

BEFORE ARBITRATOR DENNIS A. KRUEGER

IN THE MATTER OF GRIEVANCE ARBITRATION:	{	
	{	BMS CASE NO. 14-PA-1165
AMALGAMATED TRANSIT UNION LOCAL 1005	{	
	{	
AND KELLY CRAVEN, GRIEVANT	{	DATE OF HEARING
	{	SEPTEMBER 8, 2014
EMPLOYEE ORGANIZATION	{	
	{	
AND	{	BRIEFS FILED
	{	SEPTEMBER 26, 2014
METROPOLITAN COUNCIL METRO TRANSIT DIVISION	{	
	{	
PUBLIC EMPLOYER	{	DATE OF AWARD
	{	OCTOBER 22, 2014
	{	

APPEARANCES

FOR THE ATU LOCAL 1005:

Timothy Louris	Attorney for ATU Local 1005
Kelly Craven	Grievant
Dan Abramowicz	ATU Local 1005

FOR THE METRO TRANSIT DIVISION:

Marcia Padden	Labor Relations Specialist
Tony Brown	Labor Relations Specialist
John Paul Zanaska	Director, Commuter Rail
Tony Hebert	Assistant Manager, QA/Training
Thomas Humphrey	Deputy Director, Bus Maintenance

JURISDICTION

The first task of this neutral is to determine whether or not the claims raised by the Grievant are subject to the arbitration provision of the collective bargaining agreement and to establish that arbitral authority exists for the resolution of this dispute between the parties.

Metropolitan Council, Metro Transit Division (hereinafter "Metro Transit", "Company" or "Employer") and Amalgamated Transit Union Local 1005 (hereinafter "Union" or "Local") are parties to a Collective Bargaining Agreement covering August 1, 2012 to July 31, 2015 (Joint Exhibit #1"). Within that Agreement, there is a Grievance Procedure at "Article 5" involving the application and interpretation of the Agreement. For clarification and abbreviation, "Company" or "C" and a number will refer to Company Exhibits. "Union" or "U" and a number will refer to Union Exhibits.

Kelly Craven (hereinafter "Grievant") is a member of the bargaining unit and hence covered by the Collective Agreement (See Joint #1). A grievance was filed on January 13, 2014 by the Grievant and the Union alleging a violation of "Overtime Rotation Procedure" at Article 23, Section 3. (C#4 and U#9) This grievance was processed through the contractual procedures as evidenced by Exhibits C#4 and U#9, U#10, and U#11 and then submitted to arbitration.

Metro Transit and the Union (hereinafter "Parties") mutually selected the undersigned arbitrator for this case. The CBA contains "Arbitration Procedures" at Article 13 that states, "The arbitrator's decision shall be final, binding, and conclusive". Neither the Employer nor the Union objected to the implementation of the arbitration process or proceeding forward with this hearing. Given this result, it is determined that this neutral does have jurisdiction over this matter.

With this logical foundation, the finding is that this matter is appropriately presented before this neutral for consideration of procedural and substantive issues raised by the parties. The Parties further agreed at the onset of this hearing that there existed no procedural issues or jurisdictional issues for consideration by this neutral.

HEARING

This matter came to hearing at 9:00 a.m. on September 8, 2014, before the undersigned arbitrator who was appointed as the impartial arbitrator through the utilization of the Minnesota Bureau Mediation Services and the mutual agreement of the parties. Neither party made an objection to this neutral presiding over this case and both parties agreed that this matter was properly presented before this neutral. Both parties were afforded a full and complete opportunity to present written evidence and witnesses, to cross-examine witnesses, to provide rebuttal information, and to argue their respective positions. All exhibits presented by the Employer and the Union were received and made a part of this record. There were no objections made to any of the exhibits. The hearing was recorded with the Arbitrator retaining the recording for his personal records. The oral portion of this hearing concluded around 1:00 p.m. The Arbitrator requested short briefs outlining the major arguments of both parties that were to be provided by the end of the day September 26, 2014. Subsequent to the receipt of those briefs, the hearing will be closed. The signed award is to be placed in ordinary mail addresses to the parties as designated on the appearance sheet and an electronic copy will be sent to the parties simultaneously.

STATEMENT OF THE ISSUE

The parties were not in agreement on the issue before this neutral at the beginning of this hearing and were asked to refine the issue as much as possible. The Undersigned arbitrator did request that at the beginning of the oral hearing for authority to develop a statement of the issues if no agreement was reached. There was no objection made by either party. The parties were requested to supply a joint statement of the issue(s) as a part of their final briefs. They were not able to jointly accomplish that request or task. The final statement of the issue supplied by each of the respective parties is thus reproduced from those post-hearing briefs and is provided below.

EMPLOYER STATEMENT OF THE ISSUE

Did Metro Transit violate Article 45, Section 12 and/or Article 23, Section 3 on December 28, 2013, when Commuter Rail Foreperson, Robert Lex, while working overtime in the capacity of Commuter Rail Technician (CRT) completed a portion of a "general clean"?

UNION STATEMENT OF THE ISSUE

Did the Employer violate Article 45, Section 12 of the parties' contract by allowing non-cleaners to perform Saturday overtime cleaning work in the Commuter Rail Department without first offering the overtime cleaning work to cleaners?

If so, what remedy is appropriate?

ARBITRATOR'S STATEMENT OF THE ISSUE

The arbitrator in this case has reviewed the record of the hearing and has utilized the statements provided by both parties, and has incorporated them into one statement as an accurate statement of the issue.

Butler Paper Co., 91 LA 311 (Weiss, 1988)

Did Metro Transit violate Article 45, Section 12 and/or Article 23, Section 3 on Saturday, December 28, 2013 in making the determination of which Employee should provide overtime-cleaning work?

If the contract was violated, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 5

GRIEVANCE PROCEDURE

...

Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

...

ARTICLE 13

ARBITRATION PROCEDURES

In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties within thirty (30) days after the dispute or controversy first arises, the Metro Transit or the ATU, whichever is applicable, in accordance with Article 2 or 5 hereof, may request in writing that the dispute or controversy be submitted to arbitration. The State Bureau of Mediation Services shall furnish a list containing the names of seven (7) persons from which the arbitrator shall be selected. Within five (5) days after receipt of such list, the parties shall alternately eliminate one name from the list until only one name remains.

