

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LIDLAW TRANSIT, INC.

and

KENOSHA SCHOOL BUS DRIVERS & MONITORS UNION

Case 6
No. 61976
A-6052

Appearances:

Mr. Robert K. Weber, Weber & Cafferty, S.C., 704 Park Avenue, Racine, Wisconsin 53403, appearing on behalf of the Union.

Mr. Marcus Franklin, Regional Human Resources Manager, Laidlaw Transit, Inc., 1240 East Diehl Road, Naperville, Illinois 60504, appearing on behalf of the Employer.

ARBITRATION AWARD

Laidlaw Transit, Inc., hereinafter referred to as the Employer, and Kenosha School Bus Drivers and Monitors Union, hereinafter referred to as the Union, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. Pursuant to a Request to initiate Grievance Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the pay of an employee. Hearing on the matter was held in Kenosha, Wisconsin on March 7, 2003. Post hearing written arguments were received by the Arbitrator by April 8, 2003. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties where unable to agree upon the framing of the issue and agreed to leave framing of the issue to the Arbitrator. The Arbitrator frames the issue as follows:

“Did the Employer violate the collective bargaining agreement when it failed to pay the grievant Monitor pay when the grievant performed Monitor duties in addition to her Special Ed route driver duties?”

"If yes, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE 13

During the term of this contract, it is further agreed that should any difference or dispute arise between the Company and the Union in connection with the administration of this Labor Agreement, a grievance shall be filed within 14 working days after the occurrence of the situation, condition, or action giving rise to the grievance. To be valid, the grievance must be in writing and copies of the grievance must be submitted to the Company and the Union. An earnest effort must be made to settle such grievance promptly. The company must respond within 7 working days after receiving the grievance. The Union member involved in the following steps A, B, C and D has the right to have one of the Union Officers as he/she designates to represent him/her at any meeting in connection with the grievance. The paragraph and paragraphs below will not apply to any difference or dispute between the Company and the Union in connection with the collective bargaining over wages, hours and working conditions or in connection with collective bargaining to negotiate another labor agreement. Grievances may proceed only by recourse to the following successive steps.

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36. COMPENSATION RATES

- A. In addition to the rates on page 19, the following will be in effect.
- (i) Defensive driving course will be mandatory within the first year of employment, and time for the course will be compensated at minimum wage per hour.
 - (ii) In the event that a driver must wait a half hour or longer for a bus after the scheduled start time, driver shall be paid at charter per hour rate.

- (iii) The Company shall pay for CDL license costs.
 - (iv) The Company shall pay for CDL-required physical if Company's physician is used or shall reimburse employee \$75.00 if employee's personal physician is used.
 - (v) The Company will not deny unemployment claims for layoff periods. The Company also agrees that for the purposes of summer layoffs for unemployment compensation purposes, it shall layoff in inverse order of seniority. All other layoffs shall take place in accordance with Article 27 of the Labor Agreement.
- B. When a Driver has to monitor, the pay rate shall be charter pay.
 - C. When an Ortho charter is run without a monitor, the driver will receive an additional \$1.00 per hour.
 - D. If a driver covers another drivers routes in addition to their own, then they shall be compensated at that route(s) rate, or portion thereof, for the route(s) covered.
 - E. Employees will be paid time and one half for any work performed over forty (40) hours per week.
 - F. Length of routes are as follows:

(1) Single (not to exceed)	1 hour - terminal to terminal
(2) Double (not to exceed)	1 ½ hours - terminal to terminal
(3) Triple & Standby (not to exceed)	2 hours - terminal to terminal
(4) Special Ed (not to exceed)	1 hour - terminal to terminal
(5) Orthopedic	3 consecutive hours A.M.
	2 consecutive hours mid-day
	3 consecutive hours P.M.
	Schedules will be set by Company

- G. The pay rate for pick-up and delivery of new buses shall be based on the total mileage divided by 45 miles per hour and paid per hour at the charter rate. Drivers will be responsible for other travel expenses such as meals and lodging. This driving function shall be posted and assigned by seniority. Breakdown and waiting time will be paid in addition to actual driving rate and shall also be paid at the hourly charter rate.
- H. Weekly payroll to commence January 1, 2003.

BACKGROUND

The Employer operates a transit system that provides transportation for students who attend the Kenosha School District. Some students require special needs and assistance during transportation to and from school. The Employer has designated certain buses and routes for the transportation of such students. The collective bargaining agreement designates these routes as Special Ed. Drivers are directed not to leave their seat while operating their buses and Monitors are normally assigned to the Special Ed route to attend and assist students. At the commencement of the 2001 – 2002 school year Margaret Acosta, hereinafter referred to as the grievant, posted for and received a Special Ed route. As there was no Monitor available she was required to perform both Bus Driver and Monitor duties. She kept track of the hours that she performed Monitor duties, submitted them to the Employer, and received pay for these hours during the month of September. In October the Employer ceased paying the grievant for performing Monitor duties. She was told to keep track of her hours and at the end of the semester, January 2002, she turned in a request for payment for 280 hours she performed Monitor duties. Thereafter, the instant grievance was filed and processed to arbitration in accord with the parties' grievance procedure.

The record demonstrates that the Employer has established a policy of providing Monitors for all Special Ed routes. When Bus Drivers are assigned to ride along on a Special Ed route to perform Monitor duties they receive the agreed upon Charter rate of pay. The record also demonstrates that in the past when the Employer has assigned a Special Ed Bus Driver to perform both Bus Driver and Monitor duties the employee has received both the Bus Driver and Monitor pay. Prior to the instant matter there is no evidence the Employer has ever denied an employee who performed both duties the Monitor pay rate in addition to their Special Ed route pay.

UNION'S POSITION

The Union argues that under the principles of unjust enrichment/quantum meruit and past practice an award should be rendered in favor of the grievant. The Union argues the theory of unjust enrichment should apply in the instant matter because the Employer had the Monitor services performed free of charge. In support of its position the Union points to CHICAGO BOARD OF EDUCATION. AAA Case No. 51 390 00431 95 where in Arbitrator Jeanne Vonhof

awarded pay for additional work because the employer was aware of and tacitly approved of the employee's activities. The Union points out that herein the grievant had no discretion to refuse to perform Monitor duties for students who required assistance. The Union further points out that Branch Manager David Wildes acknowledged during his testimony that it is the Employer's policy to assign Monitor's to Special Ed bus routes. The Union concludes it would be an unreasonable and arbitrary exercise of management rights to deny the grievant pay for performing the Monitor duties.

The Union also argues that it is clear from the earning statements of the grievant's and other employees that the grievant and other employees were paid for performing both duties when a Monitor was not present. The Union points out the Employer made no attempt to disprove the existence of this practice. The Union asserts this fact is relevant as the language of the collective bargaining agreement, Section 36 B, is unclear on this issue. The Union argues such practices speak louder than words and give substance to ambiguous language.

The Union also asserts that once a practice that constitutes an economic benefit to employees has been established it cannot be changed unilaterally. The Union argues the benefit is considered a part of the employee's overall compensation package becoming an implied term of the collective bargaining agreement and not subject to change without the consent of both parties. The Union concludes that compensation for performing Monitor duties is a part of the employee's overall compensation package, a pay rate established for Bus Drivers performing such duties.

The Union would have the Arbitrator sustain the grievance and direct the Employer to make the grievant whole for performing both duties.

EMPLOYER'S POSITION

The Employer contends the plain and unambiguous language of the collective bargaining agreement warrants that the grievance be denied. The Employer argues that the language of the collective bargaining agreement is clear and unambiguous. Article 36, Section B specifically states that when a driver has to monitor, the pay rate shall be the Charter pay. The Employer argues this provision was established so that there was a pay rate for Bus Drivers who were asked to perform Monitor duties on an open route. The Employer points out that pursuant to Article 36, Section C when an Ortho charter is run without a Monitor the Bus Driver receives an additional \$1.00 per hour because of additional duties necessary to assist students with wheelchairs.

The Employer contends the Union must point to an ambiguity in the language of the collective bargaining agreement to warrant an inquiry into the intent of the parties. The Employer asserts the Union has failed to demonstrate an ambiguity in the collective bargaining agreement. The Employer argues the Union is attempting to argue that there is a past practice

that Special Ed Bus Drivers receive Monitor pay in addition to their driver pay. The Employer concludes that because the collective bargaining agreement is clear and unambiguous there is no need for the Arbitrator to analyze the existence of a past practice or otherwise look beyond the four corners of the collective bargaining agreement because the language is clear and unambiguous.

The Employer also contends that even if the Arbitrator were to find the language ambiguous, negotiations and the Employer's established practices support the Employer's interpretation of Article 36. The Employer points out Special Ed routes are paid more than a Single route because of the extra duties and points out the grievant acknowledged this during her testimony. The Employer also points out there is no way to determine from the pay stubs submitted by the Union whether the Bus Driver received Monitor pay in addition to their Bus Driver rate or if they received the rate for performing Monitor duties on someone else's route.

The Employer concludes it is unrealistic for the grievant to believe she should be paid twice for performing the same work. The Employer asserts the fact the grievant did not have a Monitor does not mandate she receive a "premium" when she was already receiving a higher rate of pay than a regular route Bus Driver. The Employer also argues the one or two exhibits presented by the Union do not establish a past practice that demonstrates the grievant was paid incorrectly. Therefore the Employer would have the Arbitrator deny the grievance.

DISCUSSION

A careful review of the parties' collective bargaining agreement demonstrates that when an Ortho route driver does not have an assigned Monitor to supervise students while driving their route the employee receives an additional \$1.00 per hour. The collective bargaining agreement also specifies that when a driver is assigned to perform Monitor duties while another employee is driving the route, the employee is paid the Monitor (Charter) rate of pay rather than their route rate of pay. However, the collective bargaining agreement is silent concerning what rate of pay a Special Ed route driver receives if a Monitor is not assigned to their route. The record also demonstrates that because of the amount of supervision students on Special Ed routes require the Employer has established a policy that Monitors be assigned to Special Ed routes. Therefore, contrary to the Employer's arguments, the normal duties of a Special Ed route driver do not include the duties of monitoring students. Thus the Arbitrator finds it can not be concluded that when the parties established the rate of pay for Special Ed route drivers the parties included in the scope of duties for the Special Ed route driver the duties of monitoring special ed students.

The record demonstrates that in at least five (5) different pay periods prior to the commencement of the 2001-2002 school year the grievant received Monitor pay in addition to her regular Special Ed driver pay because she did not have a Monitor assigned to her Special Ed route (Union Ex 2). The Employer presented no evidence that refuted the grievant's testimony. The record also demonstrates another Special Ed route driver, David Gerger, received Monitor

pay in addition to his regular Special Ed route driver pay in four (4) different pay periods (Union Ex 3). The Employer presented no evidence that refuted the Union's claim that the Monitor pay was in addition to Gerger's Special Ed route pay because a Monitor was not assigned to the Special Ed route. While the Employer argument that one or two examples are insufficient to establish a past practice, the Arbitrator finds that nine (9) examples from the previous school year totaling more than seventy (70) hours of pay are sufficient to establish that the parties have a practice of paying Special Ed route drivers Monitor pay in addition to their route pay when a Monitor is not assigned to their Special Ed route. The Arbitrator notes here that the Employer claim that the payroll clerk may have incorrectly coded the paychecks would have merit if the Employer had demonstrated a Special Ed route driver did not receive Monitor pay when a Monitor was not assigned to the Special Ed route. However, there is no evidence the Employer has ever denied such a request in the past.

The record also demonstrates that the grievant was informed by the payroll clerk to keep track of her hours and to turn them in at a later date. At the beginning of the school year's second semester the grievant was assigned a Monitor and she turned in her request for 280 hours of Monitor pay to David Wilds. The grievant testified at the hearing that her request was approved by Wilds and she waited to receive her pay. In late March, 2002, she had still not received her Monitor pay and she discussed the matter with the payroll clerk. The grievant was informed the Employer was redoing the check because the number of hours kicked it into overtime and the Employer was redoing the check. The grievant did not receive the Monitor pay in her next check nor the following check. The grievant again discussed the matter with the Employer and informed the Employer she did not want to file a grievance over the matter. The grievant was informed filing a grievance may be for the best. The grievant then filed the instant grievance. The Arbitrator concludes that because the Employer never informed the grievant it was denying her request for Monitor pay the Employer cannot claim the grievance is untimely. There is no evidence that at anytime after she filed her request for Monitor pay the Employer denied the request other than when it denied the instant grievance on July 2, 2002. Thus the Arbitrator finds the grievant could reasonably conclude the Employer was going to pay her the Monitor pay up to the time she filed her grievance.

Therefore, based upon the above and foregoing, and the evidence, testimony and arguments presented, the Arbitrator finds the Employer violated the parties' collective bargaining agreement when it failed to pay the grievant her requested Monitor pay. The Employer is directed to make the grievant whole by paying her 280 hours of Monitor pay at the appropriate rate of pay. The grievance is sustained.

AWARD

The Employer violated the collective bargaining agreement when it failed to pay the grievant Monitor pay when the grievant performed Monitor duties in addition to her Special Ed route driver duties. The Employer is directed to pay the grievant 280 hours of Monitor pay at the appropriate rate of pay.

Dated at Madison, Wisconsin, this 26th day of June, 2003.

Edmond J. Bielarczyk, Jr. /s/

Edmond J. Bielarczyk, Jr., Arbitrator

EJB/gjc
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