ARBITRATION OPINION AND AWARD

BEFORE

ROBERT B. MOBERLY, ARBITRATOR

IN THE MATTER BETWEEN

KANSAS CITY AREA TRANSPORTATION AUTHORITY
Employer

and

AMALGAMATED TRANSIT UNION LOCAL 1287
Union

FMCS Case No. 090401-02112-A
Walker Overtime

REPRESENTATIVES

For the Employer: Jeffrey M. Place, Esq., Littler Mendelson, P.C.

For the Union: Scott A. Raisher, Esq., Jolley Walsh Hurley Raisher & Aubry, P.C.

Pursuant to the contract between the above parties, the undersigned was designated as Arbitrator in the above dispute. An arbitration hearing was conducted in Kansas City, Missouri, on August 25, 2009, at which time the parties were given full opportunity to present evidence and arguments. Both parties submitted post-hearing briefs, the last of which was received on December 11, 2009. Additional material was submitted on December 22, 2009.

ISSUES

Did the Authority violate Article III, Section 3.5 of the Collective Bargaining Agreement (CBA) with respect to Grievant Clint Walker by the manner in which it arranged for voluntary extra work on December 10, 2008, for a shift to be filled on December 11, 2008?

The parties stipulated that there are no procedural objections, and that the matter is properly before the Arbitrator for a final and binding decision.

PERTINENT CONTRACT PROVISIONS

ARTICLE III
Maintenance Seniority Unit

...

Section 3.5. Extra Work.

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

...

8. 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 on a fair and equitable basis for all concerned as soon as possible.

FACTS

Distribution of Overtime Work

The Authority provides mass transit service to the public in the Kansas City area. The Union represents most of its hourly employees.

Article III of the CBA applies to employees in the Maintenance Security Unit, which includes the Vehicle Maintenance, Facilities Maintenance, and Procurement Departments. Section 3.5 establishes a procedure for the distribution of "extra work" among employees in the Unit. Section 3.5(d) provides for "Voluntary Extra Work Lists," wherein eligible employees may sign up on several different lists covering different types of work and shifts. The lists are maintained in the order in which employees sign up. When overtime work is available, the supervisor calls down the list until he has enough volunteers.

Section 3.5(e) states that "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 on a fair and equitable basis for all concerned as soon as possible." Also relevant is a 2001 letter agreement in which the parties agreed to "clarify the methodology used to notify employees of overtime needs," which in turn would "streamline the filling of overtime and maintain a large list of employees who desire to work overtime." The letter agreement states as follows:

> "Only one telephone number, provided by the employee, will be used to call the employee for overtime. An annotation of "Not Available for Overtime" will be automatically applied in the instance of an employee turning down overtime, as well as in the instances of no answer at their phone number, an answering machine pick-up, a busy signal, or a family member stating that the employee is not at home."

Events Leading to The Instant Grievance

Grievant Clint Walker has been employed as a Class "A" service worker in the Vehicle Maintenance Department since 2002. He currently works as a Fueler from 8:00 a.m. to 4:30 p.m., Monday through Friday.

On December 10, 2008, Supervisor Tony Bragulla needed to fill three voluntary overtime assignments from the Night Serviceworker Voluntary Extra Work List for the following day. Grievant was the second person eligible for this work, and had provided his cell phone number. Bragulla testified that he called the number; that Grievant's voicemail answered the call; that he hung up immediately when he recognized Grievant's voicemail message; that he entered "NA" next to Grievant's name on the voluntary overtime list; that he made about seventeen additional calls; and that if he had reached Grievant, he would not have had to call nine other employees in an attempt to fill the overtime assignments. The Authority's call accounting report showed that Bragulla called Grievant's cell phone at 5:42 p.m., and that the call lasted for one second.

Grievant testified that he had his cell phone with him that evening; that it was turned on; that to the best of his knowledge it was working; that to the best of his recollection he was not talking on the phone; that he never received the call from Bragulla; that his phone did not have a ring or other sound indicating an incoming call or message; and that his cell phone did not show any missed call. Grievant's cell phone records, submitted after the arbitration hearing, indicate that Grievant was not on his cell phone at 5:42 p.m. on December 10, but that he made calls both before and after 5:42 p.m.

Grievant filed a grievance on December 23, 2008, stating "on 12/10/08 I was passed for overtime for 12/11/08 on the 5:30-1:30 shift. The remedy I seek is 8 hrs overtime plus 1 hr call out." On December 24, 2008, Superintendent Walt Woodward denied the grievance, stating, "In reviewing the phone record the log shows that on 12/10/08 at 5:42 pm Mr. Walker number was called. It is my belief that we have fulfilled all of our contractual obligations as the record shows Mr. Walker was called." The Union appealed

the denial to Director of Maintenance Ted Stone, who denied the grievance on January 6, 2009. He stated that Grievant's telephone number appeared on the call accounting report; that the parties agreed "that if a voice mail recording answers the phone it is indicative of a no answer;" and the "phone system only records a phone call when the call is completed by someone answering or the voice mail answering the call."

Operation of the Authority's Call Accounting System

Ms. Laura Reeves, the Authorities Information Technology Manager, testified that the Authority's phone system produces reports showing the date, time, duration and number called for each telephone call originating from its land lines. Both parties have relied on these reports in considering grievances regarding voluntary overtime assignments.

At one time, the parties believed that "duration" included time that the phone rang without an answer. This led to a grievance by employee Bryan Jackson, who alleged that the call log showed that "the phone only rang for 6 seconds." Superintendant of Maintenance Jim Clayton granted the grievance on December 3, 2008. Two days later Clayton issued a memorandum to supervisors noting that the grievance was granted because the supervisor only let the phone ring twice before hanging up; that management would establish a protocol to follow when calling for overtime; and that supervisors should let the phone ring a minimum of six rings.

When the instant grievance arose, it was learned that the previous understanding of how the call accounting system works was not correct. Bragulla insisted that he made the call, and that Grievant's voicemail system answered the call. The call accounting report showed a one-second call to Grievant's cell phone. Superintendent Clayton then reviewed

how the length of time for each call on the call accounting report is determined, and, on December 22, 2008, issued a memorandum to Vehicle Maintenance Supervisors, with a copy to the Union, stating a follows:

> "There has been a lot of discussion over the phone call log and how the time is actually recorded. Originally we thought that the length of the call started when the phone started ringing.
>
> We just recently were told that the time frame for the phone call does not start until some sort of connection is made either by way of voice mail or if someone actually answers the phone.
>
> We decided to conduct a test with [Union representative] Tommy Hernandez present as a witness. I made several calls, recorded the time of day and then the length of call that is shown on the phone itself. I requested the phone call log to compare the length of call from the actual phone display and compared it to the call log. The time frame did match which means that the length of call is determined after the connection is made either through voice mail or by being answered.
>
> What this does not tell us is how many times the phone rang; some phones go to voice mail on the 2nd or third ring which may not allow enough time for the person to answer. Once the phone goes to voice mail you have satisfied the requirements for calling overtime. You must be careful in that you allow enough time once any connection is made on a voice mail for it to be recorded as a call. I personally have had better success by leaving a message when trying to fill a job.
>
> If you have any questions about this process please see me."

Ms. Reeves further testified that the call duration noted on the call report is triggered when there is a connection on the other end; that a phone merely ringing or having a busy signal does not trigger a contact; and that either a human or an automated response such as voicemail has to pick up in order for the time to be registered on the call report. On cross-examination, Reeves stated that while she knows what happens on her end, i.e., whether a connection has been made, she does not know whether or not a connection is displayed on the other end, especially since "there are hundreds of different phone systems out there;" and that she does not know whether the one second represents

the time from the initial contact to the time the receiver hangs up, or whether the one second is a true second or simply a rounding up to a whole second.

During the arbitration hearing, the parties agreed to test the call accounting system, using a speakerphone so that all present could hear. Bragulla placed three calls to the cell phone of Mr. Place, counsel for the Authority, and three calls to the cell phone of Mr. Hernandez, Union representative. The results of the calls to Mr. Place were as follows:

1. The group listened to the entire voicemail message of Mr. Place, and Bragulla then hung up without leaving a message. The call lasted 19 seconds, and this was accurately reflected as 19 seconds in the call accounting report.
2. The group listened to a few seconds of counsel's voicemail message, and Bragulla then hung up. The call accounting report did not log this call.
3. The group listened to the first word or two of counsel's voicemail message, and Bragulla then hung up. As with the previous call, the call accounting report did not log this call.

