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AMERICAN ARBITRATION ASSOCIATION
EMPLOYMENT ARBITRATION TRIBUNAL

In the Matter of the Arbitration between:

Case Number: 01-20-0014-8150

Keith Rice, Jr.,
Claimant,
-vs-

PJ Cheese, Inc.,
Respondent.

FINAL AWARD OF ARBITRATOR

I, Bruce W Bennett, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties dated December 27, 2018, and having been duly sworn, and having duly heard the proofs and allegations of the Parties, with Claimant represented by Mark Potashnick, Esq., of Weinhaus & Potashnick, and Respondent represented by William Hancock, Esq., of Galloway, Scott, Moss & Hancock, LLC, at an evidentiary hearing held on December 7, 2021, do hereby find and AWARD, as follows:

Background and Claims

This case stems from a claim under the Fair Labor Standards Act (the "FLSA"). Claimant was an employee and pizza delivery driver at various times for Respondent from September 2018 through October 2020, who owns and operates Papa John's franchise stores. In connection with his employment, Claimant seeks an award for damages for vehicle delivery expenses he claims to have incurred that were not adequately compensated for in violation of the FLSA. Respondent asserts Claimant failed to prove damages, and that he even if he could have, his expenses were fully

compensated.

On September 15, 2021, Respondent filed a Motion for Summary Judgement on all claims. On November 12, 2021, Interim Order No. 1 was issued in Claimant's favor, leaving only two issues remaining:

1. The appropriate method to apply for estimating or reasonably approximating Claimant's vehicle expenses, and

2. The question of whether unreimbursed fixed expenses reduce Claimant's wage below the minimum wage.

Discussion

ISSUE NO. 1: What is the appropriate method for estimating or reasonably approximating Claimant's vehicle expenses?

Claimant asserts he has two options for estimating or reasonably approximating his vehicle expenses: (1) he may use the reasonable approximation method to calculate the cost per mile for making deliveries, or (2) he may use the published IRS rate for business travel. Respondent asserts an employer is allowed to reimburse employees based on estimated travel expenses, that Claimant was unable to adequately estimate his costs, and the IRS rate is not required and acts merely as safe harbor under the FLSA.

(a) The reasonable approximation method

The parties engaged in a detailed, point-counterpoint analysis of the cost drivers that comprise estimated costs per mile. These drivers include for example, maintenance, depreciation, taxes, insurance, registration fees, and gasoline. Some costs are easily verifiable, such as the price paid for gas at the pump, registration fees, and taxes. Others are more subjective and rely on estimates since neither Claimant nor Respondent kept detailed receipts. In addition, Claimant drove multiple somewhat older vehicles over the course of his employment, with each having its own unique set of operational and

maintenance costs.

Although the parties' analyses were comprehensive and pointed to sources to support their positions, they were generally unpersuasive. Many repair receipts were missing and Claimant, through no fault of his own, could not definitively recall all of the costs he incurred. To fill in the gaps, unreliable references were made to third-party sources. For example, Claimant relied on a 2016 website published by yourmechanic.com, which lists repair costs rates charged by mobile mechanics. The rates in yourmechanic.com do not apply to Claimant's home area and it is unclear if they include repair and maintenance costs, or repair costs only, or whether there is an actual difference between the two. It is also not clear if mobile mechanics charge more or less than the amount Claimant might have paid. Another example of an unpersuasive argument is a reference to Kelly Blue Book values to determine depreciation, which requires a subjective estimate of a vehicle's condition and knowledge of what options are included with the vehicle. These vehicle options were not addressed in particular detail for any of Claimant's four vehicles. Moreover, the parties did not agree on some of the sources used to estimate expenses, and there was disagreement over whether certain insurance costs should be included in the cost per mile calculation. In sum, it is impossible to state with confidence, based on either party's argument, that estimates of costs are reasonably correct, or if one is more accurate than the other.

b. The IRS business mileage method

The Employment Arbitration Rules and Mediation Procedures (the "Employment Rules") are guided by principles set forth in the Employment Due Process Protocol, which was established in 1995 by a consortium of individuals representing private institutions including the AAA, management, labor, and governmental agencies in "an effort to ensure fairness and equity in resolving workplace disputes." (See *Employment Due Process Protocol* of the Employment Rules, p. 6) This provision describes the overarching purpose of the Employment Rules, which is to provide "fairness and equity" to the parties. Rule 30 takes this purpose a step further, which requires an arbitrator to "be the judge of the relevance

and materiality of the evidence offered, and conformity to legal rules of evidence shall not be necessary." Thus, the goal of the arbitrator is to judge the relevance and materiality of the evidence with an eye toward providing an outcome that is both fair and equitable.

Keeping this principle in mind, and after weighing the evidence and arguments of the parties, the IRS business mileage rate is the appropriate method to use to calculate Claimant's expenses. The IRS rate is updated regularly, is easy for everyone to find, easy to understand, and has been used by companies and employees for years. It includes fixed and variable expenses, which as discussed in Interim Order No. 1 are reimbursable. For example, the IRS determined the portion of the business standard mileage rate treated as depreciation, a fixed cost, is "25 cents per mile for 2018, 26 cents per mile for 2019, and 27 cents per mile for 2020." I.R.S. Notice 2022-03. Respondent claims the *total* mileage reimbursement rate for 2018-2020 should range from $0.23 to $0.28 per mile, which is less than or equal to the IRS depreciation rate, and only one of the costs incurred to operate a vehicle.

In addition, reimbursements using the IRS rate does not require detailed record-keeping, except for mileage incurred. It eliminates the need for employers and employees to second-guess one another over a comprehensive record of actual expenses incurred, which neither party had. It removes the guesswork over third-party sources, disposes with the debate over which costs are reimbursable, and obviates the need to interpret source data (e.g., Kelly Blue Book values – is the vehicle in good, fair, or excellent condition?).

Granted, the IRS rate is imperfect since it blends costs from various vehicle types, ages, conditions, and geographical locations, but it is a fair and equitable way to compute the cost to drive a personal vehicle for business purposes. It is transparent and does not subject employers and employees to extensive record-keeping which costs time and money. It can minimize the need for litigation, and as previously discussed, eliminates the dubious exercise of cherry-picking private third-party sources.

Respondent argues it is unnecessary to use the IRS mileage rate since it met its minimum wage obligation by reasonably approximating Claimant's vehicle expenses. This issue was addressed in

Interim Order No. 1, where it was decided the issue before the Arbitrator is not what an employer may do, but instead what an *employee* may do. Moreover, as discussed above, it is difficult to confidently estimate the reasonable cost of Claimant's automobile expenses. Therefore, this point is moot and need not be addressed.

ISSUE NO. 2: Did unreimbursed fixed vehicle expenses reduce Claimant's wage below the minimum wage?

At its core, this case is about an alleged FLSA violation. Claimant states he was paid less than legally required since the actual costs to drive exceeded his reimbursement, which effectively reduced his hourly rate to less than minimum wage. Based on a review of the evidence and actual mileage recorded, Claimant was under reimbursed $10,199.84. This does not include miles driven back to customers to correct orders since those miles were not sufficiently proven.

A FLSA violation occurred since Claimant was paid at or near the minimum wage while being substantially under-reimbursed for mileage costs. Because of the violation, Claimant also seeks liquidated damages, which by statute doubles actual damages. Claimant is entitled to such an award since Respondent did not assert an affirmative "good faith" defense. Respondent further failed to take appropriate action when Claimant notified Respondent that reimbursements were insufficient. Respondent did not remedy the shortfall or show Claimant why in its opinion, reimbursements were adequate. This lack of response is not in good faith; therefore, Respondent is liable for liquidated damages pursuant to 29 U.S.C. § 216(b).

Since a determination is made that a FLSA violation occurred, it is unnecessary to delve into the question of whether fixed expenses were not sufficiently reimbursed. The IRS business mileage rate method, which is applicable here, includes both fixed and variable expenses. That rate, which varies slightly by year, was much higher than the mileage reimbursement rate paid by Respondent. Therefore, under the IRS method, Claimant was not fully reimbursed for the total vehicle fixed and variable costs.

