BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL UNION 695

and

CITY OF MADISON

Case 233
No. 59965
MA-11475

Appearances:

Mr. Brad Wirtz, Labor Relations Analyst, City of Madison Human Resources Department, City-County Building, Room 501, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, appearing on behalf of the City of Madison.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley,** 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Union Local No. 695.

ARBITRATION AWARD

City of Madison, hereinafter City, and Teamsters Local Union No. 695, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Commission on May 21, 2001. Commissioner Paul A. Hahn was appointed to act as arbitrator on July 17, 2001. The hearing took place on October 1, 2001 at the offices of Teamsters Local Union No. 695 in Madison, Wisconsin. The hearing was transcribed. The parties were given the opportunity to file post-hearing briefs. Briefs from both parties were received by the Arbitrator on January 14, 2002. The parties were given the opportunity and declined to file reply briefs. The record was closed on January 14, 2002.

ISSUE

Union

The Union states the issue as follows:

> Did the City violate the parties' collective bargaining agreement when it failed to advance the grievants to the next wage progression step?
>
> If so, what is the appropriate remedy?

City

The City states the issue as follows:

Does the collective bargaining agreement require the Employer to include time spent on authorized leave of absence without pay and time spent in layoff status in determining an employee's wage progression schedule?

Arbitrator

Did the City violate the collective bargaining agreement when it failed to credit the grievants with the time they spent on layoff toward advancement to the next wage progression step?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 8 – GRIEVANCE AND ARBITRATION

. . .

8.4 The arbitrator shall have no power to change, modify or add to or detract from any of the terms of this Agreement. The award of the arbitrator within the term of authority conferred upon him/her by this Agreement shall be final and binding upon both parties. Any question of excess of authority, fraud or arbitrary action shall be subject to the usual legal remedies.

. . .

ARTICLE 14 - WAGES AND WORKING CONDITIONS

ALL EMPLOYEES

14.1 All employees shall be subject to wage progression in accordance with the following wage progression schedule. The biweekly base wage rate salary and progression schedule set forth in Addendum A is based on a forty (40) hour workweek, notwithstanding other provisions of this Agreement to the contrary.

Step One-First Six (6) Months of Continuous Service—Seventy-Five Percent (75%) of the maximum biweekly base wage rate.

Step Two-After Six (6) Months of Continuous Service—Eighty Percent (80%) of the maximum biweekly base wage rate.

Step Three-After Eighteen (18) Months of Continuous Service—Eighty-Five Percent (85%) of the maximum biweekly base wage rate.

Step Four-After Thirty (30) Months of Continuous Service—Ninety Percent (90%) of the maximum biweekly base wage rate.

Step Five-After Forty-Two (42) Months of Continuous Service—One Hundred Percent (100%) of the maximum biweekly base wage rate.

. . .

14.14 All permanent full-time and permanent part-time employees shall receive longevity pay, subject to the following schedule and terms and conditions:

A. Upon completion of 48 months of continuous service, 3% shall be added to the base hourly rate of pay;

B. Upon completion of 108 months of continuous service, an additional 3% (for a total of 6%) shall be added to the base hourly rate of pay;

C. Upon completion of 156 months of continuous service, an additional 2% (for a total of 8%) shall be added to the base hourly rate of pay;

D. Upon completion of 180 months of continuous service, an additional 1% (for a total of 9%) shall be added to the base hourly rate of pay;

E. Upon completion of 204 months of continuous service, an additional 1% (for a total of 10%) shall be added to the base hourly rate of pay;

F. Upon completion of 228 months of continuous service, an additional 1% (for a total of 11%) shall be added to the base hourly rate of pay;

G. Upon completion of 288 months of continuous service, an additional 1% (for a total of 12%) shall be added to the base hourly rate of pay.

Longevity payments shall be effective on the first day of the biweekly pay period following the completion of the required length of service.

Any time spent on authorized leave of absence without pay and any time spent on layoff status shall not act to break the continuous employment. However, any leave time or layoff time in excess of thirty (30) days shall not be considered employment time for the purpose of computing longevity.

. . .

ARTICLE 23 – SENIORITY

. . .

23.6 **A.** An employee shall lose seniority only by discharge, voluntary quit, or more than a five (5) year layoff. In the event of a layoff, an employee so laid off shall be given ten (10) days notice of recall mailed to his/her last known address. The employee must respond to such notice within three (3) days after receipt of notice and must actually report to work not later than seven (7) days after receipt of the certified notice unless otherwise mutually agreed to. In the event the employee fails to comply with the above, he/she shall lose all seniority rights under this Agreement.

. . .

ARTICLE 24 – LAYOFF AND RECALL

24.1 For full-time employees, Transit Division seniority shall be defined as the most recent date of hire as a permanent full-time Transit Division bargaining unit employee. For part-time employees, Transit Division seniority shall be defined as the most recent date of hire as a part-time Transit Division bargaining unit employee. The Employer shall post and maintain a master seniority roster.

. . .

24.8 SHORT TERM LAYOFFS

A. Layoffs not to exceed four (4) weeks in a calendar year shall not be subject to the bumping process. Such layoffs shall occur in one (1) week increments.

. . .

D. Such layoff shall not affect accrual of vacation, sick leave, longevity, or seniority, nor shall the City alter its contributions for any benefits.

STATEMENT OF THE CASE

This grievance involves the City of Madison and Teamsters Local Union No. 695. (Jt. 1) The Union alleges that the City violated the collective bargaining agreement by failing to advance the Grievant and similarly situated employees through the contractual wage progression schedule while they were on layoff from their employment. (Jt. 2)

The City operates a municipal bus company and employs bus drivers, mechanics and clericals.

The labor agreement between the parties provides in Section 14.1 a wage progression schedule by which employees over a period of time as noted above advance through the wage progression schedule based on their continuous service. The Grievant is a bus driver; he and similarly situated driver/employees were, on or about June 3, 2000, laid off from the City due to economic conditions. The Grievant was recalled on August 27, 2000. Similarly situated employees, on whose behalf the grievance was filed, were laid off for similar periods of time, all of which exceeded four weeks of duration. (Jt. 2) During the period of layoff the Grievant and similarly situated employees' benefits were put on hold and the employees did not advance through the wage progression schedule of the labor agreement for the time that they were on layoff.

The Grievant upon returning to work determined from his pay stub that he had not in fact received a step 3 pay raise provided for in Section 14.1 of the labor agreement after 18 months of continuous service. The Grievant pursued the matter with appropriate representatives of the City. Failing to receive a satisfactory answer from the City as to why he did not progress through the wage progression schedule even though on layoff since his continuous service had not been broken, the Grievant filed a grievance on behalf of himself and other employees and members of the Union. In essence, the Union position is that even though employees are on layoff, they continue to progress through the wage progression schedule under the terms of the collective bargaining agreement; the City takes the position that while the employees' seniority from date of hire is not broken, they do not receive credit toward wage progression and other benefits during the time they are on lay off.

The Union filed the grievance in this matter on April 9, 2001 and it was denied by a representative of the City on the same date. (Jt. 2) The parties processed the grievance through the grievance procedure of the parties' collective bargaining agreement. The matter was appealed to arbitration. Hearing in the matter was held by the Arbitrator on October 1, 2001, in Madison, Wisconsin. No issue was raised as to the arbitrability of the grievance.

POSITIONS OF THE PARTIES

Union

The Union takes the position that Section 14.1 (Wage Progression) of the labor agreement is subject to more than one single, reasonable, apparent understanding, and therefore the language is ambiguous under established arbitration principles. The Union posits that the real issue before the Arbitrator is the definition of continuous service which is open to more than one interpretation as evidenced by the parties' dispute. While not defined in Section 14.1, the Union argues that continuous service is defined in Section 14.4, longevity, by the statement that "any time spent on authorized leave of absence without pay and any time spent on layoff status shall not act to break the continuous employment." The Union argues that this definition of continuous employment or service is applicable not only to the longevity provision under which section the definition is stated but refers also to the continuous service language in the wage progression schedule under well recognized rules of construction that a word used by the parties in one sense is to be interpreted as employed in the same sense throughout the contract.

The Union avers that the definition of continuous employment in Section 14.14 must apply to both the longevity and wage progression provisions; the exception providing that after 30 days employees will not receive credit for longevity is merely an exception because the contract, under Section 14.14, clearly references only longevity. Reviewing the contract as a whole, the Union argues that the only exception to the continuous service language in the labor agreement is the computation of longevity pay and the parties, in drafting the contract, did not limit the definition of continuous service found in 14.14 only to longevity and could have said so if that is what the parties intended. The Union further argues that the Madison City Ordinance introduced by the City, which provides during layoff status that employees shall not receive service credits, is in conflict with the agreement and therefore the labor agreement controls based on the Union's position.

Through testimony of its witnesses, the Union argues that it was established that when the continuous service language was negotiated into the labor agreement in the early 1980's it was clearly the intent of the parties that continuous service would not be broken and that employees who were on layoff status would advance through the wage progression schedule the same as if they were working. The Union argues that the terms of the collective bargaining agreement are to be applied in a logical manner consistent with the language and intent of the parties and in this case, because the intent of the parties is verified by the testimony of a Union witness who was present at the time of the original negotiations of the subject language, the intent so expressed should be honored by the Arbitrator.

Lastly, the Union argues that the City failed to establish a binding past practice. The Union argues that the testimony and evidence presented by the City is self serving and the alleged practice of adjusting wage step increases was not supported by such evidence. The City's evidence that certain employees have had their longevity increases adjusted as a result of

a medical leave is not the subject of the present grievance and therefore is irrelevant to the issue. Further, the evidence of medical leaves for which the employees had their wage and benefit increases adjusted does not specify the length of the medical leaves, and the evidence does not clearly establish the reasons the employees had their longevity or wage step increases adjusted. The City's examples, the Union submits, do not meet the requirements of past practice. Further, the Union argues that this practice was unknown to the Union and was not accepted by it. The City, the Union submits, failed to provide credible evidence to establish any binding past practice that the City's use of a recently agreed-to practice of freezing wages and benefits for a driver who loses his CDL license is germane or relevant to the issue before the arbitrator.

The Union asks the Arbitrator to order the City to cease and desist from counting employees' time on layoffs and leaves of absence against them for purposes of wage progression in Section 14.1. The Union requests that the Arbitrator require the City make whole all employees who have been adversely affected by the City's improper interpretation of Section 14.1.

City

The City takes the position that there is no logic in employees being moved through the wage progression schedule under 14.1 when they are not working and such would violate the very reasons for a wage progression schedule. Wage progression, the City argues, is to allow bus drivers to develop knowledge of the job and to develop skills that only can be learned over a period of time. The City points to the fact that 14.1 talks about continuous service based on a 40-hour work week and that it is not logical that one can interpret this sentence without looking at the requirement of a 40-hour work week. Therefore, the City argues Section 14.1 is not ambiguous, as stated by the Union, but clearly requires that in order to move through the wage progression schedule employees must actually be working.

Noting other sections of the labor agreement, the City submits that the contract, as shown by the contract provisions stated above, differentiates between a short term leave or layoff, under four weeks, and a long term leave or layoff, over four weeks. Benefits are affected for the long term layoff, which includes the Grievant and similarly situated employees in this case, and short term layoffs where benefits are not affected. The City considers the wage progression schedule and receipt of wages thereunder as benefits.

The City submits that the Union's statement that the only benefit not affected by layoff is the wage progression, when all other benefits are clearly affected by a layoff under the contract, does not make sense and is not supported when the contract is considered as a whole. The City argues that only under Section 23.6 of the seniority article is continuous service broken and continuous service was not broken in this case. In other words the employees'

seniority date, i.e., their time in service from date of hire, was not changed and the employees came back to the same wages and benefits after layoff that were in effect for those employees when they started the layoff. Continuous service was not broken under 14.14, the City submits; it could not have been broken under 14.1.

Further the City argues that Section 14.14 applies only to longevity because that section deals only with longevity.

The City argues that its consistent practice, not only with the employees represented by the Union but with employees represented under other City unionized labor agreements, has been that on leaves and layoffs the benefits of the employees, including movement through wage progression schedules, have always been frozen during the term of the layoff if the layoff exceeded 30 days. While there have been few layoffs with the members of the Union under the agreement in this case, City witnesses clearly stated that the practice has always been to freeze benefits and wage step movement. This the City contends is logical as continuous service is really another name for seniority which is not broken except for those breaks in service mandated by Section 23.6, such as discharge, voluntary quit, layoff over five years, etc.

The City argues that the CDL language, where the parties agreed to incorporate language in the contract to confirm a practice that benefits and wage progression will be frozen for employees on a leave of absence while they no longer have their CDL driver's license, establishes that the Union knew of the City's practice. Therefore, under applicable arbitration case law, the Union knew and acknowledged and agreed to the City's consistent practice. This past practice the City submits proves the intent of the parties regarding continuous service and what happens to wage progression movement when employees of the City are on layoff.

Lastly, the City submits that the testimony of the Union witness who represented the Union during the original contract negotiations should be discounted because of the almost 20 years' passage of time and the fact that it is in the witnesses' self interest to explain that it was the intent of both parties that employees would continue to progress through the wage progression schedule while on layoff. The City submits that no physical evidence, such as notes from the negotiations, tentative agreements or the like, was introduced by the Union to substantiate the uncorroborated testimony by the witness that the Union's interpretation is correct.

The City in conclusion submits that the language of the collective bargaining agreement and the City's binding past practice support the City's actions and that the Union's attempt to refute that evidence is without merit. The City requests that the Arbitrator deny the grievance.

DISCUSSION

This is a contract interpretation case. The Grievant on behalf of himself and other similarly situated employees filed a grievance alleging that the City violated the collective bargaining agreement by not advancing the employees through the contractual wage progression provisions of the contract while they were on layoff. (Jt. 1 & 2) The issue before me revolves around the question of whether while the employees were on an extended layoff in excess of two months their continuous service was broken so that the time on layoff was not counted toward moving them through the contractual 42 month wage progress schedule in Section 14.1 of the Agreement. The Union argues that the Grievant's continuous service was not broken, and he should have moved through the wage progression schedule while on lay off the same as if he had been working. The City argues that while the Grievant's general or overall seniority was not broken, the time that he was layoff was not and should not be counted toward wage progression. The Union argues that the language is ambiguous and I agree.

One of the reasons for the dispute between the parties is that the labor agreement between them fails to specifically define the meaning of "continuous service". Further, there exists no specific language within the wage progression section itself to tell the parties or the arbitrator what is to happen to an employee's movement through wage progression if the employee is on layoff. The Union argues that the last paragraph of Section 14.14 makes clear that continuous service is not broken for layoff under 14.1 with the only exception being for longevity, the subject of Section 14.14. The City argues that 14.14 only applies to longevity and the agreement read as a whole is clear that benefits, including wages, are frozen for long term layoffs.

Both parties offered testimony and evidence to establish their respective positions on the intent of the agreement as it relates to the issue before me. The wage progression language was originally placed in the parties' labor agreement approximately twenty years ago during the negotiations that altered the bus system from a private entity to a public carrier. (Er. 3) Union witness Shipley who negotiated that first contract as the bargaining unit representative and subsequent agreements, testified that he agreed to a wage progression schedule in exchange for longevity to ensure that his members were receiving the same benefits as other City bargaining units. (Tr. 25) Shipley also testified that in "those days" the parties were not worried what happened during layoffs because there weren't any due to the difficulty of hiring bus drivers. (Tr. 27) Shipley further testified that it was his clear understanding and the understanding of the bargainers for the City that continuous service would not be broken if an employee were on layoff and that whenever the employee came back from layoff, he would receive credit toward his wage progression the same as if he had been working. (Tr. 27) Only in the case of longevity, Shipley testified, would time on layoff not count after a layoff of thirty days. (Tr. 26)

Shipley's testimony was not corroborated by any other witness nor was it refuted by any City witness who was present at the negotiations for the first contract. The testimony was

also not corroborated by any documentation such as bargaining notes or tentative agreements.

While I credit the Union's testimony that that may have been the Union's intent regarding continuous service and wage progression and lay off, this clearly has not been the understanding of the City as evidenced in the history of the City's treatment of wage progression and benefits when an employee is on a layoff.

Three of the City's employees involved in accounting and payroll convincingly testified that for all the City's bargaining units, including the bargaining unit involved in this case, fringe benefit accumulation and time toward wage progression are frozen for the period an employee is on layoff or a leave of absence over thirty days. (Tr. 41, 42, 48, 52, 57 & 72) It is apparent that there have been few if any layoffs at the City for this bargaining unit as normally, before the layoff that occasioned this case, the layoffs have been of short duration and volunteers are found to take the layoff. (Tr. 75) But the record does demonstrate that for leaves of absence the City's practice has been in effect for this bargaining unit. (Er. 4)

My analysis of the record to this point is to determine whether either parties' evidence is conclusive as to any agreed to or clear intent regarding wage progression for bus drivers during a layoff. I find that neither parties' evidence is conclusive. I also find that the testimony did establish that the Union has not acquiesced in the City's afore described practice as there is no conclusive evidence that the Union was aware of the practice, particularly as this may have been the first time the City's practice was applied to a layoff with this bargaining unit.

I respect the parties admonition in section 8.4 of their agreement that I should not change, modify, or add to or detract from the terms of their agreement; I do not believe I do so by interpreting their agreement as they have requested and where the current contract language does not clearly define the answer to the issue in this case. I also agree with the cases cited by the parties that suggest the parameters and guidelines an arbitrator should follow in a contract interpretation case. Above all, it seems to me the interpretation should be logical and not illogical, particularly where the parties have not agreed on either a logical or illogical interpretation of their labor agreement terms as applied to this case.

Reviewing the labor agreement in its entirety I find that the words "seniority and continuous service" as used by the parties are synonymous. The term seniority is defined in Section 24.1 of the agreement under the article dealing with layoffs. It simply means that seniority starts for an employee from his most recent date of hire. While continuous service may not be specifically defined, service generally means employment or work on behalf of an employer. It could be argued that service means actual work for the City but I believe that would add a term to the contract. When the parties provided in Section 14.1 for a wage progression schedule of forty two months of continuous service they clearly intended that to be calendar months of employment (seniority) with the City.

Therefore, continuous service or seniority is only broken pursuant to Article 23, Seniority, Section 23.6, for discharge, voluntary quit or more than a five year layoff. The

issue then before me is whether during a layoff, even though the Grievant's overall seniority or

continuous service was not broken, should his time on layoff have been credited toward the accumulation of time necessary to advance to the next step of the wage progression schedule the same as if he had been not on layoff and were driving a bus.

The Union has argued that the language under 14.14 "Any time spent on authorized leave of absence without pay and any time spent on layoff status shall not act to break the continuous employment. However, any leave time or layoff time in excess of thirty (30) days shall not be considered employment time for the purpose of computing longevity. . . ." should be interpreted to apply to the wage progression schedule in Section 14.1 in that only with longevity is their an exception that employees after thirty days will not have time on layoff and leave counted toward the time necessary to receive the next step of longevity improvement.

I first of all note that it is clear that the language quoted above falls under a section of the agreement specifically dealing with longevity, not wage progression. Further there is nothing referring the language in 14.14 to the wage progression section, 14.1. And in the first labor agreement the longevity language came first in then article 16 and under a separate subheading. (Er. 3) From this I believe there is strong contractual evidence that the language in Section 14.14 applies only to the issue of longevity. Further the word "however" means "nevertheless" or "notwithstanding" which would seem to tie the first sentence about break in continuous service clearly to the second sentence dealing with longevity. (Er. 3) If the language regarding a layoff shall not break continuous service was to also apply to the wage progression language, it is curious that over a contractual relationship of twenty years it was not more specifically referenced. It may be as testified to by Union witness Shipley that layoffs were never a concern before this grievance and so there was no need to make the specific reference. But, I am unconvinced that the language in Section 14.14 dealing with longevity applies to any other section of the agreement including the wage progression of Section, 14.1.

Therefore, the language of Section 14.1 has to stand on its own; the issue still is whether the Grievant's layoff acted to break his continuous service for purpose of computing his advancement through the wage progression schedule while he was on layoff. The Union offered no evidence to refute the City's testimony that for leaves of absence, medical leaves or layoffs in other bargaining units in excess of thirty days the City freezes or does not accumulate the employee's service toward the receipt of benefits. There was no conclusive proof that this bargaining unit has ever had a layoff before of a duration in excess of thirty days. The language of the agreement supports the proration of benefits. (Jt. 1) The City likens benefits to mean wages and one could argue that the term benefits more often is used to describe fringe benefits rather than pure wages. I also note that Shipley testified that his goal was to have his bus drivers and mechanics in this bargaining unit treated for benefits and wage progression no differently than the City's employees in other city bargaining units. (Tr. 24, 25) If that was his goal, then it is clear the City has consistently prorated benefits and adjusted step increases in wage progression schedules to account for employees being off on a leave of absence or layoff in excess of thirty days. It seems apparent, if the Union's position were to

prevail in this case, it would receive a benefit not received by other City bargaining units.

I find that the City's interpretation of the agreement as to what should have happened to Grievant's advancement through the wage progression schedule while he was on layoff to be more logical given the language of the entire agreement and the actions of the City with this and other bargaining units. As I stated earlier and as cited to me by the Union cases, my decision should be logical. The Grievant testified that he asked City representatives at a meeting in June of 2001 preceding the layoff what would happen to his wage progression during layoff. The Grievant suggested a hypothetical that he could be on layoff five years, before a break in service, and return to the 42 month of service step of the wage progression schedule as if he had been working the entire time. The Grievant claims that he never received an answer; City witnesses do not remember the question being asked. (Tr. 18, 64 & 71) Either way the hypothetical posits the issue and my finding. I also note that there was no direct evidence from either party on the reasons behind the wage progression language. Given the language of the whole agreement and the record evidence it does not seem logical that a junior employee on layoff would advance through the wage progression schedule the same as a more senior employee not on layoff who had to drive a bus in order to advance his wage progression.

This clearly is a subject best left for the bargaining table but as arbitrator that is not a remedy open to me, and I make this decision based on my view of the record evidence and determine a result that seems best in accord with the entire labor agreement.

Based on the foregoing and the record as a whole, I issue the following

AWARD

The City did not violate the collective bargaining agreement when it did not advance the Grievant and similarly situated employees through the wage progression schedule for the time they were on layoff. The grievance is denied.

Dated at Madison, Wisconsin, this 8th day of February, 2002.

Paul A. Hahn /s/

Paul A. Hahn, Arbitrator

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