

BEFORE THE ARBITRATOR

 :
 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 239
 THE AMALGAMATED TRANSIT UNION - : No. 48681
 LOCAL 519 : MA-7677
 :
 and :
 :
 THE CITY OF LA CROSSE :
 :
 :

Appearances:

Mr. James G. Birnbaum, Esq., Davis, Birnbaum, Marcou, Devanie & Colgan, Attorneys at Law, 2025 South Avenue, Suite 200, LaCrosse, Wisconsin 54602-1297, appeared on behalf of the Union.

Mr. James W. Geissner, Director of Personnel, City of LaCrosse, LaCrosse City Hall, 400 LaCrosse Street, LaCrosse, Wisconsin 54601, appeared on behalf of the City.

ARBITRATION AWARD

On January 28, 1993, the Wisconsin Employment Relations Commission received a joint request from the above-captioned parties, requesting the Commission to appoint the undersigned to hear and decide a grievance pending between them. On February 17, 1993, the Commission appointed the undersigned to hear and decide the matter. A hearing was conducted on December 14, 1993, in LaCrosse, Wisconsin. The hearing was not transcribed. The Employer filed a post-hearing brief received January 10, 1994.

Jurisdiction for this proceeding exists both contractually and by operation of a Memorandum of Understanding executed by the parties specifically creating a submission agreement, whose relevant provisions include the following:

The parties have a dispute as to the meaning of Section 31 of the Collective Bargaining Agreement. They have determined to resolve it in the following way:

. . .

3. The parties agree to waive procedural defenses.

4. The parties agree to treat this document as a joint submission request for arbitration.

5. The parties stipulate the following issue to the Arbitrator:

Does the Employer violate Section 31 by refusing to place Doug Smith and Eugene Byerson on Appendix "A" as created by Section 31.

. . .

BACKGROUND AND FACTS

The language in question (Section 31) arose during negotiations leading to a 1990-92 collective bargaining agreement between these parties. The agreement between these parties was entered into during the course of mediation. Subsequent to the 20-hour mediation session, the Mediator summarized the settlement terms in writing and forwarded those terms to the parties over a cover letter dated November 19, 1993. The language, as submitted by the Mediator, was confirmed by the parties and converted into the language appearing in the contract today. The following excerpts are from the Mediator's notes:

. . .

1. Carry forward 1988-90 terms except as noted below.

. . .

5. Job Security

- Rescind outstanding layoff notices except Smith's.
- Revert to .3 COLA at next listed COLA payment date following issuance of layoff notice to any of 27 named employees with seniority date 3/19/91 or earlier. List of 27 in protected group attached.
- If, and so long as Milo Hoeth works as a full-time bus driver, Smith shall be outside the 27 member protected group referred to above, and he shall be subject to the layoff which he was notified of previously, on 14 days written notice of his option to transfer to Local 180 with a \$500 transfer fee.

- If another protected group employe transfers out of the transit unit, Smith shall return to the protected group of 27 employes, unless Smith has previously either transferred out of transit unit left the operator classification and entered another in the transit unit.

. . .

This job security provision was the heart of a bargain struck by the parties. The quid pro quo for the security consisted of numerous economic concessions made by the union, and chronicled below. The list of employes referenced in the note above consisted of a list of 30 employes, the last of whom was Brian L. Smith, whose seniority date was 3/3/90. Three of the 30 names listed were deleted, apparently because they had left City service. The list therefore consists of 27 employes.

Milo Hoeth's name does not appear on the protected list. During this period of time, Mr. Hoeth, a bus driver, was suffering from throat cancer. He was in and out of work and no one knew if he would be able to return and/or remain at work. It appears that when Mr. Hoeth returned to work, Mr. Smith became employe number 28 on the seniority list. Ultimately, on September 4, 1992, Milo Hoeth died.

Gregory Johnson, the President of ATU Local 519 and Dale Anderson, a member of the ATU Executive Board, testified on behalf of the Union. Johnson chronicled the bargain. He indicated that the Union agreed to cut its COLA provision in half and took no raise. According to Johnson, the parties agreed that time worked, in lieu of time paid, constituted the base for holiday pay. Mr. Johnson indicated that the parties had agreed that an employe would have to work in order to get holiday pay. Johnson pointed out that the parties agreed to a \$10 an hour rate for new drivers, considerably below the rate then in existence. Johnson further indicated that the parties set up a 72-month schedule for an employe to get from the entry level to top pay. Johnson testified that the parties agreed to a "me, too" provision, tying their health insurance to that of other City bargaining units. In exchange for these numerous and very substantial concessions, the Union got a protected list. It was Johnson's testimony that there was a clear understanding that what the parties were protecting was 27 driver positions. This was not a protection of named individuals, but rather of positions.

