

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 STEVENS POINT CITY TRANSIT EMPLOYEES, :
 LOCAL 309, AFSCME, AFL-CIO, : Case 79
 : No. 45711
 and : MA-6720
 :
 CITY OF STEVENS POINT :
 :

Appearances:

Mr. Guido Cecchini, Representative, Council 40, AFSCME, AFL-CIO,
 appearing on behalf of the Union.
Mr. Bruce K. Patterson, Employee Relations Consultant, appearing on
 behalf
 of the City.

ARBITRATION AWARD

Stevens Point City Transit Employees, Local 309, AFSCME, AFL-CIO, hereinafter referred to as the Union, and City of Stevens Point, hereinafter referred to as the City, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Mr. William C. Houlihan as arbitrator to hear and decide a grievance over the meaning and application of the terms of the parties' agreement. Due to the unavailability of Mr. Houlihan, the Commission designated the undersigned as arbitrator in this matter. Hearing was held in Stevens Point, Wisconsin on July 31, 1991. The hearing was transcribed and the parties filed post-hearing briefs and reply briefs, the last of which were exchanged on October 16, 1991.

BACKGROUND

The facts underlying the instant grievance are not in dispute. On January 14, 1991, the City's Transit Manager informed all bus drivers of proposed bids for seven routes; three full time routes which were not "split shifts", three full time routes which were "split shifts", and one part time route. These routes were posted with an implementation date of January 28, 1991. On January 23, 1991 the Union objected to the changes in hours, routes and job duties and the matter was grieved and the parties agreed to allow the grievance to proceed directly to grievance arbitration without following the grievance procedure steps.

ISSUE

The parties were unable to agree on a statement of the issues. The Union framed the issue as follows:

Does the Labor Agreement or the "whole agreement" grant the City the unilateral right to institute changes in hours of work without negotiations?

The City stated the issue as follows:

When the City of Stevens Point Transit System established work schedules to be effective January 28, 1991 did it violate Articles 2, 10, and 26 of the Collective Bargaining Agreement?

If so, what shall the remedy be?

The undersigned frames the issue thusly:

Did the City violate the parties' collective bargaining agreement when it posted routes for bidding which unilaterally changed hours to include split shifts and part-time hours?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

Article 2 - Management Rights

A. The City possesses the sole right to operate City government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

1. To direct all operations of the City;
2. To establish reasonable work rules and schedules of work;
3. To hire, promote, transfer, schedule and assign employees;
4. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
5. To layoff employees because of lack of work or any other legitimate reasons;

. . .

Article 10 - Hours of Work and Route Bidding

A. Normal Work Hours:

For Regular Drivers

A. The bid work to which they are assigned vis a vis the bid process as described in Paragraph G.

For Non-Bid Route Drivers

B. Forty (40) hours per week, all hours occurring Monday through Saturday.

B. Wheelchair Van
Regular Driver

Normal work week shall consist of 40 hours, no less than eight (8) consecutive hours per day, with two (2) fifteen minute breaks and a one (1) hour lunch mutually scheduled, Monday through Friday.

C. Non-Bid Route Drivers

Bid routes on Saturday shall be "normal work hours."

D. Afternoon drivers shall be compensated for shift differential after 6:15 p.m. of twenty cents (.20) per hour.

E. A thirty (30) minute paid break shall be maintained on all regular routes.

F. All schedules and schedule changes of one-half hour or more, for bid-routes shall be posted for bid ten (10) days prior to implementation unless the change is temporary (one month or less).

G. Route Bidding

1. Regular employees shall be assigned a regular route to be obtained on a "bid" basis.

Routes will be available for bidding when there is an opening due to:

- A. Extended illness or death;
- B. Resignation/termination/promotion/transfer.
- C. All bid work will be reposted every six (6) months.

Bidding shall be based upon posted seniority list.

NOTE: All drivers currently assigned a route shall keep that route; i.e., there will be no retroactive route bidding.