...

In making such submission the issue to be arbitrated shall be clearly set forth in writing. The arbitrator's decision shall be final, binding and conclusive and shall be rendered within thirty (30) days from the date the arbitration hearing is completed.

ARTICLE 45

COMMUTER RAIL MAINTENANCE

Section 1.

All applicable contract language, work rules, and practices shall transfer from Article 23 for the Maintenance Department, with the exceptions noted in this article. See Article 23.5 for Vehicle Maintenance seniority rules.

...

Section 12. Overtime

Overtime in the Commuter Rail Division will be rotated according to shift seniority within job classification and classification needed to perform the work.

...

Section 17.

Commuter Rail department employees who are qualified will be required to do any and all work related to the maintenance and repair of Commuter Rail rolling stock, equipment and/or components whose functionality, maintenance standards or intervals are regulated by the Federal Railroad Administration.

ARTICLE 23

MECHANICAL DEPARTMENT Overall Facility and Operating Garages

SECTION 3

...

(G) Employees in the Mechanical Department reclassified from a higher classification to a lower classification will not be required to continue to do the work in the higher classification, but will be put on work, which requires the skill of such lower classification.

Specific Notation Regarding Relevant Language:

At the onset of the hearing the parties did agree that Article 45 would apply first and that Article 23 would apply second.

POSTION OF THE METROPOLITAN COUNCIL

SUMMARY OF KEY ARGUMENTS

Employees in the Cleaner Classification were not needed to work overtime on Saturday, December 28, 2013. Cleaners who primarily perform General Cleans do not work on the weekends. Therefore there was no overtime needed to fill in for an absent cleaner and there was not work that was exclusive to the Cleaners that the Mechanics on duty that day that could not contractually do. Had Metro Transit determined there was a need for dayshift cleaners on December 28, the opportunity would have been made available to the cleaners and the proper overtime rotation would have been followed.

The overtime needed for Saturday, December 28, 2013, was for a commuter rail mechanic technician not a cleaner. This was planned, prescheduled overtime coverage of a mechanic technician position. Mr. L and Mr. G perform the duties of Mechanic Technicians that day by completing the 184-day inspection, which included the "daily inspection" and finishing up some exterior work remaining on the general clean.

The work completed by the two commuter rail mechanics on Saturday, December 28, 2013, was appropriate for that classification. Mechanics have the option of sending

trains out with the general clean incomplete or finishing it. In this case that discretion was exercised and the mechanics completed the general clean. Mechanics can work down (found in Article 23, Section 13 (g)). The Employer demonstrated that when working overtime, persons in the classifications higher than that of a cleaner have performed general clean work. The pay status of the employee performing the work is not a consideration in the assignment of the work.

POSITION OF THE AMALGAMATED TRANSIT UNION

SUMMARY OF KEY ARGUMENTS

The primary facts underlying this matter occurred between Monday, December 23 and Saturday, December 28, 2013. Despite cleaning car number 601 throughout the week, as of Friday, December 27, general clean work was not yet completed. Thus, as the grievant finished her shift for the day, she asked the foreperson on duty if the cleaning work could be finish the next day, Saturday, as an overtime assignment. The Grievant was on top of the overtime rotation list. The foreman replied that no overtime cleaning work was needed that weekend, and that the cleaning work could be finished the following Monday, December 30. That Saturday, Mr. Lex performed 3.75 hours of cleaning duties and Mr. G performed 1.6 hours of cleaning duties, for a total of 5.35 hours of Saturday cleaning work on car #601 by mechanics.

For overtime assignments of one hour and 59 minutes, or less, forepersons are allowed to make such assignments without prior approval from Metro Transit management. Thus, when overtime work of longer than one hour and 59 minutes is to be assigned, the Employer is to determine the type of work involved, and then rotate such assignments amongst the employees whose "job description and classification" pertain to that work.

The Union does not dispute that mechanics are permitted to perform cleaning work in certain circumstances as discussed above. Only cleaners meet the "job description and classification" criteria for overtime cleaning work sent out in the contract. Metro Transit is therefore contractually obligated to offer overtime-cleaning assignments two hours or more to cleaners. Only if the cleaners turn down the assignment can the overtime be performed by mechanics.

ANALYSIS AND DISCUSSION OF THE CASE

The initial undertaking was a brief reading of the entire master contract as a whole document that provides a lay of the land regarding this dispute. Much the same as departing on the journey and wanting a roadmap, the contract provides a direction for this neutral. While a large majority of the contract language is not particularly applicable to reaching a final decision, it does provide a backdrop of the contractual relationship between the parties. It also provides the workings and interactions of different segments of Metro Transit Authority and the ATU that have been developed over several years and contracts culminating with the current collective bargaining agreement.

This is a case about the Commuter Rail Division of Metro Transit and more specifically the Commuter Rail Maintenance Division. One maintenance area deals with "Maintenance" and the other with "Maintenance QA and Training". Both areas maintain commuter trains and cars for timely, safe and reliable operation for all riders and the public. There are different job classifications - Foreperson, Mechanic, Cleaners, Electronic Technicians, Skilled Helpers, Rail Operations Clerk and Track Maintainer. Company #3 and Union #4 provide a flowchart diagram of the positions and the individual employees. Company #3 (p2) identifies the normal schedules for mechanics, cleaners, and electronics/helpers with the Grievant identified as CRC32. She is a "Cleaner III, Commuter Rail" within the diagram and her job description is contained within Union #1. *"This position cleans and maintains Metro Transit's Commuter Rail passenger cars and locomotives interiors and exteriors to a high standard for our internal/external customers."*

The "**Statement of the Grievance**" or the issue of grievance was overtime as identified on the ATU Local 1005 Grievance Form. (Union #9 and Company #4)

"8 hours of overtime from December 28, 2013."

"Article: 23, Section: 3. Overtime Rotation Procedure" was the violation(s)

"Pay the Grievant for 8 hours of overtime" was the requested remedy. 1/13/14

"The ATU contract was violated on Saturday, 12/ 28/13 when Bob Lex worked out of his classification to work 3.75 hours of overtime on general clean work

order 2959062 while he was in on overtime to replace CRT 13. This overtime work should have been offered first to day cleaner Kelly Craven.” 2/14/14

“Violation of Article 23, Section 3 Overtime Rotation Procedure. Eight hours of OT from December 28, 2013. Pay Kelly Craven 8 hours OT.” 3/26/14

Response to First Step Grievance - February 14, 2014

Union Position

The company cannot have mechanics performing cleaning work on overtime; it is a contract violation and a cleaner should have been called for overtime in this instance. If the EIC had called every cleaner and they all turned it down, then the mechanic could have done the cleaning work.

Management Position

Bob Lex was called in to fill a normal mechanic vacancy. Because it was a normal shift that was filled, he was acting in the role of CRT 13. Mechanics are authorized to clean; this is a well-established past practice. Had a cleaner vacancy or an extra shift for cleaning been covered by a mechanic prior to calling cleaners, a violation would have occurred, but this was not the case.

Response to Second Step Grievance – March 26, 2014

Union Position

Cleaning staff should have been called to work on the general cleaning work order 2959062 (cab car 601). Although Bob Lex was filling CRT 13, working 4 hours cleaning on overtime for a 10-hour call is not a fiscally responsible work plan. Additionally a second mechanic (on regular time) assisted in cleaning the same vehicle. The union acknowledges that mechanics can work below their classification but does not comprehend why overtime was not rotated if cleaning work was needed.

Management Position

A cleaner vacancy was not filled by a mechanic. Bob Lex was called in to fill a mechanic vacancy (CRT 13) and was assigned tasks regularly performed by the classification which is a well-established pass practice. Bob completed tasks pertaining to the inspection of this vehicle and what remained in order for the vehicle to go back in service.

There were several iterations of the grievance and responses as the grievance moved up the ladder. The responses were refined, as should be the case, with the hope of reaching agreement prior to arbitration. No agreement was reached prior to arbitration. It is evident that both parties have migrated around applicable contract provisions and potential interpretations.

The incident that caused the grievance was the request for additional weekend work if available. The Grievant makes the claim that she was entitled through the contract language to overtime hours. The Union had two witnesses in the presentation of its case.

THE UNION began its case with Dan Abramowicz. He has served on the ATU Local 1005 Executive Board for approximately 16 years, has been Recording Secretary, an ATU assistant business agent, and has represented members in grievances over this time period. His initial work period was with Metro Transit 1992-1994.

The Union Witness Abramowicz testified that the job description for "Foreperson Commuter Rail" (Union #2) and "Mechanic Commuter Rail" (Union #3) do not have the term "cleaning" or "cleaners" contained within them. Additionally, he indicated that ATU did not have a part in writing these job descriptions.

He further testified regarding *Article 45 Section 12 Overtime*. In summary, the employee in charge checks the rotation list for each classification, which is kept on a computer software program. If the overtime is 1:59 (hours) or less, this is done on "as needed basis" and is not rotated. When there is a need for overtime of 2:00 hours or more, overtime is to be rotated among the Cleaners. His experience is that Cleaner duties have been rotated if over 2 hours and if Cleaners could not cover, mechanics could work down or out of class. He went on to further explain that if Cleaners could not cover their work, Mechanics could work out of classification.

Mechanics can do cleaning IF

- 1) Straight time work,
- 2) Abundance of work regular cleaners can't cover, and
- 3) Overtime longer than two hours if cleaners refuse work.

Mr. Abramowicz went on to testify that Mechanics cannot perform overtime cleaner work unless it is first offered to Cleaners.

When asked about past practice of mechanics doing cleaning work, instances at Commuter Rail, where cleaning work was done and cleaners were not asked or offered overtime, he said it had been grieved. This particular overtime instance was known to be needed, was requested or inquired about, and was scheduled to be done by person of higher classification even though cleaners were available. There was no justification for mechanics doing more than 2 hours of overtime without first offering overtime to cleaners first.

Cleaning work should be done by a person on straight time, or preferably a cleaner on overtime. A mechanic doing work on overtime, with not enough mechanic work, does not justify doing cleaner overtime. The witness was not aware of another instance in Commuter Rail, where the floor person or mechanic has done overtime of greater than 2 hours without first offering it to cleaners.

There was only one other instance like this one that has happened, and it was grieved. Facts of this case are almost identical to the one earlier and that was the only other case. Union #14 (4 pages).

In cross-examination of the Union witness, the Employer indicated in Company #9 regarding the earlier overtime grievance, the grievance was denied by management at all levels. Management agreed to pay Mr. Herrala due to an inadvertent computer/operator issue delaying the timely delivery of the grievance response.

The Union noted that the decision to pay the grievant was not an arbitration decision.

The remainder of the testimony of Mr. Abramowicz was uncontroverted.

The second witness for the Union was the Grievant Kelly Craven who started work in July of 2010. The Grievant has been working for Metro Transit in the maintenance department as a commuter rail cleaner with her duties including the cleaning of the interior and some exterior of the rail cars. She is one of the two daytime cleaners

working days from 7 a.m. to 3 p.m. on Monday through Friday. There are four other cleaners working the night shift from 8 p.m. to 4 a.m. No cleaners normally work on Saturday or Sunday or over the weekend. Mechanics have three shifts – day shift, afternoon shift, and night shift – there are some mechanics on duty all the time.

For work of less than two hours, overtime can be assigned with no prior approval and without rotation. Hence any one can do this work for less than two hours. For overtime work of two hours or greater, prior approval is needed and overtime is rotated. The Grievant has worked assigned O/T with prior approval and rotated on seniority list – she has had experience with this process.

Some Mechanics are on all the time. Mechanics can do cleaning and they have done cleaning - such as when cleaners are short-staffed, when mechanics have helped with special events, and when offered as O/T if cleaners don't take it or accept it first. Such has happened before when down to two cleaners at night and offered.

Testimony from the Grievant indicated that she was not able to complete her usual or customary cleaning of CRC601 on Friday, December 27, 2013. The other day cleaner had taken some vacation time earlier in the week causing some cleaner work to back up. The Grievant indicated that she liked to finish her clean and she was not able to finish that car and the clean on Friday. She wanted to come in and finish her clean but the Foreman indicated "No" and said she could come in and finish the work on Monday. When she arrived on Monday and was going to finish her car, she was told that it was put back into service.

Union #8 is a Maintenance Work Order which identifies that CRC601 was given a GENERAL CLEAN on Saturday 12/28/2013 with a description "washed A end and half right side" taking 3.75 hours. (Note: This was work typically done by the Grievant.) The same Work Order # is listed on page 2 (GENERAL CLEAN) and page 3 where Employee 05491 listed 3.75 hours and Employee 72116 listed 1.60 hours.

Union #8 at bottom of page is a copy of the "Current Overtime Roster" which lists the Grievant as the next in line for overtime. The Grievant stated that if she were offered the work, she would have taken the work. Union #8 at page 3 describes the work performed

by the Grievant during the week, and it was on that Friday 12/27 that Mr. Lex told her that the work did not need to be done. There was no need to finish. Mr. Lex did the work on Saturday 12/28 with another mechanic.

When asked, "Over your time in Commuter Rail Maintenance since July 2010, are you aware of any other instance where, a mechanic or any other non-cleaners really, has done cleaning work on overtime for longer than two hours?" The Grievant responded that there was one other instance and that was grieved. No others.

On cross-examination, the Grievant stated that she has been offered work less than a full shift on overtime on Saturday or Sunday and has worked less than the full eight hours. It is 1:59 or 8 hours at the beginning or the end of her shift - Like 7 to 8:59 pm special events training.

Regarding Saturday work, she stated that Mr. Lex said there was no need for overtime and she would be there on Monday so she could finish the work then. She also said she was not even offered the 1:59 to finish cleaning the windows. (See Union #8 page 3.)

The Grievant was aware of Mike Herrala's grievance and that it was denied at both steps. She indicated that he said that he would have arbitrated if he had not gotten paid.

This was the end of the Union's case in chief.

METRO TRANSIT began its response to the grievance with Mr. Zanaska who is currently Director of Northstar Commuter Rail. He started March 2009, as Superintendent of Maintenance, and then promoted to Assistant Director and now serving as Director since August 2013. His primary responsibilities include daily oversight of commuter rail operations and maintenance. He also oversees the operation of the collective bargaining contract.

Metro Transit and ATU are responsible for repair, maintenance, cleaning of rolling stock. Company #3 is an organizational flow chart; cleaners listed in the bottom of the chart have the primary responsibility of cleaning the equipment. The secondary responsibility

falls to other qualified employees within that square. This is followed by a chart of work hours for maintenance employees. (cf Union #4, #5) The witness cited page 96 of the CBA at Section 17 describing the employees who are qualified to do work (cleaners and the mechanics) and stated that a mechanic can clean a car to get it back in service. The shaded areas are the days off or not scheduled for work. Two mechanics are kept on site to be able to safely move cars. There are six cleaners – two cleaners work day shift and four work the night shift. A general clean is top to bottom, inside and outside, wall to wall, including the exterior that may take from two days to a week, dependent on the clean.

The supervisor develops a “Weekend Work” sheet that outlines tasks to be done and assigns the maintenance work to be done by Monday. Forepersons assign mechanics and cleaners on a pass down sheet. See Weekend Worksheet for December 27-29 with pages 2-5 describing the Northstar shop status, consists, and tasks with priorities for each shift. Forepersons assign mechanics and cleaners on pass down sheet.

Northstar Status Sheet on pages 6-7 details the Saturday work for the second shift. This sheet describes the entire yard and is a one-stop shop for anyone running the ship. Overtime Notes appear for four employees. Car #601 was finished by the second shift.

Regarding the Overtime Checklist (p8), the O/T need was pre-planned on November 20 as a floating holiday for 10 hours for CRT 13. List was completed on 12/27 at 7:10 by ? , filled (Y) and rotated (Y). Bob Lex was EE# 5491 and no start or end time was provided. He was filling a maintenance job for a mechanic as his primary function. Bob Lex spent about one-third of the 10-hour day cleaning. (See page 9 for time sheet delineation and work order number.)

Regarding how overtime is to be offered; Mr. Zanaska said the Supervisor and the Foreperson determine what is needed for the weekend. In this case Mr. Lex worked a mechanic vacancy and at the end of his maintenance duties, he then did some cleaning duties as a result and then continued his day. He was filling a maintenance vacancy.

Typically 1:59 is for before a shift or after shift – or if we know we have whether it is finishing up a job because we want the unit done, mechanic is willing to stay later or

come in. This is voluntary and there is no limitation and it does not have to be rotated through the list. An example would be a shortage of personnel or a special event.

Bob Lex was a qualified mechanic to fill that vacancy and the overtime list was rotated properly. Bob Lex filled it that day and there was no need for a cleaner that day.

Anything not covered in Article 45 is covered in Article 23 or 23.5. (See Section 1 of Article 45, page 91) "All applicable contract language, work rules and practices shall transfer from Article 23 for the Maintenance Department with the exceptions noted in this article." Cleaners are not referenced in Article 45 so one goes to Article 23, Section 3 (p 40). It was not violated. There was not a cleaner vacancy so there was no need to fill any cleaner job that weekend. Ability for forepersons and mechanics to do cleaning is covered in contract. They are not allowed to work above classification but are allowed to work below classification. CBA page 44 Article 23, 13 g. Mechanic can work as a cleaner without violating the contract.

Company #6 is work order with comments regarding inspection and the steps completed as an accountability measure. Pages include the Calendar day inspection report for 12/28 signed by Mr. Lex, Maintenance Work order with notes, labor hours by work order number. The last page is the general clean procedure filled out by the Grievant,

Mr. Zanaska heard the Second Step of the grievance, researched, and denied the grievance. The job that needed to be filled was a mechanic job, mechanics are able to work below their classifications, primary role was maintenance but it did include some cleaning. Additionally we have minimum requirement to have two mechanics on site for making moves for safety reasons and to accomplish the scheduled work. We would not send one mechanic home. When we don't have work, we look for work, and if that work was cleaning, that is what's gets done.

Company #4 is similar to a situation a year before. Mr. Zanaska denied grievance but because of an error in getting it sent out, Mr. Herrala was paid for the 8 hours. Company #9 was that grievance from a year earlier including the total response from Mr. Zanaska. Mr. Zanaska talked with bus maintenance management to find out if what he was doing was allowed, and they said yes. Light rail indicated they did the same.

