BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL 579

and

CITY OF JANESVILLE

Case 73
No. 61257
MA-11869

Appearances:

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 the Union.

Attorney Wald Klimczyk, City Attorney, City of Janesville, Municipal Building, 18 North Jackson Street, P.O. Box 5005, Janesville, Wisconsin 53547-5005, appearing on behalf of the City.

ARBITRATION AWARD

City of Janesville and Janesville Transit System, hereinafter City, and Teamsters Local Union No. 579, hereinafter Union, are parties to a collective bargaining agreement that was in effect at all times relevant to this proceeding which provides for final and binding arbitration of certain disputes. A request to initiate grievance arbitration was filed with the Wisconsin Employment Relations Commission on May 28, 2002. Commissioner Paul A. Hahn was appointed to act as arbitrator on June 27, 2002. Hearing took place on September 12, 2002 in the City of Janesville, Wisconsin at City Hall. The hearing was not transcribed. The parties were given the opportunity to file post hearing briefs. Post hearing briefs were received by the Arbitrator on October 14, 2002 (City) and October 16, 2002 (Union). The parties were given the opportunity but declined to file reply briefs. The record closed on October 16, 2002.

ISSUE

The parties stipulated to the following issue

> Was the Grievant denied overtime in violation of the parties' Collective Bargaining Agreement on August 2, 13, 14 and 15, 2001?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 2 – MANAGEMENT'S RIGHTS

The Union recognizes the City as the Employer and, except as specifically limited by the express provisions of this Agreement, as having the rights to manage and direct the affairs and operations of the City and to manage and direct its employees. These rights include but are not limited to the following: To plan, direct, control and determine all the operations and services of the City; to establish priorities for all operations and services of the City; to supervise and direct the work force; to establish qualifications for employment and promotions; to create or abolish jobs; to establish job descriptions and reasonable levels of performance of jobs; to establish work, to establish standards, to assign overtime; to determine the methods, means, organization, and number of personnel by which the operations and services of the City shall be conducted; to contract or subcontract work; to establish and enforce regulations; to discipline, demote, suspend or discharge employees for just cause; to change or eliminate existing methods, equipment or facilities; provided, however, that the exercise of any of these rights shall not conflict with any of the express written provisions of this Agreement, nor shall such rights be used to discriminate against the Union or its members. The City shall discuss with the Union any proposed change, and its impact, that would affect wages, hours or working conditions of employees, before implementing such change.

. . .

ARTICLE 5 – HOURS OF WORK – HOURLY RATES – OVERTIME RATES

. . .

Section 8. Regular full-time employees shall be offered first opportunity to work in all openings in regular year-round routes, full-time maintenance work schedules, and charter runs, if the open hours scheduled are greater than what employee(s) is presently scheduled to work, except where such openings occur as the result of any leave of absence or suspension. This provision will not apply when the City is aware of such opening for less than one (1) hour prior to the occurrence of such opening.

When full-time employees are offered the opportunity to full such openings and such work will be at the overtime rate, such overtime will be offered strictly on the basis of seniority from the monthly list of employees who have indicated a

willingness to work overtime in the particular time period. Any employee who refuses to work overtime more than four (4) times shall be dropped from the existing monthly list. Anyone signing up after the first of the month will be placed on the bottom of the overtime list for picking available overtime. Once overtime work is accepted by an employee, the employee shall not drop the work assignment unless due to an unforeseen verified illness. The same attendance rules, as stated in the Transit Department's work rules, apply to overtime as for an employee's regular work shift.

. . .

ARTICLE 11 – GRIEVANCE PROCEDURE

. . .

Section 6. Arbitration shall be limited to a determination of whether the Employer or the Union has violated the express terms of this Agreement. The Arbitrator shall not have authority to decide any dispute other than whether the Agreement has been violated and he or she shall not add to, detract from, nullify, ignore, or modify in any way the terms of this Agreement.

. . .

STATEMENT OF THE CASE

This grievance involves the City of Janesville, Wisconsin and the Janesville Transit System and Local 579 affiliated with the International Brotherhood of Teamsters. (Jt. 1) The Union alleges that the City violated the collective bargaining agreement by refusing to offer the Grievant overtime pursuant to the parties' collective bargaining agreement and a long-accepted past practice. (Jt. 2 & 3) The Grievances were filed on October 2, 2001 and denied by the City on December 21, 2001. (Jt. 5) The City operates a bus transit system for the benefit of the public and the citizens of the City of Janesville. Grievant at the time of the circumstances leading to the grievance and as of the hearing date was a full-time bus driver for the City.

The City employs 15 full-time regular bus drivers, the majority of whom are assigned regular routes and often work a split shift as did the Grievant. Three of the full-time regular drivers are assigned as relief drivers. The first relief drives on other employees' days off, the second relief fills in for employees on vacation and the third relief driver covers for remaining driving time on routes that are left over and must be filled. The City also employs mechanics and part-time drivers; part-time drivers drive when regular full-time drivers are on a leave of

absence, on suspension or for reasons other than those covered by the full-time drivers and when full-time drivers are not available. The parties' labor agreement, Article 5, Section 8 and a longstanding past practice have provided that regular full-time drivers, on the basis of seniority, will be offered overtime first, after the relief drivers have taken care of all the overtime that they are able to handle. Part-time drivers and mechanics do not take overtime unless no full-time drivers are available. Part-time drivers also perform what is considered utility work, such as cleaning bus shelters and buses and engaging in miscellaneous driving covering lunch routes and routes of regular full-time drivers who call in at the last minute.

This arbitration results from the settlement by the parties of a grievance involving part-time employee Mel Walker. Walker was a part-time employee who was only supposed to work 60 hours in a two-week pay period. Walker consistently worked over 60 hours and the Union grieved. Over the course of several months of meetings to settle Walker's grievance, the parties reached a settlement agreement which was signed by the City on July 3, 2001 and by the Union on July 5, 2001. (Jt. 4) Pursuant to the settlement agreement, Walker was promoted to full-time driver status effective as of January 31, 2001. A full-time utility person position was simultaneously created in the Transit System table of organization; this position was classified under the labor agreement as a full-time bus driver and was effective as of the date of Walker's promotion. The settlement agreement set forth certain utility duties that this full-time driver would perform which would be similar to duties currently performed by part-time drivers. Regular full-time and relief bus drivers do not perform any duties other than driving a bus.

Soon after the settlement agreement, Walker, who was promoted to the full-time driver position and assumed the utility person duties, was also assigned as a relief driver by the City. Walker began to drive schedules and hours that would have been available to other full-time drivers as overtime if Walker had not been working them as a fourth relief driver. This use of Walker to take hours that would have been overtime hours for other full-time drivers led to the two grievances filed by the Grievant in October of 2001. As will be seen in the statement of the parties' positions, the parties, while agreeing to the Walker settlement agreement, significantly disagreed as to what this new full-time driver position could do. The Union argues that it never agreed to create and promote Walker to a position of fourth relief driver who could take overtime hours; the City argues that there was a clear understanding that it would be allowed to use Walker to drive previous overtime hours at straight time in order to cut down the wage and fringe benefit cost to the City of promoting Walker to a full-time driver position. On four dates in August of 2001, the Grievant alleges that she was available to work what would have been overtime hours had Walker not been driving and that the settlement agreement as interpreted by the City deprived her of these overtime hours.

The parties failed to achieve resolution through the grievance procedure. The matter was appealed to arbitration. No issue was raised as to the arbitrability of the grievance. Hearing in the matter was held by the Arbitrator on September 12, 2002.

POSITIONS OF THE PARTIES

Union

The Union argues that the settlement agreement was not intended to alter a past practice that required that overtime hours be first offered to regular full-time drivers, like Grievant, before being offered to part-time employees. The Union submits that the settlement agreement language reflects the clear understanding that Walker's duties would be similar to those duties currently performed by part-time bus drivers to include but not be limited to:

- Assigned on a weekly basis to open protection, driving, and miscellaneous assignments after full-time relief drivers have been assigned.
- Miscellaneous assignments include snow removal, shelter cleaning, fuel line, bus cleaning, bus stop sign replacement and similar duties which might be considered "garage" duties that are within the "Full-time Utility Person's" skills to perform.

