

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

**CITY OF FOND DU LAC MUNICIPAL EMPLOYEES UNION,
LOCAL 1366 AFSCME, AFL-CIO**

Case 195
No.68348
MA-14203

Appearances:

Dan Pfeifer, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin, appeared on behalf of the Union.

Davis & Kuelthau, Attorneys at Law, by **William G. Bracken**, 219 Washington Avenue, Oshkosh, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

City of Fond du Lac Area Municipal Employees Union, Local 1366, AFSCME, AFL-CIO herein collectively referred to as the "Union," and City of Fond du Lac, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Fond du Lac, Wisconsin, on January 27, 2009. The parties requested an oral award rendered after the close of the hearing followed by a limited written confirmation. Each party made oral argument and waived the filing of a post-hearing brief. After the close of the hearing, the Employer made a motion with respect to the payment of filing fees and that matter was resolved January 29, 2009.

ISSUES

The parties were unable to agree to a statement of the issues. I state them as follows:

1. Did the Employer violate the Agreement, by scheduling full-time transit employees to work less than forty hours in the period August 4, 2008, to December 31, 2008?

2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

The parties stipulated to arbitrate this matter under the terms of the parties' expired 1006-2007 collective bargaining agreement. The disputed provisions are: Article IV, Sections 1, 2 and 8; Article 22, Sections 6 and 7 and other provisions which establish that the Transit Division is on a 40 hour work-week.

FACTS

The Employer has a Transit Division which operates the local bus system Monday through Friday. There are four regular full-time drivers, three part-time drivers, and a Transit Clerk who normally operated a bus for a short period each week. Full-time transit drivers work a forty hour week but have in the past been scheduled on occasions for as little as 38.5 hours per week for reasons which no one remembers.

At all times material to this dispute, the Employer was aware that the transit clerk was going to retire effective January, 1, 2009, after 30 years of service. Her position was going to be filled from the complement of current transit employees, depending on who posted for the job.

Prior to July 28, 2007, the Employer experienced a layoff and a former transit employee bumped into a full-time transit driver position. The Employer was faced with the choice of having to lay off the junior employee to a Parks Department position or work a shorter work week until the Transit Clerk retired. It opted to work the full-time employees 39 hours per week and not layoff an employee. It posted a bid schedule on July 28 to go into effect August 4 with the reduced work week. Transit Manager Lynn Gilles made the decision. She testified that she knew at the time that the Transit Clerk would be retiring and that during the period in question, the Transit Clerk was no longer going to operate a bus, but would spend substantial time until her retirement training the new replacement. This would have resulted in both the Transit Clerk and the trainee being unusually unavailable for regular transit duties. The person who would have been laid off was a 20 hour per week operator, Mark Dorow. The Employer posted the Transit Clerk position in the period October 7 to October 13. Mark Dorow was one of three employees who applied, but the other two withdrew. Mr. Dorow was selected for the position. Shortly thereafter, he was assigned to be trained with the retiring Transit Clerk which continued until she retired.

The Union grieved the reduction and the same was properly processed to arbitration in this proceeding.

POSITIONS OF THE PARTIES

Union

Article IV Section 8 requires the Employer to establish an average 40 hour week for full-time transit workers. Article XXII, Section 7 requires that the Employer maintain a forty hour week except when unforeseen financial emergencies make such provision impossible. The Union concedes that the Employer may also provide for less than a forty hour week for “operational considerations” in the Transit Department. This was neither. The Employer should have laid Mr. Dorow off to Parks during the period in dispute.

Employer

Article IV, Section 8 requires an approximate 40 hours week. Past practice is that Transit employees have worked as little as 38.5 hours. This change was within the range of past practice. In any event, it was impractical to layoff an employee for this short of period. The Employer needed to maintain its full complement of employees in order to accommodate the training of a new Transit Clerk. This was a rare event.

DISCUSSION

The Union is correct in its position that Article XXII, Section 7 sets a strong preference for layoffs over the use of reductions of work weeks. Nonetheless, the reason that Article XXII, Section 7 uses words like “endeavor” and “except for” is the same reason that that Article IV, Section 8 uses “approximate.” No contract negotiator can anticipate everything which might occur during the administration of the agreement.

The situation involved in this case is highly unusual. First, the expected layoff would have been very short. Second, the Employer needed to maintain staff in order to train the new Transit Clerk. Third, although it was not known at the time, the fact is that the person who would have been laid off was the person who ultimately was selected as the new Transit Clerk. That person had to work with the transit clerk in this period. The better view of this evidence is that the reduction of hours fell within the range of operational necessity. While there may have been other choices, I don’t believe they could have worked as a practical matter under these circumstances. Accordingly, I conclude that the Employer did not violate the collective bargaining agreement

AWARD

The Grievance filed herein is hereby denied. The Arbitrator reserves jurisdiction over issues relating to the fees and expenses of this proceeding.

Dated at Madison, Wisconsin, this 29th day of January, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator