IN THE MATTER OF ARBITRATION	) Arbitration Award:
	) Grievances 10-157, 10-180, 10-188,
	) 10-526, 10-703
BETWEEN	) 32-Hour Rule
	)
CHICAGO TRANSIT AUTHORITY	) Raymond E. McAlpin,
	) Chairman, Board of Arbitration
	)
AND	)
	)
	)
AMALGAMATED TRANSIT UNION	)
LOCAL 241	)
	)
	)

APPEARANCES

For the Employer:	Lawrence Jay Weiner, CTA Arbitrator
	Helen Kim, General Manager, Employee Relations
	Earl Swopes, V.P., Bus Operations
	Robert Gierut, Witness
	Paul Zielinski, Senior Project Consultant, Bus. Analysis
	William R. Mooney, Former CTA Employee
For the Union:	Sherrie Voyles, ATU Local 241 Arbitrator
	Taylor Muzzy, Attorney
	Javier Perez , Local 241 Trustee/International V.P.
	Keith Hill, Assistant to the Trustee
	Woodrow Eiland, Assistant to the Trustee
	Michael McBride, Assistant to the Trustee
	Michael Simmons, Former 241 Officer and Witness

PROCEEDINGS

The Parties were unable to reach a mutually satisfactory settlement of a certain grievance and, therefore, submitted the matter to arbitration pursuant to Article XVII, Sections 1 through 7 of the Collective Bargaining Agreement dated January 1, 2007 through July 31, 2012. Evidentiary hearings were held on January 6, 2012, March 26, 2012 and April 24, 2012, in Chicago, Illinois. At these hearings the Parties were afforded an opportunity to present oral and written evidence, to examine and cross-examine witnesses, and to make such arguments as were deemed pertinent. The Parties stipulated that all provisions of the Collective Bargaining Agreement had been complied with and that the matter is properly before the Arbitrator. The Parties conducted an executive session on October 2, 2012. Final arguments were received on December 18, 2012.

ISSUE

The parties stipulated to the following issues at the hearing:

Did the CTA violate Section 3.6I(L) when it worked various part-time bus operators over 32 hours in work weeks since January 24, 2010 and continuing throughout the present? If so, what shall be the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The pertinent contractual provisions are contained in the Wage and Working Conditions Agreement between the CTA and Amalgamated Transit Union, Local Unions #241 and #308, effective January 1, 2007- December 31, 2011 ("CBA" or "Collective Bargaining Agreement") (Joint Ex. 1):

ARTICLE 2- UNION RECOGNITION

2.6 NON-INTERFERENCE

The Authority shall be at liberty at all times during the existence of this Agreement, and subject to the provisions hereof, to operate its property according to its best judgment and the order of competent authority...

ARTICLE 3- WAGES AND SALARIES

3.6 PART-TIME EMPLOYEES

I. GENERAL PART TIME EMPLOYEES

* * *

(K) Part-time operators who have completed one (1) year of continuous service shall be given the first opportunity to apply for available vacant fulltime operator positions based on selection standards established by the Authority. Part-time operators who have completed two (2) years of continuous service shall be given the opportunity to apply for available vacant full-time operator positions based solely on entered service date.

* * *

(L) Part-time employees in the Local241 bargaining unit will not work more than thirty-two (32) hours per week except in cases of emergencies or authorized trades.

* * *

(0) No full-time employee on the payroll as of January 1, 1999 shall be laid off until all part-time employees are laid off. Full-time employees on the payroll as of January 2, 1999 shall be recalled before part-time employees are recalled or hired.

II. LOCAL 241 PART-TIME OPERATORS

a. To address the high rates of absenteeism which continue to pose difficulties in staffing and require greater flexibility in the use of part-time employees, the maximum number of part-time bus operators shall not exceed twenty-five (25) percent of the number of full-time bus operators. The number of trippers set aside for part-time bus operators shall not exceed 1644.

* * *

c. A part-time bus operator will be used for the following purposes: working trippers which are not part of a run or special event service, working runs set aside on Saturday and Sunday, and in the event all full-time operators scheduled to work on the extra board at a particular time

have been assigned, then any duties normally assigned to full-time bus operators may be assigned to part-time bus operators.

ARTICLE 12 - OTHER WORKING CONDITIONS, GENERAL

12.8 LAYOFFS. In all cases where employees are laid off to reduce the force, they shall be laid off according to seniority, and when they are put back on, they shall be reinstated according to his or her seniority standing at the time he or she was laid off.
During the term of this Agreement, there shall be no lay off of any permanent full-time bargaining unit employee who on January 1, 2000 had one (1) or more years of continuous service.

ARTICLE 13- BUS SYSTEM SERVICE DELIVERY, LOCAL 241

13.15 PAST PRACTICE. All present working conditions shall remain in effect during the term of this Agreement, unless a desired change is agreed to by the parties.

* * *

ARTICLE 16- GRIEVANCE PROCEDURE

Should a grievance arise between the Authority and its employees or the duly constituted bargaining agent, an earnest effort will be made to discuss and resolve such matters at the appropriate work location prior to the formal invocation of the grievance procedure. The time limitations set forth herein are of the essence and no action or matter not in compliance herewith shall be considered the subject of a grievance unless the time limitations are extended by written agreement of both parties

* * *

Grievances will be processed in the following manner:

Step 1: The grievance must be submitted in writing by the Union to the General Manager or equivalent by delivering a copy to Employee Relations. The grievance must be submitted by the Union within thirty (30) calendar days of the occurrence or knowledge of the occurrence giving rise to the grievance.

