

because it only matters about the hours available to schedule supplemental employees. He stated the Commission determines how many supplemental employees could be utilized. He said the use of supplemental employees is supposed to balance out. He contended when a supplemental employee selects a particular line during the annual selection, the employee works that line until management determines to rebalance the schedules and noted management has the right to post the schedules every 28 days. He said the full time employees can only select lines one time during the year. He stated the full time employees in the previous Agreement made a biyearly selection.

Mr. Rowe contended the Commission determines how many hours supplemental employees are needed for the year and the hours are put up for bid. He stated based on history the Commission knows how many employees are on leave. He said if a regular employee calls off sick, the Commission has to decide whether to use a supplemental employee at the location or could call out for overtime. He explained there could be supplemental employees at the location as part of the schedule that could be put in the slot. He pointed out the Commission has to balance to determine if a need exists for permanent employees, to hire more supplemental employees or to reduce supplemental employees.

III. UNION POSITION

It is the position of the Union the Commission violated the Agreement in the scheduling of supplemental toll collectors. The Union contends the Commission violated Article 1, Section 3.E of the Agreement which defines the permissible uses of supplemental employees. The Union argues the only change in the current Agreement

related to the permitted uses of supplemental employees is to fill in for permanent employees during disciplinary action. The Union points out the parties agreed to a procedure for scheduling supplemental employees. It is the contention of the Union Article 1, Section 3. E sets the limits on how supplemental employees may be utilized and Article 8, Section 8.B.2 sets forth the procedure for scheduling periods supplemental employees are available to work, within the parameters of Article 1, Section 3.E. The Union submits supplemental employees could bid in seniority order to fill long term absences after permanent employees bid in December and supplemental employees may also bid on shifts "for which they will be available for assignment." The Union holds the position supplemental employees are only guaranteed they will be selected for available work on the selected line for 28 days "as necessary." The Union argues supplemental employees who are not able to select a line then select by seniority a location within the District. It is the contention of the Union no language in the current Agreement expands the permitted use of supplemental employees except to permit their use to fill in for permanent employees during disciplinary action.

The position of the Union is that through the testimony of the Business Agent, since the effective date of the current Agreement the Commission has been scheduling supplemental Toll Collectors for 40 hour weeks without regard to Article 1, Section 3.E. The Union states the Business Agent showed in an exhibit 48 shifts were filled by supplemental employees beyond the permitted uses of Article 1, Section 3.E. The Union argues the records conclusively prove the Commission has been flagrantly ignoring Article 1, Section 3.E. every month since January 2008. It is the contention of the Union the Commission offered no evidence to rebut the Union's testimonial and documentary

evidence of the Agreement violation. The Union submits the Commission offered the testimony of the Director of Fare Collection although he was not part of the discussions.

It is the position of the Union the Commission called Secretary-Treasurer, Principal Officer of Teamsters Local 77 who testified to an understanding of Article 8, Section 8.B.2 that is completely unsupported by the Agreement language and was never offered to Local 250 as justification by Commission for its conduct. The Union points out this witness referred to the new approach used as balancing the scales and explained his understanding was the use of supplemental employees no longer needed to be justified on a one for one basis, but rather on the basis of the Commission's annual estimates. The Union alleges Mr. Pedicone never heard the balancing theory before Mr. Rowe testified about it at the arbitration hearing and notes during the processing of the grievances the Commission never raised this theory. The Union argues Mr. Rowe's balancing theory is contradicted by his own testimony because he admitted there was no increase in the permitted use of supplemental employees, except for disciplinary action. The Union alleges the balancing theory permits the Commission to use supplemental employees even when not permitted by the Agreement as long as the total number of hours worked by supplemental employees does not exceed the Commission's annual estimate. However, the Union contends the balancing theory directly violates Article 1, Section 3.E. The Union states if the parties intended to use the balancing theory, they could have stated it in the Agreement. The Union contends Mr. Rowe's testimony may accurately describe his understanding of the way supplemental employees are to be utilized, but his testimony has no evidentiary value and should not be considered as

evidence of bargaining history because he never testified the parties discussed this theory at the bargaining table.

It is the position of the Union a make whole remedy is appropriate because the Union has proven the Commission utilized supplemental employees when not permitted by Article 1, Section 3.E. The Union argues the Commission should have offered this work to permanent toll collectors. The Union contends for each violation a review of the Commission documents can be used to identify the specific violations to permanent employees who should have been offered this work on an overtime basis. The Union alleges the refusal to transfer and properly assign supplemental employees to another location to fill in for a permanent employee is a violation.

The Union explains the remedy requested in the award "follow contract language" requires the Commission to compensate permanent employees who were deprived of overtime opportunities because the Commission gave the work to supplemental employees in direct violation of Article 1, Section 3.E. The Union asserts Mr. Pedicone's undisputed testimony establishes in all 15 meetings involving the Commission, he indicated he was seeking a make whole remedy. The Union contends the Commission was aware of the make whole remedy earlier than a month ago as the Commission witness testified. The Union argues all of the information necessary to calculate a make whole remedy is available. It is the contention of the Union the arbitrator not only has the authority to award a make whole remedy, but also the obligation. The Union argues the permanent employees who should have been scheduled for the work were deprived of overtime opportunities and the only appropriate remedy is to compensate those employees who lost the opportunities. The Union concludes, based on the foregoing

facts, arguments and authority, the Commission violated Article 1, Section 3.E in scheduling supplemental employees. The Union requests for the grievances to be sustained and the permanent employees who were denied overtime opportunities to be compensated for such work at the overtime rate of pay.

IV. COMMISSION POSITION

It is the position of the Commission the grievances should be denied. The Commission contends Lugin and Fowler lack standing to pursue individual grievances and the attempt to transform their grievances into a group grievance is improper. The Commission submits Lugin's grievance form claims the Commission "is exceeding work opportunities for supplementals" and Fowler's grievance form claims the Commission in "District 1 and [Pittsburgh] interchange ha[s] exceeded the work opportunities for supplementals." The Commission takes the position neither the grievance forms nor the elicited testimony establishes Lugin and Fowler have been adversely affected by the claimed violation. The Commission argues neither grievant testified as being injured or adversely affected by the negotiated changes to the scheduling of supplemental employees. It is the position of the Commission during the arbitration hearing the Union improperly attempted to transform both grievances into a group grievance. The Commission argues this attempt is not permissible because the Agreement does not permit group grievances and Lugin and Fowler did not file a group grievance. The Commission asserts the Union's improper attempts to transform the individual grievances into a group grievance should be denied and the evidence submitted during the hearing pertaining to other Districts should be excluded from consideration. The Commission

contends the Union's improper attempts to enlarge the scope of the grievances by raising claims for the first time at the arbitration hearing is improper and should be disallowed.

The Commission further contends the Memorandum of Understanding, dated December 7, 2007 is a valid agreement which precludes the grievances and was in effect when the grievances were filed. The Commission points out in December 2007 the parties agreed the Commission could assign supplemental employees to a set schedule at one interchange. The Commission asserts Mr. Pedicone acknowledged a "gentleman's agreement." The Commission argues the memorandum altered the prior practice of scheduling supplemental employees. The Commission contends after the memorandum was memorialized, management believed the issue surrounding the scheduling of supplemental employees had been resolved and supplemental employees were allowed to select an established work line. The Commission asserts the memorandum represented a valid agreement between the Union and the Commission and it was in effect when Lugin and Fowler filed the grievances and governed the scheduling of supplemental employees. It is the position of the Commission the memorandum unequivocally allowed the Commission to schedule the supplemental employees to a fixed line at an interchange. It is the contention of the Commission it has abided by the contract provisions pertaining to the scheduling of supplemental employees. The Commission states as a result of negotiations, the Union and Commission agreed supplemental employees would select an established work line for scheduling and overtime purposes. The Commission contends the prior practice where each supplemental employee's shift must be pursuant to an Article 1, Section 3.E vacancy was supplemented with an overall balancing of hours and Article 1, Section 3.E vacancy. The Commission argues to ensure the balancing was

accurate, the parties modified Article 8 of the Agreement to allow the schedules of supplemental employees to be reset every 28 days as needed. The Commission takes the position management began implementing the negotiated changes concerning supplemental employees after the Agreement was ratified by the Union in October 2007 even though it was not executed until a year later. The Commission argues a memorandum was memorialized on December 7, 2007 as a bridge agreement until the current Agreement was executed. It is the contention of the Commission Mr. Rowe, who negotiated changes on behalf of the Union, testified the Commission was scheduling supplemental employees pursuant to the negotiations and also testified the Commission is scheduling supplemental employees similar in the western region as in the eastern region. The Commission submits the Union cannot establish a current Agreement violation and the grievances must be denied.

The Commission also argues scheduling is an inherent management right that the Commission has preserved in the Management Rights article of the Agreement. The Commission alleges Mr. Rowe testified the Commission has certain rights over scheduling matters. The Commission contends the Union recognizes the Commission's right to alter and modify work schedules. The Commission argues the modifications to the manner in which supplemental employees are scheduled is necessary to obtain optimum efficiency in the operations of the Commission.

It is the position of the Commission the grieving parties did not properly request a make whole award. The Commission points out the Union requested on the Lugin and Fowler grievance forms "follow contract language" and did not complete the adjustment section of the form. The Commission submits substantial precedent provides an

arbitrator should limit the scope of the remedy to that which was requested in the written grievance. The Commission alleges there is nothing in either form that can be read as a request for monetary damages for a make whole award for alleged past wrongs or back pay. The Commission, therefore, concludes for the foregoing reasons the grievances should be denied.

V. RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 1 RECOGNITION

Section 2. The Union's bargaining units shall include all eligible employees under the Act in the following departments under the jurisdiction of the Commission.

- A. Bargaining Unit I is comprised of all eligible non-professional/non-supervisory employees in the Maintenance Department.
- B. Bargaining Unit II is comprised of all eligible non-professional/non-supervisory employees in the Fare Collection Department.
- C. Bargaining Unit III is comprised of all eligible non-professional/non-supervisory employees in the Construction Department.

SECTION 3:

- E. A "supplemental employee" is defined herein as a person who is hired as a replacement for a permanent full time employee who is on sick leave or other authorized leave. The use of supplemental employees is to be determined in accordance with the provisions of this Section. Any supplemental employee who is awarded a permanent full time position in the classification in which he is currently working shall receive one (1) day of credit toward satisfying his probationary period for each day of work completed during the immediately preceding six (6) month period. Supplemental employees will not be scheduled for more than eight (8) hours in any twenty-four (24) hour period, except as provided for in Article 9, Section 11 herein.

In addition to the uses listed above, supplemental employees may be used to:

- 1. Fill in during the bidding process.
- 2. Fill in for permanent employees who request a holiday off.
- 3. Fill in for permanent employees who have been assigned to a different position as shift leaders or janitors.

4. Create within a Fare Collection District extra work opportunities totaling three (3) work opportunities times the number of interchanges in each District during each twenty-eight (28) day schedule. These work opportunities may be used within each District to assign supplemental employees to interchanges to address staffing needs including, but not limited to, those caused by traffic volume, special events and similar circumstances as determined by the Commission.
5. Fill in for permanent employees during disciplinary action.

Supplemental employees shall receive a fifty (50%) percent contribution towards Appendix A, Section 5 benefits after the completion of six (6) months of employment and shall receive full Commission paid Appendix A, Section 4 and 5 benefits after one (1) year of employment.

