In the Matter of FIRST TRANSIT, INC. and AMALGAMATED TRANSIT UNION, LOCAL 1287 (Vacation Time and Vacation Pay Arbitration)

Arbitrator: **John M. Gradwohl**

Date of Decision: **November 16, 2010**

Appearances: **For First Transit, Inc.:**

Lawrence K. Hoyt
Senior Labor Counsel
First Transit, Inc.
Cincinnati, Ohio

For Amalgamated Transit Union, Local 1287:

Scott A. Raisher
Attorney
Jolley Walsh Hurley Raisher & Aubry, P.C.
Kansas City, Missouri

The Issues:

The issues in this arbitration concern the calculations of number of hours of vacation time and of pay for vacation time to which employees are entitled under Section 21.1 of the collective bargaining agreement between the parties, as Section 21.1 was interpreted in a prior arbitration decision of Rex H. Wiant, dated January 2, 2008.

Relevant Portions of the Agreement:

Section 21.1, on page 23 of the Agreement, states:

> **All operators shall receive, after one year of continuous employment, a paid vacation as further detailed. Operators who complete one (1) full year of continuous [service[1]] shall receive a vacation of forty (40) hours duration, and after three (3) full years or more of service, eighty (80) hours will be granted[.] Operators who have completed ten (10) full years of service shall be granted one hundred twenty (120) hours of vacation. Vacation pay will be based upon the average amount of hours an employee works for the latest four week period, not to exceed forty (40) hours for each week of vacation entitlement.**

---

[1] **See Wiant Decision, second page.**

The complete text of Article 21, Vacations, on pages 23-24 of the Agreement, is appended to this written decision.

The authority of the arbitrator is set out in Section 12.3 on page 17 of the Agreement. The parties stipulated that procedurally the grievance is properly before the arbitrator for decision.

Relevant Portion of the Wiant Decision:

The complete four page decision of Rex H. Wiant, Arbitrator, dated January 2, 2008 is appended to this written decision. The interpretation of Section 21.1, on the third and fourth pages of the decision, is as follows:

> **In this case the language is one paragraph of straight forward words. It can be divided into two sections: The first determines how much paid vacation the employees receive. The second determines how they are to be paid when they take a day off.**
>
> **In closer examination of the first point, the Arbitrator is struck by the use of the phrase "All operators shall ..." There is no distinction between 35 hour a week drivers and 10 hour a week drivers. "All" means all. The language continues to award vacation based on length of service. One year - 40 hours, three years - 80 hour[s] and ten years - 120 hours. While the bargaining history indicates the Company avoided the use of the term "bank" to describe vacation that is a practical description. An employee who drives for seven hours a day and takes one day of vacation has his total reduced from 40 hour[s] to 33 hours. When an employee reaches zero then they have no more paid vacation.**
>
> **The parties chose to do something different in determining vacation pay. Most times vacation pay is calculated by multiplying the number of hours times the hourly rate. In this case they [sic] parties agreed to a more complex formula. The language specifically states:**
>
> > **Vacation pay will be based upon the average amount of hours an employee works for the latest four week period, not to exceed forty (40) hours for each week of vacation entitlement.**
>
> **While this is more complex than most procedures, there is nothing wrong with this method. It is made significantly easier in an age of computers that can figure each person's pay rate after a few key strokes.**

Statement of Facts:

This saga was begun on December 15, 2005, when ATU Local 1287 filed a grievance against First Transit, Inc.'s predecessor, Laidlaw Transit Systems, alleging that the Company's method of calculating vacation time and vacation pay did not comply with Section 21.1 of the Agreement. The grievance progressed to arbitration and an arbitration hearing was held in October 2006. Unfortunately, the Arbitrator died before issuing a decision.

By agreement, the parties submitted the matter for decision by Arbitrator Wiant on the record made at the previous hearing with further oral argument. Arbitrator Wiant issued a decision on January 2, 2008. The grievance was denied by Arbitrator Wiant for the following reasons:[2]

> **The Union comes forward with numerous complaints that the Company is not either calculating the number of hours or pay rates correctly. Information supporting claims should be easy to produce. In materials they cite the following example of a person having 40 hours vacation and using 37 of them. Another is that the pay rate was incorrectly calculated. In each example it would be easy to provide evidence such a[s] pay stubs or vacation reports but none of that is presented as exhibits or testimony. The Union fails to present a single employee who claims to have lost a specific amount of time or money. Without such detail the Arbitrator cannot sustain this grievance. If specific errors are made in the future the individual employee or union may seek redress through the grievance procedure.**

The present grievance was filed by the Union on June 6, 2008, "on behalf of Jamie Hutchens and all affected drivers denied their vacation time as specified in Section 21.1 of contract and pursuant to the Rex H. Wiant award dated 01/08/2008 [sic]." The requested remedy was "Pay drivers according to section 21.1 of Union Contract as follows: A.) 1--2 yrs. 40 hrs. of vacation B.) 3–9 yrs. 80 hrs. of vacation C.) 10 yrs. or more 120 hrs. of vacation."