* * *

The time limitations set forth herein are of the essence and no action or matter not in compliance herewith shall be considered the subject of a grievance unless· the time limitations are extended by written agreement of both parties. The grievance must be submitted by the Union within thirty (30) calendar days of the occurrence or knowledge of the occurrence giving rise to the grievance.

ARTICLE 17 -ARBITRATION

* * *

17.3 Decision The decision of a majority of the arbitration committee shall be final, binding, and conclusive upon the Union and the Authority. The authority of the arbitrators shall be limited to the construction and application of the specific terms of this Agreement and or to the maters referred to them for arbitration. They shall have no authority or jurisdiction directly or indirectly to add to, subtract from or amend any of the specific terms of this Agreement or to impose liability not specifically expressed herein.

ARTICLE 20-TERM OF AGREEMENT

* * *

20.2 CHANGES

* * *

All conditions of this Agreement are to continue in full force and effect until changed, revised or amended from time to time by agreement of the parties or by the decision of the Board of Arbitration.

* * *

20.5 SOLE AGREEMENT This written Agreement and the documents attached hereto in Exhibit A, Local 308 and Exhibit B, Local 241 constitute the entire written Agreement between the parties, with the exception of settlement agreements.

PROCEDURAL AND FACTUAL STIPULATIONS

The Chicago Transit Authority ("CTA") and the Amalgamated Transit Union, Local241 (the "Union") hereby stipulate as follows:

1. The parties do not waive the tripartite panel in this matter. ATU Local 241's arbitrator is Sherrie E. Voyles and CTA's arbitrator is Lawrence Weiner. Raymond McAlpin has been selected as the Impartial Chairman of the Arbitration Board.

2. ATU Local 241 and CTA have been parties to a series of collective-bargaining agreements, the most current of which has effective dates of January 1, 2007 through December 21, 2012 ("CBA").

3. The CBA contains a restriction on the number of part-time employees allowed in the bargaining unit in Section 3.6 I(G):

> For employees in the Local 241 bargaining unit, the maximum number of part-time employees shall not exceed twenty-five percent

> of the number of full-time employees, except for that part-time servicers shall not exceed fifteen (15) percent of full-time servicers.

4. The CBA contains a further restriction on the number of part time operators allowed in Section 3.6 II(A):

> To address the high rates of absenteeism which continue to pose difficulties in staffing and require greater flexibility in the use of part-time employees, the maximum number of part-time bus operators shall not exceed twenty-five (25) percent of the number of full-time bus operators. The number of trippers set aside for part-time bus operators shall not exceed 1644.

5. The CBA contains a restriction on the number of hours part-time operators are allowed to work each week in Section 3.6 I(L):

> Part-time employees in the Local241 bargaining unit will not work more than thirty-two (32) hours per week except in cases of emergencies or authorized trades.

6. Part-time bus operators do not receive paid vacation, short term disability payments, do not accrue seniority, and do not participate in the Retirement Plan for the CTA employees.

7. On December 20, 2011, CTA received a subpoena directing it to provide the following documents:

> [1] A document, in Microsoft Excel format, showing the total hours worked per week for each part time operator from January 1, 2010 through the date of the fulfillment of the request; and
>
> [2] The gross payroll summary for each part time operator, for each pay period, from January 1, 2010 through the date of the fulfillment of the request.

UNION POSITION

A. LIABILITY

The following represents the arguments and contentions made on behalf of the Union:

The Parties agreed in collective bargaining negotiations held in 1982 that the CTA may employ part-time employees including part-time operators ("PTBOs"). There are restrictions on the maximum number of such operators and hours each could work per work week. Over the years the maximum hours have been increased through negotiations from 20 hours per week to the current 32 hours per week The theory behind this was that, when CTA has more work than can be completed by the maximum number of part-time operators working the maximum number of hours, it would transition those part-time operators to full-time employment.

As long as there has been a contractual limit, CTA has violated those limits even according to its own witnesses. When such violations came to the attention of the Union, the Union officials approached CTA management about curbing such violations. The Union consistently requested that CTA do a better job of complying with the limits. Over the years the CTA did work with the Union to resolve these complaints. As a partial solution, the CTA agreed that extra work would go to full-time operators ("FTBOs") who wanted such work before utilizing part time operators. There have been various discussions about this topic over the years, the last of which occurred sometime after July, 2005. The Union asked for information so that it could police the hours being worked by bargaining unit personnel. The CTA was not always forthcoming with such information. Over the years there were many understandings to insure that FTBOs were not being deprived of work opportunities due to violations of the part-time hour limits, and that PTBOs' hours were distributed equally to all PTBOs. At one point, due to a grievance filed over the issue, almost 100 PTBOs were transitioned to full-time status. None of these agreements was ever reduced to writing, nor was the Collective Bargaining Agreement modified with respect to this issue. Over the years the CTA has acknowledged the 32 hour limit. This was reiterated in an arbitration award dated December 13, 2011 wherein CTA sought to limit a backpay

award for a PTBO to 32 hours per week. The Union noted that it did complain about the violations prior to February, 2010 without resolution.

Prior to the current dispute, both full-time and part-time employees were working. This changed in February, 2010 when nearly 1,000 bus operators were laid off. After the layoff, the CTA continued its practice to routinely work PTBOs beyond the 32 hour limit essentially replacing the hours of the laid off drivers. The CTA also failed to transition PTBOs to full-time status since August, 2009. From the middle of December, 2010 through November, 2011 the CTA violated the 32 hour limit by a minimum of 161,084 hours. This is a clear violation of the Collective Bargaining Agreement. The language at 3.6I(L) is clear and unambiguous. Working PTBOs beyond 32 hours is prohibited unless the work falls within one of the two enumerated exceptions. The Employer admitted that the Union did complain over the years about these violations.

The record in this case shows that the CTA failed to establish that the violations of the 32 hour limit fell with one of the two contractual exceptions. The records show that there were repeated violations.

One of the exceptions noted is in cases of emergency. This was reviewed by Arbitrator Fletcher in a recent award. He noted that an emergency is an unexpected state of affairs that requires immediate action. The burden is on the Employer to show that one or the other of the exceptions resulted in the extra hours.

The record shows that absenteeism and the need for flexibility do not create exceptions to the 32 hour provisions. Absenteeism is not an emergency. The Parties are bound by the Collective Bargaining Agreement not what is the best way to have duties performed.

The CTA's past violations cannot be elevated to the position of a contract provision when clear contradictory language exists. The CTA is attempting to justify its continuing violations by utilizing past

instances of violating the same section. Past practice can be utilized when the language is ambiguous. This is not the case here. Neither party loses its ability to enforce the terms of the Collective Bargaining Agreement because it allowed past violations. In addition, there was no showing that the Union agreed to these violations in this matter. The CT A cannot show any explicit or implicit agreement by the Parties to modify the current contract language. The Union did complain and the CTA took some remedial steps to address those complaints. The record shows that the CTA utilizes the 32 hour limit for part-time operators when such limit is advantageous to the Employer.

The CTA also argued the timeliness issue. The first grievance filed in this case occurred on February 24, 2010, therefore, this grievance is timely for any violations occurring on or after January 24, 2010 and, therefore, the grievances were submitted within 30 calendar days of the violations giving rise to the grievances.

The CTA may argue that its violations were longstanding and routine. This argument would remove the contractual limit from the Collective Bargaining Agreement. Such a conclusion would be outside of the Arbitration Board's authority and jurisdiction. In addition, arbitrators have not strictly enforced grievance time limits where the actions complained of are an ongoing violation. Due to the CTA's actions, there is significantly less work available for FTBOs, both on an overtime basis or for those laid-off .

With respect to remedy, the Parties agreed to reserve the remedy pending the decision on the liability. The Union reserves its right to renew its repeated requests to receive records that establish actual weekly violations.

B. REMEDY

Thirty days prior to the first grievance and continuing to date the CTA has routinely violated the prohibition contained in Section 3.6(I)(L) of the Parties' Collective Bargaining Agreement by working

PTBOs more than 32 hours in a work week. The CTA does not and cannot contest such evidence, and instead offers various justifications for its ongoing violations including absenteeism, convenience and waiver. In addition, the evidence establishes that in years prior to the current dispute, the CTA and the Union reached formal resolutions to the CTA's violations. These resolutions occurred when there were no laid off bus operators. In February, 2010 the CTA laid off over 17% of its bus operators. At that time, the Union put the CTA on notice that it would no longer tolerate or resolve 32-hour violations outside of the formal grievance procedures. The CTA continued to violate the 32-hour prohibition. The CTA's own record shows continuing violations of the contract language of Section 3.6.

The records received show significant violations of the rule. The Arbitrator has the authority to issue a make-whole remedy. The relevant citations were provided. Some arbitrators have held that the Arbitrator's authority to craft a remedy is limited by the relief requested in the grievance. Additional citations were provided. The Union would note that any limitation on the Arbitrator's authority is narrow.

The Union's position is that the remedy should be across the spectrum of PTBOs and FTBOs who lost work opportunities which may or may not include laid-off operators. In any event Joint Exhibit 1A contains a stipulated issue which gives the Arbitrator the authority to craft an "appropriate remedy." This empowers the Arbitrator to award a remedy regardless of the grievance request.

The Union's grievance in this matter has always been a class action grievance. The monetary award of back pay does not exceed the Arbitrator's authority even if monetary damages were not requested. The CTA has been on notice since February 24, 2010 of the broad scope of the dispute and was further made aware that the Union was seeking a monetary award.

A make-whole remedy is not only appropriate but necessary. The CTA is asserting that the Union essentially waived its right to contest current violations because the Union had not contested past violations. This argument is directly contrary to well settled arbitral law.

The Union disputes that in past years it simply allowed the Employer to violate the 32-hour prohibition. The CTA's own witness testimony demonstrates that past violations were subject to an informal arrangement that always included the Union receiving a quid pro quo.

Even if a waiver exists, it is limited only to those periods of time in which the Union chose the informal path to address the violations. This waiver could not be prospective. It does not apply to violations occurring 30 days prior to the filing of the grievance and going forward. Accordingly, the CTA acted at its own peril from February 24, 2010 and forward. CTA's violations amount to approximately 528,000 hours. This is a clear repetitive and large scale violation of the Collective Bargaining Agreement. The Arbitrator must decide what monetary remedy should be awarded for the work opportunities lost in the bargaining unit. The Arbitrator has such authority. Again, citations were provided.

Arbitrators have found that, where no remedy is assigned, this would reflect adversely on the Union and injure the Union's standing among its bargaining unit. Arbitrators have also found that the contract has been broken with apparent impunity. Even a well-intentioned company has no incentive to work harder to prevent misassignment of work. Both rationales exist in this case.