He asked for a printout of information, Company #7 is that printout history of work orders where mechanics and others had performed overtime-cleaning functions. This covers overtime in commuter rail, light rail, and bus in the last three years. Company #8 is similar data but for straight time. This information on both reports indicates that mechanics and others performed work below their classifications, which is allowed by the contract.

On cross-examination, Mr. Zanaska was asked questions about Company #7 (Union #12) dealing with overtime by non-cleaners doing O/T cleaning work on commuter rail. Only the top four lines apply to commuter rail -- there were only four instances total in the last three years and 8 months where non-cleaners were doing overtime cleaning in commuter rail. Two for weekend work were grieved (Herrala and this grievance). Two were for less than 2 hours. There is no practice of non-cleaners doing overtime on Saturday more than two hours from the chart (Company #7). No knowledge of facts of the other cases, some may be less than two hours, some greater than two hours. Do not know if cleaners have turned down work or what actually happened. The two instances cited earlier for less than two hours were not on a Saturday. There was nothing for Saturday work being done by cleaners and Mr. Zanaska was not aware certain why this was the case and was not aware of the circumstances.

On Union #13 (Company #8) on first page with data going back to 2011, shows non-cleaners doing cleaning on straight time, 32 times in 3 years and 8 months in commuter rail. Only two instances of non-cleaner doing cleaning work on Saturday on list and both dates were straight time and grieved. There is no practice whatsoever for non-cleaners doing cleaning work on Saturday when no cleaners are scheduled. There are four examples, at least two, which are Saturday where we have done work cleaning. Grievances were filed and both were denied. One was paid because a timeline was missed and the second grievance is this current one.

The Union asked about Article 45, Section 12 requiring that overtime be rotated. Mr. Zanaska stated that regarding overtime, he agreed that it should be rotated ... pertaining to the classification that has a vacancy on that day. The Union said that is not what Section 12 says. *“Overtime in the Commuter Rail Division will be rotated according to shift seniority within the job description and classification needed to perform the work.”*

Mr. Zanaska said that there was no cleaner needed that day and Train 601 was put back in service Saturday night. "We needed to meet federal requirements, the aesthetics of that which the mechanics can do, it was finishing cleaning to the level they perceive. We did need cleaning work done. Cleaning work was done, and there was more than two hours of cleaning work done, but that was not known at the time of the assignments – but according to the work order yes."

Everyone can do cleaning and it is part of the inspection – "not a cleaner campaign" It was about of one-third of Bob Lex's day that was spent scrubbing the exterior of the vehicle. "Whether the vehicle is there or not there is irrelevant, there will be another vehicle. Even if priorities change, Metro Transit has the ability to call the operators about overtimes."

Mr. Zanaska did not know before the hearing that the Grievant asked for overtime work on the day in question. (Ms. Craven asked to do the work according to her testimony.) Bob Lex was able to make that determination regarding offering overtime to a cleaner on Friday. There was no cleaning work to be done. This was a normal weekend.

Mr. Tony Hebert started with Metro Transit in Maintenance and QA & Training in September 2013. In his role as Assistant Manager he heard the "First Step" of the grievance and he wrote the "Response to First Step Grievance". After he did research and looked at a prior grievance that was done, he declined the grievance. He indicated that he denied the grievance because "a mechanic can work a level down or a classification down, the mechanic's responsibility was to insure the equipment is clean and ready to go out in service, and that the mechanic came in as a mechanic that day, he did some cleaning, but that was just a small portion, of his day to day work". During cross-examination, the witness indicated that this is the first grievance that he handled. As part of making his decision regarding the grievance, he looked at what was done in the 2012 grievance that was filed and based it on the same set of facts and followed the mold of the 2012 grievance. (See Company #9 pages 1-5.)

Mr. Thomas Humphrey has worked for Metro Transit since 1980 in several different positions from bus cleaner, mechanic, management as supervisor in 1998, assistant director, to deputy director of bus maintenance in 2013, currently responsible for five

operating garages for overall bus maintenance division. His role in this grievance was that he was asked to gather data regarding:

1. To explain how bus maintenance handles similar issues on the bus side
2. To gather data from maintenance/management materials database for this arbitration hearing.

He was the person responsible for compiling the data on Union Exhibit #12, which is the same as Company #7 regarding general clean overtime work. He also did the work for Union Exhibit #13 which is the same as Company #8 for straight time.

His experience with 1:59 is typically before or after shift to do some work that is needed at the staffing at that time that they are not able to do - for example a service call or to finish a job or that maybe when they started and they didn't have time to finish at the end of their shift. Mr. Humphrey stated that the ATU contract does allow employees in higher classifications to work down. In Article 23 Section 13 (g) at page 44 employees moved from a higher position to a lower position are not required to do the work of the higher position. He stated that by inference, persons in higher classifications can do work in lower classifications.

He explained that after the bus area, Metro Transit added two other departments, light rail and commuter rail departments. They have aspects in the contract that are specific to their departments, and beyond that everything falls back to Article 23. With the new contract, where we have the vehicle department move, employees are able to move between departments. There is a great partnership and synergy between all vehicle departments, to attempt as much as possible by contract, so when employees move from one vehicle group to the next, there is not confusion on how we run the business. He indicated this was described loosely in Article 23.5. He also cited page 50 regarding vehicle maintenance groups and the explanatory diagram.

It is now time to start connecting the dots, or more appropriately the puzzle pieces, surrounding several facts and contract language. At the onset of the hearing the parties did agree that Article 45 would apply first and that Article 23 would apply second. This agreement does provide the initial set of facts regarding the construct of this case.

This neutral does find the “Vehicle Maintenance Group” chart on page 50 of the CBA to be helpful in identifying the bus, light rail, and commuter rail as the three major sections of vehicle maintenance. The commuter rail section is the primary focus with the specific issue being overtime for cleaners.

ARTICLE 45 COMMUTER RAIL MAINTENANCE

Section 12. Overtime

Overtime in the Commuter Rail Division will be rotated according to shift seniority within job description and classification needed to perform the work.

