

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

IN THE MATTER OF THE ARBITRATION
BETWEEN:

LECRENSKI BROS., INC. (LBI)

-and-

AMALGAMATED TRANSPORTATION
UNION (ATU), LOCAL 448

ARB-13-2892

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Arbitrator:

Brian K. Harrington, Esq.

Appearances:

Bernard J. Romani, Esq. - Representing Lecrenski Bros., Inc.

Stephan MacDougall - Representing ATU, Local 448

The parties received a full opportunity to present testimony, exhibits and arguments, and to examine and cross-examine witnesses at a hearing. I have considered the issues, and, having studied and weighed the evidence presented, conclude as follows:

AWARD

The grievance is sustained. The Employer violated Article 12 of the Agreement by paying the first negotiated 25 cent per hour increase effective February 1, 2013 instead of effective July 1, 2012.



Brian K. Harrington, Esq.
Arbitrator
April 30, 2014

INTRODUCTION

On June 12, 2013, ATU, Local 448 (Union) filed a unilateral petition for Arbitration. Under the provisions of M.G.L., Chapter 23, Section 9P, the Department of Labor Relations (Department) appointed Brian K. Harrington Esq. to act as a single neutral arbitrator with the full power of the Department.¹ The undersigned Arbitrator conducted two days of hearing at the Department's office in Springfield on September 30 and November 8, 2013.

The parties filed post hearing briefs on January 10, 2014.

THE ISSUE

Did the Employer violate the Collective Bargaining Agreement (CBA, or Agreement) by paying a 25 cent per hour wage increase effective on February 1, 2013 instead of on July 1, 2012?

If so, what shall be the remedy?

RELEVANT CONTRACT LANGUAGE

The parties' Collective Bargaining Agreement contains the following pertinent provisions:

Article 6 – GRIEVANCE AND ARBITRATION PROCEDURE (In Part)

In the event that a grievance shall arise under the terms of this Agreement, the procedures outlined in this Article shall be followed.

¹ Pursuant to Chapter 145 of the Acts of 2007, the Department of Labor Relations "shall have all of the legal powers, authorities, responsibilities, duties, rights, and obligations previously conferred on the ... the board of conciliation and arbitration ... including without limitation those set forth in chapter 23C, chapter 150, chapter 150A, and chapter 150E of the General Laws."

STEP ONE. The Union shall report his/her grievance in writing to the Manager within twenty working (20) days of the occurrence, and the Manager and Employee with Union representation will meet in an attempt to adjust the grievance within five working (5) days of receipt of the written grievance.

STEP TWO. If the grievance is not resolved at Step One, the Union has the option to meet with either the President and/or Vice President of the Company by submitting a written request within thirty working (30) days of the occurrence in an attempt to adjust the grievance, at which time an appointment for a meeting will be set by the Company within seven working (7) days. The Company shall have seven working (7) days from the date of the meeting to adjust or deny the grievance.

STEP THREE. If the grievance is not resolved in Step Two of this procedure, the Union may within forty-five working (45) days of the occurrence or seven working (7) of the Company's written response to the Step Two procedure, whichever is later, refer the case to the Massachusetts Division of Labor Relations.

Working days shall mean business days Monday through Friday, excluding holidays and vacations. An Employee working during the summer shall file said grievance as set forth above excluding holidays.

Article 12 – WAGES AND BENEFITS (In Part)

Regular route drivers and Spare drivers driving regular routes shall earn the following rates of pay as of:

07/01/11--\$21.00

07/01/12--\$21.25

07/01/13--\$21.45

Article 13 – DURATION

This agreement shall be effective as of the date of execution and shall remain in full force and effect through June 30, 2016. The parties agree to submit proposals for any future collective bargaining agreement by May 1, 2015.

THE FACTS

Lecrenski Bros., Inc. (LBI or Employer) and the Union are parties to a CBA which is dated July 1, 2011-June 30, 2016. This CBA covers regular and spare

bus drivers employed by LBI who transport students of the Westfield Public Schools. Witness testimony from both sides demonstrated that the parties have been lax in observing the grievance and arbitration time limits detailed in the Agreement.

In late 2011 the parties commenced negotiations for a successor agreement to replace the one that expired on June 30, 2011. On February 10, 2012, the parties tentatively agreed to a wage package, with the first raise effective on July 1, 2012.² Subsequently, the Union brought a complete package settlement to the Union body for ratification but the membership rejected it. After further discussion the Union brought a memorandum of agreement before the Union membership again on June 12, 2012 and the membership ratified it. At this point the Employer prepared a draft successor contract, and the parties communicated back and forth on language changes from June through December, 2012. Representatives of the Union signed the new contract on January 15, 2013, and the Employer signed the new contract on February 1, 2013.

The Employer increased the wage rate effective the first pay period after they signed the Agreement, stating that since the contract had not been signed, it was not in effect prior to that date. However, the Employer conceded that it believed that the rest of the terms of the new CBA were in effect before the Employer signed the Agreement. The Agreement clearly states that the effective date of the first increase is to be July 1, 2012. The parties presented evidence

² The 2008-2011 agreement contained a wage increase effective 6/30/11 which both parties understood represented the wage increase for the first year of the 2011-2016 agreement.

was presented at the hearing that in the two prior collective bargaining agreements (in 2004 and 2009), the Employer paid employees retroactively to the agreed date even though the parties did not sign the contracts themselves until months later.

Although the Union had difficulty locating its copy of the original grievance, testimony established that the Union filed it by mail on February 28, 2013. The Employer responded to Step 1 of this grievance on March 14, 2013 and a Step 2 meeting was held on March 21, 2013. The Employer responded to the Union by email on April 19, 2013 that the grievance was denied. Testimony from both sides suggested that discussions concerning this matter continued subsequent to the Employer's April 19, 2013 response. The Union filed its arbitration demand with the Department on June 12, 2013.

POSITIONS OF THE PARTIES

THE UNION

The Union first argues that the grievance was filed in a timely manner. Although there were technical difficulties in locating its copy of the original grievance, witness testimony established that it was filed at the first two steps in a timely fashion and the Employer responded to it. Testimony from both Union and Employer witnesses established that both sides have been lax in observing grievance time limits in the past. The parties engaged in continuing discussions to resolve the dispute after the Employer sent its Step 2 response to the Union. To allow the Employer's Motion to Dismiss would be inequitable.

As to the merits of the case, the Union asserts that the plain language of the Agreement establishes the date of the first wage increase, namely July 1, 2012. The Employer acknowledged that it believed that the rest of the Agreement was in effect during the time period subsequent to ratification but prior to contract execution. To accept otherwise would allow the Employer to delay any negotiated raise it chose because the final two weeks delay was caused by the Employer's failure to sign the Agreement during that period. Testimony and documentary evidence demonstrated that when the parties finalized the prior two contracts in a similar manner with similar wage increase effective dates the Employer paid the first raise retroactively. Therefore, employees should receive 25 cents per hour for all hours worked between July 1, 2012 and February 1, 2013.

THE EMPLOYER

The Employer begins by stating that the grievance should be dismissed because the Union did not comply with any of the time limits specified by the grievance. The Union could not produce a copy of the initial grievance on the first day of hearing, nor could it prove that any step was sent by certified mail (which was the usual practice). Any subsequent testimony regarding the filing at Steps 1 or 2 should not be given credence. The evidence presented did not demonstrate that there were any meetings or correspondence regarding this matter prior to the Employer's email of April 19, 2013. Even if the arbitrator finds compliance with Steps 1 and 2, the demand for arbitration was filed well past the filing deadline. As to the merits of the case, the Employer relies on the language

of Article 13 which says that the Agreement is effective upon execution. Thus the first wage increase should commence on February 1, 2013.

OPINION

The issue before me is: did the Employer violate the Collective Bargaining Agreement (CBA or Agreement) by paying a 25 cent per hour wage increase effective on February 1, 2013 instead of on July 1, 2012? If so, what shall the remedy be? For the reasons stated below, I find that the Employer did violate the CBA when it paid employees a 25 cent per hour increase effective on February 1, 2013 instead of July 1, 2012. The grievance is sustained.

At the first day of hearing on September 30, 2013 the Employer submitted a Motion to Dismiss the grievance on the grounds of procedural arbitrability. The parties agreed that I would rule on this motion first, and then address the merits of the case only if the Employer's motion is denied. I deny the Employer's Motion to Dismiss for the reasons stated below and will therefore address the merits of the case as well.

First, I deny the Employer's Motion to Dismiss. Although the Union's recordkeeping should have been better, with regards to Steps 1 and 2, the evidence convinces me that the grievance was filed in a timely fashion and discussed by the parties on multiple occasions. The delay in filing for arbitration is more troublesome, but to deny this grievance on those grounds would be inequitable considering the history of the relationship between the parties.

The Employer cannot raise the defense of untimely grievance and arbitration filing for the first time at the hearing itself. See generally, Elkouri and

Elkouri, How Arbitration Works, 5-11; 5-29 (7th Ed., 2012). The record shows that in the past, both parties have been lax as to observing time limits for all steps of the grievance process including the arbitration step. Thus, I decline to enforce them strictly absent prior notice from one party to the other demanding strict adherence. *Elkouri*, at 5-30.³ Moreover, the evidence suggested that the parties engaged in continuing discussions to resolve the dispute subsequent to the Employer's Step 2 response, which alone would be reason enough to deny the Motion to Dismiss. *Elkouri*, at 5-91.

Apart from the Motion to Dismiss, the contract language and bargaining history regarding the effective date of wage increases mandates only one possible result. Finding the first negotiated wage increase to be effective on February 1, 2013 instead of July 1, 2012 would render meaningless the provision in Article 12 which states that this increase is effective on July 1, 2012. A result which finds contract language meaningless should be avoided in arbitration. *Elkouri*, at 9-35.

While the Employer could argue that this ruling renders the term "execution" in Article 13 meaningless such a result is not supported by the evidence. Both the conduct of the parties in negotiating prior agreements, and the testimony of Employer witnesses demonstrate that the parties both understood successor agreements to be in place prior the signing of the new contract. I need not specifically define the word "execution" in Article 13 of the

³ However, if the Employer notifies the Union that it intends to strictly enforce time limits in the future, and raises the issue as soon as an alleged violation takes place, the outcome in a future case may be quite different.

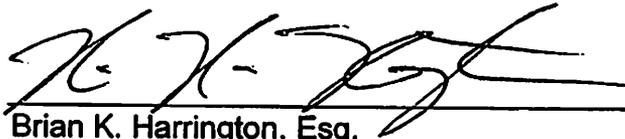
Agreement⁴ to conclude that it does not mean both parties signing the final contract agreement subsequent to all language edits. Therefore, employees are entitled to the 25 cent per hour wage increase effective on July 1, 2012.

THE REMEDY

All eligible drivers who actually worked between July 1, 2012 and February 1, 2013 shall be compensated 25 cents per hour for all hours actually worked during that period of time.

AWARD

The grievance is sustained. The Employer violated Article 12 of the Agreement by paying the first negotiated 25 cent per hour increase effective February 1, 2013 instead of effective July 1, 2012.



Brian K. Harrington, Esq.
Arbitrator
April 30, 2014

⁴ Nor do I find if the parties even ascribe the same meaning to the word.