BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
AMALGAMATED TRANSIT UNION, LOCAL 519, AFL-CIO,	Case 259 No. 50518 MA-8278
and	
CITY OF LaCROSSE (TRANSIT)	

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, 2025 South Avenue, Suite 200, P. O. Box 1297, LaCrosse, Wisconsin 54602-1297, by Mr. James G. Birnbaum, appearing on behalf of the Union.

Mr. James W. Geissner, Director of Personnel, City of LaCrosse, 400 LaCrosse Street, LaCrosse, Wisconsin 54601-3396, appearing on behalf of the Employer.

ARBITRATION AWARD

Amalgamated Transit Union, Local 519, AFL-CIO, hereafter the Union, and City of LaCrosse (Transit), hereafter the City or Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union, with the concurrence of the City, requested that the Wisconsin Employment Relations Commission designate a member of its staff to act as impartial arbitrator to hear and decide the instant grievance. The undersigned was so designated. A hearing was held on May 10, 1994, in LaCrosse, Wisconsin. The hearing was not transcribed and the record was closed on July 11, 1994, upon receipt of post hearing written argument.

ISSUE:

At hearing, the Union framed the issue as follows:

> Did the City violate the collective bargaining agreement and past practice when it imposed a 12.5 hour maximum on drivers?
>
> If so, what is the appropriate remedy?

At hearing, the Employer framed the issue as follows:

> Did the City violate Section 6 and Section 22 of the collective bargaining agreement and Section 111.70 of the State Statutes by imposing a maximum 12.5 hours on drivers? If so, is the City required to negotiate on the proposed work rule?

The Arbitrator adopts the following statement of the issue:

> Did the City violate the collective bargaining agreement when it implemented Sec. 3.22 of the Municipal Transit Utility Employee's Manual?

If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

SECTION 6

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the management of the Municipal Transit Utility and the direction of the work force included but not limited, to the right to hire, discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to make reasonable rules or regulations governing conduct or safety pursuant to Section 22, to be able to determine the methods and process of performing work, are vested in the management.

The exercise of the foregoing functions shall be limited only by the express provisions of this contract and the City has all rights which it has at law except those which were expressly bargained away in this agreement. This article shall be liberally construed.

The exercise of the employer of any of the foregoing functions shall not be reviewed by arbitration except in case such function is so exercised as to violate express provisions of this contract.

SECTION 14

GUARANTEE TIME

All persons who report for work when requested are guaranteed a minimum wage equal to eighty (80) hours at straight time, in one pay period of two consecutive weeks. Any and all hours worked in any of the weeks in

the pay period in question will be used in computing the guaranteed time. If an extra board person is called upon to work and refuses to do so for any reason, except on his/her regular days off, the guaranteed time will be reduced by the number of hours the person was privileged to work and refused to do so.

Part-time employees may be used on special and intermittent type services being performed as of June 16, 1975. No part-time employee may be used until all regular, extra board operators, and regular reserve operators who have requested special or intermittent type work have received such providing they are available for the work.

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.

A week for purposes of this provision, shall begin on 12:01 Monday and end on 12:00 midnight the Sunday following.

A twenty-five cents ($.25) per hour shift differential shall be paid to mechanics who work shifts other than the day shift.

SECTION 22

RULES AND REGULATIONS

The employee shall serve under the present rules and regulations of the City and such reasonable rules and regulations as it may hereinafter adopt. No rule or regulations may be adopted or enforced which is inconsistent with the terms of this agrement.

All new employees shall be furnished a copy of the present rules and regulations upon employment.

Any proposed change in the rules and regulations shall be posted on the bulletin board of the City in the Service Building one calendar week before the effective date of the rule.

The reasonableness of any rule or regulation shall not be challenged unless a conference is asked within one calendar week of the time it is posted on the bulletin board of the City in the Municipal Service Building.

The City agrees that all work rules shall be applied equally.

BACKGROUND

On December 4, 1993, Carlson issued the following:

To: Greg Johnson, President, Local 519

From: Keith Carlson, Manager

Subject: Work rule additions and clarifications

Date: December 4, 1993

The following items were discussed at our meeting of November 30, 1993. An official notice of rule change is forthcoming.

Please review these changes and let me know if you have any other ideas.

1. No Bus Operator may work more than 12.5 hours in one calendar day. In the event an operator must be relieved to keep from working more than 12.5 hours, the operator will be relieved at the Transit Center (5th & State), and at such time to allow his/her relief to work a minimum of two hours. Under no circumstances is an employee guaranteed 12.5 hours pay if they must be relieved prior to the end of a shift.

2. Extra list operators must physically work a minimum of 5.5 hours on Sunday to be credited with a Sunday worked on the "Extra List Sunday Schedule". The only exception would be if an extra list operator takes a paid vacation or personal business day.

3. As for pay for time between pieces of work. While we agreed in principle, I am reluctant to try to word a rule that may conflict with the labor agreement. Section 13, "Operator's Pull Out Time", addresses

this issue, and if we want to clarify that clause during negotiations perhaps that is the place for it. We will continue to follow our understood past practice until that time.

If you need further information please contact me, thank you for your help in this matter.

When Carlson did not receive a response to his letter of December 4, 1993, he issued the following letter of January 5, 1994:

To: All MTU Employees

From: Keith Carlson, Manager

Subject: Addition to MTU Employee's Manual

Date: January 5, 1994

The following shall become part of the Municipal Transit Utility Employee's manual. Effective date January 12, 1994.

SECTION 3 "GENERAL PROCEDURES"

3.22 Bus Operator Length of Day

No Bus Operator may work more than 12.5 hours in one calendar day.

In the event an operator must be relieved to keep from working more than 12.5 hours, the operator will be relieved at the Transit Center (5th & State), and at such time to allow his/her relief to work a minimum of two hours. Under no circumstances is an operator guaranteed 12.5 hours of pay if they must be relieved prior to the end of the shift.

3.16 Extra List Policies

Extra list operators must physically work a minimum of 5.5 hours on Sunday to be credited with a Sunday worked on the "Extra List Sunday Schedule". The only exception would be if an extra list operator takes a paid vacation or personal business day.

The Union responded by filing a grievance dated January 10, 1994, and which stated as follows:

NATURE OF GRIEVANCE (DETAILED STATEMENT): The proposed work rule change dated January 5, 1994. Local 519, believes that this rule change affects both wages, and hours so it must be negotiated.

CLAUSE OF CONTRACT VIOLATED SEC. 6 Management Rights Sec. 22 Rules State Statute 111.70

SETTLEMENT DESIRED For the City not to implement this proposed work rule, but to negotiate it as required by law.

On January 17, 1994, Transit Manager Carlson issued the following letter to Union President Gregory Johnson:

> This letter is to confirm the Step #2 answer to the above captioned grievance.
>
> In this case, the grievant alleges that the Municipal Transit Utility (MTU) violated Section 6, Management Rights, Section 22, Rules and Regulations, of the agreement and State Statute 111.70.
>
> The work rule, 3.22 Bus Operator Length of Day, is consistent with what we discussed at our November 30, 1993 meeting and outlined in a memo to you on December 4, 1993. See attached memo. In fact, it was at your suggestion that we set the number of hours. In addition, the two hour minimum required in this rule is also consistent with a number of other situations that occur on a regular basis at the MTU.
>
> This grievance is denied.

The memo attached to this letter was the memo of December 4, 1993.

On February 11, 1994, Personnel Director James Geissner issued the following letter to Union President Johnson:

> This letter is to confirm that the time limits to hold a hearing and answer the above captioned grievance have been extended by mutual consent.

> After a thorough discussion of this case at two (2) separate negotiating sessions leading to a new 1994-1995 agreement, the parties were unable to resolve the matter. In those negotiations, the City informed the Union that it intended to continue to implement the work rule which became effective January 12, 1994.
>
> Please consider this letter as the grievance answer. The City does not believe that it violated the 1993 contract when it implemented the changes described in a memo dated January 5, 1994 to all employees. Therefore, this grievance is denied.

Thereafter, the grievance was submitted to arbitration.

POSITIONS OF THE PARTIES:

Union

The City has unilaterally implemented a work rule which limits all drivers to no more than 12.5 hours of available work in a given day irrespective of any indications of driver impairment or safety threat. The work rule which has been unilaterally changed by the City specifically places no limit on the number of hours that an employe may work in a given day and, more importantly, specifically mandates that an employe is entitled to available overtime based upon seniority. Contrary to the argument of the City, Union President Johnson did not request the establishment of the changed work rule.

The unilaterally implemented work rule change is contrary to the clear and consistent practice in which the City has always allowed and always paid employes for time beyond 12.5 work hours in a given day. Not only have drivers been permitted to work more than 12.5 hours in a given day, but the City has scheduled drivers in excess of 12.5 hours in a given day.

By virtue of the contract, work rule, past practice, and work schedules of the parties, the City has violated the collective bargaining agreement by seeking to impose the 12.5 hour limitation on all employes. Additionally, the unilateral conduct of the City is in violation of the Municipal Employment Relations Act.

In arguing that the impact on overtime eligibility is de minimis, the City begs the question. Individual employes are denied pay as a result of the implementation of this work rule and it is irrelevant that other bargaining unit employes may work the disputed hours.

Contrary to the argument of the City, the work rule was not a subject of negotiation when the parties bargained their most recent contract. The City lay in the weeds and implemented the changed work rule four (4) days after the new contract went into effect.

The City's arguments, in which it seeks to justify the unilateral change in the work rule, are appropriate for interest arbitration. A grievance arbitrator, however, cannot alter the terms of the collective bargaining contract.

The City asserts that one of the reasons for its decision to impose an hours restriction is an overriding concern for safety. Conspicuous by its absence in this record, is any credible evidence that the practice of the parties has in any way constituted an unsafe condition.

Bargaining unit employes may have incurred worker's compensation injuries. There is, however, not one shred of competent evidence to suggest that hours of work are responsible for any injury caused to an employe. Moreover, if the City believes that hours of work were the cause of any particular employe's condition, it has the remedy to submit the employe to physical examination to make that determination.

The Union does not criticize the City for seeking ways to efficiently operate the Transit System. However, the desire to save money does not provide the City with the right to abrogate the terms of the collective bargaining agreement. Rather, the City should negotiate the desired change with the Union. The grievance must be sustained.

CITY:

By virtue of State Statute 111.70(1)(a) and Section 6 of the collective bargaining agreement, implementation of the work rule is both a right and a responsibility of the employer. The work rule was implemented to protect both the public and the drivers.

If the work rule results in any loss in wages, such loss is minimal. The application of the work rule would be infrequent and it is likely that any loss of pay for one bargaining unit employe would be gained by another.

The City has the longest work day of cities with a similar population. Bus Drivers cannot be expected to work fourteen or fifteen hours straight and remain alert to safely drive the city streets and transport members of the public. The City's twelve and one-half (12.5) hour work day is not only reasonable, but it actually goes beyond the policy that similar transportation employers have. The testimony of the City's Worker's Compensation Manager and Transit Manager Carlson indicate that extensive hours on the job results in increased worker's compensation injuries and lost time.

Following the settlement of the Virgil Halderson grievance, the parties met to discuss methods for avoiding future grievances. While Transit Manager Carlson wished to maintain the status quo, deciding each case on the basis of common sense, the Union wanted a set number of hours established. At this meeting, the Union President told Carlson that "it is your right as the boss to set a time limit, just set the number of hours." The memo of December 4, 1993, contains the work rule which the Union requested at this meeting.

Although the Union was invited to comment on the work rule, the Union made no attempt to respond to this issue, not even at the contract negotiation session on December 28, 1993. After a month of silence from the Union, the City posted the memo concerning the rule which was to take effect January 12, 1994. The Union seeks to obtain in arbitration that which it failed to request in bargaining. The arbitrator is without authority to add to, or subtract from, the terms of the contract.

The number of hours paid should equal the number of hours worked. If the rule were administered as the Union would like, then the City would pay fourteen and one-half hours (14 1/2) for thirteen hours of work. This is both unreasonable and inconsistent with the legislative intent of the Municipal Employment Relations Act. It is also inconsistent with the conclusions of the Doolittle Report regarding the reform of various timekeeping inefficiencies.

The grievance arbitration forum is not the appropriate forum to litigate alleged violations of Sec. 111.70, Stats. The City has not violated the collective bargaining agreement. The grievance is without merit and should be dismissed.

DISCUSSION:

Section 3, Grievance Procedure, of the parties' 1994-95 collective bargaining agreement defines a grievance as "Matters involving the interpretation, application, or enforcement of this agreement." Thus, as the City argues, the grievance arbitration forum is not the appropriate forum to litigate violations of state statutes, such as the Municipal Employment Relations Act. Accordingly, the undersigned has not given any consideration to the Union argument that the City has committed a prohibited practice in violation of Sec. 111.70, Stats., by unilaterally imposing the disputed work rule.

The Union argues that the City cannot implement Work Rule 3.22 because this work rule violates a past practice of not limiting the number of hours that a driver may work in a day. For the sake of argument, the undersigned has assumed that there is such a past practice. 1/

The parties' collective bargaining agreement does not contain a maintenance of standards provision. Nor does it contain any other provision which incorporates the parties' past practices into the collective bargaining agreement. Additionally, the contract language is silent with respect to the length of the Bus Driver work day. Thus, the past practice alleged by the Union is an unwritten practice, existing apart from the contract.

1/ The City denies that there is a past practice of not limiting the number of hours worked in a day. According to the City, the Transit Manager has reserved, and exercised, the right to use discretion in limiting the number of hours worked in a day.

While there is disagreement among arbitrators on this issue, Arbitrator Richard Mittenthal has presented the most cogent view on the general subject of when, and under what circumstances, such a practice can be terminated. Arbitrator Mittenthal writes:

> Consider first a practice which is, apart from any basis in the agreement, an enforceable condition of employment on the theory that the agreement subsumes the continuance of existing conditions. Such a practice cannot be unilaterally changed during the life of the agreement. For, as I explained earlier in this paper, if a practice is not discussed during negotiations most of us are likely to infer that the agreement was executed on the assumption that the practice would remain in effect.
>
> The inference is based largely on the parties' acquiescence in the practice. If either side should, during the negotiation of a later agreement, object to the continuance of this practice, it could not be inferred from the signing of a new agreement that the parties intended the practice to remain in force. Without their acquiescence, the practice would no longer be a binding condition of employment. In face of a timely repudiation of a practice by one party, they must have the practice written into the agreement if it is to continue to be binding. 2/

Negotiation of the parties' 1994-95 agreement commenced on or about November 8, 1993. On November 30, 1993, Union President Johnson and Transit Manager Carlson met to discuss several issues, including the right of the City to limit the number of hours worked by Bus Drivers. On December 4, 1993, Transit Manager Carlson issued a memo advising Union President Johnson that the City intended to establish a work rule addressing the length of the Bus Driver work day. The work rule contained in this memo is identical to Work Rule 3.22, which is the subject of this dispute. 3/ Transit Manager Carlson invited the Union to respond to his memo of December 4, 1993. When the Union failed to respond, Transit Manager Carlson issued his memo of January 5, 1994, in which employes were advised that the City would implement Work Rule 3.22.

2/ "Past Practice and the Culmination of Collective Bargaining Agreements," Proceedings of the NAA (1961).

3/ As the Union argues, it is not evident that Union President Johnson requested the language contained in Work Rule 3.22. Nor is it evident that Union President Johnson expressed agreement with this language.

Although the effective date of the contract is January 1, 1994, the parties did not reach a settlement of this contract until February 1, 1994. Contrary to the argument of the Union, the City did not "lie in the weeds" and implement the work rule four days after the contract went into effect. Rather, as the record demonstrates, the Union received timely notice of the City's intent to implement Work Rule 3.22 and the Union had ample opportunity to raise the issue in contract negotiations. Assuming arguendo, that the past practice relied upon by the Union did exist during the term of the parties' 1993 agreement, the City repudiated the past practice when it notified the Union of the City's intent to implement Work Rule 3.22.

Applying the rationale of Arbitrator Mittenthal to the facts of this case, the undersigned is persuaded that, if the Union wished the alleged practice to continue to be binding upon the parties, it was incumbent upon the Union to have the alleged practice written into the 1993-94 agreement. The Union did not do so. Despite the Union's arguments to the contrary, the record does not demonstrate that Work Rule 3.22 violates any binding past practice of the parties.

The City relies upon Section 6, Management Rights, which provides the City with the right "to make reasonable work rules or regulations governing conduct or safety pursuant to Section 22." Section 22, recognizes that employes are subject to "the present rules and regulations of the City and such reasonable work rules and regulations as it may hereinafter adopt."

A Section 22 challenge to a work rule is initiated by requesting a conference within one calendar week of the time that the work rule is posted by the City. Since the work rule was effective January 12, 1994, and the Union does not argue that the City failed to follow the contractual posting requirement, the undersigned assumes that the work rule was posted on January 5, 1994, the date of Transit Manager Carlson's memo.

The testimony of Union President Johnson establishes that the Union met with the City to discuss the grievance on Work Rule 3.22 prior to filing the written grievance. Since the written grievance is dated January 10, 1994, it is evident that the Union did ask for a conference on the proposed work rule within one calendar week of the time that the work rule was posted.

The undersigned is satisfied that the Union has preserved its contractual right to challenge Work Rule 3.22. Given the City's Section 22 right to adopt reasonable rules and regulations, Work Rule 3.22 must be upheld unless the record demonstrates that Work Rule 3.22 is not reasonable.

Section 22 expressly states that the City may not adopt any work rule or regulation "which is inconsistent with the terms of the agreement." Since a work rule which violates this stricture would be unreasonable, the undersigned turns to the issue of whether or not Work Rule 3.22 is inconsistent with the terms of the parties' agreement.

The Union relies upon the contractual provisions of guarantee time, overtime and work week to argue that the contract reflects the parties' agreements concerning hours of work. The provisions relied upon by the Union are contained in Sections 14 and 15 of the contract.

Section 14 contains two paragraphs. Paragraph One sets forth circumstances in which an employe is guaranteed a minimum wage equal to eighty (80) hours at straight time. Paragraph Two addresses the use of part-time employes.

Section 15 contains three paragraphs. Paragraph One addresses the payment of overtime for working more than forty hours in a week. Paragraph Two defines the work week. Paragraph Three provides a shift differential of twenty-five cents per hour for mechanics.

Work Rule 3.22 sets forth a procedure by which Bus Drivers are limited to working no more than 12.5 hours in a calendar day. Work Rule 3.22 also addresses the use of Relief Drivers to ensure that a Bus Driver does not work more than 12.5 hours in a calendar day. Neither Section 14, nor Section 15, addresses these issues. Thus, Work Rule 3.22, on its face, is not inconsistent with Section 14 or Section 15. 4/ Nor does the record establish that the City has applied Work Rule 3.22 in a manner which is inconsistent with Section 14 or Section 15.

Section 6, Management Rights, relied upon by the City, reserves management of the Municipal Transit Utility and the direction of the work force to the City, except as otherwise provided in the labor contract. Given the fact that the parties' contract language is silent with respect to the issues addressed by Work Rule 3.22, the establishment of Work Rule 3.22 is consistent with rights reserved to the City by Section 6.

