

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
PROFESSIONAL TRANSIT MANAGEMENT OF RACINE, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 3

No. 66807

A-6280

(Holiday Pay Grievance)

Appearances:

John Ravasio, Attorney at Law, 6405 Branch Hill-Guinea Pike, Suite 203, Loveland, OH 54140, on behalf of Professional Transit Management, Inc.

Nathan D. Eisenberg, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North RiverCenter Drive, Suite 202, Milwaukee, WI 53212, on behalf of Teamsters Local Union No. 43.

ARBITRATION AWARD

The Company and the Union are Parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union filed a petition with the Wisconsin Employment Relations Commission for arbitration of a grievance concerning overtime pay. From a panel the parties selected Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on August 9, 2007 in Racine Wisconsin. No transcript was prepared. The Parties filed written briefs and the record was closed on September 25, 2007.

ISSUES

The Parties stipulated to the following statement of the issues:

Did the Company violate the contract when it stopped treating holiday pay as hours worked for purposes of calculating overtime after and including the January 1, 2007 holiday?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 13. WORK WEEK

Full-time employees shall be scheduled for a minimum forty (40) hour week. Employees for health reasons, proof from a medical doctor required, may work less than forty (40) hours per week and enjoy full-time classification by agreement between the Employer and the Union. Part-time drivers may be scheduled for any available work that cannot be scheduled for full time drivers.

No bus operators shall be required to perform more than (10) hours of platform time unless by mutual agreement.

. . .

ARTICLE 16. VACATION & HOLIDAY PAY

An average of 10% of employees in each classification will be allowed off at any one time. For classifications with less than ten employees a minimum of one employee in that classification will be allowed off.

. . .

Full-time employees who have completed their probationary period shall receive holiday pay in the amount of eight (8) hours x the employee's current hourly rate of pay for each of the following holidays:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

If a holiday falls within the workweek, computation for overtime hours shall be reduced by eight (8) hours straight time holiday pay.

It is agreed that if any of the negotiated holidays fall on a day other than the employee's normal work day or during the employee's vacation period, the employee shall be paid an additional eight (8) hours pay at the employee's straight time hourly rate.

If the employee may be required to work on any holiday, the employee shall receive time and one-half for all hours worked in addition to the eight (8) hours holiday pay, at their straight time rate.

In order to qualify for eight (8) hours of straight time pay for a holiday not worked, it is provided that regular employees must work the regular scheduled work day which immediately precedes and follows the holiday, except in cases

of proven illness or unless the absence is mutually agreed to. Regular employees are entitled to holiday pay if the holiday falls within the first thirty (30) days of absence due to illness or non-occupational injury, or within the first six (6) months of absence due to occupational injury or during period of permissible absence.

Employees on the ten hour work day shifts shall be paid ten hours pay at their straight time hourly rate for all paid holidays.

Holidays shall be paid at eight (8) hours for full-time employees or whichever is greater.

. . .

ARTICLE 27. WAGES

The straight time hourly rate for employees covered by this Agreement shall be as follows:

. . .

Time and one-half shall be paid for all time worked in excess of forty (40) hours in any one (1) work week. This provision does not cover instances where employees exchange off days to accommodate a fellow employee and in these instances only straight time hourly rate will be paid. Further, any exchange of off days must have prior approval of the Employer. Holiday pay shall be considered as time worked.

. . .

BACKGROUND AND FACTS

The public transit service in Racine, Wisconsin has been operated by Professional Transit Management Racine, Inc. (PTM), the Employer herein, since 2004. This is primarily through the use of busses with approximately ten routes. There are approximately 90 employees. Normal operations are seven days per week, with fewer routes on weekends. There is no service on the holidays specified in the Parties' agreement. There are many different work schedules and work shifts. Some bus drivers have shifts of approximately ten hours, for example. The previous employer was a Party to collective bargaining agreements with Teamsters Local Union 43, the Union herein. PTM and the Union entered into a new agreement effective July 1, 2005. The new and previous agreements¹ contain the same provisions that are at issue in this matter.

¹ For example, Joint Exhibit 3, the 1996-1999 agreement.

Prior to July 4, 2005 and for approximately 24 years the Employer had consistently treated holiday pay as hours worked for purposes of calculating overtime.² In 2005 for the July Fourth, Labor Day and Thanksgiving holidays the Employer, PTM, did not treat holiday pay as time worked for purposes of calculating overtime. This affected very few employees because the public transit service does not operate on holidays and because of the variety of schedules. Union representatives and PTM, through its former general manager in Racine, then discussed this and how overtime had been calculated in the past. Thereafter, PTM resumed treating holiday pay as time worked in calculating overtime in 2005 for the Christmas holiday and in 2006 for the New Year's Day and Memorial Day holidays. For the July Fourth 2006 and holidays thereafter PTM did not treat holiday pay as time worked for purposes of calculating overtime. After the January 1, 2007 holiday the Union again discussed this with PTM. At that time PTM had a new general manager, the current executive director, in Racine. Thereafter, PTM has not treated holiday pay as time worked for purposes of calculating overtime.

On or about February 8, 2007 the Union filed a written grievance describing the grievance as: Employer refuses to recognize that holidays falling on an employee's day off shall be considered as time worked per contract and past agreement. The grievance alleged this was a violation of Article 27 paragraph 7, last sentence, and past practice. PTM denied the grievance, noting the labor agreement is inconsistent with regard to this point, and reasoning that the preponderance of the agreement language specifies that holiday pay will not be used in the calculation of overtime. This arbitration followed.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

Union

In summary, the Union argues the contract language clearly states that "holiday pay shall be considered as time worked" for purposes of overtime. In situations where a holiday falls on days other than the employee's regular work week, the employee works forty hours plus eight hours for the holiday. Under Article 27 holiday pay is treated as time worked for the calculation of overtime, entitling the employee to forty hours of straight time and eight hours of overtime for the week.

² For example, bus driver Nicks had worked a regular shift of four ten-hour days Tuesday through Friday. If a holiday fell on a Monday he was paid for 48 hours, eight of them being overtime. His current schedule, based on exhibit C-1, indicated approximately ten-hour days including Mondays, but not on Tuesdays. The scenario of holiday pay would be the same for holidays falling on a Tuesday.

The Union argues this does not conflict with Article 16. A holiday falling outside the employee's regular work week, but on the first day of the week, is paid at straight time. However, where during that week the employee then works an additional forty hours of work, the employee would be entitled to overtime for the last eight hours worked because "holiday pay is treated as time worked". Both provisions may be given meaning and effect. It is the hours over forty, not the holiday hours, which are being treated as overtime. If a holiday falls within the work week, the combination of hours worked and holiday pay will not exceed forty hours, assuming an eight hour day. Article 16 says "overtime hours shall be reduced by eight (8) hours straight time". However, no overtime is earned in such a scenario and no reduction is necessary.

The Union argues where, as in this case, the negotiated holiday falls on a day other than the normal work day, Article 16 states employees are entitled to be paid eight hours for such holidays and nothing else, and this is no obstacle. If holidays are not treated as time worked it would permit the Employer to call in employees during holiday weeks without paying them overtime. An employee could be called in on their day off without being paid overtime for working on the 6th day. This would also conflict with Article 27.

The Union further argues that whenever two interpretations are possible, one making the agreement valid and lawful and one making a portion of it invalid and unlawful, then the former interpretation will be utilized, citing arbitral authority. The Employer's interpretation of Article 16 would give no effect to the language of Article 27 treating holidays as time worked for purposes of calculating overtime. There is no possible manner under the Employer's interpretation which would render the provisions of Article 27 effective. Such interpretation is to be avoided. The clear language supports the Union's position and the grievance may be decided based solely on the language of Article 27.

The Union also argues that if an ambiguity in the language exists, past practice indicates that holidays shall be treated as time worked for purposes of overtime. If the language of Article 16 does conflict with Article 27 then the contract contains a latent ambiguity. Where ambiguity exists it is necessary to look to the parties' bargaining history and past practice as it applies to the provisions at issue, citing arbitral authority. In this case what one provision grants, the other provision denies. Thus, a latent ambiguity may exist. There are two types of parole evidence demonstrating how the parties have reconciled the Articles. They have a long standing past practice of treating holiday pay as hours worked where the holiday does not fall during the regular work week. The Parties stipulated that prior to July 4, 2005 all hours paid as a result of holiday pay were counted as hours worked for purposes of calculating overtime. There was no change in the contract language or other basis for terminating the practice. There is no dispute the practice was unequivocal in nature, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

The Union contends the Employer's unilateral change in 2005 was neither mutual nor clearly enunciated, and when discovered and brought to the attention of management the past practice was recognized by both and reinstated. The 2006 changes were made without discussion with the Union and the Union grieved. This was not a mutual change. Where the Union has no knowledge of payment methods of holiday pay the Employer's unilateral interpretation of contract language does not create a past practice. Here the Union has diligently attempted to enforce the past practice. In the last approximately sixty holidays only six were not calculated for overtime and the Union successfully contested three of those. Past practice remains unambiguous despite some blemishes. Also, the prior settlement is a second indicator that the practice of the Parties is to treat holiday pay as hours worked for the purposes of calculating overtime. This is evidence of intent and carries special weight, citing arbitral authority. Here the settlement in 2005 is further evidence that the past practice was mutual and longstanding. To the extent a latent ambiguity exists in the agreement the past practice and past grievance settlement indicates holiday pay is to be treated as time worked for calculating overtime.

In addition, the Union argues that the Employer has expressly waived time limits in this case. The Employer raised timeliness for the first time at the hearing. Arbitral authority has determined that a timeline defense may not be raised for the first time at the arbitration hearing itself, and failure to raise the question before the hearing is often reason to dispose of the question. The Employer's failure to raise the issue is itself untimely and contrary to verbal agreements of the parties. It was not raised at any step in the grievance process nor included in the answer to the grievance. The Employer explicitly agreed to waive time limits in this case. The Union testimony is without contradiction. The Employer waived the issue of timeliness.

PTM

In summary, PTM argues that the contract language is clear and unambiguous by stating that holiday pay is always given at straight time hourly rate and is never to be considered in the computation of hours worked for overtime pay. Article 27 states "Holiday pay shall be considered as time worked". Article 16 established the rate of pay for this time worked as "eight (8) hours x the employee's current hourly rate of pay", and six holidays are listed. This clearly means that holiday pay is given at straight time rate. Full-time employees are guaranteed forty hours of pay per week and receive time and one-half pay for time worked in excess of forty hours. However, holiday pay – though considered to be time worked – does not cause a person to exceed forty hours in a workweek. Under Article 16 "If a holiday falls within the workweek, computation for overtime hours shall be reduced by eight (8) hours straight time holiday pay". No employee works on any of the six holidays. Thus, the language only addresses this situation when a holiday occurs on an employee's normal work day. The employee will receive eight hours of holiday pay at the current hourly rate. The

agreement clearly intends to exclude these holiday pay hours from the overtime calculation of time worked by reducing the calculation specifically by eight hours of straight time holiday pay. The only way the employee would receive time and one-half pay for hours worked during a week that a holiday occurs on the employee's work day is if the hours worked on the non-holiday workdays exceed the forty hour threshold for overtime.

PTM argues the grieved issue is "holidays falling on an employee's day off" and Article 16 speaks directly to this. "It is agreed that if any of the negotiated holidays fall on a day other than the employee's normal work day . . . the employee shall be paid an additional eight (8) hours pay at the employee's straight time hourly rate." The contract could not be any more clear as to how holiday hours should be paid when the holiday falls on an employee's day off: the pay rate is an additional eight hours at the straight time hourly rate. The only way an employee in this situation would receive time and one-half pay for hours worked during the week is if the hours worked on the actual work days, excluding the hours paid for the holiday on the employee's day off, exceeded the forty hour threshold for overtime. Throughout Article 16 there are many other references to holiday pay at straight time, and absolutely zero references in the entire agreement that describe holiday pay as time and one-half.

PTM also argues that holiday hours are considered as time worked, but for purposes of calculating overtime, the overtime hours shall be reduced by these same eight hours straight time holiday pay. It is precisely the holiday pay hours that are excluded from the calculation of determining whether the employee exceeded forty hours in a given week. There is clear, unambiguous contract language stating that holiday hours are paid at a straight time rate, and will not contribute to a calculation of weekly hours worked that exceed forty hours. The Union's complaint that holiday hours are not being treated as time worked is simply not true. The hours are treated as time worked and are paid at a straight rate, but as the contract states, holiday pay hours are not considered when calculating overtime pay at time and one-half.

PTM further argues that the Union has not shown that the contractual language is ambiguous, and any evidence of a past practice should not be considered. Union witnesses testified to schedules, how the Employer historically treated holiday pay, the former manager agreed to pay time and one-half in the future, filling open work assignments, and no evidence of conversations with the former manager. Union witness Nick's testimony failed to show that the contract language on holiday pay is ambiguous. Union witness Gable testified to steps in the grievance process but also failed to show any ambiguities in the contract language. Any historical evidence should not be considered if it is decided that the contract language is clear and unambiguous. Evidence of a past practice contrary to contract language is not used to show how the language itself is unclear or ambiguous. The Union failed to show the language is unclear or ambiguous and evidence of the past practice should not be considered.

DISCUSSION

The issue requires a determination of whether the collective bargaining agreement requires treating holiday pay as hours worked for purposes of calculating overtime. This is an acute question, and one raised by the grievance, where the holiday falls on an employee's normally scheduled day off. Initially, both Parties contend the clear language of the agreement

supports their position. The Union's core position is that under Article 27 these holiday hours are counted in computing hours for overtime, with the total hours over forty per week being paid as overtime. PTM's position is that the holiday hours are never paid at anything other than straight time under Article 16, and Article 16 sets that straight time pay for holidays outside the normal work day and reduces by eight (8) hours holiday pay at straight time for holidays falling within the workweek. The Union takes the further position that if there is an ambiguity in the agreement then a longstanding past practice and a 2005 settlement of the same issue shows a mutual intent that the hours be used to calculate overtime. PTM denies the agreement is ambiguous so that there can be no resort to past practice. PTM had also raised a timeliness issue for the first time at the hearing, but did not argue that issue in its written post hearing brief. The timeliness issue was the subject of un-rebutted Union hearsay testimony to the effect that time limits were waived during discussions surrounding the initial grievance process. This is corroborated, if slightly, by timeliness not being raised in the written denial of the written grievance. By not having included written post-hearing arguments on timeliness that issue is deemed to have been abandoned by PTM.

The collective bargaining agreement guarantees a minimum of a forty hour work week. Article 13 states in pertinent part:

Full-time employees shall be scheduled for a minimum forty (40) hour week.

If an employee is actually not scheduled for a full forty hours then PTM adds time to their hours schedule in a column called GUAR to fulfill this provision, and they are paid for forty hours even if under their normal schedule they have actually worked less. The agreement provides for the payment of overtime, and mentions holiday pay in the same paragraph. Article 27 states in pertinent part:

Time and one-half shall be paid for all time worked in excess of forty (40) hours in any one (1) work week. . . . Holiday pay shall be considered as time worked.

The agreement sets out six holidays and provides for payment at current hourly, or straight time, rates for holidays falling both within the workweek and for other than a normal work day. Article 16 states in pertinent part:

Full-time employees who have completed their probationary period shall receive holiday pay in the amount of eight (8) hours x the employee's current hourly rate of pay for each of the following holidays:

New Year's Day	Labor Day
Memorial Day	Thanksgiving Day
Fourth of July	Christmas Day

If a holiday falls within the workweek, computation for overtime hours shall be reduced by eight (8) hours straight time holiday pay.

It is agreed that if any of the negotiated holidays fall on a day other than the employee's normal work day or during the employee's vacation period, the employee shall be paid an additional eight (8) hours pay at the employee's straight time hourly rate.

If the employee may be required to work on any holiday, the employee shall receive time and one-half for all hours worked in addition to the eight (8) hours holiday pay, at their straight time rate.

In order to qualify for eight (8) hours of straight time pay for a holiday not worked, it is provided that regular employees must work the regular scheduled work day which immediately precedes and follows the holiday, except in cases of proven illness or unless the absence is mutually agreed to. Regular employees are entitled to holiday pay if the holiday falls within the first thirty (30) days of absence due to illness or non-occupational injury, or within the first six (6) months of absence due to occupational injury or during period of permissible absence.

Employees on the ten hour work day shifts shall be paid ten hours pay at their straight time hourly rate for all paid holidays.

Holidays shall be paid at eight (8) hours for full-time employees or whichever is greater.

Both Parties make a plausible argument as to how the agreement language supports their position. As PTM points out, Article 16 sets out with specificity that holiday hours are to be paid at straight time and, in some situations, computation for overtime hours are reduced by eight hours straight time holiday pay. This particular reduction clause is for holidays falling within the workweek, which is not the issue raised in the grievance, but would be covered by the stipulated statement of the issue. Regardless of that, the next provision addresses a holiday falling on a day other than the normal work day (such as raised by the grievance and also covered by the stipulated statement of the issue) and provides for holiday pay at straight time as additional payment. As the Union points out, Article 27 provides for time and one-half for all time worked in excess of forty hours in any one week, and states that holiday pay shall be considered as time worked. In situations where a holiday falls outside a normal workweek then forty-eight (48) hours are accumulated and overtime above forty hours would be due.

The agreement thus presents an ambiguity wherein under Article 27 holiday pay is considered as time worked for all time worked in the computation of overtime, which is paid at

time and one-half, and Article 16 which adds³ the holiday hours to a normal schedule and pays those hours at straight time. Even PTM's written answer to the grievance itself states, among other things, that "[T]he labor agreement is inconsistent with regard to this point". The provision that considers holiday pay as time worked is in the very paragraph of Article 27 which provides for overtime pay, and that language does not say it will not be considered, which would then be consistent with Article 16.

When faced with ambiguous contract language, evidence of past practice can indicate the proper interpretation of the language. In order for a past practice to become binding as part of a collective bargaining agreement, such practice must be well established. As noted by the Union and set out in Elkouri & Elkouri, How Arbitration Works, (6TH Ed.) pp. 605 - 609, a past practice, to be binding, must be unequivocal, clearly enunciated and acted on, readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties.

Here, the Employer, be it PTM or the predecessor operating under the same contract language, used holiday pay as hours worked for purposes of calculating overtime for approximately 24 years. After a very few instances to the contrary in 2004 the Union and the Employer, through positions of authority, discussed the matter and the use of holiday hours for calculating overtime was resumed until current management stopped doing so. That prompted the grievance. Twenty-four years is certainly a reasonable period of time to assess how up to six holidays per year were calculated for pay purposes. This is readily ascertainable as either the holiday pay was treated as hours worked for purposes of calculating overtime, or they were not. They were. It was acted upon because overtime was paid for those hours using holiday pay in the calculation. It was enunciated in the form of payment. It was unequivocal. The only time such payment was interrupted was in 2004 without prior notice for three holidays affecting only some of the employees. When brought to the attention of management the use of the holiday hours for calculating overtime resumed. This was in view of a discussion with the Union that it had been calculated that way in the past. This is both, in the context of 24 years, unequivocal and, a clear indication that the then current management understood the agreement was to be interpreted in the fashion that used holiday pay as hours worked for purposes of calculating overtime. This became a fixed, established practice accepted by both Parties. Although PTM contends there is no ambiguity and no reason to resort to past practice, it does not actually argue that there had not been a past practice.

This past practice resolves the ambiguity in the Union's favor. The Parties have considered the agreement to provide for treating holiday pay as hours worked for purposes of calculating overtime. When PTM stopped treating holiday pay as such, it violated the contract.

³ Or reduces eight hours, in the appropriate circumstances, which might also include a situation where more than forty hours are worked in a workweek.

Accordingly, based upon the evidence and arguments in this case I issue the following

AWARD

The grievance is sustained. As for a remedy the Employer will make the employees whole by treating holiday pay as hours worked for purposes of calculating overtime after and including the January 1, 2007 holiday.

Dated at Madison, Wisconsin, this 8th day of January, 2008.

Paul Gordon /s/

Paul Gordon, Arbitrator