

BEFORE THE DART TRIAL BOARD

In the Matter of the Arbitration
between

BRUCE BROWN

Grievant

and

DALLAS AREA RAPID TRANSIT

Employer

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Grievance No. 3055-U-ATU

BEFORE: Edward B. Valverde, Esq. – Arbitrator – DART Trial Board Hearing Officer

APPEARANCES:

For DART: Tammy Barrow, Senior Assistant General Counsel; Joe Coker, DART Representative

For Grievant: Hal K. Gillespie, Counsel for ATU and Grievant, Kenneth Day, President and Business Agent for ATU, Local 1338; Evelana “Chris” Garrett, Executive Vice President; Franklin Jones; Bruce Brown, grievant

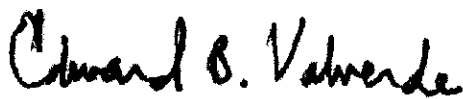
Place of Hearing: Dallas Area Rapid Transit
1401 Pacific Avenue
Dallas, TX

Date of Hearing: August 18, 2011
Date Hearing closed: November 4, 2011¹
Date of Award: December 16, 2011

Type of Grievance: Contract - Overtime

AWARD SUMMARY

Grievance sustained. Grievance was timely filed. HEM does not allow Employer to preclude overtime to grievant, an employee-representative of the Union.



Edward B. Valverde, Esq. – Arbitrator – TBHO

¹ The record was closed upon receipt of the parties' briefs.

DISCUSSION, OPINION and AWARD

This matter was heard on August 18, 2011 at DART headquarters in Dallas, Texas. All parties fully participated in the hearing and were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence on the issues. Based on the record evidence, my observation of witnesses, examination of all exhibits, and consideration of the arguments presented by the parties, the TBHO issues the following Discussion, Opinion and Award.

ISSUES

Did Brown timely file this grievance?

Did DART violate the HEM when it failed to offer grievant Bruce Brown work overtime? If so, what is the appropriate remedy?

BACKGROUND SUMMARY

Bruce Brown (Brown or grievant hereinafter) has been employed as a body shop mechanic in the maintenance department of the Employer since 1986. His scheduled working hours were from 7 a.m. to 3:30 p.m. In January 2008, Brown a member of the ATU was elected by the union membership to serve as executive board member. In that capacity, Brown is occasionally required to perform representational services (e.g., participate in grievance meetings with management) during the workday.

Employees in the maintenance department have opportunities to work overtime. Those employees who desire to do so are required to submit their request for overtime online identifying the days they are willing to work overtime. Management uses the information to schedule overtime. According to the maintenance department's overtime regulations overtime is to be distributed as evenly as possible. Employees who designate a desire to work overtime are placed on the list presumably according to department seniority with the senior person being selected first and the next second and so forth on down the list. Brown submitted his request for overtime covering the latter part of September 2010.²

² All dates hereinafter refer to 2010 unless otherwise noted.

From September 16-30, 2010 Brown was off work due to union business.³ On September 24-26, 2010, overtime in the maintenance department was available and was assigned to maintenance employees on the overtime request sheet. Although Brown was on the overtime request sheet for September 24-28, he was not contacted to come in to perform any overtime work. Upon his return to work on October 12, Brown learned that he had been passed over by management for overtime work. Brown asked supervisor Lonnie Jackson and manager of Fleet Service Juan (Carlos) Gonzales about this on October 12. The following day Gonzales told Brown he had not been contacted to work overtime because he was out on "Union Business," that being on union business kept him from receiving overtime as if he were on vacation. (Employees on vacation are not eligible for overtime assignments.) Since the overtime work was scheduled for the midnight shift Brown could have worked the overtime had he been called. Brown could not believe that he was being denied overtime, so Brown went to the next level of management, to Assistant Vice President of Fleet Services Joe Coker, to correct this mistake made by lower level management. Brown issued Coker an email on October 18 requesting a clarification of this overtime issue. On October 26, Coker replied to the email confirming that the Employer was not providing him overtime work: *"If an employee is off for the entire shift (union business or otherwise) they are unavailable for the day and not eligible for overtime."* Brown, on the 10th working day after receipt of the email filed this grievance.

