

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 43**

and

**PROFESSIONAL TRANSIT MANAGEMENT**

Case 2

No. 66806

A-6279

(Survey Pay Grievance)

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**Appearances:**

**Ms. Andrea F. Hoeschen**, Attorney, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, appearing on behalf of Teamsters Local Union No. 43.

**Mr. John C. Ravasio**, Attorney, Professional Transit Management, 6405 Branch Hill-Guinea Pike, Suite 203, Loveland, Ohio, appearing on behalf of Professional Transit Management of Racine.

**ARBITRATION AWARD**

Teamsters Local Union No. 43 hereinafter "Union," and Professional Transit Management, hereinafter "PTM or Company" requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which the parties would select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on September 21, 2007, in Racine, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs with the option to file reply briefs which expired on December 1, 2007, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

### ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

1. Is PTM violating the collective bargaining agreement by refusing to pay drivers survey pay for their current duties?
2. And if so, what is the appropriate remedy?

### RELEVANT CONTRACT LANGUAGE

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#### ARTICLE 10. COLLECTIONS & SURVEYS

Exact fare system that is now in effect will be maintained for the life of this agreement.

It is agreed that when surveys are required, the drivers shall receive an additional fifty cents (.50) per hour.

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#### ARTICLE 14. MANAGEMENT RIGHTS

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it by this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

1. To direct all operations of the transit system.
2. To hire, promote, transfer, assign and retain employees in their positions with the transit system and to suspend, demote, discharge and take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with seniority provisions of the agreement.
4. To maintain efficiency of the transit operations entrusted to the Employer.

5. To introduce new or improved methods or facilities.
6. To change existing methods or facilities.
7. To contract out for goods or services; however, there shall be no layoffs or reductions in hours due to any contracting out of work.
8. To determine the methods, means and personnel by which such transit operations are to be conducted.
9. To take whatever action which must be necessary to carry out the functions of the transit systems of emergency.
10. To take whatever action is necessary to comply with City, State, or Federal law.

In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the Employer to consult or negotiate with the Union concerning the above areas of discretion and policy.

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### **BACKGROUND AND FACTS**

PTM provides mass transit bus service to the City of Racine. PTM and the Union have been parties to a collective bargaining agreement for a number of years, the most recent agreement for the time period July 1, 2005 to June 30, 2008.

PTM is mandated by the state and federal government to survey ridership. The Federal Transit Administration (FTA) requires the Company to submit ridership data monthly, annually, and every three years. The State of Wisconsin requires PTM to submit ridership data quarterly. The data submitted for the FTA and Wisconsin reporting requirements is utilized to determine the formula for funding.

When conducting a FTA/WisDOT survey, drivers manually survey ridership for one week with a hand-held "clicker" calculator. Drivers assess each passenger upon entry onto the bus and "click" the corresponding ridership designation on the "clicker" unit. At the end of each driver's shift, he/she records the total for each ridership category for his/her shift on a paper form. The last driver of the day calculates the total of all ridership by category and submits the completed form to PTM.

During December 2005, PTM mechanics installed TRIM Units in PTM buses for operation in 2006. TRIM Units are attached to the bus fare box, but operate independent of the fare box keypad. The TRIM Unit contains a 16 digit keypad which is programmed to monitor nine different fare variations and are attached to the fare box in the bus. The keypads were programmed in late 2006 to allow the drivers to record ridership data by pushing one of nine numerical keys on the keypad for each passenger entering the bus.

In settlement of a grievance, the parties entered into the following Letter of Understanding on January 25, 2006 which read:

The following letter of Understanding by and between Professional Transit Management of Racine, Inc. and Teamsters Local 43, dates this 1<sup>st</sup> day of January, 2006 and extending through April 1, 2006, shall be used as reference for activities related to electronic data gathering. Whereas;

Both parties agree that this Letter of Understanding is valid through April 1, 2006 and that actions defined herein will be taken on a non-precedent setting basis;

The City of Racine desires to fully implement farebox features of the Automated Vehicle Locator (AVL) system installed in 2005;

Work performed (electronic data gathering), while similar in content to FTA/WisDOT mandated surveys, is being sought to test the integrity of the AVL system in general;

The Labor Agreement by and between Professional Transit Management of Racine, Inc. and Teamsters Local 43 includes language specific to the aforementioned survey(s). There exists a survey pay differential of \$.50 that has been historically paid to bus operators to conduct the FTA/WisDOT surveys;

Both parties are in agreement as to the relative importance of developing and maintaining accurate data for the efficiency of the AVL system;

The Union membership will not seek survey pay for electronic data gathering through April 1, 2006.

