
In the Matter of the Arbitration between

OPINION

**AMALGAMATED TRANSIT UNION
LOCAL 1342**

AND

AWARD

and

**NIAGARA FRONTIER TRANSIT
METRO SYSTEM, INC.**

Grievance: Coin Room Comp.

**Before: THOMAS N. RINALDO, ESQ.
P O Box 1334
Williamsville, New York 14231-1334**

The undersigned was duly designated Arbitrator in accordance with the provisions of the Parties' Collective Bargaining Agreement. Hearings were held in Buffalo, New York on November 6, 2014 and May 29, 2015. Appearing on behalf of the Amalgamated Transit Union, Local 1342 ("Union") was the law firm of Reden & O'Donnell, LLP, by Terry M. Sugrue, Esq., and on behalf of Niagara Frontier Transit Metro System, Inc. ("Company") was David J. State, Esq., General Counsel, by Wayne R. Gradl, Esq. of Counsel. The Parties were in all respects accorded a full and fair hearing, including the right to present oral and written evidence and to examine and cross-examine witnesses. Post-hearing briefs have been filed by both Parties.

ISSUE

The Parties did not agree on an issue to be presented for decision.

The Union's proposed issue is:

Did the Company violate Sections 16-4 and/or 19-1 of the Parties' CBA when, after almost 30 years of practice, it decided to pay Counter-Wrapper Clerks and Replenishment Clerks a total of 40 hours per week rather than 42.5 hours? If so, what shall the remedy be?

The Company's proposed issue is:

Did the Company violate the Parties CBA when the Company discontinued paying Counter-Wrapper and Replenishment Clerks working in the Coin room 8 hours per day, plus a half hour paid lunch for 7.5 hours of work per day and instead began paying said clerks 7.5 hours of hourly pay per day for the actual hours worked, plus the half hour paid lunch specified in Section 16-4.1(c) of the CBA? If so, what shall be the remedy?

The Arbitrator does not find the Parties to offer any substantial disagreement about the scope of the grievance under consideration. For the sake of simplicity, he adopts the following issue:

Did the Company violate the Parties Agreement when in 2014 it began to pay Counter-Wrapper and Replenishment Clerks a total of 40 hours per week rather than 42.5 hours? If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS
**SECTION 16 - PROVISIONS RELATING EXCLUSIVELY
TO OFFICE AND CLERICAL EMPLOYEES**

...

SECTION 16-4.1 Work-Day and Work-Week

16-4.1(a) Work-Day: Monday through Friday, seven (7) hours. For Counter-Wrapper Clerks and Replenishment Clerks, Monday through Friday, seven and one-half (7-1/2) hours.

16-4.1(b) Work-Week: Thirty-five (35) hours. For Counter-Wrapper Clerks and Replenishment Clerks, Thirty-seven and one-half (37-1/2) hours.

16-4.1(c) There shall be a daily one (1) hour paid lunch, which shall not be considered as work time. The paid lunch period for Counter-Wrapper Clerks and Replenishment Clerks shall be one-half (1/2) hour, which shall not be considered as work time. The pay for such lunch is included in the hourly wage rates set forth in this Section 16.

...

**SECTION 19 - WORKING CONDITIONS,
PRACTICES, ETC., TO CONTINUE**

19-1 The present working conditions, practices, rules and regulations of the Company not altered or modified by this Agreement, shall continue in full force and effect except it is understood and agreed that the hours of work and scheduling of runs may be revised by the company if it deems such revision necessary by reason of the Award or determination of any board of Arbitration herein provided for. However, it is understood and agreed that the Company shall always be privileged from time to time to revise, supplement and otherwise change its rules, provided same are not in conflict with any specific provision of this Agreement, and if in conflict or inconsistent with any such specific provisions, such revised, supplemental, or changed rules or regulations shall be subject to the approval of the Union which approval the Union agrees not to unreasonably withhold.

BACKGROUND FACTS

The grievance in this proceeding was filed by the Union on March 4, 2014. The Union based the grievance on the following allegation:

For almost thirty (30) years the Company has paid Counter-Wrapper Clerks and Replenishment Clerks a total of 42.5 pay hours per week. Despite this well-established pay practice the Company has recently announced its intention to reduce the weekly pay hours for the same employees to 40 hours per week.

Said change is in violation of the parties' cba as noted above. The Union demands the continuation of this long-standing pay practice and for all negatively affected bargaining unit members to be made whole.

The grievance was denied by the Company's Manager of Labor Relations. In pertinent part, the denial stated:

A review of the facts, reveals the Company is complying with the collective bargaining agreement. I find no memorandum of agreement or past practice that allows ATU Counter-Wrapper Clerks and Replenishment Clerks to be paid for hours not worked.

It will be useful to trace the history of the Parties' documented understandings regarding Counter-Wrapper and Replenishment Clerks. In their 1983 Agreement, the Parties, in Section 16-3.1 and 16-4.1, stated that all Clerks worked 7.5 hours per day, with one hour of unpaid lunch. With the advent of the rail system in 1985, the Parties reached a written understanding regarding Counter-Wrapper Clerks and the new position of Replenishment

Clerk. It is noted that there were other Clerks not falling into these two positions who were not affected by this understanding. The last paragraph of the understanding read:

The replenishment clerk position was created effective April 1, 1985. For the month of April 1985, the normal workweek for the replenishment clerk and the counter-wrapper clerk will be 37.5 hours with a one hour unpaid lunch. Effective May 1, 1985, the lunch period will be reduced to one-half hour, increasing the normal workweek to 40 hours. This change is made necessary by the opening of the LRRT and has been fully discussed with all concerned parties who are in total agreement. Therefore, the monthly rates of pay for the counter-wrapper clerks/replenishment clerk positions will be increased accordingly to reflect the additional time worked effective May 1, 1985.

During the 1987 negotiations for a new Agreement, the Parties entered into the following "Memorandum of Agreement Effective With Ratification of a New Contract,":

Any reference to the workweek of 37 one-half hours shall be changed to 40 hours. Any reference to daily hours of work of 7 one-half hours shall be changed to 8 hours, which shall include a one hour paid lunch.

This is effective for office and clerical employees covered by SEC. 16-10.1 and 16-10.2 of the contract.

Before ratification of a new Agreement, the Union filed various grievances regarding how employees would be compensated for working through their lunch hours. The Parties then reached an Agreement dated December 21, 1987, to settle the grievances. Paragraph "4" of the Grievance Resolution agreement stated:

Any employee forced to work thru his/her lunch hour will be paid time and one half for the lunch hour and hours of overtime after 4:00 p.m.

In their 1987 Agreement, which became effective August 1, 1987, the Parties set forth the following relevant provisions regarding the workday and workweek of Clerks:

16-4.1(a) Work-Day: Monday through Friday, seven (7) hours. For Counter-Wrapper Clerks and Replenishment Clerks, Monday through Friday, seven and one-half (7-1/2) hours.

16-4.1(b) Work-Week: Thirty-five (35) hours. For Counter-Wrapper Clerks and Replenishment Clerks, Thirty-seven and one-half (37-1/2) hours.

16-4.1(c) There shall be a daily one (1) hour paid lunch, which shall not be considered as work time. The paid lunch period for Counter-Wrapper Clerks and Replenishment Clerks shall be one-half (1/2) hour, which shall not be considered as work time. The pay for such lunch is included in the monthly wage rates set forth in this Section 16.

It is clear from the record that the Counter-Wrapper Clerks and Replenishment Clerks, at the very least since the 1987 Agreement, received 42.5 hours of pay per week. In the 1990 Agreement, the Parties changed the language of 16-4.1(c) so that the last sentence read: "The pay for such lunch is included in the hourly wage rates set forth in this Section 16." This change represented the only change to 16-4.1(a)-(c) the Parties made. Thus, 16-4.1(a)-(c), other than the identified change, remains the same in the Parties' current Agreement as it did in the 1987 Agreement.

On February 10, 2014, the Company notified the Union as follows:

This email is to advise you that a review of Coin Room operations in connection with Kronos implementation disclosed that Counter-Wrapper Clerks and the Replenishment Clerk in the Coin Room have been getting paid 2.5 hours of time each week above and beyond the hours actually worked and/or what they are entitled to under the CBA. Apparently this overpayment has been going on for quite some time before being uncovered in the recent review of Coin Room operations.

Please be advised that this overpayment will be stopped as of March 1, 2014. Since management is ultimately responsible for allowing this error to have occurred as it has there are no plans to seek reimbursement of the past overpayments.

Any questions, please contact ... in Labor Relations.

Needless to say, it was this change in payment to the Counter-Wrapper and Replenishment Clerk that triggered the filing of the instant grievance.

POSITION OF THE UNION

The Union relies on the language of Section 16-4.1(c), which was added to the Parties' Agreement in 1987. The Union asserts that reading the first two sentences of the Section together leads to the understanding "that all clerks receive a one hour paid lunch, while Counter-Wrapper Clerks and Replenishment Clerks only receive a half-hour 'period' of time in which to take the lunch." (Emphasis provided by Union). According to the Union, the "30 year pay practice" of paying these Clerks "shows that this is how the parties themselves implemented the paid lunch language of the 1987 cba." The third sentence of 16-4.1(c), which in 1987 stated that the "pay for the lunch is included in the 'monthly' wage rates" (now reading "hourly wage rates") must be understood, according to the Union, as reflecting that "employees did not actually receive anything additional out of it"; instead, the Union puts forth, "[t]he parties reduced the clerk's rates of pay to make the 'paid lunch' cost neutral."

Further, the “monthly wage rates,” the Union argues, that was mentioned in the Section 1 added in 1987 to the Parties’ Agreement “reflected the increase in wages that all employees received.” The Union emphasizes that “the monthly wage rates for the Counter-Wrapper Clerks and Replenishment Clerks also retained the increased number of worked and paid hours, as agreed to in” a 1985 Agreement between the Parties. (Emphasis in original). Because of the increased hours worked by the Counter-Wrapper Clerk and Replenishment Clerk positions, the Union asserts, “received the highest monthly wages of any of the clerical positions listed in Section 16-10.1 and 16-10.2” of the 1987 Agreement. The Union notes that these Clerks, however, worked 2.5 more hours per week than all other Clerks.

In setting forth its understanding of the Agreement, the Union also identifies past practice. To this end, the Union relies on the testimony of its witness Kathy Ehrig, a former employee in the Company’s Payroll Department. The Union notes her testimony establishing “the formula used by the Company to break down the ‘monthly’ rates of pay into ‘hourly’ rates of pay.” Further, the Union identifies Ms. Ehrig’s testimony that she “used that formula and broke down the monthly rates of pay to hourly rates of pay for all of the clerical positions listed in Section 16-10 of the parties’ 1983, 1987, and 1990 cba.” Moreover, the Union relies on the evidence that “Ms. Ehrig broke down the monthly rates of pay into hourly rates of pay using two different numbers of paid hours (i.e., 42.5 and 40) to compare the hours that the employees [in the two affected positions] were actually receiving for 30 years (starting with the 1987 cba) to what the Company now says the employee should have received.” (Emphasis

in original). This evidence, according to the Union, indicates that the Counter-Wrapper Clerk and Replenishment Clerk positions received the same rate of wage increases from the 1983 to 1986 Agreement as the remainder of clerical positions only if the full one-hour paid lunch is included (42.5 hours per week). If the full one-hour paid lunch is not taken into account, according to the Union, meaning that there were only 40 hours per week attributable to the positions, the wage rates for the Clerks would have been “far above what every other clerical employee received.” This conclusion, the Union claims, is consistent with the testimony of the ATU President and chief negotiator for the 1987 Collective Bargaining Agreement, Ronald Bohn.