In reading the contract language several times, there seems to be clarity regarding the language. The terms, “rotated”, “shift seniority”, “job description” and “classification”, are well known and commonly used in labor contract language. While this is the first focus on overtime and the most important one, it is not the only one. This above cite clearly identifies Commuter Rail Maintenance such that this is specific, and written to apply and impact this area. Nowhere in relevant contract language is there any prohibition of overtime work or any exception made for cleaners. Specific terms in an agreement more clearly reflect the parties’ intention than does general language. Given the specificity of this language, this neutral gives Section 12 added weight.

This arbitrator does not want to interpret contractual terms in isolation from the rest of the agreement, so it is important to read the contract as a whole document. That is why other overtime provisions within this same contract are reviewed. With some phraseology changes, parallel construction of overtime language appears in another area of the collective agreement (See below.). The neutral notes that the major concepts of the language (as underlined) are the same, while there are differences.

ARTICLE 23 MECHANICAL DEPARTMENT Overhaul Facility and Operating Garages

Section 3.

Overtime in the overhaul facility will be worked by the shop division in which that work is normally performed and rotated according to seniority within the job description and classification needed to do the work.

This language refers to the “Mechanical Department” which includes several areas - bus, light rail, and commuter rail. This is contrasted to the specific language in Article 45 covering only Commuter Rail. A thorough reading of this Section seems to this neutral to be centered on Bus Vehicle Maintenance and there are some language areas that seem to have no application or meaning for Commuter Rail overtime. There was no specific bargaining history supplied to explain the genesis of language.

While looking at the above language, both parties using different witnesses, brought up overtime and referred to “1:59” or “Hour 59”. This is a non-contractual practice of the parties. Hence, this concept is absent from any contract language to accompany it or explain it, but is known, recognized, and utilized by both parties. Testimony established that forepersons are allowed to make overtime assignments without prior approval from Metro Transit management for assignments of one hour and 59 minutes or less. These shorter overtime assignments typically occur when employees are called in early to get a head start on their shift, or when a small amount of work remains on a project at the end of the day and employees stay late to finish the job. Any employee can and has been assigned overtime without restrictions such as seniority or rotation, provided it is less than one hour and 59 minutes. It became clear to this neutral that this “1:59” hour was a way for the Union and Metro Transit to have a “buffer zone” for overtime work. After the “1:59” time period, the master contract controls.

The Grievant described why cleaning was taking longer than expected (as her testimony explained earlier) for the week in question and she wanted to stay and finish her cleaning work for Car #601 on overtime for Saturday. It is not disputed in the record that she requested overtime work, although the precise conversation is not known, and it is not disputed that she was told that no cleaning was needed on the weekend. The foreperson was never called to testify so any dialogue around the request or the response is not available. It is an uncontested practice of the parties that any overtime less than “1:59” or “HOUR 59” is a management prerogative. It is used on “as needed basis” and that decision is left to the discretion of the foreperson. Given that unwritten understanding of the parties, any action, or no action, regarding overtime less than 1:59 is a past practice. This neutral does view “HOUR 59” as a past practice of the parties. This is due to the factors of clarity and consistency of the pattern, longevity and repetition, acceptability, and mutual acknowledgement.

Once the overtime hits the 2:00 hour mark, the practices of the parties and contract language starts to come into play and this language becomes highly relevant for this neutral. The testimony of the Union business agent provided his credible experience dealing with overtime. He indicated that there is a rotation list for each commuter rail classification kept on computer software similar to that for bus maintenance. For overtime of less than 1:59, overtime is not rotated. For overtime of 2:00 hours and greater, his experience has been that overtime is rotated. The Overtime Checklist (Union #6) refers to the "OT List Rotated". Director Zanaska in his testimony further explained in detail going over the Overtime Checklist (Company #5) and the checks that were made to see that the list was rotated.

Moving through the language of Article 45 Section 12, shift seniority is identified for the Grievant Craven on the "Current Overtime Roster" that ranks her "Rotation No." as "1" and would make her next in line for overtime work when it becomes available. (Union #8) There was no question regarding the contract terminology or the shift seniority of the Grievant.

The next area of contract language deals with the job description and classification. The Grievant is a Cleaner III, Commuter Rail within Commuter Rail Vehicle Maintenance. The job description states, "This position cleans and maintains Metro Transit's Commuter Rail passenger cars and locomotives interiors and exteriors to a high standard for our internal/external to customers." Added information and descriptors are provided on Union #1. As written by the Company, they do provide intent of work.

At this juncture, the happenings become more complicated and a bit convoluted. Union Exhibits #2 and #3 indicate that cleaning is not contained in the foreperson and mechanic job descriptions. However, testimony from the Union Business Agent outlined that mechanics can perform cleaning duties under certain conditions. Mechanics can do overtime cleaning 1) if on straight time, 2) if there is an abundance of work that regular cleaners cannot cover, and 3) if overtime is longer than 2 hours and cleaner refuse the overtime. The Grievant indicated that mechanics do cleaning when cleaners are short-staffed, mechanics help with special events, or also when offered as overtime if cleaners don't take the work or accept it.

Metro Transit provided pages of records concerning overtime. The most compelling document was a twenty-plus page printout Company #7 (Union #12). Since either party did not title this data, it will be called “overtime by non-cleaners doing cleaning”. The data covers a period of time over three years and covers NSTAR, LRV, and BUS.

NSTAR (Commuter Rail) data is the focus and is given weight. There have been four total instances of non-cleaner employees performing overtime-cleaning work in the commuter rail maintenance department. Two were occurrences that were less than two hours in duration (less than 1:59), did not occur on the weekend, and the Union did not dispute those assignments. Another instance was grieved with employee receiving pay due to timeline violation. The only other one is the current grievance being arbitrated.

Given the above discussion, it is noteworthy that on the two earlier happenings, it was a mechanic technician (73059) for 1:59 hours and foreperson (05491) for 1.70 hours that did the overtime work and the work did not go beyond 1:59. Both parties had testimony and exhibits related to the Herrala grievance (Company #9). That particular grievance was neither sustained nor denied by an arbitrator. The master contract at page 7 states the following:

“Failure to comply with procedures and time limits above outline shall be deemed an abandonment or settlement of the grievance and shall terminate the matter.

A timeline violation caused a payment to be made to Mr. Herrala. Other than Company #9, there was no abandonment or settlement “agreement” in this record. Absent formal resolution by an arbitrator, this neutral cannot draw any conclusions regarding the overtime cleaning practices. One isolated instance does not establish any type of practice, past or otherwise, for either party.

In reviewing the areas of light rail and bus, there seems to exist a dichotomy. In the Light Rail area, the majority of “overtime by non-cleaners” is several hours in length with the mode being 7. Light Rail does have a “LRT Helper” that is at a different level than “Cleaner”, and there are no Light Rail Cleaners shown or listed. The Bus area has a “Cleaner” listed as well as “Skilled Helper” and Helper”. Without a detailed summation or an arithmetic mean, it is evident that the large majority of “overtime by non-cleaners” in the bus area is overtime work of less than two hours. For both areas there is no compilation of whether cleaners first turned down the overtime assignment, prior to the

mechanics receiving the overtime. This fact leaves an unanswered question for this neutral.

Director Zanaska did testify about there was no need for a cleaner that day and that mechanics can work down or out of class. See Article 23, Section 13 (g). He had researched the situation and mechanics were allowed to work below classification.

This neutral in reading the contract language of Section 13 comes away with concerns regarding the melding of the concept of “working down” – which is not defined in the collective agreement – and “reclassification” which is defined. In reading the contract as a whole, the language surrounding that Section 13 of the contract talks about filling vacancies, bidding procedures, posting, picks, and promotions. For this neutral, when reading the sections preceding and subsequent to Section (g), the meaning and intent seems to change the timeframe associated with “reclassification”. It is different than determining a few hours of overtime. While testimony indicated there was “an inference that mechanics could work down and take the work of the cleaners”, this neutral acquires a flavor of different intent. This unfettered statement without any restrictions is too general and could well severely impact the work of the cleaners and the mechanics.

The next concern is for overtime that goes beyond the 1:59 time. The testimony of Mr. Abramowicz tied several concepts together and clarified some of the practices around overtime. For overtime greater than two hours ----

Rotated among the cleaners based on seniority.

If cleaners could not cover the work, mechanics can work out of class.

Mechanics can do cleaning IF

Straight time

Abundance of work regular cleaners can't cover

If cleaners refuse O/T work longer than two hours, mechanics can do it

He indicated that the foreperson and mechanics cannot do overtime cleaning without first offering the work to the cleaners.

There was no evidence provided regarding the bargaining history of any of the contested language. No proposals or counterproposals around the negotiation of any contract language were entered into this record.

Some facts are understandable from the presentations, and after this neutral has taken more time to digest the total record.

The Grievant Ms. Craven is a Cleaner III, Commuter Rail as described in her job description. (CRC32) Her usual workdays are Monday – Friday 0700-1500. Cleaners do not normally work on weekends.

Mr. Lex is Foreman as described in his job description. (CRF01) His usual workdays are Monday – Friday 0700-1500. He does not normally work weekends.

The Grievant did request overtime work based on missing one cleaner during the week, doing added work, and wanting to finish the clean on Friday. Mr. Lex denied the request.

The person that ended getting the overtime cleaning work on Saturday was the same person that denied the request for overtime on Friday. Mr. Lex – the foreperson from Friday -- ended up with overtime work on Saturday, December 28 that included overtime cleaning. Mr. Lex was working during a Saturday overtime situation and was “working down” from foreperson to mechanic. The “overtime checklist” for overtime work was dated November 20, 2013, more than a month prior to overtime request of the Grievant.

The events for December 28 occurred well after that approval. The Director Zanaska indicated that he did not know about the Grievant’s request for overtime work. There was request made but no one knew about it other than Mr. Lex. There was no record of any other supervisor seeing or responding to the overtime request of Ms. Craven. The overtime requests of Ms. Craven and Mr. Lex are two distinct events in the eyes of this neutral.

For work of less than two hours, overtime cleaning work can be assigned with no prior approval and without rotation. Hence any one can do this work for less than two hours.

Director Zanaska testified that his interpretation of “rotated” means “Pertaining to the classification that has a vacancy that day”. This description or definition of overtime rotation does not square with the contract language, the Overtime Checklist, or the

interpretation of this neutral. Additionally the statement that “Everyone can do cleaning and this was part of an inspection and “not cleaner campaign” does not fit the context of HOUR 59. The chain of communication for requesting cleaner overtime seems questionable and explanations or motives are lacking. Neither Lex nor any Supervisor testified about the facts and they would be the closest source to the information. Director Zanaska did not know about the overtime request.

It may be noted that the burden of going forward with the evidence may shift during the course of the hearing; after the party having the burden of persuasion presents sufficient evidence to justify of finding in it's favor on the issue, the other party has the burden of producing evidence in rebuttal. (Elkouri, p 424)

The Union has carried its burden of proof, however, it becomes inherent for this neutral to review and respond to the comments of Metro Transit.

As a neutral, one must carefully look at the statements of Metro Transit in its brief.

1. *Cleaners who primarily perform General Cleans do not work on the weekends.* In reviewing the work schedules on Company #3 p2, this exhibit shows the normal work schedules. Ms. Craven and Mr. Lex are both shown as not working on Saturday and Sunday. Since Mr. Lex was assigned overtime on Saturday, Ms. Craven could have been assigned overtime. In reviewing contract language there is no prohibition to Saturday or Sunday work or a specific exclusion made for cleaners.
2. *Mechanics can work down (found in Article 23, Section 3).* As discussed earlier, it is not contested that mechanics can work down (be reclassified) but the facts, timing, and factors surrounding the total situation must be consistent with other contract terms and practices. They were not in this case.
3. *Overtime was not offered for cleaning.* This statement is a bit of a contradiction in that overtime cleaning was performed for several hours. While technically trying to be correct, it was not really offered until time surpassed 1:59 hours. At that point, the cleaning work became work for Cleaners.
4. *The employee working on overtime was serving in the capacity of a mechanic.* This statement is true, however, this fact must be taken in concert with the rights

of Cleaners doing overtime work. The fact that the mechanic was doing overtime work should not blot out all over time cleaner work. Carried to an extreme case, if the mechanic did overtime cleaning for the entire day, the result would have far greater and far-reaching impact.

5. *Metro Transit requires two Commuter Rail mechanics per shift - safety and train movements require this.* Metro Transit facts cited that it requires two mechanics per shift for safety and train movements. Director Zanaska testified to this statement and work schedules identify that at least two mechanics are scheduled for each day. This statement is true, understandable and makes logical sense. The problem for this neutral is that this specific fact is not directly tied to the overtime question raised and the work of mechanics and cleaners are not mutually exclusive.
6. *Mechanics are responsible for and ensuring that all aspects of an inspection are complete prior to returning a vehicle to revenue service.* This statement is true, understandable and makes logical sense. The problem for this neutral is that this specific fact is not directly tied to the overtime question raised. Both mechanics and cleaners have jobs to perform and assigned duties. This is weighed against the fact that Cleaners are primarily responsible for cleaning duties and the attached contractual rights for overtime cleaning.

As a neutral, it is important to respond to the final arguments of Metro Transit. This is done to make certain that I have not overlooked the arguments and that I have given them weight and incorporated them into my thought process in reaching a decision.

1. Employees in the cleaner classification were not needed to work overtime on Saturday, December 28, 2013. The fact of the matter and the fact of the contract language was that overtime cleaning work was performed on that Saturday for greater than "HOUR 59" or "1:59". With the limitations contained in "HOUR 59" and then the claim that mechanics "work down", the rights of cleaners to Saturday overtime become greatly challenged, absurd, or non-existent.
2. The overtime needed for Saturday, December 28, 2013, was for a commuter rail mechanic technician not a cleaner. The overtime situation, as discussed by Metro Transit, that was planned and prescheduled on November 20, 2013, is a

different fact situation. (See “Overtime Checklist”.) The Grievant’s request for overtime cleaning work was not known until Friday, December 27, 2013, after cleaning work had backed up. The noted contract language of “Section 12. Overtime” specifically states “job description and classification” which is that of a cleaner. Overtime cleaning work was done for greater than “HOUR 59”.

3. The work completed by the two commuter rail mechanics on Saturday, December 28, 2013, was appropriate for that classification. This statement is partially true. Mr. Gutkaes was scheduled for work as a mechanic and that was a regular day on straight time for him. He also worked less than “HOUR 59” on cleaning so that work was permissible. His work was appropriate for his time and classification. The problem arises for Mr. Lex in that he was doing overtime cleaning and that cleaning work surpassed the “HOUR 59”. That opened the door for overtime cleaning work for cleaners – that is their job description and classification. A different fact situation may well have produced different results.

There was no evidence provided regarding the bargaining history of any of the contested language and no proposals or counterproposals were entered on the record.

The argument of the Union that there should be consideration of wage rates paid to mechanics and cleaners lacks merit. This concept is nowhere contained in any overtime language. Metro Transit indicated that the pay status of the employee performing the work is not a consideration in the assignment of the work. The wage differential between mechanics and cleaners working overtime may be a practical issue for Metro Transit and/or the ATU; however, it clearly is not a consideration for this neutral in this forum.

SUMMARY

In reaching a final conclusion regarding this grievance, one must return to the contract language. From the initial reading of this language, the meaning was apparent to this neutral but needed to be verified. After reviewing the record and listening to the testimony and arguments, the same meaning was still apparent to this neutral. I find language to be understandable and straightforward, especially for individuals working in this industry.

When the language of the agreement is clear and unambiguous the arbitrator must give effect to that language without resort to evidence of the parties' negotiations or to evidence of the parties' conduct. Lackawanna Leather, 113LA603, 608 (Pelofsky, 1999)

The master contract is clear on "overtime will be rotated according to shift seniority within job description and classification needed to perform the work". While the primary language reference is Article 45, Section 12, Overtime, it is noted Article 23 supplies a similar intent as well. The Grievant was ranked first on the rotation list for Cleaners. Once the HOUR 59 threshold time limit was passed, overtime cleaning was a contractual right for her job description and for her classification. She was entitled to 3.75 hours of overtime cleaning.

In reaching this conclusion, the undersigned is cognizant of the collective bargaining agreement and is noting that this determination is congruent and consistent with my interpretation of that document.

"The interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly."

As a result, I find that there was a violation of the Collective Bargaining Agreement at Article 45, Section 12. Overtime. The appropriate remedy is that the Grievant Kelly Craven shall be paid for 3.75 hours of overtime.

The advocates for both the Metropolitan Transit Authority and the Amalgamated Transit Union are commended for a professional presentation that well represented the interests of both parties and provided numerous pages of information, data, and with hours of testimony. In reviewing the record as a whole, the Undersigned has determined that the Amalgamated Transit Union Local 1005 had the burden of proof and has carried that burden.

THE APPROPRIATE REMEDY

Finding that there was a violation of the collective bargaining agreement, the Grievant Kelly Craven shall be paid for 3.75 hours of overtime work that was denied on Saturday, December 28, 2013. While the Union claimed 5.35 hours of overtime, Mr. Lex actually performed 3.75 hours of cleaning overtime and that was a contract violation. Mr. Gutkaes performed 1.6 hours of cleaning on that Saturday as a mechanic as part of his regular workday. Since that cleaning time period was under the "1:59", his cleaning work was not a contract violation.

This one time payment shall be made within thirty (30) calendar days of the receipt of this award. The undersigned arbitrator will retain jurisdiction for thirty calendar days after the issuance of this decision.

DECISION AND AWARD

For the above reasons, the Arbitrator concludes that the evidence does establish that there was a violation of the Collective Bargaining Agreement by the Metro Transit Authority. In arriving at this decision, I have considered all the evidence, arguments and authorities submitted by the parties, even if not specifically discussed in my decision. Based upon the foregoing findings and conclusions, I hereby sustain the Union's grievance. In so doing, I find that the Grievant was entitled to 3.75 hours of overtime work on December 28, 2013.

Respectfully submitted:

/s/

October 22, 2014

Dennis A. Krueger, Arbitrator

Date

CERTIFICATE OF SERVICE

I certify that on this _____ day of _____, 2014, I served the foregoing **GRIEVANCE ARBITRATION AWARD** upon each of the parties to this matter by mailing a copy to them at their respective address as shown below:

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Electronic copies have been emailed simultaneously to Timothy J Louris, Esquire and Marcia Padden, Labor Relations Specialist on this date.

Dated the _____ day of _____, 2014

/ s / Dennis A. Krueger,

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