BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
AMALGAMATED TRANSIT UNION LOCAL 519	Case 205 No. 46043 MA-6854
and	
CITY OF LaCROSSE	

Appearances:
Mr. James G. Birnbaum, Davis, Birnbaum, Joanis, Marcou & Colgan, Attorneys at Law, Community Credit Union Building, 2025 South Avenue, Suite 200, P.O. Box 1297, LaCrosse, Wisconsin 54602-1297, on behalf of the Union.
Mr. James Geissner, Personnel Director, City of LaCrosse, LaCrosse City Hall,

ARBITRATION AWARD

The Amalgamated Transit Union Local 519 ("the Union") and the City of LaCrosse ("the City") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the City concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to serve as arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement relating to the computation of overtime. Hearing in the matter was held in LaCrosse, Wisconsin, on October 3, 1991; it was not transcribed. The City and Union filed written briefs, respectively, on April 3 and June 1, 1992, and reply briefs, respectively, on July 24 and July 20, 1992.

ISSUE

Has the City violated the collective bargaining agreement by the exclusion of sick leave, vacation, holiday, and other leaves from the computation of overtime? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

From the 1988-1990 collective bargaining agreement:

Section 14

Premium Time

Operators shall be paid time-and-one-half for all hours worked over forty-four (44) hours per week. All shop employees shall be paid time and one-half for all hours worked over forty (40) hours per week. Sick leave, vacation, holidays and excused absences by the supervisor in writing shall be interpreted as time worked for purposes of calculating overtime within the weekly pay period.

. . .

Section 15

Holiday Pay

All full time employees shall receive pay for the following holidays: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Christmas Eve and New Year's Eve. Employees who do not work on a holiday shall receive holiday pay only. Employees who work on a holiday shall receive holiday pay in addition to pay for regular hours worked.

Holiday pay shall be calculated as follows: All full time bus operators shall receive eight (8) hours pay at the regular straight time hourly rate. All full time employees shall receive eight (8) hours pay at the regular straight time hourly rate.

New Year's Eve shall become effective December 31, 1982.

All employees shall receive eight (8) hours of holiday pay for the three (3) non-transit holidays, that is Good Friday, New Year's Eve and Christmas Eve. In the event that an employee works on any of these three (3) days, he/she shall be paid straight time wages for the actual hours worked and eight (8) hours holiday pay. Such holiday pay may not be used to calculate overtime compensation when the work week exceeds forty (40) or forty-four (44) hours.

From the 1990-1992 collective bargaining agreement:

Section 3

Grievance Procedure

Matters involving the interpretation, application or enforcement of this agreement shall constitute a grievance under the provisions as set forth; however, a grievance not initiated within ten (10) days from the date the employee knew or had reason to know of the cause of such grievance (Saturdays, Sundays, holidays excluded) shall be held invalid. If an employee has a grievance, he shall:

1. Within ten (10) days discuss the grievance with his immediate supervisor. If no solution is reached, he may within ten (10) days of initiating the grievance;

2. Reduce the grievance in detail to writing a clear and concise statement of the grievance and indicate the issue involved, the relief sought, the date the incident or violation took place, and the specific section of the contract involved and submit it to his supervisor who will note his comments and forward it to the Director of Personnel, who with the department head, within ten (10) days (Saturdays, Sundays and holidays excluded) shall attempt to solve the grievance and answer the written grievance in writing.

3. If a satisfactory solution cannot be reached, the

grievant may, within thirty (30) days of receipt of the City's written answer, appeal to the Wisconsin Employment Relations Commission, who will appoint a neutral arbitrator.

If a matter is not timely advanced by the grievant from one step to the next, the grievance shall be considered settled as of the last completed step and shall be invalid.

The arbitrator shall not add to, or subtract from, the terms of this agreement.

The City and the Union agree that the decision of the arbitrator shall be final and binding of both parties.

The grievance procedure set forth herein shall be the exclusive complaint of an employee as to any matter involving the interpretation or application of this agreement.