The Union notes that, beginning with the 1990 Agreement, the Parties used “hourly” wage rather than “monthly” wages. The Union relies on Ms. Ehrig’s testimony and attendant exhibit that utilizing 42.5 pay hours for the affected Clerks from 1987 to 1990 would reflect that they received a wage increase which was the same as other clerical positions. However, the Union notes, without taking into account the full one-hour paid lunch (paying the affected positions at 40 hours per week), would have meant that in 1990 the affected Clerks would have received a pay cut of \$.72 per hour despite the fact that “no other clerical positions received any sort of pay cut ... rather they all received raises.” In addition, the Union relies on Ms. Ehrig’s testimony that no Union positions have ever received an actual pay cut in her 30 plus years of employment with the Company. Hence, the Union puts forth that “the only conclusion that can be drawn from the evidence is that **42.5 hours were built into the**

monthly wages for the Counter-Wrapper Clerk and Replenishment Clerk by the parties when they negotiated the paid lunch language in 1987.” (Emphasis in original). This understanding, the Union maintains, has “been hiding in plain sight - right where Section 16-4.1(c) said to look for it.” The Union also asserts that it never “bargained away” the Company’s “underlying obligation to pay the full one-hour paid lunch while only providing the at-issue positions an opportunity for a half-hour ‘period’ in which to take lunch” when they Parties moved from monthly to hourly wages in 1990.

POSITION OF THE COMPANY

The Company contends the Union has the burden of establishing a breach of the Parties’ Agreement. It rejects any contention by the Union that Section 19.1 of the Agreement has been violated because the language therein, the Company maintains, “actually preceded commencement of the payments at issue.” As such, the Company contends, Section 19.1 cannot be used by the Union in support of its position.

The Company also argues that the Union, cannot rely on any “past practice” argument because “past practice cannot be used to justify the payment of monies not authorized by the CBA.” The Company relies on a decision issued by PERB in which the Administrative Law Judge rejected a labor organization’s claim relying on past practice on the ground that the

municipal employer “was entitled to revert to those terms [to which it reverted], regardless of the length of time it had granted benefits in excess of the negotiated benefits.”

Turning to the Union’s reliance on Section 16-4.1 of the Parties’ Agreement, the Company maintains that the language of that provision “cannot reasonably be stretched to support entitlement of Coin Room clerks to the 2 ½ hours pay in question.” A “plain consistent reading” of the applicable language, the Company asserts, requires a different conclusion than that urged by the Union. The Company offers its observation “that the second sentence in §16-4.1(c) could have easily said that Counter-Wrapper and Replenishment Clerks will only actually take half of their 1 hour paid lunch and will be paid an extra half-hour per day for working through half of their lunch period, but the language of this subsection does not say anything even remotely close to this.” The only “reasonable construction of this sentence,” the Company contends, “is that in contrast to other clerks, the ‘paid lunch period’ for the Coin Room Clerks is a half-hour.”

Further, the Company claims that the Union’s interpretation of Section 16-4.1(c) is not consistent with other language found in Section 16-4.1. According to the Company, when the entirety of Section 16-4.1 is read, its intent “is plainly designed to give all clerks covered by this Section 40 hours of base pay per week when the normal designated work hours and the paid lunch period are added together.” For Counter-Wrapper and Replenishment Clerks, the Company puts forth, this “40 hours of base pay per week ... is expressly defined to consist of five 7 ½ hour work days, plus a ‘paid lunch period ... [of] one-half hour(½).’”