The results of the calls to Mr. Hernandez were as follows:

1. The group listened to the first part of Hernandez' voicemail message "Please leave your," and Bragulla then hung up. The call accounting report logged this as a 3-second call.
2. Bragulla let the phone ring several times and hung up before the voicemail service answered. The call accounting report did not log this call.
3. The group listened to Hernandez' entire voice message, and then Bragulla left a message stating "Tony Bragulla, the ATA," before hanging up. The call lasted about

20 seconds, from the time the voice mail answered to the time Bragulla hung up. The call accounting report logged this as a 20-second call.

POSITION OF THE UNION

The Union cites Section 3.5 of the CBA, the 2001 letter agreement, and rules of construction such as construing the CBA as a whole, giving effect to all clauses and words, avoiding a forfeiture, and avoiding harsh, absurd or nonsensical results. It also cites 3.5(e), stating that disputes over overtime procedures are to be resolved "on a fair and equitable basis for all concerned," as the standard that the Arbitrator should apply.

The Union further contends that the Authority did not comply with the CBA and required procedures in passing over Grievant; that it did not prove Grievant was both called and the reason for determining him to be "not available;" that the evidence does not show that a "call" was made or that Walker's voicemail picked up; that the Union met its initial burden by proving that he never received the required call and his phone record showed no incoming call at 5:42 p.m.; and that the burden now shifts to the Authority to show it complied with both requirements, which it did not do.

The Union also states that it does not believe supervisors are required to leave a voice message, but that a supervisor must allow sufficient time so as to confirm that a voicemail was picked up and that a "call," not just a "contact," was made. It also notes that Bragulla's other calls that night ranged from 4 seconds to 3 minutes, and argues that Bragulla should have stayed on the line when calling Walker for more than 1 second.

In conclusion, the Union requests that the Grievance be sustained; that Mr. Walker be awarded eight hours overtime pay plus one hour "callout;" and that the Arbitrator retain jurisdiction to assist in the implementation of any award if that becomes necessary.

POSITION OF THE AUTHORITY

The Authority argues that Bragulla called Grievant's cell phone, and that Grievant's voicemail answered the call; that the Clayton/Hernandez test of the call accounting system in December 2008, the phone system manual, and the test at the arbitration hearing confirm that calls are not logged unless a number is dialed and the telephone answers. It also states that even if Grievant's phone didn't ring or show any missed call, this did not prove Bragulla did not call, since cell phone technology is not perfect and there are a variety of reasons why the call may have gone to voicemail without the phone ringing, and why Grievant's phone record would not have shown a call.

The Company further states that Bragulla had every incentive to reach Grievant and no reason to bypass him; that the only reasonable conclusion is that for some reason Bragulla's call went to voicemail; that the call accounting report clearly showed Bragulla called the number and the voicemail system answered; and so the Authority complied with its obligations under Section 3.5.

The Authority argues that a voicemail "pick up" satisfies the CBA obligations for offering overtime under Section 3.5 and the August 2001 letter agreement; that once an answering machine picks up the call, the employee is automatically considered to be not available; that leaving a message is not required; and in any event Bragulla had legitimate business reasons for not leaving a message and simply hanging up when he recognized Greivant's voicemail.

The Authority further argues that the Arbitrator's duty is to interpret the agreement, not to create new language or obligations; that Section 3.5(e) creates an obligation to meet but not agree; that the obligation to meet is triggered by the other

parties request to meet, and no such request or proposed changes were made by the Union; that this is a grievance rather than an interest arbitration; and that the Authority's good faith in addressing issues under Section 3.5 was evidenced by Clayton's "six rings" rule for calls that go unanswered. In conclusion, the Authority requests that the grievance be denied in its entirety.

DISCUSSION

Article III, Section 3.5 governs "Voluntary Extra Work Lists." That section is not particularly specific regarding what supervisors and employees should do with respect to telephonic notification of such overtime work. Section 3.5(d)(8) simply states that an employee called or asked to work such overtime will be told what job vacancy he is to work. It states nothing about how a supervisor should make such calls, or how supervisors who make such calls should determine whether an employee is unavailable for voluntary extra work.

Section 3.5(e) recognizes that questions may arise regarding voluntary extra work, and provides that the Union and Authority will meet at the request of either party to resolve such questions on "a fair and equitable basis for all concerned." In 2001, the parties met to "clarify the methodology used to notify employees of overtime needs," which in turn would "streamline the filling of overtime," as well as maintain a large list of employees desiring to work overtime. As noted above, the parties agreed that an employee would provide one number to be called for overtime, and that the employee would be considered not available if he or she turns down overtime. The agreement also states that the employee will be considered not available in three other instances: (1) no answer; (2) an

answering machine picks up; and (3) a family member states that the employee is not home.