All complaints originating in City departments shall be handled in the manner outlined above and no deviation therefrom will be permitted. Specifically, employees are prohibited from presenting such complaints, formally or informally to officers of the City of LaCrosse not included in this procedure.

. . .

Section 15

Premium Time

Effective April 4, 1991, Operators shall be paid time-and-one-half for all hours worked over forty (40) hours per week. All shop employees shall be paid time and one-half for all hours worked over forty (40) hours per week.

. . .

Section 16

Holiday Pay

All full time employees shall receive pay for the following holidays: New Year's Day, Good Friday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, Christmas Day, Christmas Eve and New Year's Eve. Employees who do not work on a holiday shall receive holiday pay only. Employees who work on a holiday shall receive holiday pay in addition to pay for regular hours worked.

Effective April 4, 1991, the employee must physically work their last scheduled day prior to the holiday and their first scheduled day following the holiday in order to receive holiday pay as outlined in this section. Personal business days, vacations, and sick leave with an acceptable medical substantiation is considered time worked for purposes of this section.

Holiday pay shall be calculated as follows: All full time bus operators shall receive eight (8) hours pay at the regular straight time hourly rate. All full-time employees shall received (sic) eight (8) hours pay at the regular straight time hourly rate.

All employees shall receive eight (8) hours of holiday pay for the three (3) non-transit holidays, that is Good Friday, New Year's Eve and Christmas Eve.

BACKGROUND

The case concerns the interpretation and application of new language in the parties' 1990-1992 collective bargaining agreement regarding the calculation of hours for the payment of overtime. The City contends that, effective April 4, 1991, the computation was switched from an hours paid to an hours worked formula; the Union disagrees, contending that the parties instead agreed to pay holidays at straight time wages.

As noted above, the 1988-1990 collective bargaining agreement explicitly stated that sick leave, vacation, holidays and excused absences would be interpreted as time worked for purposes of calculating overtime. That language was dropped from the successor agreement.

Prior to negotiations, the City commissioned a report by the consulting firm of John Doolittle and Associates, Inc., to focus on management and operations. That report concluded that the City's Municipal Transit Utility (MTU) was paying excessive driver overtime, and that one of the causes for this result was "allowing sick leave and excused time off to count as time worked for the purposes of computing overtime...." A copy of the Doolittle report was provided to the Union.

When negotiations for the successor agreement began, the City was represented by Personnel Director Ralph Nuzzo. Nuzzo left after about six months, in July, 1990; his replacement then left about two months later; negotiations were completed during the tenure of Personnel Director James W. Geissner. The primary Union spokesperson throughout this period was ATU President Greg Johnson.

By letter of April 9, 1990, Nuzzo informed the union that the City wished to negotiate, inter alia, on the topics of premium pay and holiday pay. In its preliminary final offer of June 19, 1990, the City proposed that operators be paid time and one-half for all hours worked over forty (40) hours per week, rather than 44 as in the 88-90 agreement. In that same document, the City also proposed to amend holiday pay by deleting the reference to 44 hours, and by adding the following:

> The employe must physically work their last scheduled days prior to the holiday and their first scheduled day following the holiday to receive holiday pay as outlined in this section. If an employe is off sick, they must submit a doctor's excuse for their actual scheduled day prior and/or their actual scheduled day after the holiday.

In a document titled "Union's Last Proposal", dated October 31, 1990, the Union described the changes, in both overtime and holiday pay, from 44 to 40 hours as tentative agreements. The Union offer also repeated the paragraph on holiday pay cited immediately above.

Also on October 31, 1990, the City prepared a document which, as to overtime calculations, included both the proposed revision from 44 to 40 hours as well as the deletion of the last sentence in the first paragraph. The revision is marked with a symbol indicating tentative agreement; the deletion, raised in writing for the first time in this document, has no such symbol. The City's offer also reincorporates the first sentence of the holiday pay paragraph cited above, which it indicates is a tentative agreement. Also cited as a tentative agreement is the following:

> Such holiday pay may not be used to calculate overtime compensation when the workforce (sic) exceeds 40 (40) hours.

On October 31, 1990, WERC Investigator Marshall L. Gratz directed the parties to submit Final Offers. The City's Final Offer, submitted on November 10, 1990, contains the same proposed changes as reflected in the October 31 submission. The Union's Final Offer, submitted on March 19, 1991, states that there were tentative agreements on the following: as to overtime calculation, the revision from 44 to 40 hours, the deletion of the last sentence in the first paragraph, and the effective date being the date of the award; as to holiday pay, the addition of the language from the City's proposal of October 31, again to become effective on the date of the award.

On March 19-20, Investigator Gratz led the parties in a marathon, 22-hour

mediation session. At the successful completion, the parties initialed an eight-page Tentative Settlement Agreement. Included therein was the following, incorporated directly from the Union's submission:

> Section 14, Premium Time
>
> Revise the 1st sentence to read as follows: "Operators shall be paid time and one half for all hours worked over forty (40) per week."
>
> Delete the last sentence in the 1st paragraph. Effective on date of the award.
>
> Section 15, Holiday Pay
>
> Add the following to the 2nd paragraph
>
> The employee must physically work their last scheduled day prior to the holiday and their first scheduled day following the holiday in order to receive holiday pay as outlined in this section.
>
> Effective on date of the award.

The 1990-1992 contract does not contain a provision that holiday pay may not be used to calculate overtime compensation when the work week exceeds 40 or 44 hours. Such a provision was included in the 1988-1990 contract. The Tentative Settlement Agreement, initialed by the parties on March 20, 1991, did not, by its express terms, either amend or delete this provision.

The 1990-1992 contract does contain a provision that, when assessing days worked in connection with holiday pay, "(p)ersonal business days, vacations, and sick leaves with an acceptable medical substantiation is considered time worked for purposes of this section." Such provision was not included in the 1988-1990 contract. The Tentative Settlement Agreement did not, by its express terms, reflect such an addition to the contract.

On April 4, 1991, the City's Finance and Purchase Committee voted unanimously to recommend ratification. On April 5, 1991, the LaCrosse Tribune published an article, headlined "City, Union Pleased with MTU Contract," in which Personnel Director Geissner and ATU President Johnson both praised the settlement. Johnson is quoted as describing the settlement as "a win-win deal," because "(t)axpayers save some money, the City saves the system and the union saves jobs," adding, "we have traded a little money for more job security. That's the name of the game -- jobs."

The article also relates that "Geissner and Johnson outlined key parts of the deal which resulted in work rule concessions by MTU Local 519." These items included the use of part-time drivers, the salary schedule, the cost-of-living increase adjustment, a job security list, and the following:

> Overtime rules which proved costly to MTU have been revised. Previously a driver received time-and-a-half pay if any combination of sick leave and time worked exceeded 40 hours.
>
> Now the driver will not receive overtime until after 40 hours of actual work.

On April 8, 1991, Geissner sent a memorandum to the Mayor and Common

Council Members recommending ratification of the contract. As point three of an 11-item list of "Highlights," Geissner stated that "the definition of overtime has been changed from an hours paid approach to an 'hours worked' method." The City ratified the contract.

On July 8, 1991, Johnson, on behalf of ATU Local 519, submitted the following grievance:

> Local 519 agreed by contract to have hours paid for sick time, vacation time, personal business time, and holiday pay to be paid at straight time rates. However Local 519 never agreed to having these hours excluded from the computation of overtime. The City has excluded these hours from the computation of overtime.

As remedy, the Union sought "Use all time worked and earned in the computation of overtime."

On July 16, 1991, Geissner responded to Johnson, in part, as follows:

> The City rejects the grievance on the grounds that the grievance fails to site (sic) a specific violation of the agreement and that the issue of computing overtime on an "hours worked" basis was specifically agreed to in the negotiation of the present agreement. The agreement to change to "hours worked" from an "hours paid" approach is reflected by a specific change of language. The matter is further discussed in various communications with the union, the signed tentative agreement and collective bargaining notes.
>
> The grievance is denied.