It is evident, the Company claims, that the provisions of the Parties' Agreement that came into effect on August 1, 1987, did not adopt the Memorandum of Agreement by the Parties and did not "specify the work days and work weeks of any clerks subject to §16-4.1 to be 8 hours per day and 40 hours per week." Rather, the Company observes, the "work days and work weeks of clerks other than Counter-Wrapper and Replenishment Clerks was set at 7 and 35, respectively." For the Counter-Wrapper and Replenishment Clerks, the Company notes, the 1987 Agreement treated them separately with a workday of 7 ½ hours and a workweek of 37 ½ hours. Further, the 1987 Agreement, according to the Company, specifically stated that the "paid lunch period" for the Counter-Wrapper and Replenishment Clerks was to be only one-half hour. The Company states that "[t]here are simply no provisions in §16-4.1 which contemplates that Counter-Wrapper and Replenishment Clerks would normally receive 42 ½ hours pay each week exclusive of overtime when their regular work hours and paid lunch period were added together."

According to the Company, the practice of paying Counter-Wrapper and Replenishment Clerks 42 ½ hours each week "had nothing to do with what was actually agreed to and put into the Parties' CBA." In fact, the Company notes, Union witness Ehrig "testified that the half hour per day began getting added to the pay of Counter-Wrapper and Replenishment Clerks **before** the finalized version of the CBA, effective August 1, 1987, was finished getting compiled for distribution to the Parties." (Emphasis in original). What

occurred, according to the Company, was that the payment of 42 ½ hours per week to the affected Clerks “was rooted in a notion of what was supposedly fair for these clerks.”

The Company also observes that under the 1987 Agreement, although “Counter-Wrapper and Replenishment Clerks may have had to actually work an extra half hour per day in comparison to other Full-Time clerks, they were also paid a higher salary” and, in fact, “the half-hour paid lunch specified for Counter-Wrapper and Replenishment Clerks is a half-hour more paid lunch than employees in the Maintenance Department receive.”

Thus, the Company states that the only reasonable reading of the Section 16-4.1 is “that the normal work week and paid hours of Counter-Wrapper and Replenishment Clerks is 37 ½ hours, plus a half-hour paid lunch period for a regular total, exclusive of overtime, of 40 hours, not 42 ½ hours.”

DISCUSSION

Section 16-4.1 is contained in Section 16 which is that portion of the Parties’ Agreement containing “Provisions Relating Exclusively To Office and Clerical Employees.” Section 16-3 refers to Clerks “whose duties cannot be performed within standard hours.” It is Section 16-4, which references “Other Full-Time Clerks,” that refers to the Counter-Wrapper and Replenishment Clerks as well as other full-time Clerks. In Subparagraphs (a) through (c) of Section 16-4.1 the Parties define “work-day” and “work-week” of these Clerks

and draw a distinction in all three subparagraphs between the Counter-Wrapper Clerks and Replenishment Clerks, on the one hand, and other full-time Clerks on the other. This distinction is set forth in Section 16-4.1(a) by the definition of different length of a workday. For the Counter-Wrapper Clerks and Replenishment Clerks the workday is 7 ½ hours whereas for the other Clerks the workday is 7 hours. In subparagraph (b), the workweek for the Counter-Wrapper Clerks and Replenishment Clerks, consistent with the longer workday they are given, is 37 ½ hours whereas the other full-time Clerks have a workweek of 35 hours. In subparagraph (c), the Parties address “paid lunch” and state in the first sentence that “[t]here shall be a daily one (1) hour paid lunch; in the second sentence they say that “[t]he paid lunch period for Counter-Wrapper Clerks and Replenishment Clerks shall be one-half (½) hour.” In the third sentence of subparagraph (c) they then state that the “[t]he pay for such lunch is included in the hourly wage rates set forth in this Section 16.”

