdraw these proposals, but reserve their right to raise these issues with the individual arbitrators.

II. RESPONDENTS' PROPOSAL

A. Respondents' Proposal Is Inefficient and Unworkable

Respondents' proposal also fails to streamline these arbitrations in any way. Under Respondents' proposal, it would take approximately 3 years to resolve all 307 individual arbitrations covered by the CAMP agreement, and that is making some unreasonably optimistic

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arbitration discovery and motions for the remaining 278 arbitrations and 7 months to try the remaining 278 arbitrations.

[5] CAMP had also raised concern that Item 3(a) (monthly updates to disclosures) might be outside the CAMP stipulation, but Claimants believe 3(a) is clearly within the terms of "pretrial issues" and "scope of discovery and manner of resolving discovery disputes." CAMP Stipulation Number 2. Respondents' understanding that the CAMP Stipulation covers scope of discovery is also shown by Respondents' submission proposing that CAMP address the number of depositions allowed to each side in these 307 cases.

and unlikely assumptions. For example, Respondents' proposal assumes that, during the weeks in which arbitrations hearings are taking place, all of the arbitration hearings proceed each week and each day without interruption. This is extremely unlikely given the number of parties involved whose schedules would have to be coordinated and the other things that the arbitrators and counsel will have to attend to during that time unrelated to these cases. Likewise, Respondents propose that more than one arbitrator hear arbitrations simultaneously. However, this is unworkable, given that each party has lead trial counsel who will be integral to the prosecution of each arbitration. Finally, Respondents' schedule calls for a 9-month fact discovery period. This is highly unlikely if the parties have to separately present identical discovery disputes in each individual arbitration to the CAMP for individual rulings. The only apparent efficiency in Respondents' proposal is that after the first wave of arbitrations, the hearing time of the remaining arbitrations is reduced from four days to one. While Respondents do not explicitly say so, Claimants assume that this will be because evidence that is common to all arbitrations will not be presented again.

B. Respondents' Proposals Regarding Discovery Unfairly Favor Respondents

Respondents' proposal that each party gets only one 7-hour deposition highly favors Respondents. The pertinent issue here is the level of control Respondents exerted over Claimants. The only person they need to depose in any given arbitration is each individual Claimant. However, there are many people on Respondents' side who exerted control over each individual Claimant, not to mention many people with knowledge of the policies implemented by Respondents to exert control over Claimants. Further, there is the knowledge of the corporate entities themselves for which 30(b)(6) depositions would appear to be necessary. While this issue is somewhat mitigated by Claimants' proposal that common deposition testimony be used in all

individual arbitrations and Respondents' proposal that the parties "will endeavor to avoid unnecessary duplication," Claimants will need more than one deposition per individual arbitration (albeit the length of the depositions will be limited to 2 hours).

Similarly, depositions in person highly favor Respondents if Respondents insist on holding them in Salt Lake City. This is where Respondents are headquartered, so most of Respondents' witnesses will be located there. However, Claimants are located all over the country, are working class people, and may not be able to take several days off from their jobs to travel across the country to sit for a deposition. Respondents undoubtedly hope that this will cause Claimants to withdraw their claims. Again, this concern is mitigated by Claimants' proposal that depositions of witnesses, including Respondents' employees, be done via phone or video conferencing if the witnesses are located outside of Salt Lake City and its surrounds.

Finally, the limited number of document requests favors Respondents. Most of the documentary evidence in this case is going to be in the possession of Respondents. Again, however, this issue is somewhat alleviated by Claimants' proposal that common documents be used in all individual arbitrations, providing that those documents do not count towards the 20 documents request limit.

CONCLUSION

Arbitrations are to be conducted efficiently and expeditiously. That is why the parties entered into the CAMP Stipulation. All of Claimants' proposals are geared to effectuating these goals while also permitting the parties to engage in limited discovery where necessary to prepare their cases. Claimants' proposals are consistent with the CAMP Stipulation. They are consistent with the arbitral goals of speed and efficiency. They are consistent with the arbitration agreement. Claimants' proposals should be adopted by CAMP.

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Respectfully Submitted,

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