2. All reassignment of routes done by

virtue of the bid process will be implemented within five (5) work days of completion on the top half of the seniority list choosing between December 1 and December 15/June 1 and June 15, and those on the bottom half of the seniority list choosing from December 15 to December 24/June 15 to June 24. New routes will be assigned on January 1/July 1 following the bidding.

. . .

Article 26 - Entire Memorandum of Agreement

This Agreement constitutes the entire Agreement between the parties and no verbal statement shall supersede any of its provisions. Any amendment or Agreement supplemental hereto shall not be binding upon either party unless executed in writing by the parties hereto. The City recognizes the right of the Union to discuss and/or negotiate changes in working conditions affecting the bargaining unit.

UNION'S POSITION

The Union contends that the collective bargaining agreement does not grant the City the unilateral right to institute split shifts or to unilaterally reduce the hours of work. It submits that the agreement is silent on the question of specific hours of work. It points out that Article 26 of the agreement specifically requires that any addendum or amendment must be in writing to be binding on the parties and the City has produced no writing to specifically allow it to unilaterally change hours. The Union asserts that the City never offered to negotiate an agreement on split shifts or on any reduction of hours. The Union argues that "routes" and "bids" should not confuse the issue and it concedes that the City has the right to determine routes and the right to add to or to diminish the work force. It admits that the City may change the hours of work and "work schedules" may be determined exclusively by the City; however, the City may not arbitrarily reduce the hours of work, and correspondingly, the pay of employees or to require split shifts without first bargaining with the Union. The Union insists that the City by instituting split shifts and reducing hours without first bargaining with the Union violated the agreement and it prays that the City be ordered to negotiate in good faith over hours of work and make employees whole for any economic losses incurred, if any.

CITY'S POSITION

The City contends that under Article 10, Section A, Subsection A and Section G, it had the authority to establish work schedules for the regular drivers. The City notes that under Article 10, there are three distinct categories of drivers; regular drivers, non-bid route drivers, and wheelchair van regular driver. It points out that the language of Article 10 contains specific language in terms of hours of work for the wheelchair van regular driver. The City also refers to a side letter dated January 5, 1990, which was made a part of the 1989-90 collective bargaining agreement, which further evidenced a distinction between the various categories of bus drivers. The City argues that the clear and unambiguous language of Article 10 allows the City to unilaterally change hours of work during the term of the agreement including the unilateral establishment of routes to be bid by employees.

The City claims that bargaining history supports its position. It maintains that the right to establish work schedules was bargained in the initial contract between the parties and the Union was the principal drafter of Article 10. The City insists that it did not need to procure any additional language as it had the right to establish work schedules and the Union had the opportunity to bargain changes in the language in successor agreements but the language has remained the same. The City asserts by the language of Article 10, Section A, the Union has waived its right to bargain changes in work schedules and the City has the unfettered right to determine hours of work and work schedules for all drivers except the wheelchair van regular driver. The City requests that the grievance be denied.

DISCUSSION

An employer has a statutory duty to bargaining collectively with the representative of its employes with respect to mandatory subjects of bargaining during the term of an existing collective bargaining agreement, except as to those matters which are embodied in the provisions of said agreement, or bargaining on said matter has been clearly and unmistakably waived. 1/ Where a collective bargaining agreement expressly addresses a mandatory subject, the language of the agreement determines the rights of the parties. 2/ The determination of whether the language constitutes a waiver must be determined on a case by case basis. 3/ In the instant case, the collective bargaining agreement contains provisions related to hours of work. Article 2 provides that the City has the right to establish hours of work and to schedule employes. Article 10 is entitled "Hours of Work and Route Bidding" and provides in Section A that the normal work hours for regular drivers is the work to which they are assigned pursuant to the bid process. Many arbitrators have recognized that except as restricted by the agreement the right to schedule work remains in management, and where the agreement is silent as to the workweek, the employer may change the starting and stopping times for shifts. 4/ In the instant case, the Union has conceded that the City may

1/ City of Richland Center, Dec. No. 22912-A (Schiavoni, 1/86), affirmed Dec. No. 22912-B (WERC, 8/86); Racine Unified School District, Dec. No. 18848-A (WERC, 6/82).

