

**IN AN ARBITRATION PROCEEDINGS PURSUANT TO THE  
COLLECTIVE BARGAINING AGREEMENT BETWEEN**

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CHICAGO TRANSIT AUTHORITY,

Employer,

- and -

AMALGAMATED TRANSIT UNION  
LOCALS 308 AND 241,

Unions.

**DETERMINATION AND  
AWARD**

RE: Calculation of Make Whole Back Pay Awards

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**HEARING DATE: September 20, 2012**

**BEFORE: Epifanio Castillo, Jr.**

**APPEARANCES**

For the Unions:

David Huffman-Gottschling, Esq.  
Jacobs, Burns, Orlove & Hernandez  
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Chicago, Illinois 60603

For the Employer:

Judith A. Kelley, Esq.  
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567 West Lake Street  
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**ISSUE**

The parties did not agree upon a statement of the issues in this case. The Arbitrator believes the following is an accurate statement of the issue:

Whether the method employed by the CTA to calculate back pay for a make whole period that includes holidays yields less than the back pay awarded. If so, what shall be the appropriate remedy?

## **PRELIMINARY STATEMENT**

Pursuant to the Collective Bargaining Agreement (CBA) between Amalgamated Transit Union Local 308 and 241(Unions) and the Chicago Transit Authority (CTA) the undersigned was designated as the Neutral Arbitrator to hear and render a determination in this matter. The parties have not waived the tripartite panel and have reserved their right to an executive session, if required, within 10 days of receipt of the Neutral Arbitrator's determination and award.

This interpretive case arises out of a class action grievance filed jointly by the Unions. The consolidated grievances in this matter each raises the question of the appropriateness of how the CTA calculates back pay for an employee who has been awarded reinstated and back pay as an arbitral remedy, after an arbitrator has found that the CTA's decision was not for sufficient cause. Specifically, the Unions claim that CTA's method of calculating back pay "systematically underestimates the amount of holiday pay wrongfully discharged or suspended employees would have earned had they not been discharge or suspended." Union Brief pg. 3.

The parties were represented by thorough and competent advocates at the hearing. The hearing was orderly. Full opportunity was given to the parties to present evidence, to call and examine and cross-examine witnesses and to present oral argument on the cases. Each side offered aggressive defenses of their respective positions and submitted equally compelling argument sent forth in the post-hearing briefs. After the receipt of the post-hearing briefs, the record was then closed and the matter was taken under advisement.

The salient facts in this case are not in dispute and are fully stipulated in the parties' Stipulation of Facts submission and the post-hearing briefs and will not be repeated here. In addition, Joint Exhibits 1-4 were admitted at the beginning of the hearing. Sworn testimony was taken from CTA's former employee, Diane Traxler, who was for years engaged in back pay calculation as directed by arbitration awards, until her retirement in 2011.

### **DETERMINATION**

The Neutral Arbitrator has given this case extensive review and deliberation. The arbitrator has reviewed the testimony and evidence presented during the hearing and the post-hearing briefs and for the reasons set forth below find that the grievances have merit and should be sustained. All of the evidence adduced discloses that the method employed by the CTA to calculate for make whole periods that include holidays results in a back pay payment less than what was awarded by the arbitrator. I am, therefore, rejecting the CTA's defenses that: (1) its current method of calculating back pay is an established past practice; and (2) awarding premium holiday pay is not appropriate because the employee did not actual "work" the holiday as contemplated in the parties' collective bargaining agreement. Hr. Trans. Pgs.31- 44.

Thus it is the Neutral Arbitrator's determination that:

- Essentially for the reasons set forth by Union counsel, no past practice has been established here. I agree that every case is a "new occasion" to present and argue on behalf of an aggrieved bargaining unit member/CTA employee.

- A CTA employee or former employee is entitled to receive back pay for the period during which an unjustified or unwarranted personnel action was in effect that terminated or reduced the compensation, allowances, differentials, premium pay, and employment benefits that the employee normally would have earned during the period.
- The proper remedy generally for improper dismissal is reinstatement with back pay and other emoluments to make an employee whole, from the date of the unjustified or unwarranted personnel action.
- Unless specified otherwise in an arbitration award, the back pay make whole period for make whole awards begins on the date of the separation from employment or other adverse action (i.e. demotion, transfer, etc.) and ends when one of the following occurs:
  1. The employee is put back to work,
  2. An offer of reinstatement is made, or
  3. Another resolution brings closure to the action.
- The language of an award for make whole back pay is unique for each situation. Awarded back pay and related benefits must be processed according to specific provisions of the arbitrator's award.
- It is a matter of simple justice, to make CTA employees whole is to place them in the position they would have been in had they not been subjected to an unjustified or unwarranted personnel action.

- The back pay calculation should account for all of the earnings attributable to the lost work opportunity. Lost earnings include but are not limited to: wages, salary or premium pay, any other fringe benefits.
- For purposes of entitlement to employment benefits, the CTA employee is considered as having rendered service for the period during which the unjustified or unwarranted personnel action was in effect.
- CTA will be required to pay for Holiday hours that a reinstated employee could have earned during the make whole period had the employee not suffered an unjustified or unwarranted separation from employment.
- The CTA employee should be compensated at the premium rate for Holiday hours only if the employee was scheduled to work and would have worked the day before and the day after a scheduled holiday during the make whole period. Otherwise, no compensation for premium Holiday hours shall be paid by the CTA to the employee.
- This outcome is consistent with the equitable, make-whole purpose underlying a make whole back pay remedy.

### **AWARD**

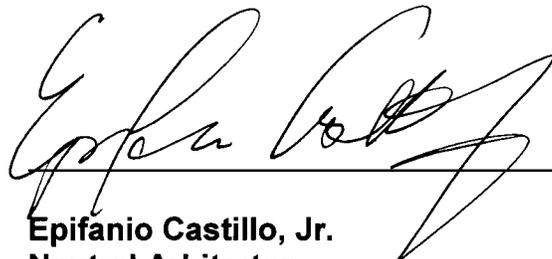
**IT IS HEREBY ORDERED** that the Grievances filed in the above entitled matter be and, are hereby sustained. Consistent with this determination, CTA shall:

1. Make whole all adversely affected bargaining unit members set forth in these Grievances.
2. Cease and desist from computing back pay awards in the manner which resulted in these Grievances.

3. Remedy and other issues relating to the underlying Grievances should be addressed by the parties, consistent with this determination.

4. The Neutral Arbitrator shall retain jurisdiction of this matter for a period of 60 days from the date of this Award for the sole purpose of assisting the parties with implementation of the Award to insure compliance with the full scope and intent of the remedy directed.

Dated: Yonkers, NY  
February 14, 2014



**Epifanio Castillo, Jr.**  
**Neutral Arbitrator**

**AFFIRMATION**

EPIFANIO CASTILLO, JR., ESQ., affirms that on the 14<sup>th</sup> day of February, 2014, he executed the foregoing instrument which is his Opinion and Award as the Arbitrator of a hearing convened to hear and finally determine the merits of a grievance filed by the Union challenging the CTA's method of calculating back pay when a make whole remedy has been rendered in an arbitration award.