The Union argued that without these violations the Employer would have recalled laid-off employees at a faster rate than actually occurred. The Union would note that the laid-off employees had all been recalled as of the last date of the hearing in this matter. The CTA acted at its own peril continuing to ignore clear contractual prohibitions. If it is not required to pay for its contractual violations, there is no incentive for it to stop violating the contract going forward. Failure to award

money damages will reward the CTA both economically and from a bargaining perspective. A simple cease and desist order will not be an effective remedy.

There is nothing novel in holding the CTA accountable in a monetary manner. The Union cited an award by Arbitrator Fletcher who fashioned a monetary remedy of approximately $750,000.

At a minimum the Arbitrator must award a monetary remedy for every violation hour. The record is devoid of evidence establishing any actual emergencies that coincide with any specific violation. If any offsets occur, bargaining unit members who lost work should be made whole based on the amount of revised violation hours.

There are two classes of employees who lost time as a result of these violations. The first would be PTBOs who did not work at least 32 hours during the work weeks in which there were violation hours. These total approximately 288,336 hours which would have been worked at straight time. After subtracting these hours from the total, FTBOs would have been properly working their overtime rate for the additional hours. The Pension Fund is entitled to be made whole as well.

CTA's arguments as to the proper remedy are without merit and should be rejected. The CTA admitted that it has systematically and consistently violated the prohibition against working PTBOs in excess of the contractual limit. In arguing that only a cease and desist remedy is appropriate, the CTA essentially brought forward two arguments - (1) since it previously violated the Collective Bargaining Agreement, it should not be held monetarily accountable for the same type of violations even after it was put on notice. The CTA acted at its own peril; and (2) the CTA argued that it is a public entity funded by public dollars and should not be required to pay for its contractual violations. The CTA is held accountable in its obligation both contractually and otherwise just like any other employer. The high cost of its violations should not serve as an escape path for its actions.

In addition to the above, additional remedies should be awarded to make the bargaining unit whole. Arbitrators have recognized that extraordinary violations call for extraordinary remedies. The Arbitrator should issue an award of overtime and order the CTA to restore the bargaining unit, which declined in members during the subcontracting violation. An award of interest is proper. The Arbitrator should make an additional award to compensate the entire bargaining unit for losses that would not be rectified by the back pay award. The CTA was put on notice as of February, 2010 of its clear violations. The requested remedies are justified because of the size of the violations and will deter the CTA from future violations of the agreement. This is within the Arbitrator's authority.

There is no question that the CBA requires a finding that the CTA owes bargaining unit members a substantial remedy. This remedy stems directly from the bargain made between the CTA and the Union which the Union negotiated on behalf of its members. The size of the violation itself demonstrates why a make-whole remedy is appropriate. The Union at pages 17 and 18 of its remedy brief suggested a seven-point draft finding on the remedy.

C. UNION REPLY ON REMEDY

This is the Union's reply to the CTA's brief on the remedy.

Past practice does not trump clear language. The CTA admitted that most arbitrators who find the language of the Collective Bargaining Agreement clear and unambiguous will not resort either to past practice or negotiation history in interpreting the Collective Bargaining Agreement. The cases cited by the CTA in the current dispute are much different. There is no past practice of simply allowing the CTA to violate the 32-hour prohibition at will. The CTA was mindful of its contractual obligation, attempted to comply, and for the most part did comply. The Union had made complaints to the Vice President of Employee Relations over the years. The CTA continued in its efforts to comply and agreed with the Union to take other actions to make sure that the PTBO hours were equalized and the FTBOs

who wanted to work were given the opportunity. At best the past practice that the CTA relied on establishes that, in order not to be held liable for every 32-hour violation, the CTA must prove that the PTBOs were getting equalized hours and all FTBOs were getting the work that they wanted. This has not occurred over the last three years as demonstrated by the CTA's own records. The key element is that FTBOs were not working the hours that they wanted because there were hundreds in layoff status.

The CTA's proposed remedy serves to solidify its right to violate the 32-hour prohibition and make substantive changes to the Parties' Collective Bargaining Agreement. The CTA asked the Arbitrator to decide questions of contract interpretation that have not been placed before him.

The CTA's claim of substantial disruption of service to the public is baseless. The Employer asked that it be given additional time even to comply with the basic cease and desist order. The record shows that, to avoid past violations, the Employer would only have had to shift hours, on average, by one hour per week per FTBO. Compliance is not anywhere near as cumbersome or disastrous or debilitating as the CTA portends. The CTA is seeking really to avoid inconvenience. This underscores the necessity of a monetary penalty to motivate the CTA to discontinue its violations immediately.

The CTA is asking the Chairman to make changes in the contractual provisions. This is contained in its alternative remedy. This is outside of the scope of the authority of the Board of Arbitration in this matter. The proposed language is directly contrary to Section 3.6 of the Collective Bargaining Agreement. Additionally, the CTA proposed to have this Board of Arbitration to find emergency as it is applied in Section 3.6. The proper arena for changes in the contract is during collective bargaining.

Finally, the CTA cannot achieve here what it could not in bargaining. The CTA argued against granting the Union a remedy because the Union made the proposal in bargaining and the CTA rejected it. This argument is unnecessary as the Union did not request its bargaining proposal as the remedy and agreed that neither side could achieve through this arbitration what it could not achieve through

bargaining. This applies both to the Union and the CTA. The Union respectfully requested the Chairman issue a draft award that incorporates the Union's proposed traditional make-whole remedy.

D. DAMAGES

The Chairman of the Board of Arbitration concluded that the CTA violated Section 3.6I(L) of the Collective Bargaining Agreement when it worked some part-time bus operators more than 32 hours per week. The findings were that the most appropriate remedy would be a make-whole remedy for provable hours lost that did not meet the two exceptions of the above article. The violation period was limited to May 24, 2010 to January 27, 2012.

The CTA provided payroll data as well as a summary of that data. It is the Union's position that this resulted in 364,727 violation hours at $28.96 per hour excluding 86,983 voluntary trade hours and 41,216 hours that represent the premium portion of overtime hours. The Union also agreed to exclude 96.8 hours that are related to grievance settlement, therefore, the total number of violation hours is 236,430.9 hours.

The Employer claimed that it is entitled to additional offsets because those hours would not have otherwise gone to a particular employee. This attempt to further reduce the Employer's liability should be rejected completely.

These offset claims must be rejected for four reasons. First, the CTA itself accounts for every category of hours. Second, because of the nature of CTA's bus operations, if an employee is doing something other than operating a bus as scheduled, someone else fills in for that operator. Moreover, even if agreed to by the Chairman of the Board, the CTA failed to present any evidence that the offsets it seeks were for hours worked by a specific part-time operator in a week in which the part-time operator did in fact work over 32 hours during that week. In addition, the CTA received a huge offset by the limited violation period.

All hours are included in CTA's tracking of the 32-hour limit was proven by testimony from Union and Employer witnesses. Miscellaneous and other hours worked by PTBOs push work to other employees, therefore, there is no rational reason to use these hours as an offset. There is no evidence that claimed offset hours are for hours in excess of 32. The Union agreed that an offset of almost 87,000 hours is appropriate. The Employer did not present any similar evidence on the remaining claimed offsets.

The Union asserts that the remaining Violation Hours total 236, 440.9. The Union has used payroll data provided by the CTA itself. Also, the Union used the average wage rate as identified and provided by the CTA.

During the violation period many part-time operators worked fewer than 32 hours a week. The Employer could have used those individuals before reinstating any laid-off FTBOs. Over the course of the violation period there was a total of 131,182 underutilized part-time bus operator hours. This is shown by the information on Exhibit 1 which makes it easy to find damages for any given week for PTBOs. This exhibit simply notes the number of hours under 32 in each work week for PTBOs in the Violation Period multiplied by the average wage rate.

After distributing the violation hours to the underutilized PTBO hours, the remaining hours should be distributed to FTBOs who were laid off during the violation period. Because FTBOs were reinstated at different times over the Violation Period, the Union's methodology for FTBO accounts for the wages that the laid-off FTBO would have earned had CTA not violated the 32-hour provision of the contract – while still using averages to avoid the time-consuming process of tracking each Violation Hour individually.

First, the Union determined the average number of FTBO Violation Hours per month in the 21-month Violation Period which is 5,011.8 hours. Next, the Union divided the monthly average FTBO Violation Hours by 175, which is the average number of hours a FTBO works in a month to determine how many FTBOs should have been reinstated (on average) each month to work the Violation Hours. That calculation equates to 29 FTBO each month of the Violation Period. Thus, the 29 highest seniority FTBO on lay-off each month of the Violation Period receive their share of the monthly Violation Hours and should be paid according to the average wage rate provided by CTA. As more senior FTBOs were reinstated over the violation period, the less senior FTBOs move up into the group of 29 that should have been recalled earlier and, thus, are entitled to damages.

Using the above averages eliminates the time consuming process of tracking each violation hour individually. The Union's method for determining who receives what because of the violation is easily calculated.

Based on the above, the damage allocation should be incorporated into the award as follows:

1. Violation hours equal 236,430.9.

2. 131,182 violation hours should be paid to underutilized PTBOs at the average wage rate of $28.96.

3. 105,248.5 violation hours should be paid to FTBOs utilizing an average rate of $28.96 in accordance with the Union's methodology outlined in its brief.

4. The CTA must remit its pension contribution for the hours paid on behalf of the FTBOs.

EMPLOYER POSITION

A. LIABILITY

The following represents the arguments and contentions made on behalf of the Employer: Part-time operator positions started in 1982 with 12.5% of the operators and up to 20 hours per week. Over time that has been increased to 25% and 32 hours, respectively. Part-time operators are scheduled by the scheduling clerks who are members of the bargaining unit.

CTA has a history of chronic absenteeism and the system uses part-time bus operators to keep the system running in spite of absenteeism. Some absenteeism is provided for in the Collective Bargaining Agreement such as vacations, holidays, FMLA, funeral and jury duty. Non-contractual absenteeism refers to employees who simply do not show up to work. During January, 2012 the non-contractual absenteeism rate was averaged at 9.65% per day. Someone must perform that work. The system cannot use full-time operators to fill these non-contractual absenteeism slots because they picked their work and, unless they voluntarily trade, they have rights to perform the work that they have selected.

The system attempts to keep part-time bus operator hours below 32 hours a week, but when there is a need to assign more hours, part-time operators are given the option to work additional hours. The CTA believes that it is common knowledge that part-time operators were working in excess of 32 hours per week, a widespread and longstanding past practice, to account for excessive absenteeism by full-time operators. From time to time the Union would complain about this practice and documentary evidence shows its widespread use and Union knowledge. It is clear even at the garage level that the Union had knowledge of this practice. Once the scheduling clerks have gone through the work book and

the extra board is exhausted, part-time bus operators may be assigned to left over work by the scheduling clerks.

Prior to this case, there has been only one grievance regarding the 32 hour rule. At that time there was a 30 hour rule in effect. That grievance was settled by transitioning the Grievant to a full-time bus operator status.

Effective February 7, 2010 the CTA laid off 1019 Union employees. Arbitrator Benn found that it was not required to lay off part-time and temporary employees before full-time permanent employees.

The Union has the burden in this matter to demonstrate that the language in the Agreement has been violated. There is nothing in the Collective Bargaining Agreement that gives full-time operators the right to any hours available to the part-time bus operators in excess of 32 hours. There is no practice of doing this either. Full-time operators do not have any rights to any work of the part-time bus operators. There is no requirement that the CTA must reduce the percentage of part-time operators.

This case involves five grievances filed after the February 7, 2010 layoff. The grievances are untimely and two of the grievance must be denied for failure of proof. The contract would require an extension by written agreement of both Parties. The practice at issue here dates back over 25 years. The only grievance that was within the required 30 days was the West grievance, which was also the only grievance characterized as a class grievance. In addition, there was no evidence as to any evidence for past practice waiving the time limitations. One grievance stated that the part-time employee wanted the CTA to stop working her over 32 hours and wished to be made whole. The testimony clearly established that the CTA's practice is not to force part-time bus operators to work an excessive 32 hours if they indicated that they did not want to. In her case the garage was experiencing a state of emergency causing a serious manpower shortage. One grievance stated that the Grievant was taken out of service because she made a request not to work over 32 hours per the contract language.

As noted above, the Union has the burden of proof. The language at 3.6I(L) is ambiguous. The Union's own scheduling clerks assigned the work. The Union was admittedly well aware of the regular practice. Given the circumstances, the Union would presumably have filed more than one individual grievance in 1998. In addition, the Collective Bargaining Agreement should be interpreted as applying the maintenance of standards provision and past practice. The Collective Bargaining Agreement contains a zipper clause which provides that all conditions of the Agreement continue in full force and effect until changed or revised or amended. The Collective Bargaining Agreement is the entire written agreement between the Parties with the exception of settlement agreements. Arbitrators have almost uniformly enforced the Agreement as it is consistently applied and lived under by the Parties and should do so in this case.

The Union should be limited to the stipulated issues that would apply only to Section 3.6I(L). Even if the general layoff grievances are found to be timely, the Union has failed to sustain its burden of proof. This is a difficult burden for the Union to meet based on the Benn award. The Union is attempting to circumvent that award. In addition, the CT A has the sole and unfettered managerial right to operate its property according to its best judgment. The Union is attempting to give full-time bus operators rights over the part-time bus operators and they do not have any bumping rights. There is no alleged violation of provisions limiting the percentage or number of part-time bus operators.

Finally, the Union in 2010 attempted to protect all full-time employees from being laid off before all part-time employees are laid off. It was not successful in this request and the Union should not be permitted to obtain through arbitration what it failed to obtain in negotiation or what it failed to gain in the Benn arbitration. Full-time bus operators have no bumping rights or recall rights to re-employment. The record shows that the Union has knowingly acquiesced and agreed to the practice that is in place.

Even if the grievance is sustained, the appropriate remedy is a cease and desist order. The CTA has restructured its operations in a more economical and efficient manner based on its 25 year practice. To pull the rug out now would be an unmitigated catastrophe creating a total breakdown of services to the public.

Finally, the Union at the last moment brought forth 14 additional exhibits which purportedly represented grievance relevant to this arbitration. In fact, only one such exhibit (Union Ex. 14) was filed by a part-time bus operator. That grievance was settled by a transition of that individual to a full-time bus operator.

Based on the above, the grievance should be denied in its entirety and, short of that, the appropriate would be a cease and desist order.

B. REMEDY

In the event that the grievance is sustained, the appropriate is a cease and desist order. The Arbitrator would have to find the grievances to be timely and the CT A found to have violated Section 3.6 of the Collective Bargaining Agreement, which is strenuously disputed by the Employer.

A cease and desist order is appropriate because of the excessive and crippling absenteeism of the FTBOs. The Union agreed to the hiring and extensive utilization of PTBOs. Their percentages and hours by agreement have increased during the last 25+ years. These changes were used to restructure its operations in an economic and efficient manner. To pull the rug out now would be an unmitigated catastrophe creating a total breakdown of services to the public. Assuming that the Arbitrator would find in favor of the Union's position, the only and most appropriate remedy would be a cease and desist order. It is patently unfair to impose any monetary remedy when the Union has allowed and agreed to this past practice of allowing its PTBO members to regularly work in excess of 32 hours since at least 1985.

Not counting arguments with regard to timeliness, the rule's ambiguous language has been resolved by longstanding past practice. The Union had knowledge of, agreed to and acquiesced to 25+ years of this practice. The Union agreed to and allowed this practice until the layoff. The Union and Grievants should not be awarded a windfall and unjust enrichment of millions of unearned dollars. Under the Benn award the Grievants had no seniority or other rights to these hours. Any back pay award would be inequitable.

There are notable exceptions to the principle of clear and unambiguous language trumping past practice. In this matter the Union had knowledge and acquiesced for a substantial period of time. The Union agreed to the non-compliance with the contract. The CTA would note that any contract can be modified orally.

The Employer relied on the writings of Richard Mittenthal at pages 4 through 7 of its remedy brief. Numerous citations were also provided.

The Employer also suggested alternative remedies - a cease and desist order with a reasonable period of time to allow for its implementation. Should the Arbitrator determine that a remedy in addition to a cease and desist order should be imposed, it should be carefully crafted to establish procedures that would be designed to minimize or avoid future violations. The Arbitrator should retain jurisdiction to insure substantial contractual compliance. These are contained on pages 14 and 15, points 1 through 9 on those pages. The CTA respectfully submits that the proposed Union remedies are unjustified, unduly harsh and punitive and not corrective in nature. The authority is not required to promote PTBOs to FTBOs nor are FTBOs entitled to the work hours or have any seniority rights thereto. The Union is attempting to gain through this arbitration what it failed to obtain through negotiations and the Union's proposed remedy should not be adopted.

C. DAMAGES

The Employer reserves its arguments and defenses contained in its initial post-hearing brief especially as to past practices. The Union waived any rights, if any, it had to grieve any alleged contractual violations. In addition, the CTA reserves its arguments and defenses contained in its initial post-hearing brief with respect to remedy. Employees should not be awarded a windfall and/or unjust enrichment of millions of dollars.

A preliminary arbitration award was issued on January 13, 2013. Findings were made as to issues and appropriate remedy. Consequently to the above, the Parties engaged in the calculation of damages.

The Parties then filed post-hearing briefs regarding a remedy which included under utilized PTBOs and FTBOs working overtime. There was a second arbitration hearing relating to damages.

From the very beginning the Union's assertion was that full-time bus operators who were laid off should have been recalled to work the hours that part-time bus operators worked in excess of 32 hours per week. The Union's position is that the CTA should have strictly enforced the 32-hour rule.

In this case the central issues are who is entitled to be made whole and at what rate of pay. Monetary damages should correspond to specific monetary losses. A number of citations were provided.

The make-whole remedy should have started with the total hours worked by part-time bus operators in excess of 32 hours per week from May 24, 2010 to January 27, 2012. The Parties stipulated that the total hours are 236,430.9 offset by exceptions. The CTA has prepared the calculation of both the hours and the actual rates of pay contained in CTA Exhibit C.

Any remaining hours should be allocated among the laid-off full-time bus operators computed at their actual rates of pay. The Arbitrator should reject any attempt by the Union to allocate these hours to the full-time bus operators who remained employed as overtime since this is contrary to the grievances and prior briefs. The CTA objects to the so-called blended rate based on hourly rated classifications including wage projections. A blanket rate is not based on actual rates of pay but rather is based on a progression of the hourly rated classification steps. These longevity steps have nothing whatsoever to do with the actual specific hourly rates of individual members of the bargaining unit. The arbitral remedy should be based on the actual compensation rates of the affected employees during the relevant time.

The Union requests both interest and attorney fees. This Arbitrator has already ruled on the issue of interest in favor of the CTA. Interest should not be awarded in the absence of

contractual provisions expressly authorizing such remedy. This same finding should apply to attorneys' fees as the contract provides that each Party shall divide equally the cost and expenses of the neutral arbitration and the administrative costs of the arbitration. Other expenses should be borne by the Parties incurring them.

DISCUSSION AND OPINION

A. LIABILITY & REMEDY

In contract interpretation cases, the arbitration process is not a court of equity in which the Arbitrator has the luxury of determining what is fair, equitable or even reasonable in the face of what might be considered by some to be unreasonable contract language. Where an Arbitrator determines that the contract language is clear, it is his/her obligation to order the Parties to follow that course of action. Arbitrators receive their authorities from the appropriate arbitration statutes, the issues stipulated by the Parties, and most importantly the Labor Agreement. It is the Arbitrator's obligation to read the Agreement, and once he/she determines the intent of that language, to relate that intent to the Parties. This must be done irrespective of the Arbitrator's personal feelings as to what would constitute an appropriate or perhaps even a reasonable provision of a Collective Bargaining Agreement.

The Arbitrator would also note, however, that each side bears the burden of proving its own contentions and, while the Union bears the overall burden, the Employer is required to provide substantive evidence of any contentions that they may make. Therefore, the Union must show by clear and convincing proof that the language supports its position.

In accordance with the above, we then come to the question of whether or not a practice exists. Arbitrators generally use five basic standards to determine if a viable practice exists:

1. Is there specific language which is clear and unambiguous which would negate the practice or docs estoppel or waiver exist;
2. Does the practice have sufficient mutuality and is there a showing that the Parties have accepted it in the past;
3. Is the practice of sufficient generality and duration to imply acceptance;
4. Is there consistency of application over a significant period of time;
5. Does the practice control general provisions of the Labor Agreement;

If a practice is found it has the weight of contract until properly changed;

The public wants and expects on-time service no matter how this is accomplished. This is not as easy as it sounds in an organization as complex as the CTA. The labor contract has contained language concerning part-time bus operators for many years. The Union and Management have negotiated to extend both the percentage of part-time bus operators versus the number of full-time operators and the number of hours allowed per week from 12 ½ % and 20 hours to the current 25% and 32 hours.

There is a chronic and unusual absenteeism situation at the Employer of approximately 9.65%, in both bargaining unit employees and non-bargaining unit employees. The Arbitrator would note that part-time bus operators are scheduled by the clerks who are also members of ATU. While the Parties were generally getting along on this issue, in February, 2010 there was a 17% layoff of bus operators. This served as an impetus for the Union to determine that it would no longer turn a blind eye to CTA's violation of the 32-hour provision and was responsible for filing a series of grievances concerning this practice.

The key language is in the Collective Bargaining Agreement Section 3.6(I)(L) which can be found at the bottom of page 7 of this award. The language is clear. Part-time bus operators are limited to 25% of full-time operators and may not work more than 32 hours per week with two exceptions-

emergencies and authorized trades. As noted above, the Union was very lenient for a long period of time to give the Employer an opportunity to fill the holes in its bus operations due to an extremely high level of absenteeism. This met the terms of establishing a practice as noted above.

A review of the record in this matter has shown this Arbitrator that, not surprisingly, many of the clerks took the easy way out giving assignments to those who seemed to be most available, whether or not it followed the criteria of the Collective Bargaining Agreement. It is clear that part-time bus operators were well over the limits, particularly after the February, 2010 layoff, even though the Union grievances put the CTA on notice that 3.6 I (L) would be strictly enforced.

Subsequent to the layoff, the Union indicated that it would take a much more stringent view of the requirements in the Collective Bargaining Agreement at Section 3.6. As a result, the Union is seeking a make-whole remedy. As noted above, it is the Union who bears the burden of proof in this matter. Certainly, it was common knowledge that part-time bus operators were working over 32 hours in many weeks. This Arbitrator has found that in other arbitrations, practices have no set time limits unlike CBA's.

A review of the record in this case does not convince the Arbitrator that either waiver or estoppel exists. The Union can certainly be credited with trying to assist the CTA in this area of the management of the business. It is certainly understandable that the large layoff of bus operators in February, 2010 would cause the Union to change its position, therefore, even if waiver had existed, it would no longer exist after that time as the Employer was on notice that the strict interpretation of the language would continue.

The Arbitrator would note that the part-time bus operator classification is beneficial to both sides. This allows the Employer to fill open spots in a less costly way and to transition employees to full-time status. There is no question that there were continuing violations even while the Parties tried to

work this situation to a mutually beneficial conclusion, however, information seemed to be hard to get and, in fact in some instances, impossible to acquire.

In this matter it is the Collective Bargaining Agreement that governs. Not only does it place obligations on the part of the Union and management, but also on the neutral arbitrator and the Employer and the Union arbitrators on the Board. This does not mean that the Union is obligated to allow the easiest way to handle open slots or even the most economical way to handle open slots. It is the Collective Bargaining Agreement that governs.

Certainly, a past practice existed here, but past practice governs only when the language is not clear and past infractions do not justify current infractions without the Union's agreement or at least acquiescence. That has not been shown here. The CTA went beyond the 32-hour rule when it was advantageous to its operations. There were longstanding and routine violations from February 24, 2010 and forward, after the Union put the CTA on notice that no more violations would be tolerated subsequent to that date.

When the layoff occurred, the Union had the right not to go back to the way things were done in the past, and to put the CTA on notice that the original language would now govern. As noted above, the language at Section 3.6 governs. The Arbitrator would also note that the layoff has recently been eliminated and all employees are now recalled. This is a good time for the Parties to sit together in good faith to see if this situation can be resolved.

The record shows that part-time bus operators and full-time bus operators lost work opportunities. Also, full-time bus operators lost pension contributions. The CTA acted at its own peril. It was put on notice that the exceptions that existed previously would no longer apply. To this Arbitrator the most appropriate remedy would be a make-whole remedy for provable hours lost that did not meet the two exceptions in Article 3.6(I)(L). Certainly, the Employer cannot achieve through arbitration what

it failed to achieve through negotiations. Any contract can be modified, however, there was no permanent modification that existed in this area of the Collective Bargaining Agreement. The Arbitrator would also note that a windfall would not be an appropriate remedy in this case. This would include any interest payments and any payments for hours that would not have gone to a particular employee. The start date for the make whole remedy is May 24, 2012 which gave the CTA a reasonable time period to correct its violations. The end date is January 27, 2012, the date the last full-time bus operator was recalled.

Therefore, based on the above the Union has achieved a partial victory in this matter.

Grievance partially sustained in accordance with the above.

Grievance partially sustained in accordance with the above.

B. DAMAGES

This Arbitrator has always been reluctant to issue windfall monetary awards. In keeping with that, the Arbitrator finds that the appropriate rates to be used in the damage calculation are the actual rates of the employees during the relevant time of this case which is May 24, 2010 to January 27, 2012.

In the original decision the Arbitrator found that clerks were much to blame for the circumstances that the Parties found themselves in, however, the clerks are supervised by the management of the CTA, and that is where the final blame lies.

The Arbitrator finds no justification for the payment of interest or attorneys' fees in this case. The Arbitrator finds that the appropriate remedies are listed in the most recent brief by the Union on page 8 under Conclusion points 1 through 4 assuming that all of those include only

actual rates during the relevant time of this grievance which is May 24, 2010 to January 27, 2012.

1. The Violation Hours for calculation of damages is 236,430.9;

2. 131,182 Violation Hours should be paid to underutilized PTBOs except that their actual rate of pay for the period they are being compensated shall be used as outlined on Exhibit 1 to the Union's damages' brief;

3. 105,248.5 Violation Hours should be paid to the FTBOs using their actual rate of pay for the period they are being compensated and in accordance with the Union's methodology outlined on Exhibit 2 (i.e. by seniority, the top 29 laid-off FTBOs each month during the Violation Period shall be paid 173.3 hours)o;

4. CTA must remit its pension contribution for the hours paid on behalf of the FTBOs; and

5. Individuals' backpay shall be less customary and applicable withholdings and deductions, including union dues, pension contributions to the Retirement Plan for CTA employees ("Retirement Plan") and the Retiree Health Care Trust ("RHCT"). Federal income tax withholding shall not exceed 25%.

Issued at Chicago, Illinois this 27th day of March, 2014.

Raymond E. McAlpin, Chair, Board of Arbitration

3-21-2014

Sherrie E. Voyles, Local 241 Arbitrator, concurring

Lawrence Weiner, CTA Arbitrator, dissenting