

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
AMALGAMATED TRANSIT UNION, LOCAL 1310

and

CITY OF EAU CLAIRE

Case 280
No. 68171
MA-14145

(Call In Pay Grievance)

Appearances:

Mr. Tom Werlein, Union Steward, and **Mr. Florian Skwierczynski**, President, 2520 Daniels Avenue, Altoona, Wisconsin appearing on behalf of Amalgamated Transit Union, Local 1310.

Mr. Stephen G. Bohrer, Assistant City Attorney, City of Eau Claire, 203 South Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin, appearing on behalf of City of Eau Claire.

ARBITRATION AWARD

Amalgamated Transit Union, Local 1310, hereinafter "Union" and City of Eau Claire, hereinafter "City," requested the Wisconsin Employment Relations Commission provide a panel of arbitrators from which to select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. From said panel, Lauri A. Millot was selected to hear the instant dispute. The hearing was held before the undersigned on December 2, 2008 in Eau Claire, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received by February 17, 2009 at which time 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:

Did the City violate the contract on February 28, 2007 when it paid Bus Driver Tim Hillery one hour instead of two hours? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

...

Article 5 – Management Rights

Section 1. The Amalgamated agrees that the right to employ in accordance with the provisions of this agreement, promote, discipline and discharge employees, and the management of the property are reserved by and shall be vested in the City, and in connection therewith the City shall have the right to exercise discipline in the interest of good service and the proper conduct of its business; however, the City recognizes the right of its employees to bargain collectively on employer-employee matters that may arise from time to time.

...

Article 7 – Working Hours

Section 1. The regular hours of employment for General Bus Mechanics are to be 40 hours per week. Scheduling of employees in this classification shall be done so as to allow one General Bus Mechanic to be on duty on Saturdays without the use of overtime. The regular hours of employment for garage employees not classified as general bus mechanics shall be 44 hours per week except for Combination Service Personnel hired after June 30, 1983 will be regularly scheduled for 40 hours of employment per week. They will also be inserted into the normal Saturday rotation without the use of overtime unless work requirements dictate the need for such overtime.

Section 2. Operators

- a. All scheduled regular runs will average 40 or more hours per week.
- b. Three picks of runs shall be held for the operators as mutually agreed upon each year and more, if run schedules are materially changed or revised. The runs shall be posted at least thirty (30) days prior to such time.
- c. Whenever a regular run is open for a period of one calendar week or more, it shall be filled by a pick from the extra list. When the regular operator returns to work, he or she will be returned to his or her former position. All other affected hours, regular or overtime, will be subject to reassignment. This does not affect hours of picked runs.

...

ARTICLE 14 – Pay Practices

...

Section 3. Whenever an employee is called for duty with more than 24-hour notice, he/she shall receive a minimum of one (1) hour pay. If less than 24-hour notice is given, he/she shall receive a minimum of two hours pay.

Section 4. Time and one-half is to be paid shop personnel who work in excess of 40 hours per week and/or eight hours per day. Injury leave, vacation, sick leave, court time, and bereavement leave will be considered as time worked for overtime purposes. Holidays shall be governed by Article 8, Section 2 regarding holidays.

Section 5. Drivers will be paid time and one-half for hours worked in excess of 40 hours per week. Charter hours will in no way effect [sic] the regularly scheduled employee hours of work. Injury leave, bereavement leave, vacation, sick leave, and court time will be considered time worked for overtime purposes. Holidays shall be governed by Article 8, Section 2.

...

BACKGROUND AND FACTS

The facts are not in dispute.

The Grievant, Tim Hillary, is employed as a 12 year full-time bus driver with the City. On Tuesday, February 28, 2007, driver Don Imm was selected to take a random drug test. Imm's test was scheduled to begin at 8:45 a.m. In preparation for Imm's absence to take the drug test, Driver Supervisor, Tom Wegener, offered the additional work hours to driver Werlein, a less senior **driver** than the Grievant. Imm returned to drive his bus route at 9:45 a.m.

The Union filed a grievance on March 2, 2007 alleging that the City had violated Article 6 of the parties' collective bargaining agreement. Specifically, it asserted that City had passed over the Grievant when filling the additional hours of work created by Imm's drug test and offered the additional work hours to the less senior employee. The Union requested a make whole. The City granted the grievance and paid the Grievant one hour of work. The Union challenged the remedy asserting that the Grievant was entitled to two hours rather than one hour of overtime consistent with Article 14, Section 3.

Additional facts, as relevant, are contained in the DISCUSSION section below.

DISCUSSION

The issue in the case is what pay provision is applicable to a driver who provides relief to a driver who leaves the work place to complete a random drug test. The Union argues that the calculation utilized by the City is inconsistent with the labor agreement. The City disagrees.

This is a contract interpretation case. Analysis begins with the language of the labor agreement. If the language is clear and unambiguous, then it is unnecessary to look to extrinsic evidence. I start with the language which the Union asserts is controlling:

Whenever an employee is called for duty with more than 24-hour notice, he/she shall receive a minimum of one (1) hour pay. If less than 24-hour notice is given, he/she shall receive a minimum of two hours pay.

This language establishes that when an employee is “called for duty”, he/she will receive either one hour or two hours of guaranteed pay, dependent on the number of hours notice that the employee receives. If the notice is greater than 24 hours, then the employee is guaranteed a minimum of one hour pay. If the notice is less than 24 hours, then the employee is guaranteed two hours pay. On its face, this language is neither vague nor ambiguous.

This language is contrasted with the language contained in Article 7 and Article 14, Sections 4 and 5. Article 7 establishes the work hours for drivers. Both Sections 4 and 5 address overtime and the payment of time and one-half for hours worked in excess of 40 per week.

During the morning of February 28, Wagener failed to offer the additional work hours to the more senior Grievant. Had the City followed the seniority provisions of the agreement, it would have offered Imm’s route to the Grievant while in pay status. He would not have had an interruption in his work status and he would have continued to drive until the completion of Imm’s drug test at 9:45 a.m. The Grievant was not “called for duty”. Being “called for duty” requires an affirmative action by the employer to bring the employee to duty status and is more than staying beyond the end of the Grievant’s regular work hours. The language contained in Section 3 is understood by industry standards to be “reporting pay” and provides employees with guaranteed payment when they report to work as requested by their employer. This is a benefit regularly bargained by unions to provide additional compensation to the employee whose personal time is disrupted by an employer’s recall.

The Union asserts that the parties have a past practice of paying employees who work extra hours to cover for random drug testing the two hour minimum. The Union looks to 11 instances that occurred in the last three years and concludes that in all instances, the two hour

guaranteed by Article 14, Section 3 was the proper payment.¹ It further asserts that the fact that the City modified the employee's timesheet does not negate the existence of a past practice because the employees did not know that they were not paid for two hours.

Looking to the 11 instances, ten were the result of an employee being directed to complete a random drug test. There is no evidence to conclude that the May 18, 2006 instance was due to a random drug test, and it will be disregarded. Of the remaining 10 instances, six were employees working before the start of their scheduled shift and four were employees working beyond their regular shift to cover for the drug test. In order for the employee to start work before their scheduled shift, they would have had to have been contacted by the City, in advance, and offered the additional work. This is a call in. In these instances, accepting the City's explanation that it does not make arrangements for random drug test coverage until approximately two hours before the test, the employee was guaranteed two hours work, regardless of whether the test took less than that amount of time. In reviewing the payroll data, it is clear that the City did not pay this in all instances and further, in some instances, it appears to have paid more.

In the remaining four instances which are factually similar to the Grievant's situation, the employee was offered the extra work during his/her shift, accepted the additional work and worked beyond his/her shift without an interruption. On August 14, 2006, the employee requested two hours and the City modified the time sheet and reduced it to one compensable hour. On February 7, 2006, the employee worked one hour, requested two hours and was paid for two hours. On November 15, 2005, the employee requested one hour of overtime and was compensated for one hour. On February 16, 2005, it appears the employee worked two hours and was paid for two hours. Thus, there is no likeness in the City's payment for the four instances. Lacking consistency, there is no factual basis to conclude either that the Union employees have a practice of requesting two hours for working beyond their scheduled shift or that the City has a practice of paying employees a guaranteed two hours.

The Union next argues that the additional pay provisions contained in Article 14, Section 3 are triggered "whenever an employee is called for duty," regardless of whether the employee is already at work and continues his/her shift. It further asserts that the parties have agreed upon exceptions to the "call in" benefits and that these exceptions are the continuation rule and the exception for emergency situations. The Union's argument is not supported by the labor agreement. The scenarios that the Union labels as covered by either the continuation rule or the emergency situation rule are legitimate exercises of management rights by the City in fulfilling its obligation to direct employees to work hours in excess of their scheduled shift.

¹ The Union looks to 11 instances involving random drug testing to serve as the the basis for establishing a binding past practice. The language of Article 14, Section 3 is not limited to solely random drug testing situations and therefore this scope of inquiry is too narrow to declare a binding past practice.

AWARD

The City did not violate the contract on February 28, 2007 when it paid Bus Driver Tim Hillery one hour instead of two hours. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 14th day of May, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator