BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE PRESS COMPANY

and

GENERAL TEAMSTERS UNION, LOCAL 662

Case 16
No. 66774
A-6277

Appearances:

Mr. YingTao Ho, Esq., Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C. Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of Local 662.

Mr. Stephen L. Weld, Esq., Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, WI 54702-1030, on behalf of the Company.

ARBITRATION AWARD

The parties jointly selected the Undersigned from a Wisconsin Employment Relations Commission panel of arbitrators to hear and resolve a dispute between them regarding the proper application of new contract language of Article 1, Section 1. The parties agreed to hear the case at Eau Claire, Wisconsin on May 23, 2007. No stenographic transcript of the proceedings on May 23rd was taken. Thereafter, the parties submitted their post hearing briefs by June 26, 2007 whereupon the record was closed.

ISSUES

The parties were unable to stipulate to the issues for determination herein. However, they agreed to allow the Arbitrator to frame the issues based upon the relevant evidence and argument in the case. The parties suggested issues[1] were as follows:

[1] At the hearing, the Company raised the issue whether the grievance was timely filed but it did not suggest a procedural issue herein. Nonetheless, as the parties have fully argued the point, I have dealt with the issue herein.

Union: Did the Company improperly exclude employees from the bargaining unit as temporary employees?

Company: Did the Company violate Article 1 when it did not collect union dues from employees scheduled to work less than 20 hours per week?

If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein and the parties' suggested issues, I find that the Union's issues fairly and properly describe the controversy between the parties and they shall be determined herein.

RELEVANT 2006 – 08 CONTRACT PROVISIONS:

ARTICLE 1 – RECOGNITION

Section 1. The Company recognizes the Union as the sole and exclusive bargaining agent for all motor route/tube route and long haul drivers, excluding mailroom employees, office clerical, temporary employees, confidential employees, and supervisors as certified by the National Labor Relations Board, Case 18-RC-15543.

A temporary employee is hired with the expectation of employment for a short duration, to replace a Union-represented employee temporarily off work, or for less than 20 hours per week. Temporary positions will be so designated at the time of hire and such employees are not eligible for Company benefits. News correspondents, newspaper carriers, and certain other sales agents are not employees of the Company.

. . .

ARTICLE 3 – UNION SHOP – CHECKOFF AND PROBATION

Section 1. Union Shop. All present employees who are members of the Local Union on the effective date of this Section, or on the date of execution of this Agreement, whichever is the later, shall remain members of the Local Union in good standing as a condition of employment. All present employees who are not members of the Local Union and all employees who are hired hereafter shall become members in good standing of the Local Union as a condition of employment on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this Section, or the date of this Agreement, whichever is the later. This provision shall be made and become effective as of such time as it may be made and become effective under the provisions of the National Labor Relations Act, but no retroactively.

Section 2. Check Off. The Employer agrees to deduct from the pay of all employees covered by this Agreement the dues, initiation fees and/or uniform assessments of the Local Union having jurisdiction over such employees and agrees to remit to said Local Union all such deductions prior to the end of the month for which the deduction is made. Where laws require written authorization by the employee, the same is to be furnished in the form required.

The Union shall certify to the Employer, in writing each month, a list of its members working for the Employer who have furnished to the Employer the required authorization, together with an itemized statement of dues, initiation fees (full or installment), or uniform assessments owed and to be deducted for such month from the pay of such member, and the Employer shall deduct such amount from the first paycheck following receipt of statement of certification of the members and remit to the Union in one lump sum.

The Employer shall add to the list submitted by the Union, the names of all regular new employees hired since the last list was submitted and delete the names of employees who are no longer employed.

Where an employee who is on check-off is not on the payroll during the week which the deduction is to be made, or who has no earnings or insufficient earnings during that week, or is on Leave of Absence, the employee must make arrangements with the Union to pay such dues in advance.

The Employer will recognize authorization for deductions from wages, if in compliance with State Law, to be transmitted to the Union or to such other organization as the Union may request, if mutually agreed to. No such authorization shall be recognized if in violation of State or Federal Law. No deduction shall be made which is prohibited by applicable law.

. . .

ARTICLE 18 – INSURANCE

. . .

Section 3. General Provisions.

Drivers with standard hours of 35 or more hours per week will be considered full-time and eligible for full-time fringe benefits the same as current full-time drivers. Drivers with standard hours between thirty (30) or more hours but less than 35 hours per week will be considered part-time and eligible for part-time fringe benefits the same as current part-time employees. Those drivers with standard hours less than 30 hours per week are not eligible for fringe benefits.

A relief driver with standard hours of thirty-five (35) hours or more per week shall be considered full-time and shall be eligible for fringe benefits on the same basis as current full-time employees. Those relief drivers with standard hours of 30 or more hours but less than 35 hours per week shall be eligible for part-time benefits in the same way that current part-time employees are eligible for fringe benefits. Those relief drivers with standards hours less than 30 hours per week are not eligible for fringe benefits.

ARTICLE 22 – PAID TIME OFF (PTO)

. . .

Section 3. Full-time (35 or more standard hours per week) and part-time (30 to 34 standard hours per week) drivers covered under this contract will earn PTO each pay period according to each driver's scheduled workweek. This accrual is based on 26 pay periods per year. PTO is earned on a continuous basis not according to calendar year.

. . .

ARTICLE 27 – WAGES

. . .

This enhanced level of increase is intended to minimize the disparity in pay between current employees represented by the Union and new employees represented by the Union. Relief drivers shall be eligible for membership in the Union on the same basis as current employees and relief drivers will be considered part-time and full-time depending on their standard hours.

SIDELETTER
Attached to
Eau Claire Press Company
Long Haul and Motor Route Drivers Contract
March 1, 2006, through December 31, 2008

Because some drivers will lose benefits or reduced benefits as a result of the negotiated settlement, the parties agreed that the employer will allow drivers, who move from full-time status to part-time status and part-time status to no benefit status, to increase their number of days on their route if the change will result in the incumbent retaining their existing benefits. If increasing the number of days on a route does not allow the employee to retain his/her benefit status, the Eau Claire Press Company will allow drivers, whose status is changed and benefits reduced as a result of the negotiated contract changes, to bump into other routes which would allow them to retain their existing benefits.

BACKGROUND

The Company and the Union have had a collective bargaining relationship since at least 1994. The Company employs motor route/tube route and long haul drivers to deliver the daily newspaper it publishes. Twice per annum, the Company's drivers can use their seniority to post into routes. After January, 2006 when the 2006-08 contract negotiations concluded, these postings referred to "hours per week" across a seven day period. No reference is made to "standard hours" or to temporary employee status on these postings. There is no dispute that the hours listed on these postings are standard hours (U. Exhs. 1 and 2).

When the 2003-05 labor agreement between the parties was still in effect, John Kaiser became the Union Business Agent, taking over in a limited way[2] for the prior agent who had become ill. In the 2003-2005 contract the parties agreed to define when benefits would be cut off or prorated using employees' standard hours but employees continued to be paid for the actual hours they worked. It is significant that in the 2003-2005 contracts no mention was made of standard hours in Article 3 – Union Shop – Check Off and Probation. However, Article 19 – Health and Welfare at Section 3, refers to "standard hours" as a means of setting eligibility for fringe benefits, as follows:

ARTICLE 19 – HEALTH AND WELFARE

. . .

Section 3.

Commencing on February 1, 2000 a new method of cost allocation will commence and will phase in, leading to an ultimate cost allocation of 80% Company paid monthly premiums and 20% employee paid contributions.

Drivers with standard hours of 30 or more hours per week will be considered full-time and eligible for full-time fringe benefits the same as current full-time drivers. Drivers with standard hours between twenty (20) and twenty-nine (29) hours per week will be considered part-time and eligible for part-time fringe benefits the same as current part-time employees.

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[2] Kaiser stated his involvement was limited to holding a meeting for unit employees to gather their concerns prior to the start of the negotiations for the 2003-05 agreement.

A relief driver with standard hours of thirty (30) hours or more per week shall be considered full-time and shall be eligible for fringe benefits on the same basis as current full-time employees. Those relief drivers with standard hours from 20 to 29 hours per week shall be eligible for part-time benefits in the same way that current part-time employees are eligible for fringe benefits. Those relief drivers with standard hours less than 20 hours per week are not eligible for fringe benefits.

Also in the 2003-05 agreement, Paid Time Off (Article 23, Section 3) was limited by the number of days per week a driver drove for the Company and eligibility for PTO was then also based on whether an employee . ". . works at least twenty (20) hours during his/her four (4) – day workweek." No reference was made in Article 23 to standard hours. Finally, Article 28 – Wages of the 2003-05 agreement referred to Union membership and standard hours, as follows:

ARTICLE 28

WAGES

It is recognized by the parties that the new collective bargaining agreement includes a dramatic change in the historical method of compensation for bargaining unit employees. Previously some employees have received compensation including one or more of the following components:

A. Base hourly pay rate, and/or
B. Commission monies, and/or
C. Gasoline and expense reimbursement above the standard Company payments for such items.