Upon mutual consent of both parties, the terms and conditions of this L.O.U. are agreeable and fully enforce upon signature.

/s/ Belle Urban System

/s/ Teamsters Local 43

The record is void as to whether drivers operated the TRIM units between January 2006 and February 2007.

PTM issued a memorandum on February 16, 2007 referencing, "Passenger Count Policy" which read as follows:

In order to satisfy FTA, WisDOT and NDT reporting requirements in addition to the desires to the City of Racine that all passenger boardings are accounted for by fare category, beginning February 19, 2007 all drivers will observe the following Passenger Count Policy:

Upon every passenger boarding one of the buttons on the GFI TRiM unit will be pushed, the only exceptions being transfers, tokens and weekend passes, as the use of these fare media are already recorded automatically by the TRiM unit.

Which button is used will be determined by the fare presented by the passenger when boarding as follows:

<b>Passenger Count Category</b>		
<b>Button #</b>	<b>Category</b>	<b>Screen Display</b>
1	Full Fare	1.50
2	Night/Student	1.25
3	Senior/Disabled	75
4	School Pass	.00
5	Weekend Pass Sale	2.50
6	Free Fare	.00
7	Short Fare	.00
8	10 Ride Ticket	.00
9	Monthly Pass	.00

Free Ride applies to all children under 6 years of age when accompanied by an adult.

You will hear a "beep" when a passenger has been counted.

If a passenger is short of the correct fare when boarding, press key 7 and dump whatever money they have provided. Advise them to provide the correct fare the next time and issue a transfer if requested.

The Union filed a grievance on January 23, 2007 asserting that the PTM had violated Article 10 of the labor agreement.<sup>1</sup> More specifically, the Union alleged that the drivers were entitled to an additional fifty cents (50) per hour because they were required to perform survey work. The Union sought the survey premium pay retroactive to January 2, 2007. PTM denied the grievance at all steps placing it properly before the Arbitrator.

### ARGUMENTS OF THE PARTIES

#### Union

The survey pay language is clear and unambiguous. It broadly provides that drivers are entitled to survey pay whenever a survey is required. Compensation is not dependent on the method of data collection or the purpose for collecting the data. If drivers are required to gather data, they are required to survey and they are therefore entitled to survey pay.

The Employer's assertion that drivers are only entitled to survey pay when they are "gathering data *for state and federal reporting*" is inaccurate. In 2006, it entered into a letter of understanding to temporarily suspend the payment of survey pay when drivers were gathering data as to the location of buses. The parties therefore have a past understanding that the definition of survey pay is broader than gathering data for governmental reporting. Moreover, the Employer understood it had an obligation to compensate the drivers for survey pay even though they were using a keypad, were not logging information on paper and were collecting the data for purposes other than governmental reporting.

Finally, the Employer's argument that data collected to verify data submitted for governmental reporting and derived from a survey in which drivers received survey pay is nonsensical. The Employer directed drivers to collect data for governmental reporting and compensated them survey pay. The Employer then directs its drivers to collect the very same data for the purpose of analyzing the accuracy of the ridership data. Regardless of the Employer's purpose in collecting the data, the drivers are entitled to the negotiated premium for performing the extra survey work.

The Union asks that the grievance be upheld and the bargaining unit made whole for unpaid survey pay.

#### Employer

The Employer maintains that the management rights clause provides it the discretion to assign job duties and to set the mode and methods of operation assigned drivers to use the

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<sup>1</sup> The filing of the grievance pre-dates the memorandum directing the bus drivers to operate the keypad and record passenger count categories and the record does not offer an explanation. Given that the Company did not challenge the proper filing of the grievance, I find the peculiarity insignificant for purposes of reaching a decision, but will consider same when/if fashioning the remedy.

TRIM unit as a part of their daily job duties was consistent with its management rights and therefore no contractual violation has occurred.

In 2007, the Employer overhauled its method of issuing transfer tickets to passengers when it installed TRIM units. The TRIM unit not only issues passengers transfer tickets, it also records the passenger fare type. Operation of the TRIM unit is an every-day job duty assigned by management to drivers. The driver need only push one button to record the passenger fare type and if a transfer is requested by the passenger, push one more button to issue the transfer.

The Employer is obligated to report accurate information on its riders and their fares to the state and federal government and utilizes surveys to collect the necessary data to complete these reports. Two surveys were performed subsequent to the installation of the TRIM units. The method of data collection is through manual surveying and the Employer has consistently compensated drivers when surveys are conducted. When performing a survey, a driver enters a manual count by using the "clicker" device, transfers those running totals to a survey form, and the last driver of the day submits an aggregate total of all survey data. This is a job duty above and beyond the work drivers do on a daily basis which now includes use of the TRIM unit. No data recorded by the TRIM unit is used to comply with reporting requirements. In fact, the TRIM unit is not used by the drivers when manual surveys are conducted. Thus, the TRIM unit operation has not taken the place of survey work.

The Union's requested remedy of an additional \$.50 per hour for drivers is exorbitant and unreasonable. Operation of the TRIM unit requires a driver press one button to record passenger fare and one button to issue a transfer. This represents a 2.7% raise for top wage earning drivers.

The Union has failed to show that a violation of Article 10 has occurred and therefore the grievance should be denied.

### **DISCUSSION**

The question presented in this case is whether the drivers are entitled to survey pay for the hours they work and operate the TRIM unit. Preliminary issues include what constitutes a survey, whether the operation of the TRIM unit by the drivers is conducting a survey and what is the value, if any, of the Side Letter entered into by the parties in 2006.

In a contract interpretation case, the Arbitrator first looks to the plain language of the agreement. If it is clear and unambiguous, then it is deemed to be the intended meaning of the language as negotiated by the parties. If the language is ambiguous, the arbitrator must resort to interpretation. The language is ambiguous if it is susceptible to more than one interpretation or can be assigned more than one meaning. If ambiguous, the Arbitrator looks to extrinsic evidence for guidance including the language of the agreement as a whole, the industry definition, bargaining history, custom and practice of the parties and prior settlements

to ascertain meaning. This list is not exhaustive, but rather is malleable given the circumstances of the case.

The language in dispute is contained in Article 10 and states, “[i]t is agreed that when surveys are required, the drivers shall receive an additional fifty cents (.50) per hour.” Thus, if the drivers were “required” to conduct a “survey”, then they were/are entitled to the premium compensation.

The Company’s memorandum of February 16, 2007 directed drivers to push one of the TRIM unit buttons for every passenger boarding. This directive fulfills the contractual “required” language of Article 10.

The parties disagree as to the meaning of “survey”. This does not, in and of itself, require that I conclude that the language is ambiguous. The Union argues that the drivers were conducting a “survey” since they were collecting the same data - ridership designations – as they did in the past when they were paid the survey premium. PTM asserts that “survey” is limited to those instances when data is collected for the express purpose of mandatory reporting to governmental entities. Given that both sides’ interpretation of the language are reasonable, I conclude that the language is susceptible to more than one meaning and is therefore ambiguous.

Looking first to the negotiated language, nowhere in the agreement does it define the term “survey”. Webster defines “survey” as, “1: to examine as to condition, situation, or value” and “3: to view or consider comprehensively 4: inspect, scrutinize” Webster’s New Collegiate Dictionary, G. & C. Merriam Co., 1981, p. 1165. Black’s provides two definitions of relevance; “an investigation or examination,” and “Polling or questioning of public regarding their views on issues, candidates, etc.” Black’s Law Dictionary, p. 1296. These definitions support the Union’s position.

As to bargaining history, the record is devoid of any evidence of the parties’ conversations or notes when the language was first included in the agreement. The Union offered a Letter of Understanding (LOU) , entered into in January of 2006, as evidence of the parties’ understanding that “survey” includes not only manual clicker surveys conducted for the purpose of reporting ridership data to governmental entities, but also operation of the TRIM units by drivers.

Looking to the LOU, I do not find the language as definitive as the Union asserts. First, the LOU specifically states that it is “non-precidential”. While it is true that this is boilerplate phraseology in settlement agreements, that does not diminish its intended purpose. The LOU clearly establishes that the parties, or at least one of the parties, did not intend for the terms of the LOU to apply to future situations of similar complaint. I agree. While I do not accept that the LOU serves as ultimate evidence of the parties’ interpretation of the relevant portion of Article 10, it does “help place the instant grievance in context” as to what



[was] the custom and usage within the Company concerning..." the language at issue. MCDONNELL-DOUGLAS CORP., Douglas Coro., 78 LA 401, 403-404 (Winton, 1982).

The LOU affirms the similarity between the content of data collected via the use of the TRIM farebox and FTA/WisDOT mandated surveys, but distinguishes their purposes. This is consistent with the Employer's position at hearing and in its brief that the TRIM farebox collection of data is different than government mandated surveys which will be further addressed below.

The LOU continues by acknowledging that the parties have negotiated language "specific to the aforementioned survey(s)" referring to the FTA/WisDOT and TRIM keypad. The fact that the LOU identifies "survey" in the plural form, rather than the singular form, indicates that the parties acknowledged that both methodologies of collecting data - FTA/WisDOT manual clicker and use of the TRIM unit - are surveys. It then continues and memorializes the parties' practice of compensating the drivers the pay differential when conducting the FTA/WisDOT survey.

While the LOU is not binding precedent, it warrants considerable weight and serves as an indicator of the parties' interpretation of the contract language at that time. As articulated by Arbitrator Robert E. Mathews, "[w]here the parties themselves settle a grievance the evidence of intent as to meaning of a provision carries special weight." BENDIX-WESTINGHOUSE AUTOMOTIVE AIR BRAKE COMPANY, 23 LA 706, 709 (Mathews, 1954). The LOU was entered into less than one year prior to the instant dispute and established a context in which to evaluate the Article 10 language. The LOU accepted the difference between farebox and clicker data collection, but acknowledged that both constituted a survey, and that survey work is entitled to survey premium pay.

Ultimately, I am not persuaded by the Employer's arguments. PTM attempts to distinguish the TRIM unit work as something other than a survey because its alleged purpose is not to collect data for state and federal reporting. PTM's argument is inconsistent with the evidence. The Employer specifically argues that "the TRIM unit is not used when the Employer complies with its reporting requirements." Employer Br. p. 5. The problem with this argument is that it conflicts with the Company's own memorandum dated February 16, 2007 that directed the drivers to operate the TRIM unit for every passenger "[i]n order to satisfy FTA, WisDOT and NTD reporting requirements in addition to the desires to the City of Racine that all passenger boardings are accounted for by fare category, ..." Whether manually or obtained via the use of the TRIM unit, the drivers were required to engage in data collection. This data collection was used for ridership reporting - whether to actually complete the governmentally required forms, to assess the accuracy of the "clicker" obtained data, or to provide an estimate of ridership in anticipation for the "clicker" survey - and the parties have negotiated premium pay for when drivers complete this task.

The Company also suggests that only data collection via the manual “clicker” constitutes a survey. As survey is defined above, the tool or methodology by which data is collected is not relevant to the meaning. Moreover, there is substantively little difference between clicking the “clicker” and pushing a button on the TRIM Unit.

The Company also argues that its decision to expect drivers to collect ridership designation falls within the scope of its Management Rights clause which provides that the Company has the exclusive right to set the mode, methods of operation and assignment of work duties. I concur that the Company is afforded these rights and moreover, that its direction to the drivers was consistent with these rights. But, the exercise of management rights does not occur in a vacuum. The Company knew that it had negotiated a premium for work performed conducting a survey. Once the Company decided that it was necessary to collect ridership data via the use of the TRIM unit, or via whatever other methodology it would choose to implement, then it was obligated to comply with the terms of the negotiated agreement.

As to remedy, the Union suggests that the make whole remedy is retroactive to January 2, 2007. There is no evidence in the record to explain why this date was chosen. As such, and consistent with the Company’s memorandum directive dated February 16, 2007, the remedy is retroactive to the requirement date.

### AWARD

Yes, PTM violated the collective bargaining agreement by refusing to pay drivers survey pay for their current duties. The appropriate remedy is to make the drivers whole by compensating them for all hours in which they operated the TRIM units collecting ridership data retroactive to February 16, 2007.

Dated at Rhinelander, Wisconsin this 22nd day of February, 2008.

Lauri A. Millot /s/

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Lauri A. Millot, Arbitrator