On July 30, 1991, the Union requested grievance arbitration pursuant to Sec. 111.70(4)(c) 2, Wis. Stats.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Union asserts and averts as follows:

> The bargaining history undisputedly establishes that the union's position is correct. It is uncontroverted that the City's former Personnel Director, Ralph Nuzzo, specifically proposed to slightly modify the premium time language to permit only the payment of holidays at straight time during weeks when the combination of holidays and hours worked reached 80 hours. The Union agreed to this, but at no time did the Union agree to totally reduce the formula to strictly hours worked. Contract language should be construed strictly against its author, in this case Nuzzo. Finally, there was no discussion or negotiation over this point after Nuzzo left the City's employ; thus, all evidence introduced through the current Personnel Director fails to address the matters tentatively agreed to prior to his hire.
>
> Thus, there is no dispute that the bargaining history clearly establishes that it was not the intent of the Union to surrender the entire premium overtime formula, but

merely to authorize a slight modification to permit a modest cost savings.

The effects of the proposal as understood by the Union is consistent with what the City proposed at the bargaining table. The record is uncontroverted that the City's proposal was intended to save it about $8,000. However, the record reveals that as a result of the City's interpretation of its proposal, it has in one year saved $30,000. Therefore, its own record and numbers establish that the City currently is making a grab well beyond its proposal and agreement.

As a result of the undisputed bargaining history, the grievance is meritorious and should be granted.

Moreover, for collective bargaining peace, the City should be bound by its agreements. A party to negotiations should not be able to obtain through arbitration what it failed to do at the bargaining table.

It is clear that the ambiguity and confusion has arisen because the City has kept changing negotiators. Now the City has sought to capitalize on a sad circumstance, primarily of its own creation. To allow the new personnel director to rewrite the clear, uncontroverted intent of the parties will do nothing but destroy collective bargaining relationships in the future. The City ought to be bound by the promises made by its former personnel director, Nuzzo.

The Union gave up substantial previously negotiated benefits to give economic relief to the City; these negotiated concessions, admittedly for purposes of retaining job security, were freely given with the full understanding that the tentative agreement between the parties concerning premium time was limited to merely the payment of holidays at straight time wages.

If the City desires to emasculate the formula for the calculation of overtime, it is incumbent upon the arbitrator to require the City to do so at the bargaining table.

Accordingly, the grievance should be sustained, and the City ordered to pay back pay to any employes who have been denied overtime pay as a result of the City's erroneous calculation.

In support of its position that the grievance should be denied, the City asserts and avers as follows:

The grievance which the Union filed on July 8, 1991 is untimely. The first dispute over the interpretation of the relevant language occurred in April, 1991, at which time the Union was aware of the City's position on the calculation of overtime (in this instance, as affected by sick leave). The Union did not grieve this matter then, nor did it grieve it late May, when the new language affected how the Memorial Day holiday was

treated. The Union did not grieve until the July 4 holiday period. The grievance is untimely.

Further, the new language in the new collective bargaining agreement shows clear and unambiguous intent to change the methodology of overtime payments. The unusual effective date -- April 4, 1991, the day the contract was ratified by the City's Finance and Purchase Committee -- shows that the parties had agreed to a change, and that the change not be retroactive to the June, 1990 starting date for the overall contract.

The first the City ever heard about the so-called Nuzzo/Johnson private agreement was at the arbitration hearing in October, 1991. The City representatives routinely informed all City decision-makers of the issues at hand, in writing. The parties had numerous negotiation sessions after Nuzzo left City employment, and this purported understanding was never raised. There is no evidence that this purported side bar agreement ever occurred.

The post-agreement press coverage -- in which the change in the overtime calculation is described as herein represented by the City -- further supports that there had been an agreement consistent with the City's interpretation.

Other contracts between the City and its unionized workers have the same, or similar language to that in the contract under review.

The arbitrator is without authority to modify the terms of the collective bargaining agreement. The Union's proposed interpretation, affecting holiday pay but not the other categories of leaves, would clearly be adding to the agreement. The arbitrator must either grant the grievance in its entirety, thereby adding sick leave, vacation and excused absences, as well as holidays, into the calculation of overtime, or deny the grievance in its entirety.

The parties deleted sick leave, vacation, holidays and excused absences from the list of items to be included in the calculation of overtime. The intent is clear, and the language unambiguous. A deal is a deal, and the grievance should be denied.

In reply, the Union posits further as follows:

The bells and whistles in the City's brief cannot obscure the critical, undisputed facts: that the language on which the City relies on proposed by its own former Personnel Director, Nuzzo; that Nuzzo specifically informed Union President Johnson as to the intent and meaning of the language, which is as the Union has described it; and that there were no further discussions on this language prior to ratification of the contract.

Because the current Personnel Director, Geissner, was not

present, of his argument is sheer speculation; attempting to make whole cloth out of thin air, he has no evidence to refute Johnson's clear and unambiguous testimony as to Nuzzo's specific oral representations.

The City's failure to produce Nuzzo to refute Johnson's testimony entitles the arbitrator to draw adverse inferences -- namely, that Nuzzo was not called because Johnson's testimony was true.

The Union has clean hands in this matter. It is the City which is improperly trying to magnify the finger which was conceded in negotiations into a grab for the whole arm. The City, which created this confusion through its lack of internal communications, must not be allowed to benefit from its wrongful acts.

The bargaining history undisputedly confirms that the City violated the express understanding between the parties; to hold any less would be to reward the City's skullduggery and encourage bargaining tactics wholly destructive of harmonious continuing collective bargaining relationships.

The City's desperation is further shown by its allegation that the grievance is untimely. The City acknowledges that the Union raised a challenge the first time the City implemented its claimed understanding on this provision; it cannot be argued that the Union, through inactivity, acquiesced in the City's erroneous interpretation. The City also concedes that there had been ongoing discussions about this provision. Thirdly, the City had waived the timeliness argument; such an alleged defense should properly have been raised in the City's answer, but it was not. Finally, just because the Union does not seek to formerly arbitrate each and every dispute does not constitute a concession as to the legitimacy of the City's interpretation.

The City failed to properly calculate and pay overtime for the July 4 holiday. The Union raised the issue on July 8. The grievance is timely, and should be sustained.

In its reply brief, the City posits further as follows:

The Union is mistaken in its assertion as to what the bargaining history establishes. The record evidence establishes that the City sought, and obtained, a change in the calculation of overtime from hours paid to hours worked.

Contrary to the Union's assertion, the modification of the relevant language did not occur under Nuzzo. City witnesses testified that the overtime methodology was discussed in detail during early 1991, after Geissner had replaced Nuzzo. Also, as the Union President himself testified, he and Geissner went over each article prior to ratification. Also, the new language contains the effective date of April 4 -- a date Nuzzo

could not possibly have known.

The first time the City heard of the "Nuzzo/holiday pay" argument was at hearing; these efforts to change the issue from an attack on the comprehensive change in overtime calculation to a single item, i.e., the computation of holiday pay, was never raised by the Union prior to hearing. Indeed, the written grievance refers to all time (sick leave, vacation, personal leave and holiday) in the same manner, and does not treat holidays differently.

The reason the City did not call Nuzzo as a witness is that, prior to the Union revealing its new position about this alleged side-bar at the hearing, the City was unaware that Nuzzo would factor in this proceeding. Indeed, since it was the Union which was suddenly relying on this purported side-bar as key to its revised position, it was the Union's responsibility -- not the City's -- to produce Nuzzo at hearing. The Union also errs in ascribing the disputed language to Nuzzo, in that it was reviewed by Union President Johnson, Geissner, the union's attorney, and the WERC mediator. Further, the City's standard practice was for Nuzzo to inform other management personnel of any side-bars; had there been a side-bar in this context, Nuzzo would have informed Transit Manager Keith Carlson.

The Union's declaration that the City immediately interpreted the new clause to count only hours worked in the calculation of overtime is an admission that this grievance is untimely. As Carlson testified, the new language was applied to Virgil Halverson within one week of the April 4 effective date. If the Union failed to grieve the April incident, and failed to grieve the Memorial Day incident, how can it now grieve the July 4 incident?