Supplemental employees shall be covered under Article 3 (Union Rights) and Article 4 (Union Security – Dues Check-off).

A district supplemental seniority list shall be kept. All openings for full-time employment shall be offered by seniority from this list.

The Commission agrees to consider seniority in offering work opportunities as set forth in Article 8, Section 8.

B.2.

Supplemental employees shall be covered under Article 13, Section 8 (Supplemental Employee Vacation); Article 15, Section 2 (Bereavement Leave); Section 5 (Union Leave); Section 6 (Personal Leave) and Section 7 (Military Leave).

Newly hired supplemental employees shall serve a probationary period of six (6) months unless they attain full time status prior thereto. Supplemental employees with rights under this subsection shall be covered under Article 11, Section 2(C)(4) and (5) Sections 1 and 4 (Discharge and Disciplinary Action) and Article 26 (Grievance Procedure). Any offense which does not constitute just cause for discharge shall be subject to Article 25, Section 1.

Supplemental employees shall receive all across-the-board wage increases negotiated for other bargaining unit employees.

When scheduled on an eight (8) hour shift, a supplemental employee shall receive the same rest and meal period entitlement as a permanent employee and will be given a meal allowance and rest or paid break when working, in accordance with the provisions of Article 9, Section 6.

ARTICLE 2 MANAGEMENT RIGHTS

Section 1. Except as expressly limited by relevant statutes and codes or provisions of this agreement and reserving unto the Commission any and all management rights which, by law, may not be bargainable, the Commission shall have and retain, solely and exclusively, all other managerial responsibilities, power and authority, which shall include, but not be limited to: the right to establish policies; to establish, change or abolish job classifications or the job content of any classification; to hire, retire, demote, layoff and recall employees to work; to control and regulate the use of machinery, equipment and other property of the Commission; to introduce new or improved research, development and services; to determine the number and types of employees required and to assign work to such employees in accordance with the operational needs of the Commission; and to direct the work force, except as expressly modified or restricted by a specific provision of this agreement. Absent an emergency or other operational need, the Commission will provide the Union with any new or revised policy 15 days prior to implementing the same.

ARTICLE 8 HOURS OF WORK

Section 8

2. Selection of work schedules and availability of supplemental employees:
 - a. Supplemental employees' lines shall be reselected in December of each year. Supplemental employees' schedules may need to be reselected every twenty-eight (28) days to accommodate the operational needs of the Commission.
 - b. Supplemental employees shall be permitted to designate by seniority during line selection the shifts for which they will be available for assignment. Once all lines are selected, the remaining supplemental employees shall select by seniority a location within the district in which he or she was hired. In the event that insufficient supplemental employees make themselves available by designation for a particular shift, the Commission shall assign shifts in inverse seniority order.
 - c. Once shifts are designated as described above, a supplemental employee is expected to be available to work that shift as necessary. A supplemental employee who is unavailable for work on his designated shift more than once each month may be subject to disciplinary action.
 - d. Supplemental employees may be offered additional work opportunities other than their designated shifts, as needed.

ARTICLE 26
GRIEVANCE PROCEDURE

SECTION 1. A grievance is a dispute concerning the interpretation, application or alleged violation of a specific term or provision of this agreement. Any grievance arising between the Commission and the Union or an employee represented by the Union shall be settled in the following manner:

VI. OPINION

The issue to be determined is whether or not the Commission violated the Agreement when scheduling supplemental employees in a manner that exceeded work opportunities, and if so, what is the appropriate remedy. A review of the relevant record establishes the following material facts. The collective bargaining Agreement is in place between the Commission and Local 250 and Local 77. The western half of the state is handled by Local 250 who has jurisdiction over the area and eastern geographical region is serviced by Local 77. Both bargaining units negotiated and agreed to the collective bargaining Agreement between the Commission and the local Unions. The bargaining unit is comprised of separate units of all eligible non-professional, non-supervisory employees in the maintenance department, non-professional non-supervisory employees in the fare collection department and non-professional, non-supervisory in the construction department. The Union also represents supplemental employees. The facts establish through negotiations a new agreement resulted effective October 1, 2007 to September 30, 2011. Local 250 had two grievances filed by its members. The first grievance, dated January 9, 2008 stated the Commission in District 1 and at the Pittsburgh interchange exceeded the work opportunities for supplemental employees. The second grievance, dated January 10, 2008, contended the Commission is exceeding work opportunities for supplemental employees.

At the outset, the Union contends the Commission violated the Agreement in the manner in which supplemental employees were scheduled. The Union argues the only permissible use of supplemental employees is defined in Article 1, Section 3.E. of the Agreement. It is the contention of the Union since the effective date of the current Agreement, the Commission has scheduled supplemental employees beyond the permitted uses as contained in Article 1, Section 3.E. The Commission takes the position management has abided by the provision of the Agreement pertaining to scheduling supplemental employees. The Commission contends a Memorandum of Understanding, dated December 7, 2007 served as an effective bridge until the current Agreement concluded. The Commission argues the parties agreed management could assign supplemental employees to a set schedule at one interchange and therefore no contractual provisions were violated. I have carefully considered the arguments of the parties. The record evidence shows the parties negotiated an Agreement, effective October 1, 2007 to September 30, 2011. The Agreement was not signed as soon as it was reached because issues needed worked out among the parties. Eventually the parties signed the Agreement around September 18, 2008.

The Agreement defines the term supplemental employee "as a person who is hired as a replacement for a permanent full-time employee who is on sick leave or other authorized leave." The provision of the Agreement also defines when supplemental employees may be used, which are to 1) fill in during the bidding process, 2) fill in for permanent employees who request the holiday off, 3) fill in for a permanent employee who has been assigned to a different position as shift leader or janitor, 4) create within a Fare Collection District extra work opportunities totaling three (3) work opportunities

times the number of interchanges in each District during each twenty eight (28) day schedule... 5) fill in for permanent employees during the disciplinary process. The facts reflect the only new reason added in this particular Agreement for a supplemental employee to be used is to fill in for permanent employees during the disciplinary process. The Agreement also outlines in Article 8 Hours of Work, the process to be used by the parties for the selection of work schedules and availability of supplemental employees. The Agreement gives the employee the ability to select lines in December of each year while the Commission retains the ability to require the supplemental employee to reselect lines every 28 days to accommodate the operational needs of the Commission.

The facts further establish the Commission and Local 250 met several times before the Agreement was ratified to discuss the interpretation of the provisions of the Agreement related to the supplemental toll collector scheduling procedures. The Commission submitted a document during the hearing which contained the supplemental scheduling process. The unsigned document indicated on December 7, 2007 both parties discussed in detail and came to agreeable terms on the supplemental scheduling process.

The language contained in Article 1, Section 3.E of the Agreement clearly defines when supplemental employees are able to be used by the Commission. The parties agreed to the same language used for supplemental employees in the prior Agreement, but added a new reason to use supplemental employees, which is to fill in for employees during the disciplinary process. The record evidence reflects all other terms and conditions of this article, except for the addition of the reason to use supplemental employees, remained the same from the prior Agreement. The Commission, however, argues the practice in place between the parties pursuant to this Article is considered to

