IN THE MATTER IN ARBITRATION BEFORE
ARBITRATOR RICHARD R. RICE

AMALGAMATED TRANSIT UNION, LOCAL 1287,	)	
Union / Grievant,	)	**OPINION AND AWARD: April 5, 2006**
v.	)	FMCS No.: **05-05872**
	)	ISSUE: **Byers Arbitration**
KANSAS CITY AREA TRANSPORTATION AUTHORITY,	)	
Employer / Respondent.	)	

ARBITRATOR'S OPINION AND AWARD

Arbitration Board:
Richard R. Rice, Esq. - FMCS
Larry Wanbaugh - Maint. Supt. - KCATA
William L. Wilson, President - ATU #1287

Appearances:
Scott A Raisher - ***Jolley Walsh Hurley & Raisher***
Counsel for the Amalgamated Transit Union, Local #1287

Michael F. Delaney - ***Spencer Fane Britt & Browne***
Counsel for the Kansas City Area Transportation Authority

Date and Place of Hearing:
December 6, 2005
KCATA - Kansas City, Missouri

INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement ("CBA") between ATU Local 1287 (hereinafter "Union") and the Kansas City Area Transportation Authority (hereinafter "Employer"). The Union, representing the Grievant, Mr. Kenny Byers (hereinafter "Grievant"), contends that: (1) the Employer unilaterally changed the eligibility criteria for inclusion on the voluntary overtime list for the Day / Night Serviceworker Mark-Out Hostler position *without* notifying the Union in late 2004 as is required by the Contract; (2) the Grievant was qualified for the position and applied in March, 2005; (3) the Employer denied the Grievant's request citing that the Grievant allegedly did not meet the minimum criteria for inclusion on the list; (4) the Employer prior to and subsequent to March, 2005, had included persons with the same or less qualifications than the Grievant; and, (5) upon realization that others similarly situated had been placed on the list, the Grievant timely filed this Grievance.

The Employer contends that: (1) any change in the eligibility criteria for placement on the voluntary overtime list was a "minor refinement" - thus, there was no need to discuss the issue with the Union; (2) Grievant was not eligible for placement on the list since he did not qualify for the position; and (3) the Grievance is untimely as filed.

The Union initiated this arbitration after unsuccessfully resolving the issues raised in the instant Grievance. Following unsuccessful attempts at resolving the grievance, it was referred to arbitration in accordance with the CBA. Using the services of the Federal Mediation and Conciliation Service, Richard R. Rice was appointed as Arbitrator to conduct a hearing and render a binding arbitration award.

The hearing was held on December 6, 2005, in Kansas City, Missouri. At the hearing, neither party, upon inquiry, raised any issue of procedural or substantive arbitrability. At the commencement of the arbitration, the parties agreed upon the issue. The parties were then afforded the opportunity for examination and cross-examination of witnesses, and for introduction of relevant exhibits. In lieu of closing arguments, the parties submitted Post-Hearing Briefs.

ISSUES[1]

The parties stipulated that the issues to be resolved in the instant arbitration were:

Issue 1: **Whether the Employer violated the CBA by failing to place the Grievant on the voluntary overtime list.**

Issue 2: **In the event the Arbitrator finds in favor of the Grievant, on what date was the Grievant entitled to be placed on the voluntary overtime list?**[2] [3]

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1 Although slightly different in wording, the Parties' statements of the issues are essentially the same. No inference should be made by the arbitrator's choice of wording of the issues.

2 It is the Arbitrator's understanding that the parties desire, in the event the Arbitrator finds in favor of the Union, to resolve the issue of damages between the parties.

3 There appears to be some issue with the timing of the filing of the Grievance. For reasons set forth below, this Arbitrator does not find that to be a valid issue before this Arbitrator.

PERTINENT PROVISIONS OF THE AGREEMENT[4]

Section 1.1 Purposes of Agreement

The purposes of this Agreement are: to assure adequate and dependable local transit service to the public without interruption or impairment by labor disputes or controversies, it being recognized by the parties hereto as a fundamental principle of public utility operation that the public interest is paramount and is not to be adversely affected by any dispute or controversy which may arise hereunder between the parties hereto; to provide procedure for adjustment of all grievances and disputes arising hereunder, including final resort to arbitration if necessary, to recognize the Union as the duly certified collective bargaining agency for the classifications of employees in the collective bargaining unit and to provide for its security; to prescribe the wage rates, hours of work, working conditions and other conditions of employment for said classifications of employees; and to set forth various other provisions relative to the rights, privileges, duties and obligations of the contracting parties hereto and of those affected hereby; all upon the terms and conditions hereinafter stated.

It is recognized by the contracting parties that the welfare of the employees depends upon the welfare of the Authority, which in turn is dependent upon the good will and patronage of the public in the communities served; and, since these mutual advantages can only be gained by giving the highest type of service, the Union agrees to exert every reasonable effort to raise the standard of ability and efficiency of the employees in order that they may have become increasingly proficient in their duties and make the service more desirable and attractive to the public; and the Authority agrees to cooperate in these efforts.

Section 1.4 Past Practices.

A past practice is an agreement either oral or written, to handle a particular factual situation in a given manner. In order for such past practice to exist it must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time.

All Past practice agreements between the parties that have not been reduced to writing and signed by the parties shall be considered void as of July 1, 1979.

No past practices may be established after the execution of this contract unless reduced to writing at the time of the establishment of the practice.

Section 1.5 Employees to Whom Applicable.

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[4] The provisions cited are those cited by the parties and provided as exhibits. While the entire CBA (FY's 2003 - 2005) has been provided (J-1), only those portions cited by the parties are listed. Nevertheless, the Arbitrator has reviewed the entire CBA for additional relevant provisions as they may become applicable. Additionally, the parties have stipulated that J-1 represents the CBA in effect at the time of the relevant conduct that is the subject of this Grievance.

This Agreement hall apply to all present and future employees of the Authority who are within the job classifications set forth in 8.1, 8.3, and 8.4 of this Agreement and to no other employees.

The term "employees", as used in the preceding paragraph of this Section, shall include "probationary" and "temporary" employees as hereinafter in this paragraph defined, except that (a) the death, disability and social welfare insurance provided for in Section 1.22 shall not apply to probationary or temporary employees, and (b) the grievance procedure provided for in Section 1.13 shall not apply to probationary or temporary employees upon discharge or suspension, nor shall said grievance procedure apply to such employees when discipline other than suspension is imposed unless it is claimed that such other discipline violates any other provision of this Agreement.

The term "probationary employees", as used herein, shall mean those who have not completed the probationary periods prescribed by their respective Department Directors and been accepted by the Authority for permanent employment. All probationary periods shall be forty-four (44) complete days actually worked in all Seniority Units. The probationary period for a bus operator begins when he receives his badge. No employee shall be allowed to bid a job during his probationary period.

Part-time employees who have completed the required probationary periods as provided for in this Agreement, shall not be deemed as probationary employees when they attain full-time status except as provided for in Sections 3.19, 4.8 and 7.7.

The term "temporary employees", as used herein, shall mean those who are hired for a maximum of ninety (90) days, whereupon they must either become permanent employees or be released; and it is understood that when such temporary employees are hired it will be with a definite job or program in mind and that they will be assigned in good faith thereto and will be used on that program exclusively while weather or operating conditions permit and will only be assigned to other work then weather interferes with said definite job or program or when such action is required in good faith for proper operations. Such temporary employees shall not be so used as to deprive permanent employees of normal work or to result in layoffs of permanent employees.

The Union shall be notified when a temporary employee is hired. Such notification shall include the specific job that will be assigned and the date of hire.

After ninety (90) days of temporary employment, the Authority must confer with the Union for job extensions. After ninety (90) days of temporary employment, the temporary help must be removed from the position and not allowed to work at that position for at least thirty (30) days, except when necessary to avoid unreasonable hardship to the Authority because of an unexpected delay in the return of the permanent employee.

It was agreed to delete all references to Collectors throughout the present Agreement. In the event that Collectors are reinstated, the pay differential between Collectors and Bus operators provided for in the November 1, 1973 Agreement will be applied.

Section 1.10 Union Recognition and Security.

The Authority recognizes the Union, during the existence of this Agreement, as the collective bargaining agency for all present and future employees of the Authority who are within the job classifications set forth in Section 8.1, 8.3, and 8.4 of this Agreement and no other employees, and probationary and temporary employees (as defined in, and subject to the limitations contained in Section 1.5); but the Union will not include or retain its membership any employee who is appointed to a permanent position conferring the power of discipline in te way of hiring, suspending, or discharging employees under them or any employee who, by promotion or otherwise, comes within a job classification not set forth in Article VII of this Agreement, provided, that if any such exempted employee is demoted to or reclassified into a job classification set forth in Article VII of this Agreement, the employee shall be subject to the Union security provisions hereinafter in this Section contained on the thirtieth day following the effective date of such demotion or reclassification.

All employees for whom the Union is recognized as the collective bargaining agency, as specified in the preceding paragraph of this Section, shall be required, as a condition of employment, to be members of the Union for the duration of this Agreement, subject however, to the following condition: that anyone becoming an employee shall be required to become a member of the Union on the thirtieth day following the beginning of such employment if he has not voluntarily joined prior to such thirtieth day. The "thirtieth day" specified herein shall be computed from the date as of which an employee is entered on the rolls in a job classification set forth in Article VII of this Agreement. (See Sections 3.18, 4.8 and 6.7 of this Agreement.)

Section 1.12 Management - Discipline.