The grievance is neither timely, nor meritorious, and should be denied.

DISCUSSION

Timeliness

The majority view of arbitrators appears to be that doubts as to the application and interpretation of contractual time limits should be resolved against a forfeiture of the right to process the grievance. 1/ This is particularly true when the parties have a practice of treating contractual time limits somewhat informally. 2/ An assertion of untimeliness may be considered

1/ Elkouri and Elkouri, How Arbitration Works, BNA Books, 1985, p. 194.

2/ CBS, Inc., 75 LA 789, 794 (Roberts, 1980).

an affirmative defense, which puts on the party raising such defense the burden of establishing its case by a preponderance of evidence. 3/

The record does not indicate that the City raised alleged untimeliness prior to arbitration. Specifically, Geissner's July 16, 1991 Grievance Answer makes no reference to this point. Further, there was testimony at hearing that the City had not previously insisted on strict, formalistic compliance with all steps in the process. Finally, although the instant dispute and the one involving Halverson are obviously closely related, I have not been convinced, by a preponderance of the evidence, that the Union, by not advancing the Halverson matter further along in the grievance process, so acquiesced in the City's interpretation of the provision at hand to make this matter untimely. Accordingly, I will consider this grievance on its merits.

Merits

Prior to the 1990-92 collective bargaining agreement, the agreement between the parties explicitly included sick leave, vacation, holidays and excused absences as time worked for the purpose of calculating overtime within the weekly pay period. The 1990-92 agreement, which preserved the provision that overtime calculations were based on a "time worked" concept, deleted the language which previously included these leaves in the computation. The County contends that this modification meant that sick leave, vacation, holidays and excused absences would no longer be considered as time worked in computing overtime pay. The Union contends it means something else.

Exactly what it is that the Union believes this language means, though, is somewhat hazy, and appears to have changed during this process. In its statement of the grievance, the Union said it had agreed to having these leave hours paid at straight time, but not to their exclusion from the computation of overtime, as the City was doing. Subsequently, in its written brief, the Union focuses solely on holidays, rather than all four leaves, stating that "the essence of the dispute is whether or not the parties agreed to simply pay holidays at straight time wages, the interpretation suggested by the union, or whether or not the parties agreed to totally exclude holidays in calculating the formula for the payment of overtime."

There were four changes made between the two contracts in the section on holiday pay. In the 1988-90 contract, there is language establishing that employes working on Good Friday, New Year's Eve or Christmas Eve shall be paid straight time wages for the actual hours worked plus eight (8) hours holiday pay, and that such holiday pay "may not be used to calculate overtime compensation when the work week exceeds forty (40) or forty-four (44) hours." These two provisions are not included in the 1990-92 contract. Included in the 1990-92 contract, effective April 4, 1991, is language requiring employes to "physically work" their last scheduled day prior to, and after, a holiday, to receive holiday pay, and defining "time worked for purposes of this section" as including personal leave, sick leave, and vacation. 4/

3/ Miami Industries, 50 LA 978, 984 (Howlett, 1968).

4/ Although the agreement at this point refers to "this section," it must in fact mean "this paragraph." "This section," refers to the overall Section 16, Holiday Pay -- and thus also incorporates the provision that "(e)mployes who work on a holiday shall receive holiday pay in addition to pay for regular hours worked." Putting these provisions together, then, results in employes on sick leave, vacation or personal leave on holidays -- defined in paragraph 2 as "time worked" -- thus being paid holiday pay plus pay for regular hours. Clearly, this is an absurd

The Union asserts that the parties agreed in the 1990-92 contract "to simply pay holidays at straight time wages," and not to exclude holidays from the calculation of overtime. The language in the agreement before me does not support this conclusion.

Both the 1988-90 and 1990-92 contract state that all full-time operators "shall receive eight (8) hours pay at the regular straight time hourly rate." Both state that employes "who do not work on a holiday shall receive holiday pay only," while employes who do work on a holiday "shall receive holiday pay in addition to pay for regular hours worked." In these regards, the language of the two agreements is identical. To the extent that the are changes between the two agreements -- the deletion of the provision barring the use of pay for non-transit holidays to calculate overtime, and the inclusion of the provision requiring presence or an authorized leave on days bracketing a holiday -- these changes do not lead to the conclusion as asserted by the union.