Further, the Union points out that although promoted to full-time driver status, Walker was also to be the full-time utility person and that Walker's duties would continue to be similar to part-time drivers and part-time drivers never receive assignments before full-time drivers get an opportunity to work overtime hours. Further, there were no discussions that Walker would be assigned as the fourth relief driver. The Union submits the doctrine of *expressio unius est exlusio alterius* – to express one thing is to exclude another, which the Union argues is applicable here that by looking at the bullet points there is nothing in them to suggest that the Walker settlement would make Walker a relief driver.

The Union submits that reading the settlement agreement as a whole it is clear that the aforementioned duties assign Walker to what part-time drivers do and part-time drivers do not have the same rights as the Grievant, a full-time driver who was also without dispute senior to the Grievant whose full-time seniority per the settlement agreement only started as of January 31, 2001.

The Union argues that it made clear during numerous settlement discussions regarding the settlement of Walker's grievance that it did not want any change in the past practice that after the three relief drivers were occupied full-time drivers would receive an opportunity for overtime for which they had signed; further, the Union did not want to in any way alter the collective bargaining agreement. The Union submits that the City position, stated at the arbitration hearing, that it wanted the flexibility to use Walker to drive overtime hours at

straight time to save money to pay for Walker's promotion to a full-time driver was never put in the settlement agreement. The Union submits the arbitral rule that a document is to be construed as a whole and that any confusion or doubt as to the meaning of the agreement arising from the contract language must be construed against the City as the drafter. Bolstering this argument, the Union points out that the City during the hearing agreed that during the settlement discussions the City never said that it would create a fourth relief driver, and yet it posted the position as a relief driver after the settlement agreement.

It is the Union's position that the Grievant was able to work the overtime hours for which she had posted which were worked by Walker and that the City could have arranged some of Walker's hours and driving to allow the Grievant to work some of the hours at overtime. As to the City argument raised at the hearing and in the City brief, that the second grievance regarding overtime hours denied on August 13, 14 and 15, where the Grievant stated in her grievance an inapplicable term of the labor agreement, the Union argues that a grievant is not held to a high standard as to setting forth the contract language applicable to a grievance. The Union also submits that the Transit Director's response to the grievance (Jt. 5) clearly acknowledged that the parties were in agreement that the grievance arose from the alleged denial of overtime hours to the Grievant based on the Walker settlement and therefore the City had notice well before the arbitration hearing as to the substance of the grievance.

In conclusion, the Union argues that the Grievant was available and had signed for overtime on August 2, 13, 14 and 15 of 2001. The City violated the parties' labor agreement and past practice when it failed to offer the Grievant overtime on those occasions and instead gave the assignments to utility person Walker. Nothing in the parties' contract or the Walker grievance settlement agreement gave the City the right to use the utility person (Walker) to deprive regular full-time bus drivers of overtime. Therefore, the Union requests that the grievances be sustained and the Grievant made whole for the overtime wages lost as a result of the City's contract violation.

City

The City takes the position that the settlement agreement (Jt. 4) resulted in the creation of another full-time driver position and that this full-time driver could also perform utility and miscellaneous work as set forth in the settlement agreement. The City argues that under the contractual management rights clause it can assign relief duties to full-time drivers as it has in the past. The City submits it has the right to always assign more drivers to relief or to hire more drivers; something which the City argues the Union agrees to. The City submits that the settlement agreement therefore did not modify the collective bargaining agreement. The City notes that there is no classification in the collective bargaining agreement other than full-time driver and part-time driver, as stated under the salary schedule, and therefore, it has retained the flexibility to assign drivers to relief and could assign Walker to that relief position. The City argues that the settlement agreement does not prevent assigning relief status to Walker.

As to the specific hours that the Grievant alleges that she could have worked overtime hours, the City points out that Grievant works a split shift from 6:00 a.m. to 10:00 a.m. and 2:30 p.m. to 6:30 p.m. on Monday through Friday. The City argues that the Grievant was not available to work the full blocks of hours which might have been available to her but for the legitimate assignment of Walker to those hours. There were other hours available later in the day on those particular dates for which the Grievant could have signed but failed to do so since the only hours that the Grievant wishes to work extra are the hours between her shift, which would be from 10:00 a.m. to 2:30 p.m. Contrary to the Union, the City argues that the collective bargaining agreement does not obligate it to change shifts or drivers and that this is consistent with the collective bargaining agreement. Further, the City submits, and as the Union witnesses agreed, there is no guarantee of overtime to any employee in the bargaining unit based on the collective bargaining agreement.

Contrary to the Union, the City argues that it only agreed to the Walker settlement to promote Walker to a full-time driver position if it could reduce the cost of that promotion by having the flexibility to assign Walker to drive overtime hours at straight time. The City argues that its witnesses credibly testified that during the course of the negotiations to settle Walker's grievance, City representatives consistently told the Union that upper management would never agree to add another full-time driver position unless the cost could be offset by that position taking hours previously worked as overtime.

The City argues that the alleged contractual violation referenced in grievance 2 (Jt. 3), the vacation article in the collective bargaining agreement, has no bearing on the grievance and that this should result in a denial of the Grievant's second grievance relating to hours on August 12, 13 and 14. Further, the City posits that to agree with the Union and Grievant is to negate the City's right to hire and assign drivers and would result in a rejection of the City's rights under the collective bargaining agreement and render the Walker settlement agreement meaningless.

In conclusion the City submits that the utility and relief position assigned to Walker provides no sustainable basis to allege that the City violated the collective bargaining agreement on the four days in question. Based on the facts in the record, the Grievant was not denied overtime pay in the violation of the parties' collective bargaining agreement for any hours on August 2, 13, 14, 15, 2001. The City's actions were consistent with all provisions of the collective bargaining agreement on the dates and times in issue. The two grievances are without merit and were properly denied by the City and the denial of the grievances should be upheld.

DISCUSSION

This is a contract arbitration case. The Union alleges that the City violated the parties' collective bargaining agreement by not affording the Grievant the opportunity to work overtime on August 2, 13, 14 and 15 in 2001. The City's transit system employs 15 full-time

bus drivers. Three of those drivers are assigned or designated as relief drivers. The labor agreement does not have a classification for relief drivers; they are merely full-time drivers so designated. Relief drivers cover for vacations of regular drivers who work regularly scheduled year around routes. They also cover for other time off and any hours that are left over where full time drivers are not available. The City also has a contractual classification of part-time drivers who are scheduled to work no more than 60 hours in a two-week pay period. These drivers cover leaves of absence, lunch relief and take regular routes when the City has less than one hour's notice that a regular driver will be absent. Part-time drivers also perform miscellaneous duties such as snow removal, cleaning buses and related work. The City also employs a classification of mechanics.

The fifteen regular and relief drivers can sign a monthly posting stating their availability to work overtime. Schedules are adjusted on a weekly basis. The record establishes, based on the testimony of witnesses for both parties, that there has been a past practice that when overtime hours are available, relief drivers receive the first opportunity to work them. Any hours left over are then offered to the other full-time drivers who have signed the overtime availability posting. Any remaining hours are offered to part time drivers. It is also clear that regular full-time drivers and relief drivers do not perform any of the miscellaneous duties performed by part-time drivers. The contractual language of Article 5, Section 8, of the agreement supports the practice regarding the offering of extra hours at overtime.

At the heart of this matter, is an Agreement (Jt. 4) which resolved a grievance involving employee Mel Walker. As set forth in the Statement of the Case, the settlement of Walker's grievance created another full-time driver position which, as the parties agreed, would create a new full-time "Utility Person." The City, after promoting Walker to a full-time driver position to settle his grievance, assigned Walker as a relief driver; it is that action and its subsequent consequences that led to Grievant filing her two grievances. The consequences affecting Grievant were that on four days Walker drove bus at times that would possibly have been offered to other full-time drivers except for the practice that overtime would only be offered to full-time drivers after relief drivers were offered the hours. Walker, as a new relief driver, worked hours that Grievant alleges she could have worked had Walker not been designated as relief which the Grievant and Union argue was in violation of the settlement of Walker's grievance. (Jt. 4)

Again, the pertinent section of the Walker settlement reads as follows:

> 2. A new "Full-time Utility Person" position will be created in the Transit System Table of Organization, classified as a Full-time Bus Driver, effective as of the same date of Mr. Walker's promotion. The duties of this position will be

similar to those duties currently performed by Part-time Bus Drivers, to include, but not be limited to:

- Assigned on a weekly basis to open protection, driving, and miscellaneous assignments after full-time relief drivers have been assigned.
- Miscellaneous assignments include snow removal, shelter cleaning, fuel line, bus cleaning, bus stop sign replacement and similar duties which might be considered "garage" duties that are within the "Full-time Utility Person's" skills to perform.

The parties began negotiating this settlement in January of 2001 and did not complete the settlement until July, 2001. From the testimony of the witnesses at the hearing, it is clear that the parties were either not listening to each other during these settlement negotiations or even though recognizing their differences, signed the agreement anyway and hoped for the best. Testimony of Union witnesses supported its argument that the practice of offering overtime to regular drivers was not to change, Walker was to be promoted to full-time driver status but was to continue to perform the same duties he had been performing as a part-time driver as a Utility Person. The City witnesses testified in support of their reading of the settlement negotiations that the only way the City could agree to creating another full-time driver, with increased pay and benefits, was to be able to use Walker to take previous over time hours at straight time. Witnesses for both parties testified that their respective positions were debated or presented consistently throughout the settlement negotiations.

The positions of both the Union and the City are logical and absent other evidence I am not inclined to doubt the creditability of either party's witnesses at the hearing. Therefore, my decision will be based on my reading of the Settlement (Jt. 4) and the collective bargaining agreement. The City correctly argues that under the labor agreement's management rights clause it has the right to determine the Table of Organization for the Transit System and despite the Settlement could at its discretion designate another full-time driver as relief. While that is true, and not challenged by the Union, by making Walker the fourth relief driver, the City tied its decision to the settlement of Walker's grievance. To find otherwise would ignore the testimony of the witnesses, the two grievances and the City's response to them. The Transit Director, David Mumma, states in a letter to Union Business Representative, Jack Adams, responding to the Grievant's two grievances:

> We agree that both grievances in question are based upon the grievant's assertion that the grievance settlement signed and entered into between the City and the Union on July 5, 2001, which created the position of "Full-time Utility Person", classified as a Full-time Bus Driver, and the subsequent use of that employee as a relief driver to fill open assignments on regular routes at the transit system is in violation of her contractual rights as a Full-time Bus Driver to be offered that work at overtime as provided in Article 5, Section 8 of the Agreement. . . .

It is clear that both parties have agreed that this decision rests on my interpretation of the settlement of Walker's grievance and the labor agreement.

The settlement agreement created another full-time driver position and that was Walker. Further, the parties agreed that a full-time utility position was created in the City's table of organization. While the settlement does not specifically say so, the fact that Walker's promotion was simultaneous with the utility position designation ties Walker to that position; nor does there seem to be any dispute that Walker is the employee assigned to that position. Notably and important, nothing in the settlement agreement talks about or mentions the creation of a fourth relief driver position. Further, the duties of this new position are similar to the duties of a part-time driver. Those duties are described in the first two bullets under paragraph two of the settlement which I have set out above. The record testimony established that those duties are not performed by regular full-time drivers including relief drivers. While the City argues that nothing in that description of duties limits Walker from driving relief, certainly nothing in those duties makes that specific. In fact driving duties are described as "miscellaneous" and only occur only after relief drivers are not available. This does not read as an intent, let alone an agreement, to make Walker a relief driver. If Walker is only in the pool of full-time drivers that only drive after the three current relief drivers are occupied, then Walker's seniority would be involved, and his full-time seniority is less than that of the Grievant.

Whether or not I agree with the Union's argument that what duties are not stated are excluded, if I look at the duties this utility position is to perform, which duties are stated as similar to a part-time driver, it is difficult from the language of the Walker Settlement Agreement to find language that supports a finding that Walker could drive at straight time hours that full-time drivers had previously been offered to drive at over time under an accepted past practice and the contractual language of Article 5.

As the Union submits, in contractual law, unclear drafting is construed against the drafter, in this case, the City. I am left to interpret language that contains absolutely no language regarding the creation of a fourth relief driver or Walker being assigned as such or language that would give the City increased flexibility to have overtime hours driven by Walker or any other driver at straight time. If this had been such a critical concern to the City, I am left to wonder why was it not made specific in the Walker settlement agreement. I do not believe the settlement can be interpreted by me in any other manner. And what results is that my interpretation does not change the labor agreement or the past practice of the parties. This finding is also consistent with the labor agreement's management rights clause. Therefore, I find that the settlement agreement did not change Article 5 of the labor agreement or the parties' practice and Grievant should have been given the opportunity to drive overtime hours on August 2, 13, 14 and 15, if available and hours for which she had signed. The effect of this decision also means that Walker cannot be assigned as a relief driver in the context of being assigned as a full-time utility person assigned to duties similar to a part-time driver.

As to the first grievance (Jt. 2) for hours available on August 2, 2001, I find that the City did not have to make the shift changes necessary to make the hours available that Grievant had signed she was available for driving extra or overtime hours. Grievant worked a split shift from 6:00 a.m. to 10:00 a.m., and then from 2:30 p.m. to 6:30 p.m., eight hours. Grievant had signed to work the period between her two shifts, four and one-half hours, less one hour for lunch. Grievant typically signed for these hours; she seldom, and not in this case, signed for hours after her afternoon shift. However, Walker had already been assigned to drive a shift that included those hours. To give the four and one-half hours that Grievant signed for, the City would have had to assign Walker to another shift and then arrange for yet another driver to work the hours of Walker's previously assigned shift that Grievant, because of her regular route could not drive. I find that the settlement agreement, the parties' practice or the labor agreement did not require the City to modify shifts to give the Grievant the only hours that she wanted to work, 10:00 a.m. to 2:30 p.m. Walker, on that day was not driving extra hours, he was driving a full shift. Therefore, I will deny the grievance as to August 2, 2001.

The second grievance (Jt. 3) concerns hours Grievant signed for on August 13, 14 and 15. Grievant signed for the same hours as noted above, the hours between her split shift. Because a full-time driver was off on workers compensation, there were five hours on each of those three days available for extra hours. Walker took the hours on all three days which means this was extra driving for him not, as on August 2, a full assigned shift. The Assistant Transit manager forthrightly, in his hearing testimony, agreed that absent the City's interpretation of the Walker settlement agreement and the assignment of Walker as a relief driver, those hours would have been available to Grievant as overtime hours resulting in Grievant being able to work ten and one-half hours of overtime on those three days. Given my decision above, I will find that the grievance as to August 13, 14 and 15 will be sustained.

The City argues that after the settlement a job was posted for a relief driver and the Union never grieved. I do not find that as any waiver by the Union. As the Union has agreed, the City has the right within the limits of the contractual management rights clause to determine the table of organization and the number of relief drivers. The problem here is that the relief job was awarded and assigned to Walker, contrary to the settlement agreement, (Jt. 4) and was used to deny overtime opportunities to full-time drivers. Nothing required the Union to grieve the posting; it grieved when the results of the posting adversely affected the Grievant. I further find that the Grievant's misstatement of the proper contractual language in her second grievance (Jt. 3) was overcome by the City's own clear statement by the Transit Director that the City had notice as to the Union and Grievant's position as to the alleged contractual violation. (Jt. 5)

The City is concerned that a decision in favor of the Grievant and Union will adversely affect its management rights. I wish to make clear that this decision is limited to the facts of this case and the two grievances involved. I understand that similar grievances are pending; I

have not been asked to decide those cases and whether this decision is any precedent for those cases is not my decision. What I have basically done is put the parties back to the practice in effect before the Walker settlement agreement where both parties should have been more careful in setting forth their written agreement.

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

AWARD

The City did not violate the collective bargaining agreement on August 2, 2001 and that grievance will be denied. The City did violate the collective bargaining agreement on August 13, 14 and 15 when it denied the Grievant the opportunity to work overtime and that grievance will be sustained. The Grievant, within thirty calendar days of this decision, will be awarded ten and one-half hours of pay at her overtime rate in effect on those dates grieved.

Dated at Madison, Wisconsin, this 7th day of November, 2002.

Paul A. Hahn /s/
Paul A. Hahn, Arbitrator

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