be a balancing of the scales because as long as the number of supplemental employees used during a particular 28 day period or longer period balances with the need for supplemental employees, no violation of the Agreement occurs in the manner in which supplemental employees have been scheduled. The Union points out even though the other Union bargaining unit which is party to the Agreement asserts the balancing process is used in the eastern side of the state, no proof establishes this practice has been used by the Commission to justify its use of supplemental employees in the western side of the state. I have carefully considered the arguments of the parties in this regard. The testimony of one of the Commission's witnesses established on the eastern side of the state there is an understanding a balancing of scales exists. The witness explained based on historical data the Commission knows how many days supplemental employees will be needed and the days the supplemental employees work balance out with the permissible uses. However, the Union President on the western half of the state pointed out he was not aware of the balancing of the scales contended to be in place. The Union further agreed the Commission did not discuss the balancing of scales during the steps through the grievance process. In my considered opinion, the record fails to establish the explanation used by the Commission witness is the practice that is in place between the parties to schedule supplemental employees instead of following the agreed upon language. The Agreement between the parties is unique in that there are two Unions who negotiate its terms and conditions with the Commission on behalf of its bargaining unit members. The Agreement contains the same language for both bargaining units. The testimony presented by the witnesses in my opinion fails to establish a practice is in place by the parties that is in opposition to the language which defines the permissible uses of

supplemental employees. Both bargaining units are subject to the same Agreement. However, the Union President of each respective Union provided different testimony to explain his understanding about the manner in which supplemental employees are scheduled. The Union representative from the eastern side of the state contended the Commission uses balancing of scales as the concept to determine the use of supplemental employees. The testimony of the Union representative from the western side of the state who filed the grievances established he was not aware through his involvement in the collective bargaining process or through the grievance procedure the Commission has used the balancing of scales approach to schedule supplemental employees instead of following the terms outlined in the Agreement. In my considered opinion, there is no consistent understanding of how the supplemental employee language has been applied since the Union Presidents from the two Unions do not share the same understanding of how supplemental employees are used by the Commission. The balancing theory explained by the Commission does not establish this practice has been consistently used by the parties. The Commission must follow the clear language contained in the Agreement on how supplemental employees are to be scheduled because no convincing practice is in place to establish the balancing of scales approach should be used. The Commission violated the Agreement in my opinion when the plain language of the Agreement was not followed in the manner in which supplemental employees are to be used.

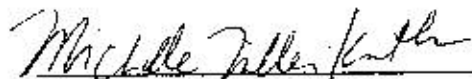
The appropriate remedy must be determined based on the Commission violating the Agreement by not following the language when supplemental employees were used. The Commission argues the arbitrator should limit the scope of the remedy in this

instance because neither grievant asked for a make whole remedy. The Union asserts a make whole remedy is appropriate based on the fact the Commission utilized supplemental employees in situations not permitted by the Agreement. The Union submits the remedy requested in one of the grievances to "follow contract language" requires the Commission to compensate permanent employees who were deprived overtime opportunities. The Union also argues during grievance proceedings its President repeatedly requested a make whole remedy.

I have carefully considered the arguments of the parties related to the appropriate remedy that should be applied. In my opinion, the violation of the Agreement did occur when supplemental employees were used outside of the permissible reasons such personnel could be utilized. The record and facts presented by the witnesses failed to prove bargaining history or an established past practice permitted the Commission to use supplemental employees in another manner than found in the clear language of the Agreement. As a result the appropriate remedy is for the Commission to make the grievants whole who were affected by the use of supplemental employees outside the scope of the Agreement. The Commission must evaluate the schedules of the grievants to determine if the lost work opportunities occurred as a result of the Commission utilizing supplemental employees outside of the permissible reasons contained in Article 1, Section 3.E of the Agreement. If the supplemental employee was not used for a proper reason and the grievant lost a work opportunity as a result, the Commission must compensate the grievant at the appropriate rate for the lost work opportunity. It is my determination once this is done the grievants would be made whole subject to the provisions of the award.

AWARD

The Commission violated the Agreement by utilizing supplemental employees outside the scope of the permissible reasons contained in Article 1, Section 3.E. The Commission must make the grievants in this instance whole for the situations of lost work opportunities. I will retain jurisdiction over this matter in the event issues arise in the implementation of this award



Michelle Miller-Kotula

Arbitrator

May 6, 2009