The Parties offer two different readings of the above contractual language. Initially, the Arbitrator would offer his observation that Section 16-4.1(c) is not a model of clarity. Thus, the Arbitrator finds that each Party’s proffered interpretation is logically consistent with the language of 16-4.1(c). The Union’s contention that the language can be read to support its position that the Counter-Wrapper and Replenishment Clerks are to be paid on a basis of 42 ½ hours a week is consistent with the language. Added to the rationality of the Union’s interpretation, of course, is the fact that the Counter-Wrapper Clerks and Replenishment Clerks work 2 and ½ hours more each week than do the other Clerks covered by 16-4.1. On

the other hand, the Company had offered an interpretation, particularly based on the language that the Counter-Wrapper and Replenishment Clerks receive only a half hour paid lunch period each day, that is also consistent with the language of 16-4.1.

The Arbitrator finds that the interpretations offered by both Parties, therefore, offer plausible understandings of the relevant contractual language. Put differently, the Arbitrator finds that the relevant contractual language is ambiguous and, therefore, not as clear as each Party asserts from their respective vantage points. The Arbitrator also finds that there is no other provision in the Parties' Agreement that sheds sufficient light on this ambiguity to permit a resolution of the question presented for decision. When the language of a relevant provision in an Agreement does not produce a sufficiently clear expression of the Parties' mutual intent to permit a resolution of the Parties' dispute, an Arbitrator is permitted to consider extrinsic evidence.

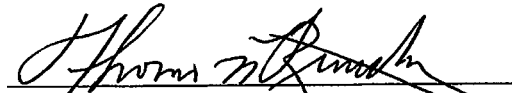
The extrinsic evidence in the record powerfully supports the Union's interpretation of the Parties' Agreement. That is, until 2014, the Company, for more than 20 years, regularly compensated the Counter-Wrapper and Replenishment Clerks in a manner consistent with the Union's interpretation of the Parties' Agreement. This practice, the Arbitrator observes, remained in place through the negotiation of various Agreements. Negotiations over wages, the Arbitrator would observe, thus occurred with the Union having the reasonable understanding that Counter-Wrapper Clerks and Replenishment Clerks were receiving compensation based on a calculation of 42 ½ hours per week. The Arbitrator would also

observe that the understanding of Section 16-4.1 that is reached by a consideration of past practice squares with the reality of the fact that the Counter-Wrapper Clerks and Replenishment Clerks work 2 ½ hours per week more than the other Clerks covered by Section 16-4.1. While the Company's implementation of the Kronos System may have led the Company to take a different look at the relevant contractual language, the Arbitrator is not at all convinced that the language of Section 16-4.1 mandates the conclusion that the language of the Agreement unambiguously supports the Company's interpretation, for the reasons set forth above, and it cannot be said, therefore, that the past practice reflected only an error on the Company's part. This conclusion also renders unavailing the Company's reliance on the PERB decision, which could be understood in the context of a broader principle that past practice evidence cannot trump contractual language with an unequivocal meaning.

Accordingly, the Arbitrator finds that the Union has sustained its burden of proof in establishing a contractual violation. Thus, the employees in the Counter-Wrapper Clerks and Replenishment Clerks positions are entitled to a "make whole" Award for the difference in what they should have received and what the Company has been paying them from the date the Company changes its payment, which this record reflects as March 1, 2014.


AWARD

The question presented for decision is answered in the affirmative in that the Company violated Sections 16-4.1 when it began to pay Counter-Wrapper Clerks and Replenishment Clerks a total of 40 hours per week rather than 42 ½ hours. Within 90 days of the date of this Award, the Company shall make all present and past occupants of the two Clerk positions “whole” by paying them the difference between what the Company had been paying them (42.5 hours a week) and what the Company began paying them on or about March 1, 2014 (40 hours per week).


THOMAS N. RINALDO, ESQ., ARBITRATOR

STATE OF NEW YORK)
COUNTY OF ERIE) SS.:
WILLIAMSVILLE, NEW YORK)

I, THOMAS N. RINALDO, do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed the within Award on July 8, 2015.


THOMAS N. RINALDO, ESQ., ARBITRATOR