2/ Racine Unified School District, *supra*; Janesville School District, Dec. No. 15590-A (Davis, 1/78), aff'd by operation of law, Dec. No. 15590-B (WERC, 2/78).

3/ Racine Unified School District, Dec. No. 19357-D (WERC, 1/83).

change the hours of work and that "bids," "routes" and "work schedules" may be determined exclusively by the City. 5/ The sole issue asserted by the Union is that the language of the agreement does not permit the City to schedule split shifts or reduce hours without first negotiating with the Union.

A review of Article 10 indicates that the "normal work hours" for regular drivers are the work hours that result from bidding for routes. It follows that the City may establish the starting and ending times of the routes which are bid by employees which then establishes their normal work hours. For example, the proposed bids which went into effect on January 28, 1991 provided a red route with a report time of 5:15 a.m. and blue route with a report time of 10:15 a.m.. 6/ These routes ran for 7.75 and 8.0 hours respectively, with the red route ending at 1:30 p.m. and the blue route ending at 6:00 p.m. with another 15 minutes for refueling and sweeping the bus. It must be concluded that the agreed upon language allowed the City to change starting times unilaterally without negotiations with the Union. With respect to non-bid route drivers, Article 10, Section A, Subsection B specifies forty (40) hours per week, all occurring Monday through Saturday. 7/ Another designation for non-bid route drivers appears to be substitute drivers. 8/ Article 10, Section B, provides that the normal work hours for the wheelchair van regular driver is 40 hours a week, consisting of not less than eight (8) consecutive hours per day Monday through Friday. The parties clearly specified that the normal work hours for the wheelchair van regular driver were no less than eight (8) consecutive hours, but the normal work hours for the bid and non-bid drivers does not contain such an express restriction. It must be concluded that where the parties agreed to restrict the City's right to schedule work, they did so by express language, but where there is no express language, it must be concluded that the parties were not placing any restrictions on the City's right to schedule work. Inasmuch as there is no language restricting bid and non-bid drivers to a work schedule consisting of eight (8) consecutive hours, the City had the right to schedule them to work "split shifts." 9/ Thus, the language of Article 10 constitutes

4/ Coca Cola Co, 73 LA 621 (Light, 1979); Elkouri & Elkouri, How Arbitration Works, (BNA 4th Ed. 1985) at pp 519-524.

5/ Union's responsive brief, p.1.

6/ Ex-11.

7/ Ex-1.

8/ Ex-17.

9/ Coca Cola Co., 73 LA 621 (Light, 1979).

a waiver of the Union's right to bargain over the unilateral implementation of split shifts for bid and non-bid drivers and the City may implement split shifts without first negotiating with the Union.

Similarly, Article 10 specifies 40 hours per week for the non-bid route drivers and wheelchair van regular driver but the agreement is silent as to bid drivers. Again, had the parties intended to restrict the scheduling of regular bid drivers to 40 hours per week, they could have similarly stated this but did not, thus inferring that there is no restriction on the City's scheduling the bid drivers to work reduced hours. The absence of language restricting the City to schedule 40 hours for bid drivers thus constitutes a waiver by the Union to negotiate reduced hours. Of course, the City must comply with Article 4 if any employe is reduced in hours. As the language of Article 10 permits the City to establish a bid route of less than 40 hours per week, the City may unilaterally implement same without first negotiating with the Union.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The City did not violate the parties' collective bargaining agreement when it posted routes for bidding which unilaterally changed hours to include split shifts and part-time hours, and consequently, the grievance is denied.

Dated at Madison, Wisconsin this 21st day of November, 1990.

By _____
Lionel L. Crowley, Arbitrator