During the course of these negotiations, these components have been identified for each of the employees currently working in the Company's distribution system. Henceforth, compensation shall be defined as "wages" which shall be computed hourly and which shall reflect the total of the components referred to above. Thus, a hypothetical employee who would have received in the past $3.00 per hour in base wage, $3.00 per hour in commission credit, and $3.00 per hour houly wage. (Fringe benefits, now, are outside of the computation of wages.) Wages, also called hourly pay, shall be paid for hours worked and it is specifically understood and agreed that the precious (sic) system of paying for particular tasks, e.g., (fence post pounding or special deliveries) is no longer operative.

In order to achieve the agreed upon goal of the parties of attempting to achieve greater wage uniformity, with the contract starting January 1, 2000, the parties agreed to an umbrella six (6) year wage plan. The purpose of that plan is to achieve a greater degree of consistency during the next three years and get more consistency after six years. It is specifically understood that the plan will not achieve consistency, however, over even the six-year term and total consistency will require a mutual effort over many years to be accomplished.

In order to enhance the achievement of consistency in wage rates, in 2003, the start or training rate shall be $8.50 per hour and, on completion of the 30-day probation period, drivers shall increase to $9.00 per hour. All drivers being paid less than $12.00 per hour shall receive a 50 cent per hour increase on January 1 until the employee reaches the wage rate of $12.00 per hour.

All drivers hired during the term of this contract will have the following start/training and 30-day rates:

	Start/Training	30-Days
1/1/2003	$8.50	$9.00
1/1/2004	$8.62	$9.12
1/1/2005	$8.74	$9.24

Those employees who do not have a regularly scheduled work shift shall be considered to be “relief drivers”. All relief drivers hired during the term of this contract will have the following start/training and 30-day rates:

Relief Driver	Start/Training	30-Days
1/1/2003	$9.00	$9.50
1/1/2004	$9.14	$9.64
1/1/2005	$9.28	$9.78

All relief drivers being paid less than $12.50 per hour shall receive a 50 cents per hour increase on each January 1 until the employee reaches the wage rate of $12.50 per hour.

This enhanced level of increase is intended to minimize the disparity in pay between current employees represented by the Union and new employees represented by the Union. Relief drivers shall be eligible for membership in the Union on the same basis as current employees and relief drivers will be considered part-time and full-time depending on their standard hours.

Prior to the 2006-08 contract becoming effective, the parties had never defined "temporary employees" although these employees had always been excluded from the bargaining unit, since the NLRB certified the unit in the 1990's. The 2003-05 agreement contained only the following reference to temporary employees:

ARTICLE 1

RECOGNITION

> Section 1. The Company recognizes the Union as the sole and exclusive bargaining agent for all motor route/tube route and long haul drivers, excluding mailroom employees, office clerical, temporary employees, confidential employees, and supervisors as certified by the National Labor Relations Board, Case 18-RC-15543.

. . .

FACTS

During negotiations for the 2006-08 agreement, in its initial proposal, the Union sought to "(d)efine temporary employees" (ER Exh. 2), although it did not propose any language to do so. In response, the Company drafted the following language:

> ARTICLE 1 – RECOGNITION, Section 1 (page 1) – Add the following paragraph:
>
> A temporary employee is hired with the expectation of employment for a short duration, to replace a Union-represented employee temporarily off work, or for less than 30 hours per week. Temporary positions will be so designated at the time of hire and such employees are not eligible for Company benefits. News correspondents, newspaper carriers, and certain other sales agents are not employees of the Company.[3]

The Company also sought major changes (concessions) in health insurance and paid time off in these negotiations. In this regard, the Company proposed to raise the number of standard hours employees needed to be eligible for full and prorated health insurance, as follows:

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[3] In their final settlement, the parties agreed to delete "30 hours" and insert "20 hours" in this provision.

ARTICLE 18 – HEALTH AND WELFARE

. . .

Section 3. General Provisions.

Drivers with standard hours of thirty-five (35) or more hours per week will be considered full-time and eligible for full-time fringe benefits the same as current full-time drivers. Drivers with standard hours between thirty (30) or more hours but less than thirty-five (35) hours per week shall be eligible for part-time benefits the same as current part-time employees. Those drivers with standard hours less than thirty (30) hours per week are not eligible for fringe benefits.

A relief driver with standard hours of thirty-five (35) hours or more per week shall be considered full-time and shall be eligible for fringe benefits on the same basis as current full time employees. Those relief drivers with standard hours thirty (30) ore more but less than thirty-five (35) hours per week shall be eligible for part-time benefits in the same way that current part-time employees are eligible for fringe benefits. Those relief drivers with standard hours thirty (30) or per week are not eligible for fringe benefits.

. . .

The Company's chief spokesman at the 2006-08 negotiations was Attorney Weld and Kaiser was the chief spokesman for the Union. Also present at bargaining for the Company and the Union respectively were Human Resources Director Hayden and former Union Steward and former employee Michael Erickson. Both Hayden and Erickson testified in this case. Kaiser also testified herein.