During the grievance process management asserted that the grievance was untimely because Brown did not file his grievance within 10 working days of first receiving notice of the denial of overtime. That notwithstanding, management also considered the merits of the grievance and determined the grievance was without merit. Thus, the grievance is now before the TBHO for consideration and decision.

³ According to DART Ex. 1, Brown was actually on vacation September 24. He was on union business with pay from September 25 through October 2; was on sick leave October 5 through October 7; was on vacation leave on October 8 and on sick leave on October 9. On October 12 and 13 Brown went to work, but performed some union business during those two workdays.

DISCUSSION and OPINION

Grievance is Timely Filed

The TBHO finds the grievance was timely filed due to an existing practice the parties have to address alleged breaches of the HEM. Specifically, the record establishes there exists an informal practice where union officials deal directly with various levels of management in an attempt to resolve matters/issues without the need to first file a grievance.

Management recognizes the HEM provides employees the right to file a grievance to complain about an alleged wrong. However, it asserts that an employee's time to do so is limited by provisions in the HEM. Chapter 8, section 8, subsection E (8.8.E.) of the HEM states that an employee has 10 working days *"from the date of the occurrence which caused the grievance, or from the date the employee first knew or should have known of the occurrence."* Management asserts that Brown knew he was being denied overtime because of his union officer status as early as October 12 when Jackson told him so and that by filing the grievance 10 working days after receiving Coker's email response (October 26) it was too late. Union on the other hand argues that it and management have a past practice of meeting informally, i.e., prior to filing a grievance, to address matters of concern to employees. It asserts that use of this past practice eliminates the need of having to file a grievance on every issue/complaint employees raise. In fact, these informal discussions have often resulted in resolution of an issue/complaint without need of having to file a grievance. In support thereof the Union provided the testimony of maintenance Vice President for the Union Rolando Rodriguez regarding the practice of going up the management ladder to address matters in dispute with lower management in an attempt to resolve the matter without need to file grievances at every turn. Further, Coker admitted that union officials have met with him directly to address an issue/complaint without the need of having to first file a grievance; and that these meetings have resulted in the resolution of an issue/complaint.

The TBHO recognizes the HEM clearly provides employees a limited time in which to timely file a grievance, i.e. 10 workdays from the time the employee knows or should have known of the alleged wrongdoing. But the record is clear that Brown had a

disbelief when told by two supervisors that he was being denied overtime simply because he was a union officer. It was only after he received confirmation from Coker, an official who clearly had the authority to reverse the actions of lower management, that Brown came to the realization that it was so. Thus, his filing of the grievance 10 workdays later was timely.

The above finding is further buttressed by the undisputed past practice the parties have maintained to address alleged wrongs without first having to file a grievance. Maintenance of such practice allows the parties to deal with matters informally and more efficiently. Thus, the TBHO applauds the parties' use of this labor/management relationship to address concerns of the workforce. Because of the existence of this practice, the undersigned finds that the filing of the grievance on the 10th workday after the informal process was exhausted is timely.⁴

There exists an additional basis for finding the grievance was timely filed. As the facts above reveal, Brown became aware of the overtime issue on about October 12. On October 18 he issued Coker an email raising his concern after he had discussed it with management officials Jackson and Gonzales. There is no requirement in the HEM that a grievance be on a specific form or in a specific format, only that it be in writing and submitted within 10 workdays. Here, the TBHO finds Brown's email to Coker meets the 10 workday requirement for it squarely brought to management's attention Brown's concern about not being offered overtime. Accordingly, the grievance is timely.

Work-related Activities must be treated Uniformly⁵

The TBHO finds that work-related activities employees engage in must be treated in the same manner. Record evidence reveals the Employer recognizes time spent by employees on Employer committees as work-related for which employees receive compensation. Further, employees who participate in committee activities during the workday are still eligible to perform overtime work if scheduled. The TBHO finds that employee-union officers (such as Brown) who participate in union activities (e.g.,

⁴ Note that this finding does not provide the Union an undue length of time to try to resolve a matter before filing a grievance. Here, the timeline is reasonable.

⁵ In the discussion hereinafter, the terms union activity/activities, representation/representational activities are synonymous with union business.

handling grievances) during the workday are similarly engaged in work-related activities and are eligible to perform overtime work.

Management argues that within the DART structure each department is allowed to establish work rules that are necessary for the operation of that department. This autonomy recognizes the different functions that departments perform. Consistent with that autonomy the maintenance department has established a work rule (Standard Operating Procedure (SOP)) that states, "Employees must work their regular shift hours on a given day to be eligible for overtime pay." (SOP 7.1(D)) Further, employees may not request overtime for any day that they have scheduled leave and must remove their request for overtime for any day they have any scheduled time off. Management essentially argues the SOP defines work as when an employee is actually engaged in the task for which he/she was hired. (See, testimony of Vice President of Human resources Lynda Jackson) Pursuant to that definition maintenance department management has determined that Brown when engaged in union activities during a workday is not eligible for overtime that day. No specific evidence was provided explaining why "work" is so narrowly defined in the maintenance department. Union, on the other hand argues that employees engaged in union activities during the workday are engaged in work and should be eligible for overtime assignments. The TBHO agrees with the Union for the following reasons.

Review of Webster's New World College Dictionary reveals a very broad definition for the meaning of "work." It can be defined narrowly as in the case of the management's interpretation of the maintenance department rule or more broadly: "*...something one is making, doing, or acting upon, esp. as part of one's occupation or duty...*" Other than presenting the rule itself, management presented no additional evidence to justify the maintenance department's narrow definition.

Record evidence establishes that employees are allowed to participate in Employer established committees, that those committees meet during the workday on premises and that employee-participants can work overtime on committee meeting days if overtime was scheduled and the employee previously requested to work overtime. Employee Van Simmons, who also serves on the Union's executive committee, testified that from 1995 to 2009 he served on the Employer's Employment Activity Committee

(EAC). EAC is comprised of hourly and administrative employees who plan social events (e.g., parties, baseball and other recreational activities). EAC meetings are conducted during the workday at the Employer's facility. Simmons stated without contradiction that over the years he worked on EAC during a shift before working overtime. Additionally, Simmons currently serves on the Communications Committee (since January 2011) and participation on that committee has not interfered with his ability to work overtime. Further, his compensation remained the same, i.e., his wages for the day were not reduced for time spent on a committee meeting. Coker, on cross-examination, confirmed that employees working on committees are compensated for their time because their committee activities were considered beneficial to the Employer. Thus, these activities can be described as work-related, for employee-participants receive compensation as if actually engaged in work. No evidence was presented establishing that maintenance department employees are precluded from participating in these committees. Thus, maintenance department employees who participate in Employer committees on any given workday can still work overtime that same day. Yet, management has decided to distinguish union activity as different from committee work.

The TBHO finds there is no basis for distinguishing committee work from union activity (union business) for purposes of overtime eligibility. An employee's ability to participate in either activity is derived from the same source – his/her employment with DART. It is employment with Employer that provides/allows employees to participate in Employer-sponsored committees. Likewise, it is employment with DART that provides/allows employees to become members of the Union and thereafter, become officers of the Union. Further, the tasks union officials perform while on union business are on behalf of employees and the HEM recognizes that employees are entitled to this representation. Thus, the broader definition of work must be applied to these activities, making all these activities work-related.

Further, it is a result of the employment relationship that employees receive benefits provided to them by the Hourly Employment Manual (HEM). Included in those benefits is the right to be represented by the Union in addressing their concerns, issues and/or complaints (e.g., "grievances") with the Employer. (See, HEM 8.8.A.) To allow the maintenance department's narrow definition of work would result in a prohibition to

maintenance department employee-union officers not applicable to employee-union officers from other departments. More important, it restricts maintenance employees in their choice of employee-representatives, i.e., if the narrow definition of work was allowed to stand, maintenance employees can only choose as representatives other employees who are willing to forfeit their right to overtime. Such a limitation is not provided for in the HEM.

The maintenance department's application of a narrow definition of work by issuance of the SOP cannot be reconciled with the fact that other departments allow employee-officers to work overtime. In fact, the record establishes that other maintenance employees are allowed to work overtime on days they conduct union business.⁶ As the HEM applies equally to all employees, such inequitable application of rules cannot be justified between departments (or even within a department) of the Employer. (HEM 8.8A.2.)⁷ Thus, the TBHO finds that employee-union representational activity (union business) and Employer committee participation by employees are both work-related activity that fall within the broader definition of work and this broader definition is required by the HEM.⁸ Thus, an employee-union officer who, during the workday, is engaged in union business must be allowed to work overtime if said employee previously noted a willingness to work overtime.⁹

⁶ Maintenance employee Rodriguez testified that he continues to receive overtime assignments on days that he has performed union business. Although there was some attempt to distinguish revenue mechanics (Brown) from non-revenue mechanics (Rodriguez) on the basis of different supervision, the TBHO finds the distinction is without significance. All DART employees are entitled to the same benefits provided for in the HEM; and their right to representation must be unencumbered.

⁷ Testimony of transportation department employee Albert Dirla (an executive board member and recording officer of the Union) and Thomas Hutchison is relevant to establish that management in the transportation department recognizes the work-related nature of transportation employees engaged in union business.

⁸ The TBHO finds that management's efforts to rebut Union's evidence that employee's who conducted union business during the workday were allowed to work overtime unpersuasive.

⁹ This finding is not in conflict with Coker's email response to Brown, which limited exclusion to overtime to those employee-union officers who were on union business the entire workday.

Maintenance Supplement Recognizes Right to Overtime

The TBHO also finds that a plain reading of the Maintenance Department's Supplement (MDS) reveals that it recognizes employees on paid leave status can receive overtime pay for hours over 40 in a week. Here, the evidence is undisputed that employee-union officers such as Brown receive compensation from the Employer (whose costs are directly deducted from union dues) while on "union business leave." MDS Section 2.C. states, "*An hourly paid maintenance employee who works or is paid leave aggregating more than 40 regular hours in a seven-day period will be paid at an overtime rate of one and one-half times the regular rate for all hours paid in excess of 40.*" According to Employer witness Jackson, the only way an employee can work overtime is if said employee has worked his/her hours. However, such narrow definition of work is in direct conflict with this MDS provision. Here, where the language is clear, any interpretation that conflicts with the language must be rejected. Thus, Brown, while on union business leave status, was entitled to be considered for overtime.

Management at hearing also argued that some of the union business is conducted off premises and on occasion consumes the entire workday or workweek, e.g., when employee-union officers attend conferences outside the city; and that such activities justify removing an employee-union officer's name from the overtime list. For the reasons previously stated, the TBHO finds these union activities to be work-related as well. However, the more important question in these situations is whether the employee is available to work the overtime. Needless to say, when overtime work is available it is because there is work that needs to be performed beyond the employee's regular work hours. In these situations the issue is whether the employee-union official is actually available to work. There is no requirement to compensate an employee, union officer or not, if the work cannot be performed by the employee.¹⁰

¹⁰ In light of the decision made herein, it is unnecessary to address Union's evidence regarding the *past practice* of allowing employees to work overtime on days that they engaged in union business. The TBHO notes, however, that this evidence directly contradicts management's assertion at hearing that it does not recognize union business as work.

Case Law Requires Broader definition of "Work"

In addition to the above finding that union representational activity (union business) is work-related, the TBHO also finds that state case authority supports this conclusion as well.

Employer argues that Union representational activities that employees engage in cannot be work within the meaning of the maintenance department's narrow definition of work because employee-officers are not directly compensated by the Employer when engaged in these activities; those costs are derived from union membership dues. However, a state appeals court rejected another employer insurance carrier's attempt to limit an employee's compensation to time actually worked for the employer.

In *Insurance Company of State of Pennsylvania v. Hazel Stelvik (Stelvik)*, 995 S.W. 2d 939 (Tex. App.-Fort Worth 1999) the appeals court sustained the district court's summary judgment for plaintiff Stelvik. In Stelvik, the insurance carrier who was required to compensate the employee off work (workers compensation) due to a work-related injury, attempted to limit the payable compensation to her by excluding the time she spent on union activities. (Stelvik requested and received permission from her employer to perform work for the union. Further, during her employment with the union she continued to receive seniority and other benefits with the employer). The court rejected the argument, finding that work performed for the union was directly tied to her employment with the covered employer (American Airlines) and as such, the employee was entitled to full compensation. Here, as in Stelvik, Brown continues to receive seniority and benefits for the time spent on union business. (HEM 6.8.D.) His work as a union officer, as was Stelvik's, is directly related to his employment with the Employer. Under these circumstances any attempt to distinguish union representational activity from the definition of work is not sustainable. As previously stated, the HEM provides

employees the right to union representation and that right cannot be encumbered by one department's application of a narrow definition of "work."¹¹

Narrow Definition of Work has Retaliatory Impact

The Union argued at hearing and in brief that Employer's maintenance would have a retaliatory impact on employees' right to use the grievance process. The TBHO agrees.

HEM 8.8.B.12, prohibits retaliation for an employee's use of the grievance procedure. As previously stated, the HEM recognizes the employees right to be represented. Here, fellow employees like Brown, who are officers of the Union, provide that representation. To allow Employer's use of the narrow definition of work to preclude employee-union officers from working overtime would not only impair an employee-grievant's right in the selection of a representative, it would also amount to retaliation against the employee-representative's participation or "use" of the grievance process. Such a narrow definition of work would inhibit an employee from participating in union business and is contrary to the intent of HEM 8.8.B.12. For this and the other reasons stated above, the Employer and its departments must recognize a broad definition of "work" that includes work-related activities.

¹¹ Management's efforts at hearing to expand maintenance department SOP's narrow definition of work to the entire workforce are similarly rejected. Such attempt appears to be contrary to the intent of section 4 of the "Arrangement Pursuant to Section 13c of the Urban Mass Transportation Act of 1964" and of Article 5154c of Vernon's Annotated Civil Statutes of the State of Texas commonly referred to as the "Right to Work Law." Both federal and state statutes recognize employees' rights to be represented by a labor organization; and while the state law restricts the rights of public employees it recognizes that they have an unimpaired right to present grievances through their representatives. (5154c V.R.C.S. Sec. 6)

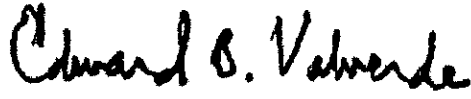
The TBHO finds that restricting employee-union officer's rights to overtime compensation impairs employees' rights to select their representative. Consistent with these statutory requirements, the HEM recognizes employees' right to representation. These rights cannot be altered or eliminated by a department SOP. Only through use of the process described in HEM 8.12 can the HEM be modified; and such was not done in this case.

DART Grievance No. 3055-U-ATU (Bruce Brown)

Award

The grievance is sustained. Brown is to be made whole for the overtime work that he was scheduled and available to perform. The TBHO retains jurisdiction to address any issues pertaining this award and/or relief granted in the award.

Dated: December 19, 2011.



Edward B. Valverde, Esq. – Arbitrator - TBHO