COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

IN THE MATTER OF THE ARBITRATION BETWEEN:	
LECRENSKI BROS., INC. (LBI)	
-and-	ARB-12-2275
AMALGAMATED TRANSPORTATION UNION (ATU), LOCAL 448	

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 in part and denied in part. The Employer violated Article 12, Section 7 of the collective bargaining agreement by refusing to pay certain employees a two hour minimum guarantee on six occasions when there were half days during the 2011-2012 and 2012-2013 school years, but did not on two occasions during the 2011-2012 school year.

Brian K. Harrington, Esq.
Arbitrator
March 18, 2014

INTRODUCTION

On October 1 2012, 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 a hearing at the Department's office in Springfield on November 8, 2013.

The parties filed post hearing briefs on December 12, 2013.

THE ISSUE

Did the Employer violate Article 12, Section 7 of the Collective Bargaining Agreement (CBA, or Agreement) by refusing to pay certain employees a two (2) hour minimum guarantee for mid-day school runs on eight (8) occasions when there were half days during the 2011-2012 and 2012-2013 school years?

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 (In Part)

[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."

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

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.

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.[2]

Article 12 - WAGES AND BENEFITS

Section 7:

The Employer shall pay a minimum guarantee of two hours pay at regular rate for school runs with the exception of kindergarten runs, late runs, field trips or charters. Runs in excess of two hours shall be paid at the regular rate for hours worked. The Employer shall pay a minimum of two hours for summer revenue school runs.

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. The evidence demonstrated that the parties have been lax in observing the grievance time limits detailed in the Agreement.

[2] This language remained unchanged from the 2008-2011 Agreement through the 2011-2016 Agreement.

During the 2010-2011, 2011-2012 and 2012-2013 school years, the Westfield Public Schools scheduled four half days each school year where either (but never both) the elementary schools or the secondary schools had half days while the other had scheduled full days. The Union filed a grievance over the way drivers were compensated for these four occasions during the 2010-2011 school year, which the parties resolved by settlement[3]. The settlement contains language stating that all future half days are subject to negotiations[4].

During a regular full school day, bus drivers for LBI transport students in morning runs and afternoon runs, with a break in between. Should either run take less than two hours, drivers are compensated per Article 12, Section 7 with a 2 hour minimum of pay. On "regular" half days (where all schools are released early) the process is the same, with a shorter break in the middle. On the half days at issue here, where some but not all schools are released early, drivers return for mid-day runs in addition to their morning and afternoon assignments. The dates at issue were October 25 and 26, 2011; March 7 and 8, 2012; October 23 and 24, 2012 and March 6 and 7, 2013. On these dates the Employer paid drivers who performed mid-day runs one hour and fifteen minutes of pay when the elementary schools released early and one hour and thirty minutes of pay when the secondary schools released early.

On March 17, 2012, the Union filed a grievance at Step 1 with Nancy Kusek (Kusek), who is the Manager of LBI. That grievance only referenced driver

[3] The alleged 2010-2011 occurrences took place during the prior collective bargaining agreement, which was effective from July 1, 2008-June 30, 2011.

[4] The Union was not required to and did not ratify this settlement agreement.

Junior Torres. On March 30, 2012, the Union sent a follow up letter to Kusek seeking an answer to its March 17 grievance. This letter referenced all employees. The Union then filed a Petition to Initiate Grievance Arbitration with the Department on October 1, 2012. The instant arbitration followed.

POSITIONS OF THE PARTIES

THE UNION

The Union first argues that the grievance was filed in a timely manner. Although the Union became aware that the violation occurred for the first time when employees were paid for October 25 and 26, 2011, the same violation took place when members were paid for March 7 and 8, 2012. The Company received the step one grievance on March 20, 2012, well within twenty working days of the violations which took place on March 7 and 8, 2012. The Employer raised the time limit issue for the first time on the day of the arbitration hearing and should therefore be precluded from asserting that defense.

Next, the Union asserts that the language in the 2011-2016 CBA concerning this issue was exactly the same as the 2008-2011 CBA. The language of the agreement in Article 12, Section 7 must be given weight, and the reference in the settlement of the 2011 grievance that "future half days are subject to negotiations" should not be given weight, as grievance settlements cannot modify sections of the CBA without being ratified by the Union, which this settlement was not. As a remedy, the Union requests that employees be made whole by being paid the two hour minimum for all eight half days which occurred during the 2011-2012 and 2012-2013 school years, and that all future half days should be treated in the same manner.

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 first occurrence of the alleged violation took place on October 25 and 26, 2011, and the grievance was not filed until March 17, 2012. This grievance did not reference any days other than March 6 and 7, 2012 so therefore any subsequent alleged violations are moot. Furthermore, the Union skipped the second step of the grievance process entirely and filed its Demand for Arbitration well beyond the time limits specified in the CBA. If the arbitrator chooses not to dismiss the case, the Employer contends that drivers were properly paid two hours in both the morning and afternoons of the days in question per the contract. The Union presented no evidence in the form of pay stubs or other records disputing this fact.

OPINION

The issue before me is: whether the Employer violated Article 12, Section 7 of the CBA by refusing to pay bus drivers a two hour minimum guarantee for mid-day school runs on eight occasions when there were half days during the 2011-2012 and 2012-2013 school year? If so, what shall the remedy be?

For the reasons stated below, I find that the Employer did violate Article 12, Section 7 of the CBA when it failed to pay bus drivers a two hour minimum guarantee for mid-day school runs on six occasions when there were half days during the 2011-2012 and 2012-2013 school years, but did not violate the CBA

on two occasions during the 2011-2012 school year. The grievance is sustained in part and denied in part.

Although the Employer did not formally raise a procedural arbitrability challenge at the hearing, it raises timeliness as a defense. However, this argument is insufficient for me to deny the grievance, and I would have so ruled even if procedural arbitrability were part of the stipulated issue. 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. Thus, I decline to enforce them strictly absent prior notice from one party to the other demanding strict adherence *Elkouri*, at 5-30.

However, that same time limits principle does not apply to the alleged violations of October 25 and 26, 2011. I cannot find that a grievance that the Union filed on March 20, 2012 covers an alleged violation which took place nearly five months earlier. Such a result would cause a loss to the Employer due to the Union's inaction, a principle not generally recognized in grievance arbitration decisions *Elkouri*, 5-29. The fact that the parties settled a grievance over the same issue during the 2010-2011 school year was not sufficient to give the Employer notice that they would be subject to continuing liability on this issue, absent another timely-filed grievance.

Once the grievance was filed, it does cover all remaining instances of contract violation for the remainder of the 2011-2012 school year and the 2012-2013 school year as well. The doctrine of continuing violations is well settled in

arbitral jurisprudence, especially as it applies to disputes involving compensation. *Elkouri*, at 5-28-29. Clearly, the half day two hour minimum issue carries forward through the 2012-2013 school year, as there was no change of circumstances or contract language from the grievance filing in March 2012 through the end of the 2012-2013 school year. Therefore, the remedy granted covers the four disputed half days in the 2012-2013 school year.

I next address the Employer's claim that the grievance only applies to Junior Torres and not other affected employees. While the Employer is correct that the Step 1 grievance only refers to Mr. Torres, logic dictates that any arbitration decision which would apply to him must also apply to other similarly situated employees. Moreover, the Union filed the Step 2 grievance, which refers to all employees, on March 30, 2012. The Step 2 filing cures the defect in the grievance within the twenty working days specified in Article 6 and causes the grievance to apply to all similarly situated employees.

Apart from the procedural difficulties presented, the contract language that applies to this issue leads to only one possible result. The meaning of the plain language of Article 12, Section 7 is easily apparent. All school runs are to be paid to employees at a guaranteed two hours pay at the regular pay rate with the exception of kindergarten runs, late runs, field trips or charters. The half days in question were not one of those exceptions. Therefore, the two hour minimum at the regular rate must be paid to all employees who performed the "extra" runs on those days.

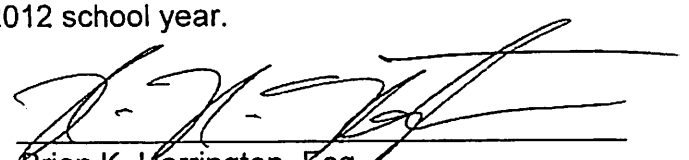
THE REMEDY

On the days in question, drivers should be compensated for either thirty or forty-five minutes, which represents the difference between what they actually received and the two hour minimum that the CBA guarantees. Specifically, when the elementary schools released early, drivers should have been compensated with the two hour minimum instead of the one hour fifteen minutes of pay they actually received. Similarly, when the secondary schools released early, drivers should have been compensated with the two hour minimum instead of the one hour thirty minutes that they actually received.

Therefore, all eligible drivers who actually worked on the days in question shall be compensated thirty minutes pay for March 7, 2012, October 23, 2012 and March 6 2013. All eligible drivers who actually worked on the days in question shall be compensated forty-five minutes pay for March 8, 2012, October 24, 2012 and March 7, 2013.

AWARD

The grievance is sustained in part and denied in part. The Employer violated Article 12, Section 7 of the collective bargaining agreement by refusing to pay certain employees a two hour minimum guarantee on six occasions when there were half days during the 2011-2012 and 2012-2013 school year, but did not on two occasions during the 2011-2012 school year.



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