Attorneys' fees and costs of arbitration

Claimant seeks to recoup the entirely of his attorneys' fees and costs of arbitration as the prevailing party under 29 U.S.C. § 216(b). In total, he requests $159,768.84, which consists of $155,635.00 in attorneys' fees and $4,133.84 in expenses.

Georgia applies the "lodestar method" in cases similar to this matter, which requires fees to be based on a reasonable rate times a reasonable number of hours worked. *Benton v. Deli Mgt.,* Case No. 1:17-cv-296-TCB (N.D. Ga. Jan. 28, 2020). Once the lodestar is determined, the court may adjust the fee up or down after considering the twelve "*Johnson* Factors" derived from the ABA Code of Professional Responsibility DR 2-106 (1980) as adopted from *Johnson v. Ga. Hwy. Express*, 488 F.2d 714, 717 (5th Cir. 1974). These factors are as follows:

(1) the time and labor required;

(2) the novelty and difficulty of the questions;

(3) the skill requisite to perform the legal service properly;

(4) the preclusion of other employment by the attorney due to acceptance of the case;

(5) the customary fee;

(6) whether the fee is fixed or contingent;

(7) time limitations imposed by the client or the circumstances;

(8) the amount involved and the result obtained;

(9) the experience, reputation, and ability of the attorneys;

(10) the "undesirability" of the case;

(11) the nature and length of the professional relationship with the client; and

(12) awards in similar cases.

Claimant described the basis for his attorneys' fees request and provided a time sheet detailing hours spent on the case and the nature of the work performed. He also submitted invoices for his

expenses along with fee awards from similar cases.

Respondent does not dispute Claimant's expenses or his attorneys' hourly rates; however, it raises objections to other parts of the request. For example, Respondent asserts in certain instances Claimant's attorney fee rates were applied for administrative tasks that should have been billed at a lower rate. It also points to tasks performed by Claimant's various counsel that were in its opinion either duplicative or unnecessary. Lastly, Respondent argues the time spent on Claimant's fee application is excessive, and in consideration of all of the above factors, suggests a 30% across the board reduction of the total attorneys' fee request.

Upon review of the record in light of the *Johnson* Factors, Claimant's attorneys' fees request is reasonable. Time entries for attorney fee rates charged for administrative tasks were *de minimis*. Claimant's lead counsel, who reviewed the complete set of time records maintained by co-counsel, states time entries were excluded that were excessive, duplicative or otherwise could not reasonably be billed to a fee-paying client. The case was complex and involved voluminous data which needed to be interpreted and summarized for trial. It would not be unusual for even experienced attorneys to seek a second opinion or review of the data from co-counsel. Claimant's attorneys, using professional judgment, are given wide latitude under the *Johnson* framework to effectively and efficiently martial resources in a manner necessary to prosecute the case. Claimant's request for attorneys' fees and costs and Respondent's objections were carefully considered. Line item time entries were thoroughly reviewed, and there is insufficient evidence in the record, or from my personal interactions with the attorneys in the case, to show Claimant intentionally or inadvertently incurred unnecessary expenses. Claimant's invoices were also reviewed and accepted, even though there was no objection.

Therefore, when considering the *Johnson* factors, Claimant met his burden and is entitled to the award requested for his attorneys' fees and expenses.

Conclusion

THEREFORE, I find, and AWARD as follows:

1. Claimant is the prevailing party;

2. Respondent violated the FLSA and shall pay actual and liquidated damages to Claimant totaling $20,399.68; and

3. Respondent shall pay Claimant's attorneys' fees and expenses in the amount of $159,768.84.

The administrative fees and expenses of the American Arbitration Association totaling $2,950.00 shall be borne as incurred, and the compensation and expenses of the arbitrator totaling $19,012.50 shall be borne by Respondent.

This Award is in full settlement of all claims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

April 13, 2022

Bruce W. Bennett
Arbitrator