The list of names was produced when Geissner, negotiator for the City, said, "I'll do you one better and we'll name the 27 people so there is no misunderstanding." It is Johnson's testimony that this list was inserted for additional protection and that the parties never discussed the possibility that the list would decrease through attrition. The guarantee was 27. Johnson testified that the enormous savings provided the City in this bargaining would never have come about if the offer had been for a list which would decrease over time. Anderson's testimony essentially corroborated that of Johnson.

Keith Carlson, Manager of the Municipal Transit Utility,

testified on behalf of the City. It was Carlson's testimony that it was never the intent of the Employer to preserve 27 positions.

According to Carlson, that would be an impossible commitment to maintain in that his staffing authority varied by year. This agreement was only attractive to the Employer because the size of the list would, through normal attrition, decline over time.

This dispute began to take on form in the Spring of 1992. Mr. Robert Wood's retirement brought the following letter from Gregory Johnson:

Mr. James Geissner

. . .

This letter is to inform you that since the retirement of Mr. Robert Wood on 3/26/92, Mr. Brian Smith will be added to the protected list of the current labor agreement in accordance with Section 31, Paragraph 4, of the agreement. Local 519, also wants you to note that the 14 day notice of layoff for Brian Smith, is no longer in effect, and he shall receive all rights outlined in Section 7 - Layoff and Recall as do all other members that are on the protected list.

If you have any questions on the position taken by ATU Local 519 on this matter, feel free to contact me at your convenience.

Sincerely,

Gregory F. Johnson

Geissner responded by letter of April 29, 1992, to Johnson as follows:

Your letter of April 6 does not conform with the terms of the labor agreement. Therefore, your request to add Brian L. Smith (BLS) to the protected list is denied. The only way that BLS would be added to the protected list would be as follows:

1. If Milo Hoeth discontinues his employment as a full-time bus driver, or
2. If a protected employe transfers out of the ATU

bargaining unit.

Since neither of the above circumstances has occurred, BLS' status remains unchanged.

James W. Geissner /s/
James W. Geissner

By letter of May 8, 1992, the Union sought arbitration. The Employer, by letter of June 16, 1992, declined to proceed to arbitration, complaining that there had been no grievance filed.

On September 4, 1992, Milo Hoeth died. On September 29, 1992, by letter to Gregory Johnson, Geissner added Brian L. Smith's name to "Exhibit 'A'", the protected list. The amended "Exhibit 'A'" lists 25 names, the last of whose is Brian L. Smith. At this time, Doug Smith had been on the payroll since October 5, 1991. By letter to the Wisconsin Employment Relations Commission with copies to Geissner and Johnson, James Birnbaum, counsel to the Union, advised the Commission that, "As of September 29, 1992, the above-referenced matter has been settled." The matter referred to is the protected list grievance.

ISSUE

The parties stipulated to the issue in dispute in their submission agreement. That issue is set forth in the jurisdictional paragraph above.

POSITIONS OF THE PARTIES

The City has taken the position that what is protected are the 27 people identified in the protected list executed by the parties. The Union has taken the position that what is protected is 27 positions. The Union argues that the names of the protected individuals will change over time.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Section 31

Job Security

All outstanding lay off notices except Brian L. Smith's (BLS) are rescinded.

In addition to all other provisions of the contract, the City agrees to provide job security defined herein to the employees named in Exhibit A.

If and so long as Milo Hoeth works as a full time bus driver, BLS shall be outside the 27 member protected group referred to above, and he shall be subject to the layoff which he was notified of previously, on fourteen (14) days written notice of his option to transfer to Local 180 with a \$500 transfer fee paid by the City.

If another protected group employee transfers out of the transit unit, BLS shall return to the protected group of 27 employees unless BLS has previously either transferred out of the transit unit or left the operator classification and entered another in the transit unit.

In the event of the issuance of a lay off notice to any of the 27 named employees with seniority dates of 3/19/91 or earlier, the COLA clause shall revert to one cent (\$.01) for each point three (.3) rise in the CPI (1967 = 100) at the next listed COLA payment date following issuance of lay off notice.

. . .

EXHIBIT A

1. William R. Rudy
2. Eugene F. Hall
3. Thomas L. Sanderson
4. Russell M. Page
5. John J. Scholz
6. Virgil R. Haldorson
7. Gregory F. Johnson
8. Gerald E. Dahlke
9. Linda M. Miller
10. Robert A. Wood
11. John C. Steele
12. Terry L. Hicks

13. Thomas J. Hill
14. Steven G. Knutson
15. John F. Smaby
16. Charles E. Huth
17. Carl E. Tabbert
18. Lawrence A. Psyk
19. Darrell R. Hodson
20. John J. Bower
21. Basil J. Martin
22. Dale E. Anderson
23. Wade A. Greseth
24. James M. Loeffler
25. Steven E. Foster
26. Clinton E. Marohl
27. Brian L. Smith

DISCUSSION

The parties stipulate that the outcome of this dispute is controlled by Section 31 of the Collective Bargaining Agreement. On its face, the Section supports the interpretation advanced by the City. The second paragraph of Section 31 sets forth the job security extended by the Section. The paragraph specifically "agrees to provide job security defined herein to the **employees named in Exhibit A**". (Emphasis supplied). This reference is an unambiguous reference to "employees", in contrast to "positions".

The third paragraph makes reference to the relationship between Milo Hoeth, Brian Lee Smith (BLS) and the 27-member protected group. Specifically, Smith remains outside the 27-member protected group so long as Milo Hoeth is working as a full-time bus driver. Inferentially, if Hoeth ceases working as a full-time bus driver, BLS would become a member of the protected group. Paragraph 3 is consistent with paragraph 2 in its reference to the protected group as consisting of "27 members". The fourth paragraph goes on to discuss the consequences for Smith

if a protected group employe transfers out of the transit unit. Under this paragraph, Smith can return to the protected group provided upon the transfer of a protected group member outside of the unit. This paragraph refers to the protected group as consisting of "27 employes" which is consistent with the previous paragraph's treatment of the group as consisting of "27 members".

The final paragraph in Section 31 is the sanction for violation of the job security provisions created in Section 31. The sanction consists of a return to the original COLA clause upon violation, and a violation consists of the issuance of a layoff notice to "any of the 27 named employes with seniority dates of 3/19/91 or earlier". (Emphasis supplied). As in the second paragraph, the enabling paragraph, the sanctions paragraph is quite specific that the sanction follows a layoff notice to a "named employe" and goes on to define the "named employe" as one who has a certain level of seniority with this employer. Brian Lee Smith's seniority date is prior to 3/19/91. The next senior employe, Doug Smith, has a seniority date that is later than 3/19/91.

All paragraphs within Section 31 treat the protected list as consisting of named employes, numbers, people. No sentence refers to protected positions.

Mr. Johnson testified that the deal struck by the parties was to protect 27 driver positions. That is not what this collective bargaining agreement says. The Union's proposed remedy is to add 2 employes whose seniority dates fall after 3/19/92 to the protected list. On its face, that exceeds the obligation imposed on the City by Section 31. The final paragraph of Section 31 permits the invocation of sanctions if the City lays off a named employe whose seniority date is 3/19/91 or earlier. Both Smith and Byerson have seniority dates that fall well beyond 3/19/91. Neither Smith nor Byerson is named.

Section 31 addresses the consequences of Milo Hoeth working or not working as his health permitted. It further addresses the consequences of a protected group employe transferring out of the bargaining unit. However, Section 31 leaves open the question of the consequence of the death, retirement, or termination of protected group members. That occurred. It appears that Robert Wood retired on or about March 26, 1992. Johnson's letter argues that the consequence of Wood's retirement is that Smith be added to the protected list. Geissner's response takes issue with that, indicating in detail the circumstances under which the Employer believes the protected list must be expanded. The Union declared its intent to arbitrate the matter. The Employer resisted arbitration. The Union contends that the Employer's September 29, 1992, letter is a response to its original grievance, arising out

of the Wood retirement. The Employer contends that its September 29 letter is a response to the September 4 death of Hoeth. The timing of this correspondence is more consistent with the Employer's contention. This is particularly true in light of the very specific denial set forth in Geissner's April 29 letter.

Geissner's September 29 letter had a protected list, consisting of 25 employes, attached. At this time, employe Doug Smith had been on the payroll since October 5, 1991, had survived his six-month probationary period, and was not included on Geissner's version of the protected list. The Union explains the lack of a grievance at this point in time as arising out of the fact that no one was on layoff. The fact that there was no one on layoff is irrelevant.

The fact of the matter is D. Smith was, at the time, unprotected.

It is against this background that the Union sent its October letter to the Wisconsin Employment Relations Commission, indicating that the matter was settled.

Both Union witnesses indicate that during the course of negotiations, Geissner made a remark to the effect of "I will do you one better", and added the names. This was purportedly done to see to it that there was no misunderstanding. While I will never know the precise context, I believe Geissner's remarks and the addition of the names serve solely to clarify the fact that it is the names and not the positions that are being protected. There would be no reason to add the names specifically if there were any other purpose. That is, if it was the intent of the parties to protect 27 bus driving positions, it seems to me they would have used those words. The act of adding the names of those protected serves only to clarify and reinforce that it was the intent of the parties to protect people, and not positions.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 9th day of June, 1994.

By William C. Houlihan /s/

William C. Houlihan, Arbitrator