(a) The Union recognizes that the management of the business, including the right to direct the working forces, to prescribe, effectuate and change service and work schedules consistent with and not contrary to any specific provisions contained in this Agreement, to plan and control corporate operations, to introduce new or improved facilities or operating methods, to relieve employees from duty because of lack of available work or for other legitimate reasons, to transfer them, to determine the minimum qualifications of experience, health and physical and mental fitness for any job covered hereby and to appraise the qualifications of any individual therefor, is vested exclusively in the Authority; subject, however to the seniority rules and grievance procedure hereinafter set forth as concerns any employee to whom this Agreement is applicable and who may be relieved from duty or transferred or whose qualifications may be questioned.

The Authority shall have the right to require appropriate medical examinations from time to time by competent doctors in order to maintain adequate and safe standards of service to the public and to minimize employee accidents; provided that any employee to whom this Agreement is

applicable and who may be adversely affected in his position or earnings as a result of any adverse medical report by an Authority doctor shall have the right to present as a grievance, for action in accordance with the grievance procedure hereinafter set forth in Section 1.13, the question of his physical or mental fitness.

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with r limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplines, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth, the question whether he has been discharged or disciplined for just cause; but neither (a) the appointment promotion, demotion, discharge or discipline by the Authority of any individual to or in any official, supervisory or other classification excluded from the collective bargaining unit of employees to which this Agreement is applicable, nor (b) the retention in service, discharge or suspension by the Authority of a probationary or temporary employee (as defined in Section 1.5), shall present a grievance hereunder or be subject to the provisions hereof, and the Authority's action in relation thereto shall be final; nor shall any other discipline imposed upon a probationary or temporary employee present a grievance hereunder or be subject to the provisions hereof unless it is claimed that the discipline thus imposed violates any other provision of this Agreement.

(c) The Union covenants that its members shall render faithful service in their respective positions and will cooperate with the management in the efficient operation of the business and in fostering friendly relations between the Authority and the general public; that they will be courteous to passengers and to other with whom they come in official contact; that they will at all times seek to protect the property of the Authority from injury at their own hands or at the hands of other: that, in the handling of equipment and other property of the Authority, they will at all times comply to the best of their ability with the rules of the Authority and with the applicable Federal, State and Municipal laws, ordinances, regulations and orders, and will make every effort to prevent injury to property and person; and that upon the handling of funds or fares or other wrongful practices, the Union will assist the Authority in eliminating such malpractices.

(d) Suspension means a total cessation of work and pay for the calendar days specified. Suspensions shall not deprive employees of Holiday pay for which they are otherwise qualified.

(e) Warning slips may remain in an employee's file but shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is warranted.

(f) Employees shall cooperate with the Management upon call in all matters of mutual interest, but no employee to whom this Agreement is applicable shall be called before an official in connection with the investigation of a matter which may involve his discharge, suspension or other discipline unless so called within four (4) weeks (Saturdays, Sundays, and holidays excepted) in cases of alleged misappropriation of fare or other property, and within ten (10) working days, Monday through Friday, except holidays, in other cases, after notice of the alleged offense has come

to the attention of management; and if the employee is discharged suspended or otherwise disciplines as a result of such investigation and believes himself to be aggrieved thereby, he shall have the right to proceed before his superintendent, Lead Foreman, Manager or Director when none of the others exist, under the grievance procedure set forth in Section 1.13, by presenting the matter to the appropriate official within seven (7) days (Saturdays, Sundays and holidays excepted) after such disciplinary action.

(g) If, after discussion with the employee, it is evident disciplinary action is indicated, the employee will be told to contact a Union representative before finalization of the disciplinary action. It is understood that the employee has the right to waive Union representation if he so desires.

(h) Employees shall be called in and notified in writing of any disciplinary actions placed in the employee's record.. Customer complaints that have not been investigated and verified shall not be used as a basis for disciplinary action.

(I) An employee who is suspended will not be permitted to return to work until all suspension time has been served. The days of suspension will be consecutive unless interrupted by assigned day(s) off or otherwise specified in an agreement between the Union and Management.

Section 1.13 Grievances.

Any employee to whom this Agreement is applicable and who claims to be aggrieved by any action of the Authority or its officials, whether occasioned by discharge, suspension or other discipline or whether because of alleged unjust treatment or failure to apply to him any of the benefits of this Agreement to which he believes himself entitled, may proceed I accordance with the following grievance procedure (except that when an employee has been discharged, suspended or otherwise disciplined after an investigation under the final paragraph of the preceding Section hereof, he may go directly to his Superintendent, Lead Foreman, Manager or Director when none of the others exist, as in Section 1.12(f) provided). Saturdays, Sundays and holidays will not be considered in computing the time in the following steps.

1. The Employee, or his accredited Union representative, shall personally and informally present the alleged grievance to the Dispatcher, Foreman or other official immediately superior to him in rank, within seven (7) days after same has come to his attention, otherwise it shall not be considered; and, in presenting such alleged grievance, the Employee may be accompanied by a duly accredited representative of the Union if he so desires; and if such alleged grievance is presented in time and is not adjusted to his satisfaction within two (2) days thereafter; then

2. The Employee shall present his alleged grievance in writing on the proper grievance for, either individually or through a duly accredited representative of the Union, to his Superintendent, Lead Foreman, Manager or the Director at a time to be agreed upon the latter, when none of the others exist, within five (5) days after his immediate superior has acted or should have acted. If not adjusted in writing to his satisfaction within five (5) days after presentation, then

3. The Employee may appeal to the Director, or his designated representative by filing therewith, individually or through a duly accredited representative of the Union and within five (5) days after the superintendent, Lead Foreman or Manager has acted or should have acted, a complaint in writing, setting forth the alleged grievance and stating the action of the Superintendent, Lead Foreman or Manager; whereupon the Director or his designated representative, shall set the case down for a hearing at a specified place, date and time not more than seven (7) days ther4eafter, giving at least two (2) days' notice thereof to the Employee or his representative, and shall render a decision thereon in writing and deliver copied thereof to the Employee and to the President of the Union within five (5) days after the close of the hearing. The third step of the grievance procedure will be held either during working hours or immediately preceding, or immediately following the Employee's run or shift. If held during nonworking hours and the grievance is upheld, the grievant will be paid up to one-half (½) hour at his regular hourly rate.

4. If the Director's decision is not satisfactory, then the dispute may be referred to arbitration by the Unio by delivering a notice of intent to arbitrate to the Deputy General Manager within five (5) days of the Union's receipt of his decision. Arbitration shall be invoked only by the Union and, if it is not, the dispute shall be resolved according to the last answer in the grievance procedure. The Union may intervene and participate in the handling of a grievance or dispute at any lever of the grievance procedure and no settlement may be reached between the Authority and an employee at Step 2 or above without the Union's knowledge and approval. The Union and Authority may be mutually agree to settle, compromise, dismiss or resolve any dispute, disagreement, claim, controversy or problem at any time or at any grievance step before the Arbitration Board issues its final and binding decision. The matter may be submitted to regular or expedited arbitration. Expedited arbitration must be by mutual consent.

(a) Expedited Arbitration. To invoke expedited arbitration the Union must serve written notice upon the Authority within five (5) working days of the Director's decision stating its intention to invoke the expedited arbitration procedure. All time limits concerning expedited arbitration may be changed or modified in a particular case by the express mutual agreement of the parties.

The Authority and the Union shall attempt to have drawn up and ready for selection, a list of mutually acceptable arbitrators who may be contacted directly for the expedited arbitration. Should this not have been done, or should no arbitrator on the list be available, and should the parties within twenty-four (24) hours be unable to agree upon an arbitrator, they shall immediately contact the office of the American Arbitration Association to request the first available arbitrator who can hear the case.

In the event of death, disability, or subsequent unavailability of the selected or designated arbitrator proceedings shall be held at the Authority property or such other place as designated by the arbitrator within the time limits prescribed in this provision, the parties shall select another arbitrator within twenty-four (24) hours, and, failing such mutual

selection within two (2) days, either party may request that the American Arbitration Association make a designation of an available arbitrator.

The arbitrator shall hold an arbitration hearing as expeditiously as possible, but in no event later than forty-eight (48) hours after receipt of said notice. The decision of the arbitrator shall issue forthwith and in no event later than twenty-four (24) hours after the conclusion of the hearing. The arbitrator's written opinion will follow within fifteen (15) days. The arbitrator's decision shall be final and binding on the Authority and grievant.

The arbitration proceedings shall be held at the Authority property or such other place as designated by the arbitrator or agreed upon by the parties.

(b) Regular Arbitration. Each party shall within five (5) days of the Union's notice of intent to arbitrate, appoint a member of said Arbitration Board and deliver written notice thereof to the other party, or otherwise forfeit its case. The two (2) members thus appointed shall forthwith proceed to select an additional member of the Board (who shall be an impartial and disinterested person; but should the two (2) members first selected fail to agree upon the other member within ten (10) days after being appointed, they shall request the American Arbitration Association to furnish a list of seven (7) member of the National Academy of Arbitration or a list of seven (7) arbitrators from the Federal Mediation and Conciliation Services, at the discretion of the party initiating arbitration, from which the third member shall be selected. Withing five (5) days after receipt of such a list, the two (2) members shall determine by lot the order of elimination, and thereafter each shall in that order alternately eliminate one name until only on name remains. The remaining person the list shall be third member of the Arbitration Board. Any vacancy in the Arbitration Board shall be filled in like manner as the predecessor member was selected. Multiple grievances may be submitted to the same arbitrator only if they arise out of the same factual situation, involved the same contract clause or work rul, or with the consent of the parties.

The Arbitration Board as thus constituted shall promptly proceed to hear the case and render a decision thereon and the decision of a majority thereof shall be final; provided, that the party appealing to the Arbitration Board shall bring the case on for hearing within ninety (90) days after the third member has been appointed, unless extended by mutual agreement, else the appeal shall be deemed abandoned and the case closed. The Arbitration Board shall make every reasonable effort to render its decision within thirty (30) days from the date of the completion of the hearing in the proceedings, or within such longer period as the parties to the proceedings may mutually agree upon in writing. All decisions of the Arbitration Board shall be in writing in triplicate, signed by at least one majority thereof, and the originals thereof shall be filed with the Authority, the employee and the Union.

5. All costs for the hearing and the service of the arbitrator shall be borne by the parties jointly. Each party will bear the expense of its representatives and for the presentation f its own case.

6. In the aforesaid first step of the grievance procedure the Employee may be requested to be present. In the aforesaid subsequent three (3) steps, or any thereof, he shall have the right to be present if he so desires, and he shall be present in person f he or his representative is so requested by the official of the Authority conducting the hearing or the party representing the Authority before the Arbitration Board (as the case may be).

7. When a case is submitted to an Arbitration Board, the Authority and the employee involved (or his representative) shall jointly present a statement in writing of the specific issue or issues to be decided, based upon the record before the Department Director (or his designated representative) and the Arbitration board shall confine its decision to the issue or issues so presented; and no such Arbitration Board shall be authorized to deal with wage, hours of service or working condition controversies of a general nature but shall be limited to considering and acting upon individual grievances as hereinbefore provided. If the parties cannot agree upon such a joint statement, each party may submit a written statement of the specific issue or issues believed by it to be involved, subject to written objection by the other party, and from such statements, objections and the record before the Department Director (or his designated representative) the Arbitration Board shall determine the specific issue or issues before it and notify each party thereof in writing at the start of the case.

8. The expense of each proceeding before an Arbitration Board, including reasonable compensation to the impartial and disinterested member, shall be equally divided between the parties, except that each party shall bear the expense of the member selected by it, its witnesses and the production of its evidence; and, in any grievance proceeding before an official of the Authority or an Arbitration Board, each party may present such witnesses and evidence as it deems material to the issue or issues involved and shall bear the expense thereof.

9. If, as concerns any grievance presented, the decision of the immediate superior official, Superintendent, Lead Foreman, Manager or the Director when none of the others exist, the Department Director or Arbitration Board, or any of them, shall sustain the position of the employee, the latter shall be awarded such remedy as the Arbitrator shall determine, less any interim earnings or unemployment compensation.

Section 3.5 Extra Work.

(a) Completion f Piece of Work at End of Shift. An employee working on his regularly assigned work day on an assignment of work at the end of his regular shift, and that piece of work is to be continued on overtime that day, shall have preference for such overtime over all other employees. Overtime worked in this event shall not affect the employee's position in the rotation of extra work.

(b) Completion of Assignment on Days Off. An employee working on any assignment requiring one or more days to be completed, and to be continued on that employee's regular days off, shall have preference for such overtime. The overtime worked in this event shall not affect the employee's position in the rotation of extra work.

(c) Regular Day Off and Prior to Shift. Extra work, not assigned under the provisions of (a) or (b), will be offered on the basis of seniority and qualifications, and such work will be offered first to employees on their regularly assigned days off on their assigned work shift (where such work will amount to four (4) hours or more). Work of less than four (4) hours duration, prior to the start of a shift, will first be offered to qualified employees, within the job classification, scheduled to work on the shift. Such work will be rotated insofar as reasonably practicable.

(d) Voluntary Extra Work Lists. Extra work not filled in accordance with the above procedure will be offered on the following basis:

1. The Authority will establish voluntary extra work lists (day and night). There will be lists for vehicle Class A Mechanics, Bodymen, Air Conditioning Mechanics, Serviceworkers, Mark-Out Hostlers, Facilities Maintenance Mechanics, Facilities Serviceworker and Stockworkers.

   Upon mutual agreement between Labor and Management, the number of lists may be changed, from time to time.

2. The overtime lists shall be posted at the main time clock area or in the appropriate work area and be brought up to date every day by 12 noon (Saturday, Sunday and holidays excluded). Lists with name changes will be posted the first day of the month.

3. Three (3) consecutive refusals of overtime will be just cause to remove an employee from the overtime list, for that month only.

4. An employee may have his name on the lists (within the appropriate grouping) for which he is eligible. An employee's status on one list will have no bearing on his status on the other list.

   Eligibility will be determined by the employee's holding a job according to the work groups referenced in Section 3.9 (a). The employee may only be on lists included in the same work group and the employee must have held the job to be eligible to work the extra work list.

5. Overtime of less than four (4) hours will not affect an employee's position in extra work rotation.

6. An employee may add to, or remove his name from the overtime list on the first of each month only. The employee must submit his name to his immediate Supervisor

prior to the 25th of the preceding month. Any names removed or added will be placed at the bottom of the list in seniority order.

7. If an employee has been on duty sixteen (16) consecutive hours he will not be eligible for further work until his next regular shift. Any employee who has been on duty sixteen (16) consecutive hours shall be excused, on request, from working any regular shift which begins within eight (8) hours of the completion of sixteen (16) consecutive hours on duty.

   Such employees shall report immediately following the eight (8) hour relief period and work the balance of their regularly scheduled shift. Al overtime and other pay rules shall apply to work performed after the employees scheduled off time, provided that the employee shall forfeit the daily eight (8) hour guarantee for that day.

8. If an employee is working the date and shift an overtime assignment is offered, he will be considered unavailable for the assignment and remain in regular rotation.

9. When called or asked to work overtime the employee will be told what job vacancy he is to work.

(e) In the event that questions arise with regard to any portion of this Section, it is agreed that the President of the Union, or his representative, and the General Manager of the Authority, or his representative, will meet at the request of either party to resolve such questions o a fair and equitable basis for all concerned as soon as possible.

Section 3.9 Seniority Annual Mark-Up.

An annual bid of all jobs in the Maintenance Seniority Unit will be conducted in December of each year, to be effective the first pay period in January, subject to the following provisions:

(a) Bidding must be within the employee's classification. For the sole purpose of the Annual Mark-Up the term "employee's classification" shall mean two (2) groupings of employees which include the following job types:

Group One shall be Class A Mechanics (including Lead Mechanics, Machinist and Welder, Body Mechanics, Plumber, and Building and Grounds), Class B Mechanics, Technician and Technician/Apprentice, Facility Mechanic.

A serviceworker, Facilities Serviceworker, Stockworker and all Leadpersons for group two employees.

(b) Bidders must be pre-qualified to the extent that there would be no testing of the bidders at the time of bidding. To be pre-qualified the bidder will have previously held or will currently be holding a job with the job title and duties bid.

(c)There would be no trial period allowed.

(d) All jobs left unassigned after the Annual Mark-up will be posted and bid according to Section 3.3, Bidding Jobs.

ARGUMENTS OF THE PARTIES

In addition to the timeliness argument mentioned in the statement of Issues above, the Employer's position is that the Grievant's exclusion from the overtime list did not violate the CBA or past practice. The Employer asserts that it can determine the eligibility criteria for the subject position. Additionally, the Employer can act as a "gatekeeper" to those seeking inclusion, if in the Employer's opinion, a member is not sufficiently experienced or trained in the position.

The Union's position was that the Employer had an obligation to bargain with the Union regarding the criteria for the position. The Union, to support this argument, maintains that past practice and prior arbitration awards have declared the Employer must bargain in good faith on this particular point. Additionally the Union asserts the Employer failed in its burden to prove the Grievant was insufficiently experienced for the position.

ISSUE 1 - FACTS & DISCUSSION[5]

The Grievance was the result of the Union's allegation that the Employer had failed to place the Grievant on the voluntary overtime list. There exists procedural misunderstanding between the parties with regard to the timing of the grievance. Both parties appeared at the hearing and announced that there would be no challenges to procedural arbitrability. Although there was some discussion during the hearing on the subject, from the notes and transcripts in the possession of the arbitrator, it appeared as if the employer was not pursuing that issue. (The arbitrator notes that from the Supplement to the brief filed by the Union - the Union was of the same impression. The substance of the Supplement indicates that the Employer did not intend at some point on challenging the grievance on the basis of a timing issue according to earlier correspondence between the parties.) Finally, both parties in framing the Issue(s) for the arbitrator did not raise this issue.

Additionally, at the outset of the arbitration, the parties had agreed upon the Issues and any collateral issues to be resolved between the parties. During the arbitration, a related issue appeared to the arbitrator, that being: *Whether the change in the eligibility requirements for placement on the voluntary overtime list was a mandatory subject of bargaining between the parties.* In fact, at one point the arbitrator had asserted his opinion that it appeared this was actually the issue between the parties rather than the agreed upon Issues stated above. The arbitrator requested the parties research and brief this issue as well. The arbitrator notes that while this issue (and the timing issue above)

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[5] The brief recitation of *some* of the undisputed facts as supported by the evidence and testimony is contained herein. These facts are found in the joint submissions, or the evidence and testimony presented during the hearing. Additionally, some of the *contested* facts are reiterated here as an aid to understanding the Discussion and Award. Not all of the facts are repeated here; only the most relevant or significant facts related to this issue have been summarized.

are discussed in the main body of the parties' briefs - neither party added this as an agreed upon issue.

While the arbitrator's opinion, as written below, contains thoughts on those subjects - it is improper for an arbitrator to issue a ruling on an Issue that is not before the arbitrator. It is well settled that an arbitrator has authority to issue *binding* awards in arbitrations where the issue is carefully framed. Usually an arbitrator's decision and award cannot be appealed *unless the arbitrator exceeds his authority or does not have jurisdiction to issue an award.* Ruling on an issue not properly before an arbitrator exceeds the jurisdiction of the arbitrator.

> Sometimes the parties agree to a statement of the issue during the course of the hearing, when the evidence places the dispute in sharper focus. The arbitrator also may initiate a discussion to clarify the issue and its scope, which could produce a different statement, perhaps worded by the arbitrator and accepted by the parties. . . . The parties may not know precisely what the issue is at the outset of the hearing. Even when they have signed a submission stating the issue, it may be ambiguous and in need of clarification. . . . at some point, the issue to be resolved by the arbitrator must be specifically stated. . . . If a new issue arises at arbitration, an arbitrator ordinarily will refuse to consider the new matter over the objection of the other party. Where a party fails to address, at the hearing, an issue raised in the original grievance, the issue is deemed waived or abandoned and the arbitrator will not consider it.

How Arbitration Works, Sixth Edition, Elkouri & Elkouri, BNA Books, pg. 296 - 298. Additionally:

> The statement of the issue, along with the agreement, defines the jurisdiction of the arbitrator. (§ 1.20). . . . A decision that answers questions not fairly posed in the statement of the issue can be vacated in later court proceedings for going beyond the arbitrator's authority to bind the parties by the award. (Comment to § 1.20). . . . Typically the parties will stipulate . . . to the issue to be decided by the arbitrator. . . . But if no agreement is reached, the arbitration proceeds at the risk of a post hearing attack on the grounds that the resulting award exceeded the jurisdiction of the arbitrator. (Comment to § 1.21).

The Common Law of the Workplace: The Views of Arbitrators, Second Edition, National Academy of Arbitrators, Theodore J. St. Antoine - Editor, BNA Books, pg. 15 - 16.

In the instant case - the issue of timing was raised during the initial stages of the grievance, but *appears* to have been waived by the Employer.[6] The issue of whether the Employer should have notified the Union of the change in eligibility requirements appears to likewise be a non-issue for the arbitrator. Whether this is a mandatory subject of bargaining or not raises an interesting point. The Contract clearly states that the parties should will meet and confer in the "*event that questions arise*" (CBA, § 3.5 (e)). The interesting point is that unless one of the parties is aware of the change, it is unlikely that any "questions" will arise until some event triggers the knowledge of both parties - such as occurred with the Grievant in the instant case.

The purpose and intent of the collective bargaining system is to promote a working environment, supported by contractual language and guarantees, that protects and benefits both parties. Clearly this means that the parties have to know of their respective positions relative to the contract. If the members of the Union do not know what is required to become eligible to join the overtime lists, it is impossible for them to adequately seek redress for any alleged violations of the contract. For the intent of the contract to be enjoyed by both parties, an understanding, after clear communication, of the jobs, duties, descriptions, procedures, etc. need be present. Although the Employer refers to the change in the eligibility requirements as a "*minor refinement*" of the practice already in place - the arbitrator has to question how it was possible that any member of the Union

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6 However - so that the parties do not get the impression that this would have impacted the arbitrator's decision - it would not. The grievance relates to the denial of the Grievant's request to be placed on the voluntary overtime list. The Grievant, and all other parties, testified that the denial was based upon the information at hand at the time of the denial. The grievance arose upon the Grievant's belief that others similarly situated to him were permitted on the overtime list. Upon receipt of this knowledge, the Grievant timely filed a grievance. As is discussed below, since the Employer had not notified the Union of the specific requirements for eligibility for placement on the voluntary overtime list, and since the Employer failed to tell the Grievant that he was eligible for placement on the "Night" list only (which appears to only have been discovered DURING the hearing) - the Grievant properly relied upon the Employer's information as the correct information. Therefore, any argument on the timing of the grievance would have been denied.

would have known about this refinement. (Employer's Brief, pg. 15.) Additionally, it appears from the request of the Grievant and the response from the Employer that the "*refinement*" was a requirement that to be eligible for the overtime list, a member of the Union had to be on one of the job lists already and trained on all three shifts. During the hearing, it appeared as if the Employer was stating that the Grievant could have been on the Night list only since he had been trained on the Night list. However - although pressed on this point, the Employer could not identify if this was a revision to the refinement, or part of the original policy. Additionally, none of this policy had ever been reduced to writing.

The problem is that although there is little or no communication on this subject between the Employer and the Union - and thus, the Employer should hardly be surprised that anyone take issue with knowing the requirements for a position - the Union, upon learning of this problem, has failed to adequately address (through follow-up meetings or through the grievance process) the lack of clearly articulated eligibility requirements for the position. Therefore, it appears to the arbitrator that the Union acquiesced to the Employer's decision making process.

Although there is some discussion in the briefs on both these subjects, any ruling or award on either of these could be subject to attack on appeal. Therefore, the only issue to be decided by the arbitrator and ruled on would be those issues identified above. As a result, the only issue this arbitrator can rule upon is whether the Grievant, as an individual, should have been placed on the voluntary overtime list.

Since the Employer, pursuant to the contract (CBA - § 3.5(d)(1)), maintains the authority to establish the overtime lists, the qualifications for eligibility of those lists, and the frequency in making minor refinements to those lists - it is nearly impossible for an employee to be secure in the

knowledge they are or are not eligible for the list on any given day. While this may, in the arbitrator's humble opinion, violate the spirit of the collective bargaining process - it is still that process that the parties to the instant arbitration have settled upon over time. As a result, the burden, as has been stated frequently before, falls not on the Grievant to show eligibility for inclusion on the list, but rather, upon the Employer to show that the Grievant was not eligible for inclusion on the list.

Both parties agreed that the Grievant did not hold the position by bid, but rather *may* have performed the duties on one (possibly more) shifts. However - it became clear through the hearing and during an examination of the exhibits that the Grievant had not yet held the job by bid as the Employer stated was the criteria necessary for eligibility. Alternatively, the Employer stated that in the absence of holding the job by bid - a successful candidate might demonstrate sufficient proficiency on *all three shifts* before inclusion were a possibility. The Grievant was unable to demonstrate that he was proficient on all three shifts.

On this point a couple of points trouble the arbitrator: First, during the hearing, it seemed as if the Employer was indicating that the Grievant could have been put on the night list, but not all lists. This seems to be a contradiction in the Employer's case; however, as explained above - this also appears to be the decision making process the parties have agreed upon. Second, the Employer included John Williams on the list. The Union argued that Mr. Williams' credentials were the same to the Grievant's, thus, demonstrating the Grievant should have likewise been included on the list. However, the Employer demonstrated that Mr. Williams' situation was different and that Mr. Williams had more experience in general in this area. Nevertheless, the confusion between the difference in both gentlemen (Mr. Williams and the Grievant) only further bolsters the arbitrator's position that the eligibility requirements for any position (regardless of whether it is a negotiated

position or within management's rights) ought to be clearly articulated to prevent the vague, subjective guesswork employed in this case.

Therefore, since the Employer was able to demonstrate that the Grievant, in March 2005, was not eligible for inclusion on the voluntary overtime lists, the arbitrator has no choice but to rule that the Employer *did not* violate the expressed terms of the CBA.[7]

ISSUE 2 - FACTS & DISCUSSION

Since the grievance has already been dismissed above, it would be improper for the arbitrator to issue an Opinion pertaining to the second issue presented by the Parties since that issue is now moot, and any Opinion would not have binding authority.

AWARD

Having heard, read and carefully reviewed the evidence and arguments in this case and in light of the above, the Union's grievance is ***DISMISSED*** since it is clear that the criteria established by the Employer for inclusion on the voluntary overtime list in March 2005, was not met by the experience and training of the Grievant. All other contentions or issues raised by the Parties are, in the opinion of the arbitrator, rendered moot by the above. The arbitrator would note that where the parties do not communicate their respective decisions or issues with one another, an overall weakening of contract results. There should be a free dissemination of information related to the eligibility criteria for any position from the Employer to the Union; and, the Union should freely

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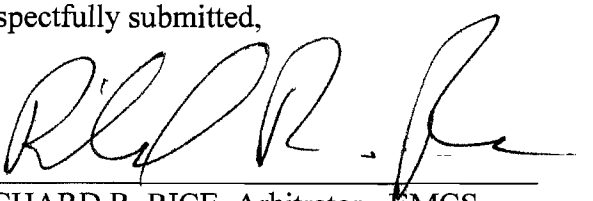
[7] The arbitrator would note that a violation of the spirit of the CBA (implied terms) may be present; however, it is unclear which party bears the majority of the responsibility for *allowing* this situation to continue, especially in light of the fact that prior grievances have touched on this area.

demand to meet and confer with the Employer every time any issue arises - and further secure any understanding in written format.

The arbitrator shall retain jurisdiction for an additional thirty (30) days solely to resolve any disputes related to the imposition of the arbitrator's Award. Should the Union or the Employer advise the arbitrator by telephone or other means of any dispute regarding the remedy directed within thirty (30) days of the date of this Award, the arbitrator's jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If the arbitrator is not advised of the existence of a dispute regarding the remedy directed herein within that time frame, the arbitrator's jurisdiction over this grievance shall then cease.

Dated this **5th** day of **April, 2006**.

Respectfully submitted,



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Certificate of Service

This shall certify that on the 5th day of April, 2005, I mailed copies of the above, first class, postage prepaid, to:

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