Erickson stated herein that prior to December, 2006 as Union Steward, the Company sent him notice of newly hired employees along with the Company's designation as Type 1, Type 2 or Type 3. Type 1 employees then worked more than 30 hours; Type 2 worked more than 20 hours and Type 3 worked less than 20 hours. Prior to December, 2006 route postings indicated the Type of employee/position and stated that the route hours were "subject to audit." Erickson stated that Hayden never spoke to him about the difference between standard and actual hours for routes.

Hayden stated herein that traditionally, almost everything at the Company is based on standard or scheduled hours, although employees have always been paid for the actual number of hours they have worked. Hayden asserted that she and her department employees hold orientation meetings with new hires as well as employees whose standard hours are set at hire or change after hire affecting their eligibility for health insurance and other fringe benefits. At these orientations, Hayden stated that she

follows the Company handbook,[4] that she tells employees what their classification is, their rate of pay, who their supervisor is and where they will be assigned, what benefits are available, the hours employees can expect to work, and how those hours might vary and when/how to call in for time off.

Hayden stated that in 2006, after the 2006-08 contract was agreed upon, the Company employed private route auditors, to study all routes. It is undisputed that prior to January, 2006, routes were generally 30 standard hours or longer but the Company was concerned about efficiency and saving money and in 2006, its route auditor cut the length of many of the routes to less than 30 standard hours after the parties reached agreement on the 2006-08 contract. Hayden stated that during negotiations, that although she could not remember exactly what was said, she stated she repeatedly used standard hours to define the status of employees and their eligibility for benefits. Hayden admitted that the Company's Article 1, Section 1 proposals to define temporary employees never referred to standard hours. Hayden also admitted that the Company took bargaining notes at all sessions.[5]

In contrast, Union Representatives Kaiser stated that although the parties talked about standard hours for other bargaining proposals, it never came up regarding the Article 1 proposed definition of temporary employees and he did not recall that the parties ever discussed standard hours verses actual hours during negotiations for the 2006-2008 agreement but that the Union wanted non-Union temporary employees to be defined as those working less than 20 hours per week. Kaiser also stated that at bargaining for the 2006-08 agreement, the Company never said it used 20 standard or scheduled hours to define temporary employees.[6]

The Company submitted the following list of guidelines (ER Exh. 1) which Hayden states it has used since January, 2006 to track employee status but which it never sent to the Union:

Class	Std Hrs per Week	Std. Hrs per Pay Period	Description	Dues?
Type 1	35 hours or greater	70 hours or greater	Full Time	Yes
Type 2	30 to 34 hours	60 to 69 hours	Part Time	Yes
Type 3	20 to 29 hours	40 to 59 hours	Temporary/Casual Union No-Benefits	Yes
Type 3	Less than 20 hours	39 or less hours	Temporary/Casual	No

[4] The Company did not proffer its handbook herein.
[5] The Company did not submit any of its bargaining notes herein.
[6] The parties executed the 2006-08 agreement in early May, 2006, although its terms were agreed to by January, 2006.

These are the new guidelines for union dues per the new contract effective March 1, 2006 for the Motor Route/Long Haul Drivers union group.

Copied: Debra Hayden, Human Resources Director, Eau Claire Press Company

On December 12, 2006, Linda O'Mara[7] on behalf of the Company, sent the Union the following letter:

. . .

> I wanted to give you notice that several employees changed status during November and December and will no longer be paying union dues effective January 1, 2007.
>
> The following employees have moved to a status of Type 3 Temporary/Casual. Their standard hours per pay period changed to less than 39 hours. This changes them from a Type 3 Union No Benefits status to Type 3 Temporary/Casual and they will NOT pay union dues.
>
> Phillip Huggins
> Louis Styer
> Art Schunk
> Gerald Russell
> Susan Rosenbrook
> Alfred Hartlich
> Joanne Deutschlander
> Michael Bedell
> Greg Bates
> Michael Erickson (crossed through)
> Sharon Hazuga
> Charlotte Davis
> Dennis Plante
> Kenneth Briesemeister
> Charles Engler
> Tim Lindeen
> John Benish
>
> These employees will be removed from the check-off list for January.

. . .

[7] O'Mara did not testify herein.

On January 9, 2007, the Union sent O'Mara, the following letter in response to O'Mara's December 12, 2006 letter:

. . .