The union has placed great emphasis on the purported "Nuzzo side-bar," during which the City's former Personnel Director reportedly informed the union president that the new language meant what the union now says it means. The union also asks that I infer from the City's failure to produce Nuzzo at hearing that he would have testified in support of the union's position had he been present.

I can draw no such inference. As the City notes, it is the union which is relying on the purported Nuzzo-Johnson side-bar, which the City states it heard about for the first time at hearing. Not knowing that Nuzzo would figure so heavily in the presentation of the case, the City could reasonably have assumed that his testimony would not be required. Moreover, it is not entirely accurate to say, as the union has, that the Johnson testimony on the Nuzzo side-bar was completely unrefuted. Transit Utility Manger Keith Carlson testified that, while Nuzzo would meet alone with Johnson, he (Nuzzo) would always report the details of any discussions and agreements, and that Nuzzo never related anything such as Johnson testified to.

The City asserts that the irrelevance of Nuzzo's testimony is further indicated by the April 4, 1991 effective date of the clause in question -- a date so many months after Nuzzo left the City's employ he could not possibly have known it. This argument is flawed. The bargaining history shows that the actual proposals and tentative agreements included provisions for an effective date concomitant with ratification, and that the April 4, 1991 date was a subsequent clerical insertion. The mere fact that the disputed clause (as well as a new aspect to the holiday pay) reflects an effective date long after Nuzzo left does not, itself, have any bearing on the degree of Nuzzo's responsibility for, or knowledge of, these matters.

Nuzzo served as the City's Personnel Director for the first six months of 1990. The record establishes that it was during Nuzzo's tenure, via Nuzzo's letter of April 9, 1990, that the City's intention to negotiate on the topics of premium pay and holiday pay was first raised. However, in its Preliminary Final Offer, dated June 19, 1990 -- when Nuzzo was still Personnel Director --

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result. However, to allow authorized leave to count as time worked in the context of the paragraph requiring work before and after a holiday in order to receive holiday pay is more understandable, especially in the negotiations context in which the "must work" concept was new language.

the City did not propose the amendment here at issue, namely the deletion of the last sentence in the first paragraph. The first documented reference to this proposal is in the City's offer of October 31, 1990 -- more than three months after Nuzzo left the City's employment. In that October 31 offer, and in the City's first Final Offer of November 10, 1990 this item is not designated as a tentative agreement; however, in the Union's first Final Offer, dated March 19, 1991, the deletion of the last sentence in the first paragraph is designated as a tentative agreement. Nuzzo and Johnson may very well have had side-bar discussions over premium and holiday pay; however, based on this chronology, I am not convinced that Nuzzo bound the City by making the representations testified to by Johnson.

In any event, parol evidence -- especially hearsay, such as the Johnson testimony -- should be relied upon only when the collective bargaining agreement itself is ambiguous. And I do not find such ambiguity to be present here.

Prior to negotiations, the City commissioned a consultant's study to identify areas ripe for greater efficiencies. One specific observation was that the City "appear(ed) to be paying excessive driver overtime," a problem which it, in part, attributed to "allowing sick leave and excused time off to count as time worked for the purpose of computing overtime...." The City shared this study with the Union.

In the ensuing negotiations, the City proposed deleting the specific sentence authorizing the practice which the study criticized; the union agreed, and the sentence was deleted. Both internally (the April 8 Geissner memo to the Mayor and Alderpersons) and publicly (the Tribune article of April 5), the parties described this proposal in a manner consistent with the City's implementation.

The City's interpretation of the language at hand is consistent with that language, and is reasonably related to addressing a situation which the City informed the union it felt was a problem needing redress. The Union has not persuaded me its interpretation is more valid than the City's.

Accordingly, on the basis of the record evidence and the arguments of the parties, it is my

AWARD

That this grievance is denied.

Dated at Madison, Wisconsin this 18th day of August, 1992.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator