

**BEFORE
RAYMOND E. MCALPIN
ARBITRATOR**

IN THE MATTER OF THE ARBITRATION)	
)	
Between)	Consolidated Grievances:
)	
CHICAGO TRANSIT AUTHORITY)	Darryle West (Class Action), Grv. 10-157;
)	Vern Hodges, Grv. No. 10-180;
and)	Nathaniel Scurlock, Grv. No. 10-188;
)	Jennifer Perkins, Grv. No. 10-526; and
)	Renita Johnson, Grv. No. 10-703
LOCAL UNION 241, AMALGAMATED)	
TRANSIT UNION.)	

DISSENT OF CHICAGO TRANSIT AUTHORITY TO ARBITRATION AWARD

The Chicago Transit Authority ("CTA") respectfully submits the following Dissent to the Arbitration Award issued March 27, 2014.

Preface

The CTA is a political subdivision, municipal corporation, and unit of local government organized existing under the laws of the State of Illinois to provide mass public transportation by means of bus and rapid transit lines to the people of the metropolitan area of Chicago and Cook County. The CTA was created by and is operated pursuant to the Metropolitan Transit Authority Act. (70 ILCS 3605/1, *et seq.*).

I. SUMMARY OF THE FACTS

A. The CTA's Bus Operating System and Its Use of Part-Time Bus Operators

The CTA moves approximately 1.68 million people daily, and operates approximately 2,100 runs. (Tr. 99-100) The CTA employs approximately 4,035 bus operators. (Tr. 95) Since early to the mid-1980s, the CTA has employed part-time, as well as full-time, bus operators. (Tr. 82-83, 155) Specifically, in 1985, as a result of an interest arbitration award by Arbitrator Healy,

12.5 percent of the workforce was allowed to be part-time bus operators, and the part-time bus operators were contractually allowed to work up to 20 hours per week. (Tr. 155; Er. Ex. 1) The percentage of bus operators allowed to be part-time bus operators has increased over time to the current level of 25% of the number of full-time bus operators. (Tr. 83; Er. Ex. 1) The amount of time that part-time bus operators were contractually allowed to work per week also increased from 20 hours per week to 30 hours per week, then to the current level of 32 hours per week. (Tr. 155; Er. Ex. 1)

Full-time and part-time bus operators are members of the same Local 241 bargaining unit. (Tr. 88) Both full-time and part-time bus operators are assigned work as follows:

[The CTA has] full-time pieces of work that we designate as runs, and they pay eight hours, approximately eight hours in pay, some greater, some slightly less, tenth of a percentage less, but those are usually designated for the full-time employees.

We have certain pieces of work that we call trippers from 1.9 hours up to maybe five hours. And those pieces of work that we call trippers are usually designated for the part-time employees.

The part-time employees currently select the work on a weekly basis. And they are on that piece of work every day of the week. Same for the full-timers who do not select the extra board.¹ They pick work as well. And they work the same piece of work every week then. (Tr. 83-84; *see also* Tr. 120-22)

The CTA has section picks four times per year, where employees get to select whether they are going to choose work on a regular basis, pick their work, or if they are going to be on the Extra Board. (Tr. 84-85) Once the Extra Board has been exhausted, work is assigned through the workbook – employees who are available to work can sign their name into the book

¹ The Extra Board relates to employees who do not pick weekly work schedules, but they are used to fill in for vacancies that the CTA has due to absenteeism or due to vacations, holidays, sick time, FMLA leaves, or any other type of absenteeism. (Tr. 84) Individuals on the Extra Board are assigned those pieces of work that become available due to the absence of individuals who regularly select that work. (Tr. 84)

for a specific day that they may be off, and, if the CTA needs extra help, the scheduling clerk will go into that book and choose names on a first-come-first-serve basis to fill any open work that's not filled by the Extra Board. (Tr. 86-87; Er. Ex. 10) All of the scheduling clerks belong to Local 241. (Tr. 87)

The schedule for each day is prepared the previous day and posted by 6:30 p.m. (Tr. 103) If there is an open run in the schedule, those open runs are usually left open at the window, meaning that "it will be up to the window clerk the next day to try to find someone to plug into that open piece of work." (Tr. 104) The window clerks also belong to Local 241. (Tr. 104)

B. The CTA's History of Chronic Absenteeism and Its Use of Part-Time Bus Operators to Keep the System Running in Spite of the Absenteeism

The CTA has a history of chronic absenteeism. This chronic absenteeism comes in two forms: contractual absenteeism relates to absences that the CTA is obligated to deal with, such as vacations, holidays, FMLA, funerals, jury duty, etc.; while noncontractual absenteeism relates to those individuals who simply do not show up to work. (Tr. 92-94) For example, in 2010, unscheduled time off taken by unionized CTA workers averaged 19 days per employee and cost \$40 million, and, in 2011, the CTA lost 159,148 days to absenteeism, which equates to 6.12% of the total days available or approximately 16 days lost per employee. (Tr. 144-45; Er. Ex. 9; Er. Ex. 13) With respect to bus operators, according to the then Vice President of Bus Operations, Earl Swopes ("Swopes"), noncontractual absenteeism in January 2012 was at a rate of approximately 9.65% per day for the entire population of bus operators. (Tr. 92)

When bus operators are absent, the CTA must find someone to take over their work assignments. (Tr. 95-95) Swopes explained what happens when a bus operator fails to show up for work:

Well, if the employee fails to show up, what happened is it has kind of a reverberating effect. Because what happens is if you don't – if you have a

bus pull up to a corner, and the bus operator is supposed to come there and get on that bus, if that bus operator fails to slow up, now you have a full bus there with 40, 50, maybe 70 people on that bus waiting to get to a destination, and you have no driver to drive the bus.

The clerks will try to scramble to get someone to go down there and get that bus because if you take them off that bus and try to put them on another bus, all the other buses are full, so there's no other buses to put them on during the rush hour. So it's an emergency. You have to get someone to operate that bus or you're going to have that group of people just standing around on the corner with no place to go.

Now, the way our system works, we have what they call fall-backs where a bus gets to the corner, he gets relieved by someone else and then he gets on the following bus and takes over that bus. So you can't ask that bus operator who pulls that bus up to that corner to continue on with that bus, because eventually, 30 minutes later, the second bus that he's supposed to get on is going to be standing there.

So it just keeps going back and further back and forth down the line where you keep having the crowds of people standing there on the corner waiting for the bus unless you have someone to take over that bus so these reliefs can be made. It's kind of like playing leap frog, if you will. You have to have someone to take over that first bus, or you're going to have chaos on the street with your customers. (Tr. 97-98)

With this chronic absenteeism, utilization of part-time bus operators is a necessity to keep the system running. (Tr. 98) Full-time bus operators cannot be used for this purpose because "when they pick their work, they're locked into that work unless they voluntarily trade that work," and "if they don't voluntarily trade, then [the CTA] can't remove them from [the] work that they have selected." (Tr. 99, 126)

Swopes further explained:

There's a lot of efficiency because if you have a part-time operator available to do that work, the scenario I just gave about those people standing on that corner, you don't have that situation. You can take a part-time off the selected piece of work that he has and have him work that piece of work for the people standing there waiting for a bus. Now, that bus can continue and the ones behind it can continue. (Tr. 99)

The CTA attempts to keep part-time bus operator hours below 32 hours per week when initial assignments are made, but when there is a need to assign more hours, such as in the circumstances described above, part-time bus operators are given the option to work additional hours. (Tr. 102) This process happens as follows:

Once the part-timers were assigned for the week, so they may have gotten an assignment in the later part of the week that would bring them over 30 hours. But once that they had been assigned for the week, or even in the early part of the week, once that they have received their normal assignment, that the work would go to the workbook. The full-timers in the workbook, they would receive the assignments if there was work. And then if there was still work to be done, that that work would be done by part-timers who were willing then to do that extra work. (Tr. 183)

When Robert Gierut was the Vice President of Employee Relations for the CTA, he was aware that part-time bus operators were working in excess of 32 hours per week, and he believed that it was "common knowledge." (Tr. 123-24) He explained as follows:

The circumstances under which part-timers exceed 32 hours, it's a fluid situation. The CTA would not purposely schedule people in violation of the contract, whether they're full-time or part-time. But given the nature of the work and given the amount of absenteeism that is experienced by our workforce, literally on a daily basis, you could have circumstances under which that work would have to be filled. And ultimately it could lead to employees being – either being paid overtime or working in excess of what the contract would require with respect to part-timers.

If 8, 9, 10 percent absenteeism rates are accurate, and I believe they are, then that translates into a significant amount of additional hours. Because again, the absenteeism rates we're talking about are unscheduled absences. It's not holidays. It's not vacation time. It's not scheduled days off.

These are additional unscheduled absences that CTA cannot predict. So in which case, because of the philosophy of putting as much work on the street as we can, we're not in the business of cancelling work. Our riding public and our passengers expect that that bus is going to be there when it's scheduled to be there.

So cancelling the work is really not a viable option from our business perspective. If you want your bus there in the middle of winter at 6:00 a.m. so you can get to work, you don't want it not to be there and then have to wait 8, 10, 12, 15 or 20 minutes for the following bus. So it's

imperative that our services be on the street when it's supposed to be and where It's supposed to be as scheduled. (Tr. 124-25)

Thus, the practice of allowing the part-time bus operators to work more than 32 hours has been a wide-spread and longstanding past practice as part of an effort by the CTA to alleviate chronic and excessive absenteeism by its full-time bus operators. This was further confirmed by the testimony of Swopes and the former CTA Chief Operating Officer William Mooney ("Mooney"). (Tr. 96, 155-56)

C. The Union's Knowledge of and Agreement to the CTA's Use of Part-Time Bus Operators in Excess of 32 Hours Per Week

The evidence is unequivocal that the Union has had knowledge that part-time bus operators regularly work in excess of 32 hours per week. The Union's Recording Secretary and Chief Grievance Officer from July 2005 through September 2011, Michael Simmons, testified on direct examination that the Union was well aware that part-time bus operators regularly worked over 32 hours:

Q. Prior to 2010, was the union aware that the CTA routinely violated the 32-hour prohibition?

A. Yes.

Q. How would the union be aware of that?

A. The executive board members would inform us that there were part-time bus operators being scheduled more than 32 hours, or were working more than 32 hours. (Tr. 198) (emphasis added)

* * *

Q. You said that the union has been complaining about PTBO's working more than 32 hours a week for a long time?

A. At least during the time I was there.

Q. How long was that?

A. I was the recording secretary from 2005 up until September of 2011. (Tr. 215)

Further, there is documentary evidence that the Union was advised in writing by the CTA as early as 1988 that there were part-time bus operators working in excess of the then 30 hours per week set forth in the collective bargaining at that time. (Er. Ex. 5) In addition, pursuant to his request, Local 241's President and Business Agent Isaiah Thomas, received monthly reports on part-time operators working over 30 hours for the entire 1990 year. (Er. Ex. 6) Similarly, in 1990-1993 the CTA notified the Union that part-time bus operators were working in excess of 32 hours per week. (Er. Ex. 7).

The documentary evidence is also consistent with a number of conversations that Mooney had with Union officials. During Mooney's tenure as the Vice President of Bus Operations and the Chief Operating Officer, he regularly met with Union officials. (Tr. 156) With respect to part-time bus operator hours, Mooney's discussions with the Union officials during these meetings included the following (emphasis supplied):

And of course with that relief and with the whole attendance issue, it came up in terms of hours that part-timers worked. And periodically the union presidents or the trustee would come to me to tell me that there was a part-timer who was working an inordinate number of hours. And by that what was being discussed was not really other the contractual limit, it was that they were working a significant amount of time much more than other part-timers.

And one of the issues that both **the two presidents** I dealt with **and the trustee and I** had talked about and **had agreed upon** is they wanted to make sure that first and foremost that part-timers, if they were working over the contractual limit, would only get that work if full-timers who had asked for work and were in the workbook were assigned work. And secondly, that if then we were assigning work to part-timers, that first off, we would only assign it to part-timers who wanted to work; and secondly, that we would assign it as fairly and as evenly, and so that you do not have a part-timer who got more than their fair share of work.

And periodically, they would bring up a part-timer who was getting more than their fair share, and they would normally tell me about a relationship either with a clerk or a manager who they felt was the reason that that work – that that part-timer was getting more than their fair share. (Tr. 161-62)

Specifically, Mooney testified that he discussed these issues with the President of Local 241, Isaiah Thomas ("Thomas"), in approximately 1998, 1999 or 2000, and, at that time, Mooney explained to Thomas that the CTA could not limit hours until absenteeism was under control. (Tr. 166-67) Mooney further explained:

Called in absent or didn't call in. But to a large extent that – you know, and that work needed to be filled. And unless we could find a full-timer who was sitting in the train room, the ready room to do that work, oftentimes you had part-timers in between pieces of work who are more than willing and able to be able to fill that work, and that was one of the ways the part-timers gained hours.

The other way part-timers gained hours in excess of the contract was as we went towards the week's close and you have a part-timer with maybe – and I'll use a 30 hours mandate just to be – you know, for the point of an example. And you had a part-timer with 24 or 25 hours, and you got a full run open, that you either could give the part-timer a piece of that work and then take the rest of that work off the street, or you could give the part-timer the full work and so that the work would be delivered and the service would be provided.

After the discussion, Mr. Thomas said, well, the real issue was he wanted to make sure that the full-timers who had put in for the workbook were getting work if work was going to be done. The full-timers would get priority of extra work over part-timers. And that if there was still work to do, that certainly 241 did not want the citizens of Chicago to be denied service. And if there was part-timers there who were willing to do the work, they were very willing to let the part-timers do that work. (Tr. 168-69)

Similarly, in early 2002, Mooney met with Lee Robinson ("Robinson"):

We got on the issue of part-timers and their assignments. I went through the issue of how I would hope that we could deal with part-timers, and that we would deal with part-timers is assign them up to the contractual limit. And if for them to get their last piece of work it took them over the contractual limit, that the union would understand that....

You know, that if there was work to be done in excess of that, that we would go to the workbook first and make sure that all full-timers got the work.

There was an issue that was going on at that time that sometimes full-timers put into the workbook that they only wanted to work particular runs

or particular times, and I said that really is not going to work for me. That if a part-timer wants to work on their day off or wants to work a second piece of work on their scheduled day, it had to be allowed to be the clerk and the management – the assignment clerk and the management to be able to determine what was the effective piece of work for that.

And then if there was any other work, that I would hope that that work would be filled – would be able to be filled by the part-timers so that all work could be filled.

And Mr. Robinson said that he agreed with that proposal. That his concern was that the work would be equitably distributed, and that there would be no – nothing unfair where somebody got benefit of the doubt. (Tr. 171-72)

Mooney also testified to discussions about part-time work that he had with the International Vice President and Trustee of Local 241, Rodney Richmond (“Richmond”), and they “went over how [Mooney] had an agreement with Lee, a verbal agreement with Lee to do it and went through how it was done.” (Tr. 175) He had a conversation with President of Local 241, Darrell Jefferson, to the same effect. (Tr. 177-78)

In addition, the testimony is also clear that, even at the garage level, the Union had knowledge of this practice.

Usually each garage has two Union representatives. (Tr. 88) These Union representatives are bus operators who participate in the disciplinary hearings and other processes at the garage that their members get involved in with management, including the filing of grievances. (Tr. 88, 91) Every two weeks the Union representatives at each garage receive a payroll summary, referred to as the big book, which summarizes all of the pay that each employee assigned to that particular garage receives in a two-week period. (Tr. 89, 181-83; Er. Ex. 8) From these payroll summaries, a Union representative could determine the hours that each part-time bus operator worked during the previous payroll period. (Tr. 90)

Further, as discussed above, once the Extra Board has been exhausted, and the scheduling clerks have gone through the workbook, part-time bus operators may be assigned to open work by the scheduling clerks. (Tr. 86-87; Er. Ex. 10) The scheduling clerks all belong to the Union. (Tr. 87) Similarly, if there is an open run in the schedule, those open runs are usually left open at the window, meaning that "it will be up to the window clerk the next day to try to find someone to plug into that open piece of work." (Tr. 104) The window clerks also belong to the Union. (Tr. 104)

Notwithstanding the aforesaid knowledge, and until the instant grievances, the Union filed only one grievance relating to the 32-hour rule, which was the individual grievance for PTBO Ira Bell on August 5, 1998 (Union Ex. 14), wherein Mr. Bell referenced the violation of the then 30-hour rule in an attempt to be transitioned to a full-time bus operator under Section 3.6I(K) of the CBA. There was no testimony adduced relating to this grievance other than that it was settled by transitioning him to FTBO status. (Tr. 210) This was the only grievance which affected all part-timers who had more seniority than Bell. (Tr. 208-209, 215)

Q. And you were here for the testimony of Mr. Mooney, correct?

* * *

Q. And would you agree that you were – were you involved in any of the discussions between Mr. Mooney and Mr. Jefferson regarding part-time hours?

A. Yes.

Q. And how often would you have discussions about part-time hours?

A. Every opportunity we got.

Q. Why?

A. Because it was a problem across the system where part-time bus operators were being scheduled or working more than 32 hours a week.

And our position was for the CTA to transition part-time bus operators to full-time and/or hire more bus operators.

D. The February 7, 2010 Layoffs and Opinion and Award of Arbitrator Edwin Benn

Effective February 7, 2010, the CTA laid off 1,019 union employees. (Er. Ex. 2 at 3) Although the Unions grieved the layoff, it did not contest the propriety of the layoff decision. (Er. Ex. 2 at 3) The Union contended that the CTA violated the (Tr. 212) seniority provisions of the Agreement by laying off employees with seniority “while temporary employees with no seniority and part-time employees, as well as employees with less seniority are being retained; and bumping rights based upon seniority must be afforded to those employees who will be laid off.” (Er. Ex. 2 at 4)

On February 3, 2010, Arbitrator Benn issued his Opinion and Award, which rejected the Unions’ position that for the employees impacted by the layoff, part-time and temporary employees must be laid off before full-time permanent employees (Er. Ex. 2 at 18-21).

By arguing that part-time employees must be laid off before full-time permanent employees who were hired after January 1, 1999, the Unions are now seeking from me in this arbitration precisely what they were unable to obtain from the CTA at the bargaining table during negotiations following the Healy clarification. I do not have the authority to give that to them.² (Er. Ex. 2 at 19)

The Unions argue that the Healy clarification should not be dispositive because “... Healy did not decide, and could certainly not have foreseen that CTA would seize on his words to create a class of ‘super senior’ part-time employee who do not accrue seniority under the Agreement, but nonetheless, remain immune from layoff while full time permanent employees are thrown out of work. The problem is that the Unions unsuccessfully tried to change the Healy clarification, but over the years

² This is not a situation where a party makes a proposal during negotiations to clarify a right it already has and the proposal should not be used to demonstrate bargaining history contrary to that existing right. See Tr. 44-46. The Unions have not pointed to any language or *bona fide* past practice establishing the requirement that part-time and temporary employees must be laid off before the full-time employees who are targeted for layoff in this case. (Er. Ex. 2 at 19) (Footnote in original text of Benn Arbitration Award)

only got the date changed in Section 3.6 I(O) from December 1, 1985 to January 1, 1999 for protection of full-time employees from layoff against part-time employees and (with the exception of the date change) that language has been carried forward in the parties' Agreements. If there has been a creation of a "super senior' part-time employee" as the Unions assert, the Agreement is the creator of that employee. (Er. Ex. 2 at 20)

* * *

In Section 3.6 I(O), the parties very clearly established layoff protection for only certain full-time employees versus part-time employees – "[n]o full-time employee on the payroll as of January 1, 1999 shall be laid off until all part-time employees are laid off." ... Because no full-time employees targeted for layoff were on the payroll before January 1, 1999, ... [t]he full-time employees targeted for layoff are not protected against part-time employees or temporary employees. (Er. Ex. 2 at 20-21)

Arbitrator Benn further found that the laid off employees had no bumping rights under the clear language of the CBA, as an inference from the seniority provisions, and under past practice, and concluded as follows:

IV. CONCLUSION

These cases are decided by the meeting of burdens. The Unions have the burden in this case to demonstrate that language in the Agreement has been violated. The Unions' position that the February 7, 2010 layoffs follow only reverse seniority within the respective units represented by Locals 241 and 308; part-time and temporary employees must be laid off before full-time employees; and, assuming the employees are qualified, that if employees are laid off they must be afforded bumping rights on the basis of seniority are not positions supported by language in the Agreement. (Er. Ex. 2 at 23)

Accordingly, there is nothing in the contract or past practices that gave the full-time bus operators any seniority or bumping rights over the temporary or part-time employees, which would include the part-time bus operators who are members of the same union.