> This letter is in response to your communication dated December 12, 2006. In your letter, you list 17 employees/members whom by your directive, will no longer have dues deducted from their payroll checks and sent to the Local Union effective January 1, 2007.
>
> The Union believes this constitutes a violation of Article 1 of the current Labor Agreement. Temporary employees were defined as someone "working" less than 20 hours per week. "Standard" hours as defined in your letter has no relevance in determining type 3 employees.
>
> Therefore, I am requesting the "actual" hours worked for names listed on above mentioned communication, and respectfully request the Union billing statement be paid as billed.

. . .

The Union never received any response to its January 9, 2007 letter. It then filed the instant grievance on January 23, 2007, alleging as follows:

. . .

> Members called today to saying (sic) the Company has failed to deduct Union dues from paychecks, violating the current Labor Agreement which describes less than 20 hours per week
>
> Company is apparently trying to apply "standard" "hours" instead of "work hours."

. . .

On February 9, 2007, Company Attorney Weld sent the Union the following letter as the Company's answer to the grievance:

. . .

The Press Company has referred your grievance regarding an alleged failure to properly deduct union dues to me for response.

The Press Company believes it is correctly deducting dues from all Union members. The collective bargaining agreement states in relevant part:

> A temporary employee is hired with the expectation of employment for a short duration, to replace a Union-represented employee temporarily off work, or for less than 20 hours per week. Temporary positions will be so designated at the time of hire and such employees are not eligible for Company benefits.

By definition, an employee hired for a position scheduled for less than 20 hours per week is considered a temporary employee.

Secondly, when an employee is hired to replace a Union-represented employee who is temporarily off work, the replacement employee is also considered a temporary employee. That replacement employee may work more than 20 hours per week.

Temporary employees are designated as such at the time for their hire. Temporary employees are not Union members.

The Press Company has carefully reviewed the scheduled hours of all drivers. All regular employees are paying dues. All temporary employees are not. Accordingly, the grievance is denied.

. . .

Thereafter, the grievance was brought forward for hearing. The Company raised the timeliness of the filing of the grievance for the first time at the instant hearing.

POSITIONS OF THE PARTIES

Union:

The Union argued that the grievance is timely filed because the Union filed it within 10 days of its knowledge that a contract violation may have occurred. The Union noted that after its receipt of the Company's December 12, 2006 letter listing employees the Company claimed were temporary non-union for whom no dues would be collected, the Union needed more information. On January 9, 2007, the Union sent the Company a letter requesting the actual hours worked by the listed employees. When the Company failed/refused to supply the requested information (never responding to the Union's January 9th letter), the Union filed the instant grievance on January 23, 2007 following the Company's failure to deduct the January dues from employees it believed were temporary non-union. The Union also observed that at no time prior to the filing of the instant grievance did the Company advise whether the employees listed on its December 12, 2006 letter had been designated as temporary non-union at hire or following a change in status. Under the circumstances here, the Union urged that the Union filed the grievance on time as, even as of January 23rd, it lacked the necessary information to determine whether the contract had actually been violated.

Concerning the merits of this case, the Union asserted that the Company failed to prove essential elements of its defense herein, as follows:

1) that it designated temporary non-union employees as such at the time of hire or at the time current employees' status changed (according to the Company) to temporary non-union status;
2) that it has a consistent protocol/requirements for employee orientations regarding their temporary non-union status, and that it consistently gives orientations to employees' whose standard hours change to less than 40 per pay period;
3) that it specifically gave orientation to the employees listed on the Company's December 12, 2006 letter.

In addition, the Union argued that the letters sent to some employees notifying them of their temporary non-union status (ER Exh. 5) did not provide timely notice/designation of the employees' status as temporary employees because those letters were sent several weeks to more than one month after their temporary status became effective. In the Union's view, as the contract clearly requires designation at the time of hire or at the time of change in status, the Company's letters were ineffective.

Under the plain language of the contract, the Union contended, the Company must pay Local 662 dues payments for all employees who worked over 20 actual hours per week. Because 38 of the 91 individuals the Company classified as temporary (U. Exh. 5) work, on average, more than 20 hours per week, the Company violated the labor agreement by failing to deduct dues during their employment. Regarding the remaining 53 individuals, the Union asserted that some of these may have worked more than 20 hours during some weeks (even if they did not clearly average over 20 hours per week) so that the Company should also be required to pay dues for these individuals for these weeks as well.

Regarding the addition of Article 1, Section 1 to the effective labor agreement, the Union noted that prior to its inclusion, the parties had consistently used the term "standard hours" to determine eligibility for benefits, while the parties used the term "hours" to describe actual hours worked. Given this context, the Union urged that the Arbitrator should not disturb the distinction the parties have historically made between "standard hours" and "hours." Had the parties intended to require temporary employees to be defined by their "standard hours" they would have written that term into Article 1, Section 1. Also adopting the Company's approach would render references to "standard hours" in Article 18, Section 3 and Article 22, Section 3 meaningless. In this case, the Union urged the Arbitrator to construe the language of Article 1, Section 1 against the drafter of the language, the Company.

Regarding the conflicting record evidence of bargaining history concerning Article 1, Section 1, the Union contended that because the language of the provision is clear, the Arbitrator should not consider extrinsic evidence relating to its meaning. In the alternative, the Union urged the Arbitrator to credit Union Representative Kaiser over Human Resources Director Hayden concerning this point. In this regard, the Union noted that the Company failed to produce any of the Company' bargaining notes to support Hayden's assertions that she stated repeatedly stated that temporary employees would be defined by standard hours. The Union noted that even if contract language is gained by mistake or trick, if the language is clear, reformation is not appropriate, where, as here, the parties reached no meeting of the minds on Article 1, Section 1.

Thus, the Union urged that Arbitrator to sustain the grievance and order the Company to pay dues for all employees the Company improperly to designated as temporary for all weeks relevant here. The Union urged that no other remedy is appropriate in this case because the Company failed to keep proper records to show the actual hours worked per pay period by the employees listed on its December 12, 2006 letter and on Union Exhibit 5. Therefore, the Union urged the Arbitrator to apply the following remedial guidelines:

Eau Claire Press should owe back dues for each week worked for employees who average over 40 hours worked per pay period, for three out of every four weeks worked for employees who average between 35 and 40 hours worked per pay period, and for one out of every two weeks worked for employees who average between 30 and 35 hours worked per pay period. The arbitrator should order Eau Claire Press to pay partial weeks as well. For example, Eau Claire Press owes 5.5 weeks of dues for an employee who worked 11 weeks, and averaged between 30 and 35 hours worked per pay period.

All of the employees who averaged under 30 hours worked per pay period were scheduled to work 38 standard hours per pay period (Union Ex 5). In other words, if they were scheduled to work a full pay period, they would be expected to work for 38 hours, if not more. There is also no evidence that the number of pay periods that Eau Claire Press credited each employee with reflected the number of pay periods they actually worked, as opposed to the number of pay periods during which they maintained their status as Eau Claire Press Employees. Given the schedule of 38 standard hours per pay period, it is reasonable to assume an employee who worked 40 hours over 2 pay periods performed 40 hours during one pay period, and none in the other; rather than 20 hours each during two pay periods.

Therefore, for employees who worked less than 30 hours per pay period, the arbitrator should order Eau Claire Press to pay dues on the maximum number of weeks, during which the employee could have statistically worked over 20 hours per

week. For example, the records show Philip Huggins worked 80.25 hours over 5 pay periods (Union Ex. 5, pg.1). The arbitrator should assume Huggins worked 40 hours during each of two pay periods, none during the other three pay periods, and therefore should have 4 weeks of dues deducted (U. Br. pp 19-20).

Company:

The Company argued that although no contractual definition thereof exists, "temporary employees" have been traditionally excluded from the bargaining unit as stated in the Recognition Clause, Article 1. The Company noted that it had a long-standing past practice of defining temporary employees by the number of "standard" or scheduled hours they drove each week on each route on a normal work day, and that "standard" hours had always been set by the Company's route auditors who calculated the number of hours it should take to drive each route per day and per week assuming good weather, no road construction or traffic problems on the routes, etc. In addition, the Company observed that employees have the opportunity to post into routes by seniority and that the posted hours for each route are understood to be "standard" hours.

However, during the 2006-08 contract negotiations, the Union proposed that the parties define "temporary employees." Thereafter, the Company drafted the language that the parties ultimately agreed to in Article 1, Section 1. The Company also noted that the parties used the term "standard hours" when defining eligibility for benefits in Article 18 and when defining relief drivers' eligibility for Union membership in Article 27.

The Company anticipated that the Union would argue that because the parties failed to use the term "standard hours" in new Article 1, Section 1, they intended the reference to hours therein to be a reference to actual work hours. But the Company asserted that the Union's interpretation of Article 1, Section 1 would cause absurd results as a regular driver's status would be measured in terms of actual hours while a relief driver's status would be dictated by his/her standard hours thereunder and because road construction, bad weather and inexperience could cause a driver to significantly exceed the standard hours on his/her routes requiring the Company at times, when actual hours exceeded 20, to consider those employees Union drivers for whom dues must be deducted yet at all other times they would not have such status.

The Company urged that it has always used standard hours to define "temporary employees" and that employees are aware that a change in their standard hours will change their eligibility for benefits and for Union membership. In this regard, the Company asserted that the record herein showed that whenever an employee's standard hours changed, Human Resources clearly informed those employees in writing of their change to non-union status (ER Exh. 5).

Finally, the Company contended that the bargaining history concerning the 2006-08 agreement supported its assertions herein. In this regard, the Company observed it was the Union that suggested defining "temporary employees" which caused the Company to propose language on the point. Indeed, the Company questioned why the Union seemed willing to require drivers who received no prorated benefits to pay Union dues. Ultimately, the Union agreed to the Company's proposed "20 hours per week" language of Article 1, Section 1. Notably, no testimony was offered regarding the past practice of basing Union membership/benefits eligibility on standard not actual hours and no Union witness stated that they recalled a discussion of standard verses actual hours at negotiations. In contrast, Human Resources Director Hayden stated that she consistently used the term "standard hours" during bargaining and that everything at the Company is based on standard hours except drivers' pay when their actual driving time exceeds their standard hours.

The Company argued that if the Union wanted to change the practice of using standard hours, it had a duty to notify the Company of its intent. Because the Union failed to so notify the Company, the new language of Article 1, Section 1 must reflect the prior practice. Also, the Company found it significant that under the 2003-05 contract, employees with less than 20 standard hours per week were not Union members and this approach never changed. Therefore, the Company urged the Arbitrator to deny and dismiss the grievance finding that drivers with less than 20 standard hours per week are not properly considered Union members.

DISCUSSION

This case involves the proper interpretation of new contract language contained in Article 1, Section 1. The Company argued at the instant hearing that the Union failed to timely file the grievance herein. In my view, the record facts failed to clearly show that the Union filed this grievance late. In this regard, I note that Article 7 of the labor agreement states that grievance "must be filed by the employee or the Union within ten (10) days of its occurrence or the time the employee became aware of the grievance." Here, the "occurrence" was the Company's January 1, 2007 removal of the Company's employees from check-off whose names O'Mara listed in her December 12, 2006 letter. Within ten calendar days of January 1st, Kaiser sent his January 9, 2007 letter requesting information. The information requested was, on its face, reasonably related to Kaiser's investigation and/or consideration whether to file a grievance in this case.

As the Company never responded to Kaiser's request for information, in fairness, the Company's inaction must be found to have tolled the time for filing the grievance indefinitely. Thereafter, Kaiser's filing of the grievance on the very day members called in to indicate the Company had failed to deduct their Union dues was

done, in my view, "within ten (10) days of . . . the time the employee became aware of the grievance." Therefore, I find that the grievance was timely filed in the circumstances of this case.[8]

Regarding the merits of this case, I note that the Company has argued there is an effective past practice under which employees must be defined by the number of "standard hours" or scheduled hours they are credited with which in turn requires a conclusion that the term "standard" must be read into the language of Article 1, Section 1 even though that provision makes no reference to standard hours. I disagree for several reasons.

First, the Union is correct that the Company should have inserted "standard" into its proposed language in order to assure the language would be read to mean "standard hours," as the parties did in other Articles of the 2006-08 agreement. Second, I note that the Company drafted the language and it would therefore be appropriate to construe the language against the drafter. Third, the fact that the Company failed to use the word "standard," in Article 1, Section 1 while the terms "standard hours" was used in some other Articles of the agreement but not in others, shows the parties never intended the word "hours" to consistently refer to "standard hours." Fourth, as the Company has asserted that the language of Article 1, Section 1 was intended to exclude employees from union membership and dues checkoff who had not previously been so excluded, it should be strictly construed to preserve employee/Union rights as much as possible. Also, I find it significant that the Company never shared Employer Exhibit 1 with the Union nor did it complete its audit of routes – performed by an independent auditor – until after the 2006-08 agreement had been ratified.

Given the fact that Erickson stated without contradiction, that he never spoke to Hayden about the difference between standard and actual hours and that Kaiser was the (newly designated) Business Agent for Company employees and that Kaiser had had little contact with the unit or its issues prior to negotiations for the 2006-08 agreement,[9] the evidence failed to show that the Union had actual knowledge and had acquiesced in the Company's application and interpretation of "standard hours." In these circumstances, the Company failed to prove a clear past practice that the Union mutually agreed to or acquiesced in.

The Company and the Union submitted conflicting evidence regarding the bargaining history surrounding the addition of Article 1, Section 1 into the 2006-08 agreement. In this regard, Human Resources Director Hayden stated she could not recall what was said on the point but that during bargaining she repeatedly referred to

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[8] I can find no record documentation to show that the Company raised its timeliness defense prior to the hearing herein. In my view, timeliness should be raised in the first stages of any grievance.