The second instance is the one relevant for purposes of this case. If a voicemail answers, it is clear under the above agreement that the employee would be considered not available. Supervisor Bragulla testified that Grievant's voicemail answered the call, and so he moved on to the next employees on the list.

Upon a full consideration of the evidence and arguments, the Arbitrator credits the testimony of Supervisor Bragulla that Grievant's voicemail system answered his call. Accordingly, it was appropriate for him to consider Grievant not available and move on to others on the list. A number of factors lead to this conclusion. First, the call accounting report logged a call at 5:42 p.m. on December 10, 2008, from Bragulla's phone to Grievant's phone. The Union notes that the call was only for one second and possibly less. However, the log clearly corroborates Bragulla's testimony that his phone connected to Grievant's phone, and since Grievant did not answer, that connection corroborates Bragulla's testimony that Grievant's voicemail answered his call. There is no reason to discount Bragulla's testimony. There was no history of animosity between Bragulla and Grievant; Bragulla has called Grievant for overtime on many occasions; and it was in Bragulla's interest to fill the overtime positions as soon as possible, rather than having to take the time and effort to continue down the list.

The Union notes that neither Grievant's phone nor phone records show a call received at 5:42 p.m. However, that does not mean that Bragulla did not make the call. There could be many reasons why a call going to Grievant's voicemail would not show up on his phone or phone records, depending on the system employed by the employee's cell

phone company. As the Authority notes, Grievant might have been out of range, or his phone company might not record calls that go directly to voicemail, or any number of reasons that are speculative in nature. The Authority does not have the burden of discovering why Bragulla's call did not show up on the phone selected by Grievant, or why it did not show up on the record of Grievant's phone company. The best evidence on whether Bragulla made the call, in addition to his testimony, is that it was logged on the Authority's automated call accounting record.

The Union discounts the call accounting report because during the calls made during the arbitration hearing, described above, the report did not log the second and third calls made to counsel for the employer, in which voicemail answered the call. However, the report accurately logged the first call to voicemail, for 19 seconds. It also accurately logged all three calls to the Union representative. The first call to his voicemail was accurately logged as a 3-second call; the second call was hung up before voicemail picked up, and the report correctly did not log this call; the third call which listened to the entire voicemail message was accurately logged as a 20-second call. In sum, the only discrepancy is that the call accounting report did not log two calls that went to the employer's counsel's voicemail. However, the fact that the report failed to log some calls that went to voicemail is a different issue than the one faced here. The issue here is whether the report would log a call when in fact it did not connect to voicemail. In the calls made at the arbitration hearing, the report never logged a call when there was no connection to voicemail. Nor was there evidence of other instances where the call accounting report logged a call when there was no connection to voicemail or a human voice. Under these circumstances, the call accounting report showing that Bragulla's phone connected to Grievant's phone

properly may be considered supportive of Bragulla's testimony that he reached Grievant's voicemail.

The Union cites Section 3.5, the 2001 letter agreement, and arbitral rules of construction. Section 3.5(d)(8) is discussed above. Section 3.5(e) states that should questions arise regarding voluntary extra work, the parties will meet upon request to resolve such questions on "a fair and equitable basis for all concerned." In accordance with this provision the parties entered into the 2001 letter agreement discussed above to "clarify the methodology used to notify employees of overtime needs," "streamline the filling of overtime," and maintain a large list of employees who desire to work overtime. Nothing in this Award is inconsistent with the language or goals expressed in the above provisions. The parties may still meet upon request to resolve questions on a fair and equitable basis; the letter agreement clarified that a voicemail pickup, as is found in this case, would result in a "not available" annotation; and such result allows streamlining the filling of overtime, and does not reduce the list of employees who desire to work overtime. The result thus construes the CBA as a whole, and gives effect to all clauses and words. The outcome also does not result in forfeiture, or a harsh, absurd or nonsensical result, since it was Grievant's phone that apparently failed to record a call that went to voicemail, rather than any harsh, absurd or nonsensical action of the Authority.

The Union further argues that Bragulla should have stayed on the line longer than one second. However, the contract imposes no such requirement. If, as here, the preponderance of the testimony warrants a finding that a supervisor called an employee and the employee's voicemail picked up, the time involved in the call is not determinative.

In light of the above discussion and findings, the Arbitrator concludes that the grievance should be denied.

AWARD

The grievance is denied.

Robert B. Moberly, Arbitrator
February 27, 2010