Section 22 also provides that "The City agrees that all work rules shall be applied equally." To be sure, Work Rule 3.22 provides that a Bus Driver may be relieved and, thus, precluded from working 12.5 hours, as necessary to ensure that the Relief Driver works a minimum of two hours. Inasmuch as the circumstance limiting the Bus Driver to less than 12.5 hours is applicable to all Bus Drivers, the Work Rule does not violate the contractual mandate that "all work rules shall be applied equally." Nor does the record otherwise demonstrate that Work Rule 3.22 has not been applied "equally."

The Union argues that Work Rule 3.22 violates seniority rights to overtime guaranteed by other Work Rules. It is not evident, however, that the contract contains any language which requires the City to continue existing work rules. In the absence of such language, the undersigned is persuaded that the City's Section 22 right to adopt reasonable rules and regulations includes the right to modify existing rules and regulations.

By enacting Work Rule 3.22, the City has effectively modified any work rule which conflicts with Work Rule 3.22. Despite the Union's arguments to the contrary, Work Rule 3.22 is entitled to be given precedence over any conflicting work rule.

Transit Manager Carlson testified that the decision to restrict the number of hours worked by a Bus Driver was motivated by a desire to protect the safety of the Bus Driver and the public. While the Union argues that the safety concern expressed by Carlson is pretextual, the record demonstrates

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4/ Apparently, the Union is concerned that the City will use Relief Drivers in a manner which contravenes restrictions on the use of part-time employes contained in Section 14, Paragraph Two. Work Rule 3.22, on its face, does not contravene this provision of the contract.

otherwise. 5/

To be sure, the City's evidence does not establish that any Bus Driver was injured as a result of working more than 12.5 hours in a calendar day. Nor does the City's evidence establish that any Bus Driver's ability to perform assigned duties was impaired by working more than 12.5 hours in a calendar day. The City, however, is not required to present such evidence.

Common sense persuades the undersigned that there is a legitimate safety interest which is served by not permitting Bus Drivers to work an unlimited number of hours. Neither Section 22, nor any other contract language relied upon by the Union, requires the City to implement the least restrictive work rule. As discussed supra, Section 22 only requires that Work Rule 3.22 be reasonable. It is not unreasonable, per se, for the City to conclude that Bus Driver safety and public safety is served by limiting the Bus Driver work day to 12.5 hours. 6/

The grievance challenging Work Rule 3.22 requests (1) that the City not implement the work rule and (2) that the City negotiate with the Union as required by law. As discussed supra, the Union had the opportunity to negotiate with the City on its decision to implement Work Rule 3.22 when the parties negotiated their 1994-95 agreement. Neither Section 22, nor any other contract provision, requires the City to negotiate work rules during the term of the parties' 1994-95 agreement.

In summary, Work Rule 3.22 is not unreasonable per se. It is not evident that Work Rule 3.22 has been applied "unequally." Nor is it evident that Work Rule 3.22 violates any provision of the parties' agreement or any binding past practice. The City's implementation of Work Rule 3.22 is consistent with the management rights reserved to the City by Section 6, as well as with the City's Section 22 right to adopt "reasonable rules and regulations."

Based upon the above and foregoing, the undersigned issues the following

AWARD

1. The City did not violate the collective bargaining agreement when it implemented Sec. 3.22 of the Municipal Transit Utility Employee's Manual.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 4th day of October, 1994.

By Coleen A. Burns /s/
Coleen A. Burns, Arbitrator

5/ Transit Manager Carlson has acknowledged that a desire to save costs was a factor in his decision to provide Relief Drivers with a minimum of two hours work. The City has a legitimate interest in saving costs.

6/ As the Union argues, Transit Manager Carlson's testimony concerning the length of work day for Bus Drivers in other municipalities is hearsay. Accordingly, it has not been credited.