BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between AMALGAMATED TRANSIT UNION, LOCAL 519 and CITY OF LaCROSSE (MUNICIPAL TRANSIT UTILITY)	Case 184 No. 42987 MA-5866

Appearances:

Davis, Birnbaum, Joanis, Marcou and Colgan, Attorneys at Law, by Mr. James Birnbaum, appearing on behalf of the Union.

Klos, Flynn and Papenfuss, Attorneys at Law, by Mr. Jerome Klos, appearing on behalf of the City.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City respectively, were signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on February 6, 1990 in LaCrosse, Wisconsin. The City's brief in the matter was received February 15, 1990 and the Union's brief was received June 13, 1990, whereupon the record was closed. Based on the entire record, I issue the following Award.

ISSUE

The parties stipulated to the following issue:

> Did the City violate Section 8 and the work rules when it refused to permit the grievant to work overtime prior to October 11, 1989?

PERTINENT CONTRACT PROVISION

The parties' 1988-90 collective bargaining agreement contained the following pertinent provision:

Section 8

Seniority

Bus operators may select a different route every six (6) months. Route changes shall be accomplished on the first Monday in January and on the first Monday of July. Such route selection shall be by seniority. Route assignments shall only be changed every six (6) months, by mutual consent or in the event of lay-off.

In the event of the hiring of new regular reserve drivers, a change in work week, or a substantial change in routes, the City shall post a new run sign-up sheet.

Bus operators seniority starts on the date of his/her appointment to the bus operator classification.

Employees in shop classifications may be promoted to a higher classification according to seniority providing qualifications and experience are equal. Where changes of shifts are made, shift selection shall be by seniority among qualified affected employees in the shop.

FACTS

The facts are undisputed. Grievant Virgil Haldorson is a City bus operator who on September 12, 1989 1/ had an acute muscle spasm of the mid-back aggravating a long history of back pain. He left work on that date, was examined and treated by a doctor and given two documents: a status report which indicated he could return to work on September 14 and a clinic note which stated in pertinent part:

> The plan will be to keep him off work for one more day. He can go back to work on the 14th. He is advised not to sign up for any overtime for the next couple weeks. Return p.r.n.

Haldorson did not return to work on September 14 though due to recurring back pain. He instead revisited the doctor who advised him to stay off work till September 25th and gave him a status report indicating same. This medical slip did not contain any work or overtime restrictions.

Haldorson returned to work on September 25th and immediately upon doing so signed up

1/ All dates hereinafter refer to 1989.

for overtime assignments. Although Haldorson had sufficient seniority to qualify for such overtime assignments, the City refused to assign him overtime based on the clinic's note of September 12 advising against overtime for a couple of weeks. Haldorson grieved this denial of overtime work.

The City did not allow Haldorson to work overtime from the time he returned to work (September 25) until December 8, 1989. At the hearing the City acknowledged that overtime was, in fact, owed to Haldorson from October 11 (i.e. two weeks after he returned to work on September 25) 2/ through December 8. The question herein is whether overtime is owed prior to October 11.

POSITIONS OF THE PARTIES

It is the Union's position that the City's denial of the grievant's request to work overtime after he returned to the Union, the grievant had a contractual right to work overtime and he indicated to City officials he was fully capable of working overtime when he returned to work. If the City was confused or in doubt as to the intent of the doctor's statement concerning overtime, the Union believes it was incumbent upon the City to contact the doctor to seek clarification of same. The Union notes in this regard that the record is devoid of any such effort. Therefore, the Union argues that the City had no basis whatsoever for denying the grievant the right to work overtime. In order to remedy this alleged contractual breach, the union requests that the grievant be paid for the overtime he was denied after September 25, 1989. 3/

The City's position is that the grievant did not have medical clearance to work overtime until two weeks after he returned to work on September 25 (namely October 11). In support thereof it relies on the note from the clinic on September 12 that it was not advisable for Haldorson to sign up for overtime for a couple of weeks. According to the employer, any application of common sense or ordinary language would mean a couple of weeks from when he was able to go back to work. It argues that when the grievant's return to work date changed from September 14 to September 25, the two week no-overtime period likewise changed. Thus, in its view to apply the Union's position to the contrary herein would obtain an indefensible result.

DISCUSSION

2/ While two weeks after September 25 was actually October 9, overtime was not available until October 11.

3/ Although the Union's brief actually listed the applicable back pay date as being September 21, this date is obviously mistaken inasmuch as the grievant had not yet returned to work as of that date. Accordingly the date the grievant returned to work (September 25) has been substituted in its place.

There is no question that Haldorson qualified contractually for overtime assignments when he returned to work on September 25. Thus, all he was trying to do was avail himself of this contractual right to overtime. The City refused to assign him overtime though based on the medical clinic's note of September 12. In the City's view, the grievant did not have medical clearance to work such overtime for two weeks after September 25 (i.e. until October 11). Accordingly, the instant matter does not involve a question of contract interpretation per se, but rather involves a determination of whether the medical documents involved support the City's denial of a contractual right to the grievant.

The first status report dated September 12 and accompanying clinic note summarized the grievant's medical status as of that point in time, to wit: he could return to work on September 14 but was not to work overtime for a couple of weeks thereafter. Thus, it was the doctor's intent, as of that date, to restrict the grievant's overtime work. Had the grievant gone back to work on September 14 as originally planned he would not have been eligible to work overtime for the next two weeks. However, the grievant did not, in fact, return to work on that date but instead saw the doctor again and obtained a second status report which indicated he could return to work on September 25. This second status report (which had a return to work date of September 25) superseded the first one (which had a return to work date of September 14). On its face, this second status report did not contain or impose any restrictions upon the grievant, specifically anything concerning when the grievant could resume overtime. This second status report was not accompanied by a clinic note like the first one was.

The City argues that when the grievant's return to work date changed from September 14 to September 25, the two week no-overtime period likewise changed. I disagree. Had the doctor wanted to impose overtime restrictions upon the grievant when he returned to work on September 25 he certainly could have done so. However, since the doctor did not explicitly do so in the second status report or make any reference therein to the overtime restrictions contained in the clinic note of September 12, the inference drawn by the undersigned is that no medical restrictions were placed on the grievant when he returned to work on September 25. Therefore, I decline to read the overtime restrictions that accompanied the first status report into the second status report. In my view, the restrictions on overtime applied to the first status report dated September 12 and that status report only. That being the case, I find no support in the applicable (i.e. second) status report for the City's position herein that the grievant was to wait for two weeks after September 25 (i.e. until October 11) before he worked overtime again.

Moreover, even if the undersigned is simply dead wrong on this call (and the doctor did intend to restrict the grievant from working overtime for two weeks after September 25), the City could have taken steps to prove same that were not shown here. Specifically, it could have either contacted the doctor directly for clarification of his intent concerning overtime or requested that the grievant do so. It did neither. That being so, the City could have substantiated its proposed interpretation of the medical documents but failed to do so. Accordingly, it has not been shown that the doctor intended to restrict the grievant from working overtime for two weeks after

September 25.

Having so held, it follows that the grievant qualified to work overtime immediately upon his return to work on September 25 because he was not under any medical restriction not to do so. Inasmuch as the City refused to assign him overtime as of that date, it follows that the grievant's contractual rights to overtime were violated. In order to remedy this contractual breach the City shall pay the grievant for lost overtime opportunities effective September 25, 1989.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That the City violated Section 8 and the work rules when it refused to permit the grievant to work overtime prior to October 11, 1989;

2. That in order to remedy this contractual breach the City shall pay the grievant for lost overtime opportunities effective September 25, 1989.

Dated at Madison, Wisconsin this lst day of August, 1990.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator