BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

AMALGAMATED TRANSIT UNION LOCAL 519

and

CITY OF LaCROSSE (MUNICIPAL TRANSIT UTILITY)

Case 266
No. 51072
MA-8483

Appearances:

Davis, Birnbaum, Marcou, Seymour & Colgan, Attorneys at Law, by Mr. James G. Birnbaum, appearing on behalf of the Union.

Mr. James W. Geissner, Director of Personnel, appearing on behalf of the City.

ARBITRATION AWARD

Amalgamated Transit Union Local 519, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. The City of LaCrosse (Municipal Transit Utility), herein the City or Employer, concurred with said request, and the undersigned was designated as the arbitrator. Hearing was scheduled for November 2, 1994, and subsequently postponed to March 28, 1995 and then to June 6, 1995. There was no transcript made of the hearing. The parties completed the filing of post-hearing briefs on July 27, 1995.

ISSUE:

The parties were unable to stipulate to a statement of the issue. The Union framed the issue at hearing as:

> Is the posted work rule "reasonable" or "consistent with the terms of the collective bargaining agreement" under the provisions of Section 22 (Rules and Regulations) and Section 6 (Management Rights)?
>
> If not, what is the appropriate remedy?

The City proposed the following statement of the issue:

> Did the City violate Section 6 - Management Rights and Section 22 - Rules and Regulations of the collective bargaining agreement when it posted a modification to its work rules on May 19, 1994, and, if so, what is the remedy?

The undersigned believes the issue to be:

> Did the City's modification of Work Rule 3.10 on May 19, 1994, violate the parties' 1994-95 collective bargaining agreement?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE and WORK RULES:

Work Rules

LaCrosse MTU Employee's Manual

. . .

3.10 SICK LEAVE

Sick leave may be used for any bona fide illness or injury except those compensated for under the Wisconsin Worker's Compensation Act or incurred by employees while engaged in any outside employment or business. To qualify for sick leave, however, the employee must:

> Call 789-7350 or 789-7370 personally 1/ at least 45 minutes prior to the scheduled start of the shift.
>
> Tell the office the nature of the illness.
>
> Keep his supervisor informed of his condition daily.

The employer may require such medical examination as it deems necessary.

Present a doctor's release upon return to work after more than three consecutive days of illness.

1/ Exception - If incapacitated by medical condition that would prevent employee from making the call personally.

. . .

TO: All MTU Employees

From: Keith Carlson, Manager

Subject: Addition To MTU Employee's Manual

Date: May 19, 1994

The following shall become part of the Municipal Transit Utility Employee's Manual. **Effective date May 27, 1994.**

SECTION 3 "GENERAL PROCEDURES"

3.09 SICK LEAVE

. . . To qualify for sick leave, however, the employee must:

Call **789-7370** personally 1/ at least 45 minutes prior to the scheduled start of the shift.

. . .

1993 Collective Bargaining Agreement

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 19

Health Insurance

Effective June 16, 1988, the employee contribution to medical, hospital and surgical insurance shall be $8.00 per month for a family policy and full premium payments for a single policy for those covered by the City's group health insurance program. The contribution of $8.00 per month by the employee for the family policy shall remain in effect for the term of this agreement.

. . .

1994-1995 Collective Bargaining Agreement

SECTION 19

HEALTH INSURANCE

1. Employee Premiums

The City contribution to group health insurance shall be

100% of the premium per month for both a single and a family plan.

2. Deductibles

Single employees will pay an annual $100.00 calendar year comprehensive deductible, and there will be three (3) single $100.00 deductibles per family plan to a maximum of $300.00 aggregate.

3. Prescription Drug Co-Pays

Employee co-pays for prescription drugs shall be $2.00 for generic and $5.00 for brand name.

4. Internal Revenue Service - Section #125 Plan

Employees may participate in an Internal Revenue Service Section #125 salary reduction reimbursement plan in order to pay for medical expenses with pre tax dollars. In addition to medical expenses, the plan may be used for vision, dental and child care expenses.

. . .

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 agreement.

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 or about August 14, 1989, the City of LaCrosse Municipal Transit Utility promulgated and distributed to its employes an Employee's Manual. Contained in that manual were work rules among which was Section 3.10 Sick Leave that required an employe, in order to qualify for the sick leave benefits provided under the collective bargaining agreement, to "Call 789-7350 or 789-7370 personally 1/ at least 45 minutes prior to the scheduled start of the shift." That rule remained in effect and unchanged until May 19, 1994, when Transit Utility Manager Carlson issued a memorandum to MTU employes stating that effective May 27, 1994, the section pertaining to sick leave usage was modified to delete from that rule the telephone number 789-7350, thus meaning that the only number that could be called was 789-7370. The reason for eliminating the one number was that there was not always someone available to answer that number at the time that employes would be calling in, early in the morning, and consequently a sick leave call-in was missed. To eliminate the potential for missing calls, the Utility Manager determined that only the number in the bus barn should be utilized by employes when calling in sick.

Thereafter, on May 25, 1994, the Union filed a grievance stating "the work rule posting on 5/19/94, is unreasonable." Under the statement "Settlement Desired" the Union grievance stated "Delete work rule from Rule Book." The reasoning advanced for filing the grievance was that the work rule as posted on 5/19/94 was now unreasonable because, commencing with the start of the 1994-1995 collective bargaining agreement on February 1, 1994, there were modifications to the health insurance plan from the prior 1993 collective bargaining agreement such that there now was an annual $100 calendar year deductible with a maximum $300 deductible per family, whereas under the old contract there was no deductible, but employes contributed $8 per month towards the monthly premium. This meant that if an employe was now required to submit to a medical examination, it would expose the employe to the potential for out-of-pocket expense in obtaining that examination because of the new insurance deductibles. The Employer denied the grievance, and the case proceeded to arbitration.

The City argues that the work rule in question has been a part of the Employee's Manual since its publication in August of 1989, and that the May 19, 1994 modification merely changed the phone number employes were required to call if they are going to be off on paid sick leave. The City does not believe that this change "violates the express provisions of the contract," the standard for review in arbitration as set forth in Section 6 of the parties' collective bargaining agreement. Furthermore, the City believes that the grievance is premature inasmuch as there is no grievant or "injured party" at the time of filing of the grievance.

The City also believes that the Union has waived any right to challenge the work rule inasmuch as it was the change in the health insurance policy effective with the 1994-1995 collective bargaining agreement that gives rise to the Union's concerns. Thus, the Union was obligated to raise those concerns at the time of bargaining the change in health insurance for the 1994-1995 collective bargaining agreement. By not raising that concern during those negotiations and demanding that the rule be modified to take into account the changes being made in the health insurance plan, it waived any right to challenge application of the rule thereafter. The Employer also points to the holiday pay language of Section 16 of the 1994-1995 collective bargaining agreement wherein it provides, in part, "Sick leave with an acceptable medical substantiation is considered time worked for purposes of this section," and states that the Union has not raised the issue concerning the new deductibles as they impact this language. The Employer concludes that the Union's failure to challenge the application of this provision of the collective bargaining agreement, viz a viz the change in health insurance deductibles, undercuts the Union's argument in the present case.

Finally, the Employer contends that the work rule in question is but one of several tools used by management to discourage sick leave abuse and, on its face, is a reasonable rule. The City argues that when a suspicious pattern of sick leave usage exists, the Employer requires medical certification in order to qualify for such paid sick leave. The Employer believes that one must consider the cost of a one-day suspension for sick leave abuse versus the cost of medical examination. It states that a bus operator with six years of service making $13.57 an hour suspended for sick leave abuse would incur a loss of $108.56. On the other hand, an employe required to produce medical verification of illness under a "worse case scenario" would incur a maximum cost of $100. The City believes this is not unreasonable particularly in light of the fact that such medical examinations are rarely required. For all of the above stated reasons, the City urges the arbitrator to deny the grievance.

The Union, on the other hand, denies that the subject grievance was filed prematurely or that the Union had waived its right to challenge the reasonableness of the work rule. The Union believes that it had the right to challenge the work rule upon its promulgation without regard to whether or not an individual employe had been adversely affected by that rule. Furthermore, it believes it could have also waited until such time as the rule had been applied adversely against an individual employe; however, it believes that it would have acted at its peril had it failed to timely challenge the rule upon its promulgation. Consequently, the Union believes that it is not appropriate to conclude that this grievance is premature. It also believes it equally unreasonable to conclude that the Union had waived its right to challenge the impact of the change in health insurance through the imposition of deductibles on the application of the sick leave call-in work rule. The Union argues that there was never any discussion at the bargaining table with regard to the impact of the new deductibles on that work rule, and therefore, to argue that a waiver occurred because no discussion took place during bargaining is inappropriate. With respect to the work rule itself, the Union believes that it is unreasonable because requiring an employe to submit a medical certificate in order to qualify for sick leave pay with the $100 deductible in effect amounts to the

equivalent of a one-day suspension for any employe required to produce such a certificate. Union argues this result is unreasonable, making the work rule unreasonable. It is also unreasonable because no standards are established within the rule itself to control when an employe could be requested to submit such medical documentation in the case of a one-day absence. Thus, the Union concludes that it has the affect, if applied, of imposing disciplinary action without just cause.

The Union also believes that this change in health insurance establishing a $100 deductible resulted in a change in the wages, hours or conditions of employment with respect to the work rule pertaining to sick leave and medical verification. As such, the Union believes it was incumbent upon the City to propose that change in work rule application at the bargaining table. It did not do so, and therefore it should not be permitted to obtain that result in grievance arbitration now. Furthermore, the Union believes that the resultant change is contrary to the consistent past practice of employes incurring no expense in producing medical verification upon being directed to do so by the City under work rule 3.10. Finally, the Union argues that the work rule is contrary to the public policy of the State as enunciated in the Wisconsin Statutes.

DISCUSSION:

The threshold issue in this case is whether the subject grievance is ripe for decision. It is true that at the time of the filing of this grievance no individual employe of the Transit Authority had been adversely impacted by the change in the health insurance plan effective with the 1994-1995 collective bargaining agreement, as applied to the work rule allowing the Employer to insist upon medical verification in order for an employe to qualify for sick leave pay. However, it is also true that the Union in this case and in others can challenge work rules as being unreasonable on their face as well as challenging the reasonableness of their application to a particular fact situation. In this case the Union filed what the undersigned would characterize as a policy grievance challenging the work rule as being unreasonable on its face in view of the changed circumstances brought about by the parties' modification to their health insurance plan wherein employes would now be required to incur a $100 individual deductible. The consequence of that change in deductibles as compared to the health insurance plan under the preceding collective bargaining agreement meant that if an employe were required to obtain medical verification by the Employer as a prerequisite to receiving sick leave pay, and that employe had not met his deductible under the health insurance plan, a visit to a physician to obtain the required medical verification would necessarily result in the employe incurring out-of-pocket costs. Prior to the change in the health insurance plan, the employe who was required to produce medical verification in order to qualify for paid sick leave could go to a physician and obtain such verification and incur no out-of-pocket expense, inasmuch as the first dollar costs of doctors' visits were covered by the prior health insurance plan.

While the undersigned would agree with the Employer's assertions that the only change in

the work rule that occurred as a consequence of the posting on May 19, 1994, was that employes now had only one phone number to call when reporting an impending absence due to illness, the undersigned does not agree that therefore the Union was barred from filing a grievance challenging the reasonableness of the work rule. Clearly, it wasn't the change in telephone number that gave rise to the Union's objection to the rule. However, that does not mean that the grievance was inappropriately filed. In fact, the substance of the rule itself was not changed by virtue of the change in phone number. However, the undersigned does not believe that the failure of the Union to grieve the work rule immediately after execution of the collective bargaining agreement which resulted in the change in insurance deductibles forever barred the Union from filing a policy grievance challenging the reasonableness of the rule on its face. Thus, the undersigned is satisfied that in this case the subject grievance is not procedurally defective as being untimely.

Also, the undersigned does not believe that the Union's failure to raise, during negotiations, the issue of how the work rule was being impacted by the implementation of health insurance deductibles constituted a waiver of the Union's right to subsequently raise that issue. The undersigned finds equally unpersuasive the Union's claim that it was incumbent upon the Employer to raise that issue in negotiations when the health insurance changes were being negotiated or debarred from enforcing the work rule until such time as it successfully negotiated the work rule's continuation in the face of the change in health insurance. Both parties are presumed to be knowledgeable of all of the terms and provisions of their collective bargaining agreement and the resultant impact of negotiated changes in one aspect of the agreement upon another. In this case, the Union either knew and agreed, knew and remained silent, or overlooked the impact of the change in deductibles on the disputed work rule. Regardless, the work rule is no less viable because a provision in the parties' agreement was modified making said rule more onerous on an employe. However, the reasonableness of the rule in light of all of the surrounding circumstances is an issue herein.

Turning then to the merits of the dispute, the real question is whether the modification to the health insurance plan wherein employes under the 1994-95 collective bargaining agreement would be required to meet a $100 individual deductible makes enforcement of the work rule allowing the Employer to require medical verification in order to be eligible for paid sick leave unreasonable. The undersigned believes that it did not, and that the rule as originally written is still reasonable on its face.

Prior to the change in the insurance plan, the Union was not contending that the work rule as written was unreasonable on its face. The Union points to the fact that employes incurred no out-of-pocket expense in complying with an Employer directive to seek medical verification. Now, however, because complying with that requirement could result in out-of-pocket expense to the employe, the Union has concluded that were such to occur it would effectively amount to a suspension of the employe without just cause. The undersigned finds that argument unpersuasive. The intent behind the rule is to provide the Employer with a mechanism by which to have an

employe substantiate his/her eligibility for paid sick leave where the Employer suspects that an employe does not meet the eligibility requirements and/or is abusing the benefit. Obviously, there are a limited number of options available to an employer who suspects that an employe calling in sick and claiming eligibility for paid sick leave, but is not ill. One such option is that which is provided for in the subject work rule. Unless an employe's supervisor is a physician or otherwise capable of determining whether an employe is too ill to report for work, the only means available to substantiate that is the case is for the employe to produce medical verification.

As both parties are well aware, this is a very common practice under collective bargaining agreements. Furthermore, the Union clearly did not believe that aspect of the rule to be unreasonable prior to the date of this grievance. And, the grievance was not precipitated by some philosophical belief on the Union's part that such a requirement on its face was unreasonable. Rather, what it finds unreasonable is that, contrary to prior years, the employe might now be required to incur an out-of-pocket expense in order to comply with the application

of the rule. Thus, the question is whether the fact that an employe may now have to pay for a doctor's visit out-of-pocket in order to substantiate his illness makes the rule unreasonable, and therefore unenforceable. The undersigned believes it does not.

Clearly, paid sick leave is universally accepted as a substantial fringe benefit. Obviously, for those employes who don't have that benefit, any time they are precluded from working due to illness they incur a loss of pay for all hours not worked. However, an employe, such as the employes in this bargaining unit, who has a paid sick leave plan available to him/her does not incur an economic penalty for being unable to report for work due to illness if they have accumulated sick leave upon which they can draw. It is not unreasonable that occasionally an employe may be required to incur an out-of-pocket expense to satisfy the Employer that abuse is not occurring. Furthermore, in those instances where, as the Union argues, the Employer can cause the employe to incur out-of-pocket expense at its whim, the undersigned would submit that a grievance would be appropriate in those instances where there was no reasonable suspicion of abuse on the Employer's behalf which triggered the requirement to produce medical verification. Thus, there are protections for both parties in these situations. Namely, the Employer has the ability to require an employe to produce medical verification of illness where it suspects the employe may not be eligible or may be attempting to abuse sick leave and, on the other hand, the employe can challenge the requirement to produce such verification where he/she believes that there is not a reasonable basis underlying the Employer's suspicion of ineligibility or abuse.

For these reasons, the undersigned believes that the change in the health insurance plan under the 1994-1995 contract, which instituted a $100 individual deductible per employe, did not convert what was otherwise a reasonable work rule allowing the Employer to require the employe to produce medical verification of illness into an unreasonable work rule.

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

AWARD

The City's modification of Work Rule 3.10 on May 19, 1994, did not violate the parties' 1994-95 collective bargaining agreement. The work rule, as modified, is a reasonable work rule. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 29th day of February, 1996.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator

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