[9] No evidence was presented to show that the Union received copies of Employer Exhibit 5, the letters sent to employees whose employment status changed in 2005-06.

standard hours as universally used in determining eligibility for benefits and in defining full-time, part-time and temporary casual employees. Hayden also stated that the Company took notes during bargaining but none were placed in this record. Although Hayden listed the orientation items she and her HR Department employees discussed – with temporary employees, she failed to mention that Union membership or dues checkoff were among the items covered. Finally, Hayden stated that she was not the Company's Chief spokesperson and that no Company proposal regarding Article 1, Section 1 contained any reference to "standard hours."

In contrast on this point, Union Agent Kaiser stated he had no recollection of discussing actual and standard hours at bargaining over the 2006-08 agreement regarding the definition of temporary employees; but that he did recall discussing standard hours for other things like benefit cutoffs, in bargaining for the 2006-08 agreement. It is also undisputed that Kaiser was the newly appointed Union Business Agent for this unit.

In my opinion, I need not resolve credibility on this point. This conflicting evidence of bargaining history demonstrates that there was no meeting of the minds that the "20 hours" referred to in Article 1, Section 1 meant 20 standard hours. In my view, had the parties mutually intended that the "20 hours" referred to in Article 1, Section 1 meant 20 standard hours, they could easily have said so. Indeed, the Company, as the drafter of the language, had a responsibility to write the proposed language clearly to reflect its interpretation[10] herein. Furthermore, there is no reference to "standard hours," or to hours of any kind, in Article 3. Finally, the fact that Hayden could not recall any specific discussions in bargaining regarding the parties agreement to Article 1, Section 1 and that the Company chose not to place any of its bargaining notes in the record further supports my conclusion that the parties never in fact agreed that in new Article 1, Section 1, "20 hours" meant 20 standard hours.

Turning now to the proper interpretation of the agreed-upon language of Article 1, Section 1, I note that the opening phrase of the Section defines a temporary employee as one who "…is hired … for less than 20 hours per week" and the Section also requires the Company to designate positions as temporary "at time of hire." In my view, the only reasonable interpretation of the phrase "…is hired …for" in this context (and given the fact that the word "standard" was not used in this Section) is that temporary employees are those hired to work for less than 20 actual hours per week. Were this not so, neither the Union nor current unit employees would have notice that working less than a definite number of hours would disqualify unit employees (who had previously qualified) for certain important benefits. Also, the phrase "…is hired…for" shows that the contract requires that temporary employees must be told at hire the specific number of hours they can expect to work. The record evidence also failed to prove employees "hired" as temporary timely received notice thereof. Without a clear

[10] Here, both parties had professionals representing them at the bargaining table so that proposals would likely be clearly drafted to reflect the parties' intentions.

reference in Article 1, Section 1 to "standard hours" and in the absence of clear evidence of bargaining proposals and uncontradicted testimony and/or bargaining notes showing that the term "standard hours" was fully explained to and made a part of the Company's proposal to include Article 1, Section 1 in the 2006-08 agreement, it would be unfair to bind the Union to the Company's asserted custom and usage surrounding "standard hours" in the newly negotiated and agreed-upon language of Article 1, Section 1. Thus, the record evidence failed to support the Company's arguments in this case and therefore, the grievance must be sustained.[11]

Regarding the appropriate remedy in this case, I note that the Union has argued in depth using Union Exhibit 5.[12] In my view, the language of Article 1, Section 1 requires that employees who work more than 20 actual hours per week pay Union dues and it therefore required the Company to deduct those dues from their pay beginning in January 2007. The Company is therefore ordered to forward payment to the Union for these employees and to properly deduct dues from employees and forward same to the Union to pay for employees in accord with this Award in the future.

AWARD

The Company improperly excluded employees from the bargaining unit as temporary employees who worked more than 20 actual hours per week. The Company is therefore ordered to forward Union dues payment to the Union for these employees and to properly deduct and forward Union dues for these employees in accord with this Award in the future.[13]

Dated in Oshkosh, Wisconsin, this 8th day of October, 2007.

Sharon A. Gallagher /s/
Sharon A. Gallagher

[11] The Company argued that a ruling in favor of the Union would cause absurd results. In my view the evidence failed to support this argument.

[12] It is significant that at no time did the Company object to or assert that Union's recommended remedy was wrong.

[13] As the creator and keeper of business and payroll record, the Company is responsible to maintain records showing the actual hours worked by its employees and any notices sent to employees, as required by Article 1, Section 1, either at the time of hire or at the time their status changed to temporary. A lack of accurate records on these points would likely require a conclusion that in fairness the Company should pay dues for employees for whom accurate records cannot be found. I urge the parties to resolve the remedy issue together. However, I will retain jurisdiction of the remedy only herein for 60 days after the date of this Award should the parties have difficulty agreeing on the remedy herein.

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