E. What the CBA Does Not Provide the Union

As testified to by Mr. Gierut, there is no CBA provision that gives full-time bus operators the right to any hours available to the part-time bus operators in excess of 32 hours, and there is

no past practice of doing this either. (Tr. 126-27) Other than picking rights, there is also no CBA provision that gives full-time bus operators rights to any work over the part-time bus operators. (Tr. 127-28) Further, there is no CBA provision that requires the CTA to reduce the number of part-time bus operators below the 25% allowed by the CBA, and there is no CBA provision that requires the CTA to provide the full-time bus operators with overtime. (Tr. 127-28) Lastly, the CTA has the sole right to determine the size of the workforce, and the CTA also has the sole right to determine the number of employees laid off and recalled from lay off. (Tr. 128)

F. The Grievances

This matter involves five grievances filed after the February 7, 2010 layoff, and during and prior to the expiration of the January 1, 2007 – December 31, 2011 collective bargaining agreement. (Jt. Ex. 1; see Appendix hereto for pertinent provisions) All of the grievances allege the violation of Article 3, Section 3.6 I(L), which states that “Part-time employees in the Local 241 bargaining unit will not work more than thirty-two (32) hours per week except in cases of emergencies or authorized trades.” (Jt. Ex. 1)

The only applicable grievance was filed by Darryle West on February 24, 2010.³ (Tr. 197; Jt. Ex. 2) The West grievance was submitted as a “class action grievance,” and states:

The CTA has violated, & [sic] continues to violate, Article 3.6L [sic] by allowing part-time operators to work more than 32 hours per week.

This grievance is filed on behalf of the operators laid off on February 7, 2010, who should not have been laid off when work is available. The effected employees should be recalled & [sic] made whole, including, but not limited to, for [sic] lost wages, benefits & [sic] pension credits. The Local requests reimbursement of its attorneys’ fees & [sic] costs for the willful & [sic] repeated violations of Article 36. (Jt. Ex. 2)

³ The other four grievances were filed on March 16, 2010 (for two grievances), July 7, 2010, and August 24, 2010, all during and before the expiration of the 2007-2011 CBA.

II. ARGUMENT

A. The Grievances Were Untimely

The Union waived and forfeited its right to grieve any violation of Article 3.6 I (L).⁴ **The Grievance Procedures allow for the filing of a grievance only within thirty (30) calendar days of the event or knowledge thereof. (Article 16, Step 1) In addition, Article 16 expressly states that “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 any grievance unless the time limitations are extended by written agreement of both parties.”** Moreover, the CBA specifically states that the Arbitrators “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.”

First, the CTA reiterates that this known and agreed-to practice dating back over 25+ years, over many collective bargaining agreements, and which was not grieved during the prior layoffs, should have been grieved long before the instant layoff.

Second, there was no evidence adduced as to any evidentiary circumstances or past practice waiving these time limitations.

Third, as to the “layoff grievances,” only the West grievance, which was the only grievance characterized as a “class grievance,” was filed within thirty (30) days from the February 7, 2010 layoff.

Fourth, in fact, except for one individual grievance over all the years protesting their having to work over 30/32 hours for personal reasons, as the testimony clearly established, it was

⁴ The pertinent provisions of the 2007-2011 collective bargaining agreement (“CBA”) are set forth in the Appendix hereto.

never the hours in excess of 20/30/32 that were even at issue. The Union only wanted the excess hours equitably distributed and to avoid favoritism.

B. The Metropolitan Transit Authority Act Required The Denial Of The Grievances

The Metropolitan Transit Authority Act (70 ILCS 3605/1, et seq.), provides that: "The collective bargaining agreement may not include a prohibition on the use of part-time operators on any service operated by or funded by the Board, except where prohibited by federal law." (70 ILCS 3605/28a(b)(3)) Significantly, this Act is only one of two laws expressly excluded from the "supremacy clause" contained in Section 15 of the Illinois Public Labor Relations Act. (5 ILCS 315/15) Accordingly, since the Arbitration Award and remedy contained therein in essence and effect constitute "a prohibition on the use of part-time operators," the Award and remedy are contrary to law and the public policy thereof.

C. The Grievances Should Have Been Denied on the Merits

1. The Union Has The Burden of Proof

In that this is a contract interpretation dispute, the Union has the burden to demonstrate a violation of the relevant contractual language in the collective bargaining agreement. *The Common Law of the Workplace* (BNA, 2nd ed.), 55 ("In a contract interpretation case, the union is ordinarily seeking to show that the employer violated the agreement by some action it took; the union then has the burden of proof"); *Tenneco Oil Co.*, 44 LA 1121, 1122 (Merrill, 1965) (in a contract case, ... "[t]he Union has the burden of proof to establish the facts necessary to make out its claim.")

2. The CBA Should Have Been Interpreted Applying The Past Practices and Management Rights Provisions *In Pari Materia*

The Union obtained an Award of millions dollars based upon a 25+ years past practice that was not only known and acquiesced in, but agreed to by the Union through many successive

collective bargaining agreements. Significantly, in addition to the 32-hour rule provision, all of these collective bargaining agreements contained the following maintenance of standards provision: **“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.”** In addition, the CBA contains the following Management Rights provision: **“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.”** The CTA respectfully submits that under this CBA there are three conflicting contractual provisions creating a latent ambiguity as to the intent of the parties, viz., the PTBO 32-Hour provision, the Past Practices provision, and the Management Rights provision, which, in this case, not only allows, but requires the consideration of long-standing past practices. The independent Arbitrator ignored the latter two of these provisions by allowing the Union to disregard the working conditions “during the term of the Agreement” merely by filing a grievance during and prior to the expiration of the term of the CBA. The independent Arbitrator should not have subtracted or amended these provisions mid-term simply because the Union no longer desired to adhere to its contractual obligations thereunder.

Moreover, the past practice provision does not, as others commonly do, limit the present working conditions to those terms and conditions not contained in the written agreement. In addition, even the “zipper” clauses have been modified to provide that “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 Board of Arbitration.” (Section 20.2)

Determinatively, there is no contractual requirement that the changes, revisions or amendments be in writing, much less the standard language requiring a writing approved by the parties. Moreover, the Sole Agreement provisions expressly provide that this “written agreement and documents attached hereto ... constitute the entire ‘written’ Agreement between the parties, with the exception of settlement agreements.” (Section 20.5)

Accordingly, the CTA respectfully submits that the independent Arbitrator, in not interpreting the document *in pari materia* and as a whole and not giving effect to all provisions, and, in particular, the past practices and management rights provisions, improperly acquiesced to the Union’s unilateral request to substantially impair the CTA in the exercise of its management rights by not adhering to a long-standing and past practice and working condition during the term of the CBA, which allowed the PTBOs to work in excess of 32 hours in order to enable the CTA to operate efficiently in providing service to its approximately 1.6 million customers daily.

In addition and/or alternatively, the CTA respectfully submits that the independent Arbitrator should have determined, at the very least, that the above contractual provisions, *viz.*, the PTBO 32-Hour provision, the Past Practices provision, and the Management Rights provision, created a latent ambiguity, which not only allowed, but required resolution by the consideration of long-standing past practices and/or the oral agreement of the parties. (See Argument B(3) below)

3. The CBA Should Have Been Interpreted Applying Long-standing Past Practices And/Or The Oral Argument Of The Parties

There is a well-established, long-standing past practice, which dates back to at least the 1985 CBA, whereby the Union Local 241 has knowingly acquiesced and agreed to the practice of PTBOs working in excess of the 32-hour provision. In fact, prior to the 2010 layoff, except for one individual grievance in 1998, the Union did not grieve the PTBOs working in excess of

32 hours, and, in fact, tacitly acquiesced and orally agreed to the past practice. The fact that a layoff occurred does not change the CBA, or its application in these circumstances.

Arbitrators and courts have relied upon long-standing past practices in construing collective bargaining agreements where a party has knowledge of the practice (as here), and has acquiesced in that practice (as here) for a substantial period of time (as here), or, even more so, where (as here) the Union had knowledge of the practice and **agreed** thereto notwithstanding the contract, as the **undisputed** testimony of the former Vice President of Bus Operations and Chief Operating Officer Mooney clearly and conclusively established in the case *sub judice*. Moreover, the fact that such acknowledged acquiescence in and agreed acceptance was oral is totally irrelevant in that any contract (except for real estate and those in perpetuity) can be modified orally

The issue of long-standing known past practices modifying collective bargaining agreements was first definitely analyzed by Richard Mittenhal, in his seminal article and presentation regarding Arbitration and Public Policy before the Fourteenth Annual meeting of the National Academy of Arbitrators, entitled "Past Practice and the Arbitration of Collective Bargaining Agreements," (BNA Incorporated, 1961 pp. 30-58), wherein Arbitrator Mittenhal stated, *inter alia*, (emphasis supplied):

As a Separate, Enforceable Condition of Employment

Past practice may serve to clarify, implement, and even amend contract language. But these are not its only functions. Sometimes an established practice is regarded as a distinct and binding condition of employment, one which cannot be changed without the mutual consent of the parties. Its binding quality may arise either from a contract provision which specifically requires the continuance of existing practices or, absent such a provision, from the theory that long-standing practices which have been accepted by the parties become an integral part of the agreement with just as much force as any of its written provisions. (p. 44)

* * *

Thus, the union-management contract includes not just the written provisions stated therein but also the understandings and mutually acceptable practices which have developed over the years. Because the contract is executed in the context of these understandings and practices, the negotiators must be presumed to be fully aware of them and to have relied upon them in striking their bargain. Hence, if a particular practice is not repudiated during negotiations, it may fairly be said that the contract was entered into upon the assumption that this practice would continue in force. **By their silence, the parties have given assent to "existing modes of procedure."** In this way, practices may *by implication* become an integral part of the contract. * * * **The common law of the shop would include, at the very least, long-standing practices in the plant.** (pp. 48-49)

Interestingly, in 1970, Arbitrator Mittenthal had applied this theory to practice in *Evening News Association*, 54 LA 716, 719-20 (Mittenthal, 1970). In siding with the Union, Arbitrator Mittenthal stated (54 LA 719-20) (emphasis supplied):

What an agreement says is one thing; how it is carried out may be quite another. This case involves a situation where an established practice conflicts with a seemingly clear and unambiguous contract provision. Which is to prevail? The union urges the arbitrator to disregard the contract language and adhere to a "long-standing, unbroken mutually accepted practice"; the Publisher urges the arbitrator to disregard this practice and affirm the plain meaning of the contract language.

* * *

The notion that the collective bargaining contract is a "living document" has won wide acceptance. Those responsible for a contract are free to change it any time by adding an entirely new provision, by rewriting an existing clause, or by reinterpreting some section to give it a meaning other than which was originally intended. Grievance settlements also result in understanding as durable as the actual terms of the labor contract. **If a contract is susceptible to change in these ways, it should be equally susceptible to change by reason of practice where the practice represents the joint understanding of the parties.** After all, the only ground for recognizing the modification or amendment of a contract is some mutual agreement. And it can be strongly argued that *the form*⁵ **the agreement takes is not important. Whether it be a formal writing, an oral understanding, or a long-standing practice, so long as**

⁵ The italic of the word "*form*" is in the original.

each is supported by mutuality, the parties have indeed chosen to change their contract.

Thus, it is possible for a modification or amendment of clear contract language to be based on past practice. * * * To state the proposition somewhat differently, **the modification is not justified by practice but rather by the parties' agreement, the existence of which may be inferred from a clear and consistent practice.**

In *Glidden Co.*, 96 LA 195, 197 (Levy, 1990), the Company had retained less senior employees in certain job classifications while laying off more senior employees despite unambiguous contract language requiring strict seniority for over 12 years, claiming that these employees were in classifications that were essential to the safe and efficient operation of the plant. Moreover, the Union (as here) undisputedly had knowledge that strict seniority was not being followed, and (as here) had discussions and agreed to the order of selection for layoff with management. Nor did the Union (as here) file any grievances or voice any objections until the instant grievance, nor (as here) did the Union object, discuss, or make a proposal regarding situation in the negotiation of the successive collective bargaining agreements. Arbitrator Levy concluded that, notwithstanding the clear and unambiguous contractual language, the contract was modified by the past practices and denied the grievance, stating (emphasis supplied):

* * *

However, as with most general principles there are always some exceptions and it appears to me that an exception to the rule that the clear unambiguous contract controls over any past practice is applicable in this case. Past practice of the parties has been held to modify clear and unambiguous contract language when the past practice has existed over a long period, the practice has been clear and unequivocal and the practice has been accepted by both parties. See generally, "How Arbitration Works," Elkouri & Elkouri, 4th ed. pp 455-456. *Hercules Product Inc.*, 81 LA 191, 193 (1983); *Louisiana-Pacific Corp.*, 79 LA 658, 663-664 (1982); *Evening News Assoc.*, 54 LA 716, 719-720 (1970).

* * *

The practice here has been in effect for twelve or more years which I consider to be a long period of time.

* * *

The support of the Union for this past practice is also shown by the fact that the Union did not voice any objections to the practice until the present grievance was filed. Nor did the Union raise the question of layoffs in any of its contract negotiations. In sum, the record supports the conclusion that on this set of facts, the past practice has *modified the contract* language and the Company has not breached the agreement in March 1989 by retaining employees with less seniority than those laid off.

Even if I were to find that the language of Section 25.01 is controlling and past practice is irrelevant, I would not award back pay in this case. The Company has not been a willful breacher acting in disregard of its contractual obligations. The Company was merely following a past practice to which the Union had acquiesced over a long period of time. The Company was encouraged to continue its practice concerning layoffs by the Union's actions and lack of objections. To award back pay in such circumstances would be inequitable. See *Gibson Refrigerator Co.*, 17 LA 313, 318 (1951).

In *Hercules Products, Inc.*, 81 LA 191, 193 (Goodman, 1983), the arbitrator sustained the Union's grievance and awarded the grievants back pay when the Company failed to follow a 13-year past practice modifying the collective bargaining agreement, stating (emphasis supplied):

It is acknowledged that arbitrators generally have no power to add to, subtract from, or modify existing labor agreements. This is especially true when the labor agreement contains specific language to that effect. It is also true that the written language of the contract states that vacation payment will be paid when the employee receives his vacation or just prior to the scheduled vacation time.

The facts are that payments had not been made in accordance with the contract language for more than 13 years. Obviously the Company knew of the practice of paying vacation pay upon request and not when vacation was actually taken. The Company made the payments. In fact the Company knew of this when the current labor agreement was signed after March 1982 and was negotiated after ownership changed. The Union made no attempt to change the language concerning vacation payments. The Union felt there was no need to change the language because after all, the language had existed for many years and was not followed by the Company. There was no reason for the Union to believe that the language would be followed in the future.

The Company did not raise the matter in negotiations. There was no announcement during negotiations that the contract language would be followed. To the contrary. Even in January 1983 Hercules evidently assumed that the matter would continue as it had in the past as Hercules submitted a list of those who had requested payment to the parent Company. Then and only then did the Union find that the payments would not be made as they had in the past. Thus, there was every reason to believe that the contract would not be followed.

Had a past practice been developed? **The tests of a binding past practice are rather simple. One, has the practice existed over an extended period of time so that employees could reasonably expect the outcome? In this case the practice continued for at least 13 years. That is a sufficiently long enough period of time. Two, has the practice been clear and unequivocal? In this case the practice has been followed clearly and without exception. Those who requested payment received payment when requested whether the vacation was taken at the time of the request for vacation payment or not. Third, has the practice been accepted by both parties? The employees requested payment and received it and the Company received the requests and paid the vacation pay. We thus find that the tests have been made. It is clear that the Arbitrator cannot modify the labor agreement. The contract is between the Employer and the Union. They wrote it and they can modify it. Modification usually takes place in a written form. It is also generally accepted in arbitration that the parties may modify the parties by their actions effectively *modified* the written agreement by their actions in a binding past practice. That past practice just as surely *modified* the written agreement as if the parties had executed a signed written document.**

Obviously, past practices may be changed and reliance placed on the contract language when certain conditions are met. Those conditions do not exist in the current matter at issue.

For these reasons, the grievance is sustained.

In *Chicago Meat Authority*, 126 LA 1213, 1218-1219 (2009), Arbitrator Aaron S. Wolff held that the Company did not violate the collective bargaining agreement when it refused to pay sanitation workers the double time required under the unambiguous language of the agreement where the parties had past practices over **19 years** and six collective bargaining agreements of paying these employees time and a half, stating (emphasis supplied):

A central issue in this case is whether §5 of the CBA is ambiguous, the Company saying "yes" and the Union, "No." However, the Arbitrator need not resolve that issue, but will assume that it is clear and unambiguous as the Union contends. Nonetheless, the grievance must be denied because the clearly established past practice that has continued over many years and successive contracts, without grievances, objections or efforts to change it, has resulted in mutual agreement to amend the CBA so as to not require double-time on Sunday under the undisputed facts here.

* * *

The practice, however, "should prevail only if the proofs are sufficiently strong to warrant saying there was in effect *mutual agreement* to the modification." (54 LA at 72) In the case before me, the stipulated facts make clear beyond doubt that there was mutual agreement to the effect that Sanitation workers on their regular Monday to Friday 3rd shift who are asked or scheduled to work an additional shift on Saturday from 10:30 p.m. into Sunday morning were to be paid at time and one-half for all hours so worked, not double-time for hours worked after 12 a.m. on Sundays. Over many years and six collective bargaining agreements, containing the same language in ¶5, the employees so scheduled were never paid double time and no protests were made, no grievances filed and no contract proposals made concerning that manner of payment. The only conclusion I can reach on this record is that there was mutual agreement to that manner of payment resulting in an amendment of the CBA. Accordingly, the grievance must be denied.

In *Village of Romeoville*, 117 LA 1392, 1395-1396 (Goldstein, 2002), Arbitrator Elliott Goldstein, in denying the grievance, held that the Union should not be allowed to "ambush" the Village by suddenly insisting on an interpretation that had not been imposed for 16 years regarding police detectives right to holiday pay, stating (emphasis supplied):

As a general matter, it is true that an arbitrator cannot ignore clear-cut contractual language. It is also true that there is no need for interpretation unless an agreement is ambiguous. Thus, while custom, practice and evidence of contract negotiations are used very frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision which is clear and certain. See, Elkouri & Elkouri, *How Arbitration Works*, Ch. 9 "Standards for Interpreting Contract Language". See also *Kennecott Copper Co., Ray Mines Division*, 70-2 ARB Sec. 8849 (Abernathy, 1970). This principle is

so fundamental that it is applied by arbitrators "even though the results are harsh or contrary to the original expectations of one of the parties." *Dell E. Webb Corp.*, 48 LA 164, 166 (Koven, 1967). See also, *Caribe Circuit Breaker Co.*, 63 LA 161 (Pollock, 1974); *Tribune Star Pub. Co.*, 62 LA 544 (Belshaw, 1974); and *Purex Corporation, Ltd., Turco Products Division*, 70-2 ARB Sec. 8661 (Traynor, 1970).

However, there is an alternative theory, one based on the finding that the disputed contract section was in fact unambiguous. It relies on the canon of contract interpretation that permits, under narrowly defined circumstances, unambiguous contract language to actually be amended by a later, inconsistent practice. See, *Louisiana Pacific Corp.*, 79 LA 658, 664 (Eaton, 1982). As Arbitrator William Eaton suggested in *Louisiana Pacific Corp.*, supra at 664: "In ascertaining the true intent of the parties...the Arbitrator is obliged to follow the most recent expression of intent," which may be "the practice not the written language." See also, *Hercules Products, Inc.*, 81 LA 191, 193 (Goodman, 1983). Under the most liberal principles of contract interpretation overwhelming proof of the scope and duration of the practice in changing a term of the contract is necessary, I note.

Last, I recognize that it has generally been accepted that in order to be considered a mutually binding practice sufficient to amend unambiguous language, a "course of conduct" must meet stringent standards. These standards have been variously expressed, but, in all cases, the evidence must generally establish:

1. **Knowledge:** Both parties must be aware of the nature of the conduct alleged to constitute a practice.
2. **Longevity and Repetition:** The practice must be readily ascertainable over a "reasonable period of time."
3. **Mutuality:** The evidence must establish that "both parties have by their conduct mutually agreed, in effect, to modify or amend the written agreement." *Immigration & Naturalization Service*, 78 LA 842, 847 (Kaplan, 1982) (emphasis in original).

* * *

There is, therefore, on the record sufficient evidence of the Employer's unilateral action inconsistent with the Agreement, and evidence on an explicit mutual prior agreement or understanding to amend the contract through a 16-year past practice, I so hold. Even under the circumstances set forth herein, some arbitrators would find that the language of the Agreement must still control the outcome of

the present grievance. However, all arbitrators would say that the Union is not allowed to ambush the Employer by suddenly insisting on an interpretation of Section 18.8 B. that has not been imposed on the Employer for 16 years. Even if I were to find that the Union is correct, and the language of Section 18.8 B. requires that officers other than those who are normally off on weekends are entitled to holiday pay if they work the Friday before the holiday, the Union is required to give the Employer notice that, after 16 years, it is going to insist that Section 18.8 B. be enforced before it can claim that this Section of the Agreement has been violated and can file an effective grievance, I so hold.

In addition, many other arbitrators have followed the foregoing application of past practice under the appropriate circumstances (as exist in the instant case) to modify or amend "apparently unambiguous language." See F. & E. Elkouri, *How Arbitration Works*, (5th Ed. 1997; Volz & Goggin, Editors), p. 652; F. & E. Elkouri, *How Arbitration Works*, (6th Ed. 2003; A. Ruben, Editor-in-Chief), p. 629; and *The Common Law of the Workplace*, The Views of Arbitrators (BNA, 1998; National Academy of Arbitrators, T. St. Antoine, Ed.), §2.19, pp. 82-83; and *Cook County Hospital*, 117 LA 1025, 1034 (2002).

There are also numerous court decisions which accept this principle. The case of *Matanuska Valley Farmers Coop. Ass'n. v. Monaghan*, 188 F. 2d, 906, C.A. 9 (1951) is an example that illustrates the doctrine. There, the contract specifically provided for two methods of payment to producers. Subsequent to the making of the contract and without any written agreement, the cooperative used a completely different method of payment to pay the producers. The Court upheld this third method of payment and stated:

Since the parties to the contract have in fact followed this method of payment from the outset and have made no attempt to conform to the provisions of paragraph 7, they must be deemed to have modified the written contract by mutual agreement, modify or rescind a contract and adopt in its stead a new agreement. An agreement to change the terms of a contract may be shown by the conduct of the parties, as well as by evidence of an explicit agreement to modify.

* * *

It is noted that “as authority the Court cites Cf. 3 *Williston on Contracts*, sec. 623, n. 6, 1936 ed.; *Restatement Contracts*, sec. 408 (1932); *Whitehurst v. FCX Fruit & Vegetable Service*, 1944, 224 N.C. 628, 32 S.E. 2d 34, 39; *City Messenger & Delivery Co. v. Postal Telegraph Co.*, 1915, 74 Or. 433, 145, p. 657; *Saul v. McIntyre*, 1948, 190 Md. 31.57 A. 2d 272, 274; *Margolys v. Mollenick*, Sup. Ct. N.Y., 1906, N.Y.S. 849.”

Accordingly, based upon the aforesaid arbitral and judicial precedent, and irrespective of whether Section 3.6I(L) is or is not clear and unambiguous, the Arbitrator should have found that, because the evidence clearly and conclusively establishes that over 25+ years and many collective bargaining agreements, the parties were undisputedly aware of the practice and working condition, which, pursuant to Section 13.15 “should remain in effect during the term of this Agreement, unless a desires change is agreed to by the parties,” that both parties mutually agreed, in both practice and by word, to modify the collective bargaining agreement, and denied the grievances in their entirety.

D. The Union Should Have Been Limited To The Stipulated Issues

The “layoff grievances” and the stipulated issues only involve an alleged violation of Section 3.6I(L). Accordingly, stipulated issues were:

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 through the present?

If so, what shall be the appropriate remedy?

Significantly, the parties did NOT stipulate that there were any issues (including remedial issues) relative to the layoff and recall provisions (Section 12.8). Under Section 17.3: “**The authority of the arbitrators shall be limited to the construction and application of the specific terms of this Agreement and or to the matters 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.”

Accordingly, the conversion of these grievances into a remedial award to the FTBOs who were laid off was improper.

E. The Union Failed To Sustain Its Burden Of Proof

The Union in essence again challenged the continued layoff of the Full-Time Bus Operators to the extent the Part-Time Bus Drivers worked in excess of 32 hours, and claiming that the FTBOs should not have been laid off, and, after being laid off should have been recalled to perform all work in excess of 32 hours in lieu of having the PTBOs do that work and, having been laid off and not recalled, then as a remedy they should be compensated for the allegedly lost work that they were purportedly wrongfully deprived of. The independent Arbitrator improperly acquiesced to the Union's demands.

In contract interpretation cases, the party alleging the violation of the contract, has the burden of proving the violation. Here, the Union had several obstacles to overcome in order to prevail. The Union's first obstacle was the Benn Arbitration Opinion and Award, wherein the Union conceded that it could not challenge the decision to layoff, but only which employees were being laid off, and asserted that temporary and part-time employees with no seniority should have been laid off in lieu of its senior Full-Time Bus Operators. Arbitrator Benn concluded that the CTA had the managerial right to determine whether and whom to lay off, and that the Union failed to satisfy its burden to prove a violation of this same collective bargaining agreement. Simply stated, there was nothing in the contract or past practices that gave the FTBOs any seniority or bumping rights over the temporary or part-time employees, which would include the PTBOs (who are members of the same union). This is exactly the same scenario in the instant case, with an additional twist, *i.e.*, here the employees had already been laid off, and,

in a back-door attempt to circumvent both the layoff and management rights language of the CBA and past practices, the Union improperly obtain as a remedy compensation for the FTBOs laid off for any work performed by the PTBOs in excess of 32 hours per week. Here again, the Union obtained in arbitration what it failed to obtain in negotiations, and in the Benn Arbitration.

The trouble with Local 241's argument was that under the CBA, the CTA had the sole and unfettered managerial right to operate its property according to its best judgment (Section 2.6), which would include discretion to determine the size of its workforce, and there is nothing in the CBA that gave these FTBOs protection from being laid-off in lieu of the PTBOs, or any bumping rights on this layoff *vis-à-vis* the PTBOs, nor the right to be recalled, much less any right to a back pay or make whole remedy!

A second obstacle was the language of the CBA itself. First, there has been no alleged violation of the provisions limiting the percentage or number of authorized PTBOs. Section 12.8 expressly authorizes layoffs of FTBOs provided that "there shall be no layoff of any permanent full-time bargaining unit employee who on January 1, 2000 had one (1) or more years of continuous service." In this layoff, no such employees were laid off. Nor does Section 12.8 grant any recall rights, other than "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." Arbitrator Bierig recently decided that the employees laid off in February 2010 had recall rights for three years, but did not rule that the CTA had to recall the laid-off employees if there was work available, whether generally or due to the PTBO's working in excess of the 32-hour limitation. Absent such express contractual provisions, the laid-off employees only had recall rights if the employer hires new employees, and, no right whatsoever to a back pay or make whole remedy.

Moreover, the Union attempted to broaden this language in 1995 to protect all full-time employees from being laid off before all part-time employees are laid off, and for all full-time employees to be recalled before any part-time employees. (Er. Ex. 2 at 19-20) Again, the Union should not have permitted to obtain through arbitration what it failed to attain in negotiations, or in the prior Benn arbitration.

Simply stated, since the instant FTBOs had no bumping rights or recall right to re-employment (even during the three (3) years), they *a fortiori* have no right to any compensation under the CBA for an alleged deprivation thereof. They should not have under the guise of a purported violation of the 32-hour provision been allowed to segway into bumping, or recall, rights(as to which there was no evidence adduced at the arbitration hearing), nor any back pay or a make whole remedy.

Arbitrator Benn's Award also established the law of this workshop with respect to seniority, viz., that the FTBOs have no seniority rights vis-à-vis the PTBOs. Accordingly, even if they were still employed, the FTBOs could not claim such extra hours on the basis of seniority – i.e., the Authority could assign that work to whomever it pleased, including other PTBOs who had not exceeded the 32-hour provision.

However, irrespective of the application and effect of past practice, in this case the unrefuted testimony establishes that the Union not only acquiesced in the practice, through a succession of presidents, trustees and representatives mutually agreed to the continuation thereof. Under such circumstances, arbitrators have enforced agreements as consistently applied and lived under by the parties, as the independent Arbitrator should have done in this case.

F. The Appropriate Remedy, If Any, Should Have Been A Cease And Desist Order

The only appropriate remedy, if any, should have been a cease and desist order for the following reasons. First, the unrebutted evidence adduced at the hearing conclusively established that the Union had knowledge of and agreed to and acquiesced in this 25+ year past practice, which resulted in the Authority's reliance upon the past practice in structuring its entire operations based upon the utilization of PTBOs to work these hours based upon their availability, flexibility, and affordability. Having agreed to and allowed this practice, and not grieving until the layoff, the Union and grievants should not be awarded a windfall and unjust enrichment of millions of unearned dollars.

Second, since the FTBOs did not have any contractual right to the work or compensation for its asserted deprivation, and by reason that, pursuant to longstanding past practices and working conditions (which, pursuant to Section 13.15, "shall remain in effect during the term of this Agreement, unless a desired change is agreed to by the parties."), the PTBOs (who are also members of Local 241) worked and were paid for that work, and the only and most appropriate remedy should have been a cease and desist order.

Third, it is patently unfair to impose any monetary remedy when the Union has allowed and agreed to this past practice of allowing their PTBO members to regularly work in excess of 32 hours since at least 1985 under many successive collective bargaining agreements.

Fourth, this is a public entity operating with public funds, and to have required what, in fact, was a payment for work not performed would be against public policy. Accordingly, for the foregoing reasons, the CTA respectfully submits, that the appropriate remedy should have been a cease and desist order.

Fifth, the make whole and unearned remedy imposed is unjustified, unduly harsh, and punitive (and not corrective) in nature, and that sanctions of this nature should not have been considered, much less imposed until the CTA failed to achieve substantial compliance pursuant to the cease and desist order.

Sixth, the make whole and unearned remedy imposed is contrary to and in violation of Section 28a(b)(3) of the Metropolitan Transit Authority Act. (70 ILCS 3605/1, *et seq.*)

Lastly, the independent Arbitrator failed to correctly calculate and reduce the hours in accordance with the CTA's requested offsets and reductions, for the reasons set forth in the testimony and exhibits submitted thereby.

G. The Arbitration Award And Remedy Do Not Draw Their Essence From The CBA, Are Contrary To Law, Contain Gross Errors Of Fact And Law, And Are Against Public Policy

For all of the foregoing reasons, the Arbitration Award and the remedy provided therein should be vacated and set aside, and the grievances denied in their entirety by reason that they do not draw their essence from the CBA, are contrary to law, contain gross errors of fact and law, and are against public policy. In the alternative, the appropriate remedy, if any, should have been a cease and desist order.

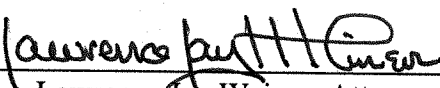
III. CONCLUSION

For the foregoing reasons, the Chicago Transit Authority, dissenting, respectfully submits that the Arbitration Award and remedy therein should be vacated and set aside, and the grievances denied in their entirety. In the alternative, the appropriate remedy, if any, should have been a cease and desist order.

Dated: May 28, 2014

Respectfully submitted,

CHICAGO TRANSIT AUTHORITY

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APPENDIX

PERTINENT CONTRACTUAL 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 full-time 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 Local 241 bargaining unit will not work more than thirty-two (32) hours per week except in cases of emergencies or authorized trades.

* * *

(O) 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 layoff 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

13.8 OVERTIME - REPAIR DEPARTMENT

The Authority will make very reasonable effort to distribute overtime equally rotating among employees in their respective classifications and departments in accordance with seniority.

The Authority agrees to give the employee concerned as much notice of scheduled overtime work as is reasonably possible. The Authority further agrees to make available to the Union at the applicable work location a record of such overtime work for examination by the Union representatives at a mutually convenient time.

* * *

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 matters 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.