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;
	)	Nathaniel Scurlock, Grv. No. 10-188;
and	)	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 <u>one</u> 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 <u>only</u> 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 crating 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)