Jamie Hutchens was entitled to 40 hours of vacation under the collective bargaining agreement when she took five days of vacation on May 12, 2008, through May 16, 2008.[3] Her "average amount of hours . . . for the latest four week period" was determined to be 7.62 per day or 38.10 per week. She was paid her regular hourly wage rate for 38.10 hours for the week of May 12 through May 16. On May 29, 2008, Ms. Hutchens requested 1.9 hours of vacation time off [40 hours minus 38.10 hours equals 1.9 hours] to be taken on June 6th. Her request for this vacation time was denied by the Company on June 3, 2008, for the stated notation "no

---

[2] Wiant Decision, fourth page.

[3] Union Post-Hearing Brief, page 2 n.2 and notation on supporting documents showing her seniority date of September 30, 2005.

availability."[4] Later on January 21, 2009,[5] the Company stated its interpretation of the Wiant arbitration decision, portions of which support its method of compensation for the vacation time of Jamie Hutchens in 2008:

> **An employee who averaged 36 hours in the previous four weeks will receive 36 hours of pay as she schedules and uses her 40 hours of vacation.**
>
> **[and]**
>
> **As a further example, assume an employee who is entitled to 40 hours of vacation averages 30 hours of work in the four weeks prior to the week she is scheduled for vacation. Assume her regular wage rate is $ 15 per hour. She will be paid 30 times $15 or $450 for her scheduled 40 hour vacation. If she only schedules and uses 20 hour[s] of her bank of 40 hours, she will be entitled to $225,[6] and have 20 hours remaining in her bank.**

The underlying issue in this arbitration, therefore, is the calculation of vacation time within the so-called vacation "bank." There is no contention that Jamie Hutchens was not initially allowed 40 hours of vacation time under the collective bargaining agreement. There is no contention that Jamie Hutchens was not properly paid for 38.10 hours at her regular rate of pay for the vacation week of May 12 through May 16. The essence of the disagreement between the parties in this arbitration is the operation of the so-called vacation "bank," itself. The claim of Jamie Hutchens is for 1.9 hours of vacation pay at her regular rate of pay which the Company denied on June 3, 2008.

<u>Union Position</u>:

The Union's numerous allegations and arguments boil down to a claim that employees are entitled to the contractually specified number of vacation hours per year at their regular rate of pay. It asks the arbitrator to sustain the grievance filed by the Union on behalf of Jamie Hutchens and "all affected drivers" and to retain jurisdiction as to the implementation of that award by the Company.

---

[4] Supporting documents presented by the Union.

[5] Company Exhibit 1, E-mail dated January 21, 2009.

[6] That would be 15 hours at $15 per hour.

Company Position:

The Company's position is succinctly summarized on page 5 of its Post-Hearing Brief:

> **The Company's interpretation leads to a reasonable result that is neither harsh nor absurd. The parties negotiated a vacation benefit that takes into effect the average hours the employee has averaged over the prior fo[u]r weeks. There is no hardship in that construction. The Union, as the party alleging a violation of the contract, bears the burden of proving by a preponderance of the evidence that the Company violated the contract . . . [and] has not met that burden.**

Discussion:

(a) The Grievance and Issue For Decision.

It is important at the outset to determine what is before the arbitrator for resolution in this matter. The Wiant Arbitration correctly emphasized that an arbitrator under a labor agreement must rely upon a factual record as to the particular claim involved. In denying that grievance, he laid out the ground rules for the present claim:[7]

> **The Union fails to present a single employee who claims to have lost a specific amount of time or money. Without such detail the Arbitrator cannot sustain this grievance. If specific errors are made in the future the individual employee or union may seek redress through the grievance procedure.**

The present grievance states that it "is being filed on behalf of Jamie Hutchens and all affected drivers denied their vacation time as specified in Section 21.1 of contract and pursuant to the Rex H. Wiant award dated 01/08/2008 [sic]." The evidence with respect to the claim of Jamie Hutchens shows the following:

• She was initially credited with 40 hours of vacation time for 2008, the proper number of vacation hours for 2008 specified in Section 21.1 of the collective bargaining agreement.

• She was correctly paid for 38.1 hours of vacation time for the period May 12 through May 16, in accordance with the "average amount of hours an employee works for the latest four week period" formula in Section 21.1.

• She was paid her regular hourly rate of pay for 38.1 hours for the period of May 12

---

[7] Wiant Decision, fourth page. The full paragraph is quoted in the Statement of Facts, on page 3, above.

through May 16.

• The Company interpreted the pay for the week of May 12 through May 16 based on the "average amount of hours an employee works for the latest four week period" formula in Section 21.1 to fully satisfy Jamie Hutchens vacation pay entitlement for 2008. Hutchens and the Union claim that she was entitled to an additional 1.9 hours of vacation pay entitlement for 2008.

• Hutchens' claim for 1.9 hours of vacation pay entitlement was denied by the Company on June 3, 2008. The grievance concerning that claim is procedurally properly before the arbitrator for decision in this matter.

• During the pendency of this grievance, the Company has restated its interpretation that an employee who has averaged fewer than 40 hours per week in the previous four weeks is entitled only to the amount of pay based upon the previous four week average number of hours at the regular rate of pay in satisfaction of the 40 hours of vacation entitlement for that year.

This proceeding is full of hypothetical questions concerning the interpretation and application of Section 21.1 in a wide variety of situations. The only issue for resolution, however, is whether or not Jamie Hutchens was entitled to an additional 1.9 hours of compensated vacation time during 2008.

(b) Interpretation and Application of Section 21.1 and the Wiant Decision.

Section 21.1 states:

> **All operators shall receive, after one year of continuous employment, a paid vacation as further detailed. Operators who complete one (1) full year of continuous [service[8]] shall receive a vacation of forty (40) hours duration, and after three (3) full years or more of service, eighty (80) hours will be granted[.] Operators who have completed ten (10) full years of service shall be granted one hundred twenty (120) hours of vacation. Vacation pay will be based upon the average amount of hours an employee works for the latest four week period, not to exceed forty (40) hours for each week of vacation entitlement.**

The Wiant Decision described the general structure of the language of Section 21.1:[9]

In this case the language is one paragraph of straight forward words. It can be

---

[8] See Wiant Decision, second page.

[9] Wiant Decision, third page.

> **divided into two sections: The first determines how much paid vacation the employees receive. The second determines how they are to be paid when they take a day off.**

Arbitrator Wiant stressed that Section 21.1 applies to "all operators." He stated:[10] "In closer examination of the first point, the Arbitrator is struck by the use of the phrase "All operators shall..." He added that there is no distinction between 35 hour a week drivers and 10 hour a week drivers and then repeated "'All' means all." In the preceding paragraph of the Wiant Decision, set out above, he referred to this as "how much paid vacation the employees receive."

The other aspect of the section, as analyzed by Arbitrator Wiant, "determines how they are paid when they take a day off." Actually, Section 21.1 specifies "a vacation of . . . [a specified number of] hours in duration." Vacation entitlement is stated in terms of "hours" of vacation rather than "weeks," "work weeks," "days," "hours per day," "scheduled hours," or some other unit of measurement.

Arbitrator Wiant determined that he did not have a clear factual record of the claim which was being asserted in the grievance. The decision states:[11]

> **The Union comes forward with numerous complaints that the Company is not either calculating the number of hours or pay rates correctly. Information supporting claims should be easy to produce. In materials they cite the following example of a person having 40 hours vacation and using 37 of them. Another is that the pay rate was incorrectly calculated. In each example it would be easy to provide evidence such as a pay stubs or vacation reports but none of that is presented as exhibits or testimony.**

Without a clear factual record of the claim being asserted in the grievance, the Wiant Decision lacks focus on the second aspect of Section 21.1, "how they are to be paid when they take a day off," and, especially as it relates to the present grievance, how the second factor relates to the first factor, "how much paid vacation the employees receive." The decision recites that the contractual "language continues to award [an hourly] vacation based on length of service," after which it states:[12]

> **While the bargaining history indicates the Company avoided the use of the term "bank" to describe vacation that is a practical description. An employee who**

---

[10] **Wiant Decision, third page.**

[11] **Wiant Decision, fourth page.**

[12] **Wiant Decision, third page.**

drives for seven hours a day and takes one day of vacation has his total reduced from 40 hour[s] to 33 hours. When an employee reaches zero then they have no more paid vacation.

Following that explanation, the Wiant Decision turns to the aspect of how much pay an employee is entitled to when she or he takes a vacation "day." The decision states:[13]

> **The parties chose to do something different in determining vacation pay. Most times vacation pay is calculated by multiplying the number of hours times the hourly rate. In this case they [sic] parties agreed to a more complex formula. The language specifically states:**
>
> > **Vacation pay will be based upon the average amount of hours an employee works for the latest four week period, not to exceed forty (40) hours for each week of vacation entitlement.**
>
> **While this is more complex than most procedures, there is nothing wrong with this method. It is made significantly easier in an age of computers that can figure each person's pay rate after a few key strokes.**

The Wiant Decision apparently did not present a factual record sufficient to allow the arbitrator to apply fully the language "vacation pay will be based upon the average amount of hours an employee works for the latest four week period." In the present arbitration, Jamie Hutchens was paid for the "average amount of hours" she had worked for the latest four week period. She was paid for 38.1 hours. She was paid for these hours at her regular rate of pay. Thus, the record shows that she was properly compensated for the week of May 12 through May 16, 2008.

The grievance claims that Jamie Hutchens should only have been charged with having taken 38.1 hours of vacation time for purposes of what Arbitrator Wiant referred to as the "vacation bank." Neither Section 21.1 nor the Wiant Decision is free from ambiguity as to the amount of hours of vacation time that Hutchens should have been charged against her 40 hour annual vacation entitlement for 2008.

An interpretation of Section 21.1 and the Wiant Decision charging Hutchens' vacation entitlement with 38.1 hours is the most plausible interpretation based upon the record in this arbitration. Section 21.1 refers to "paid vacation as further detailed." Hutchens was paid for 38.1 hours of vacation. The compensation for 38.1 hours of vacation time for the week of May 12 through May 16, 2008, represents the "amount of hours" she would presumably have worked during that week. The collective bargaining agreement calls for 40 hours of vacation

---

[13] **Wiant Decision, fourth page.**

time, not one week of vacation time.[14] The Wiant Decision does not explain the linkage between what it refers to as the "two sections" of Section 21.1.

The record in this matter establishes that Jamie Hutchens was entitled to an additional 1.9 hours of vacation pay for 2008, which was erroneously denied by the Company on June 3, 2008. She was properly initially credited with a vacation entitlement of 40 hours for 2008. She was properly compensated for 38.1 hours of vacation time for the week of May 12 to May 16, 2008. She was paid at her regular rate of pay. The 38.1 hours for which she was paid should have been subtracted from the 40 hours to which she was entitled, leaving a balance in the so-called "vacation bank" of 1.9 hours.

(c) Appropriate Remedy.

For the foregoing reasons, the grievance should be sustained. The grievance relates to "Jamie Hutchens and all affected drivers denied their vacation time" for the same reasons. It is the responsibility of the arbitrator to fashion "an appropriate remedy" in these circumstances.

Jamie Hutchens is entitled to 1.9 hours of vacation pay for 2008 at her regular rate of pay on June 3, 2008. The Company should pay Jamie Hutchens for the loss of vacation time, if any, in 2009 and 2010 for having charged her annual vacation hourly entitlement with more hours than were actually paid at the regular rate of pay in those years. The Company should also pay all other bargaining unit employees for the loss of vacation time, if any, in 2008, 2009, and 2010 for having charged their annual vacation hourly entitlement with more hours than were actually paid at the regular rate of pay in those years.

The Company should be given 30 days from the date of this Award to review its records for the years 2008, 2009, and 2010, specify each employee entitled to compensation under this decision, together with relevant information showing the figures and calculations involved in each determination, and supply a copy to the Union. The Union should be given 30 days from receipt of this information from the Company to respond to the Company's showing, in writing with a copy to the Company.

The parties are strongly encouraged to arrange for the implementation of this Award by their voluntary agreement. The arbitrator will retain jurisdiction with respect to the implementation of the Award if issues arise for which a further determination is necessary.

---

[14] Company Exhibit 1 makes clear that the Company interprets the 40 hour allowance to equate to one week of vacation pay based upon the average number of hours worked during the latest four week period: "An employee who averaged 36 hours in the previous four weeks will receive 36 hours of pay as she schedules and uses her 40 hours of vacation."

AWARD:

From the evidence presented, and for the foregoing reasons,

1. The grievance is sustained.

2. The Company is directed to compensate Jamie Hutchens for 1.9 hours of time at her regular rate of pay as of June 3, 2008.

3. The Company is directed to pay Jamie Hutchens for the loss of vacation time, if any, in 2009 and 2010 for having charged her annual vacation hourly entitlement with more hours than were actually paid at her regular rate of pay in those years.

4. The Company is directed to pay all other bargaining unit employees for the loss of vacation time, if any, in 2008, 2009, and 2010 for having charged their annual vacation hourly entitlement with more hours than were actually paid at the regular rate of pay in those years.

5. The Company is given 30 days from the date of this Award to review its records for the years 2008, 2009, and 2010, specify each employee entitled to compensation under this Award, together with relevant information showing the figures and calculations involved in each determination, and supply a copy to the Union. The Union is given 30 days from receipt of this information from the Company to respond to the Company's showing, in writing with a copy to the Company.

6. The parties are strongly encouraged to arrange for the implementation of this Award by their voluntary agreement. The arbitrator retains jurisdiction with respect to the implementation of this Award if issues arise for which a further determination is necessary.

John M. Gradwohl, Arbitrator

University of Nebraska College of Law
Lincoln, Nebraska 68583-0902