Communications Workers of America
District 3
AFI-CIO

Alabama, Florida, Georgia
Kentucky, Louisiana, Mississippi
North Carolina, South Carolina
Tennessee

3516 Covington Highway
Decatur, Georgia 30032
404 296-5553

NRB

File

Differential

June 14, 2005

TO: All Staff & Local Presidents
BellSouth Bargaining Units

FROM: Beverly A. Hicks
Assistant to Vice President

RE: **Full Arbitration Award:**
Harley Cecil - Differential
Arbitration Cs. #B3-04-038 - Gr. #B03041-3611
Raleigh, NC
Union Won

Attached is a copy of the above Arbitration Award rendered by Arbitrator Benjamin M. Shieber who ruled in favor of the Union on June 7, 2005.

BAH:ms
opeiu #2, afl-cio

Attachment

cc: Noah Savant
Patrick Scanlon
Linda Crawford

IN ARBITRATION

BETWEEN

BellSouth Telecommunications, Inc.	Grievance: Harley Cecil; Differential
and	CWA Arbitration Case No. B3-04-038
Communications Workers of America	Grievance No. B03-04-3611

ARBITRATOR:

Professor Benjamin M. Shieber
Paul M. Hebert Law Center
Louisiana State University
Baton Rouge, Louisiana 70803-1000

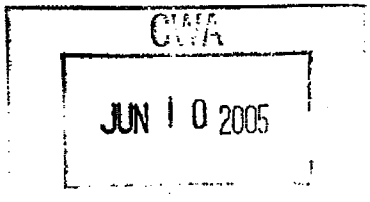
APPEARANCES:

FOR THE COMPANY:

Mr. Leon H. Lee, Jr., Esq.
BellSouth Telecommunications, Inc.
Suite 1400
1100 Peachtree Street, N.E.
Atlanta, GA 30309

FOR THE UNION:

Mr. John L. Quinn, CWA District Counsel
Communications Workers of America
3516 Covington Highway
Decatur, GA 30032



OPINION AND AWARD

I. Issues

The Arbitrator finds that the issues in this case are as follows:

Should the April 18, 1997 award of Arbitrator F. Jay Taylor in Grievance No. B-3-96-085 entitled "Equipment Inventory Coordinator: Wage Rate" be given res judicata effect in this case?

If not, did the Company violate the August 5, 2001 Agreement when it failed to pay Grievant a differential when he performed comprehensive inventory of plug-in cards work in 2002 and 2003?

If it did, what should the remedy be?

II. Facts

The Company and the Union have been parties to collective bargaining agreements for more than 50 years, with the applicable agreement in this case effective from August 5, 2001 to August 7, 2004. See Jt. Ex. 1, August 5, 2001 Agreement, Section 31.01.

The Company owns millions of electronic plug-in cards which it uses to provide telephone, data transmission, and other services to its customers. Each card has a unique identifier which is displayed on the spine of the card in two formats: one, letters and numerals; and two, a bar code that is legible by a scanner. For example, Co. Ex. 3, a plug-in card is identified as 5SC3TU7DAA and in a bar code that appears above that format. The Company maintains an inventory of its plug-in cards from the time of their receipt from its suppliers. The inventory enables the Company to know whether a particular card is in storage, on an employee's truck, in use in a central office, or in use in a remote terminal.

All Company employees who handle plug-in cards are trained in the use of a software program called Loop Electronic Bar Code Inventory (LEBCI) which enables them to enter the identifier for a particular plug-in card into the Company's inventory. See testimony of Mr. James L. Bjork, Area Manager, R. 108. Thus, employees at different wage scales all work with LEBCI to keep the Company's inventory of plug-in cards current. Thus, Frame Attendants at Wage Scale 24; Service Technicians, Wage Scale 30; Digital Technicians, Wage Scale 32; and Electronic Technicians, Wage Scale 32 are all trained on LEBCI and use it in their regular work. See Jt. Ex. 1, August 5, 2001 Agreement, Appendix A, Part I, Departmental Usage of Titles-Wage Scale Table. At the end of their workday, employees download the information from LEBCI into the Company's central inventory of plug-in cards which is known as Stock Inventory Module, (SIM). See Mr. Bjork's testimony, R. 99. Service Technicians, Digital Technicians and Electronic Technicians are all supplied with portable computers which contain the LEBCI program. When a technician takes a plug-in card off his/her truck and puts it in service the technician documents that the plug-in card was put in service at a particular location by typing in the identifier of the plug-in card using the LEBCI software program. See Grievant's testimony, R. 51 and Mr. Bjork's testimony, R. 100-101. He/she does not scan the bar code. At the end of the day the technician will download the inventory information in the LEBCI program to the Company's central inventory, SIM. See Mr. Bjork's testimony, R. 101.

Early in 2002 Mr. James L. Bjork, Area Manager for Raleigh, North Carolina, was tasked with the job of doing a comprehensive inventory of plug-in cards in his area. He first instructed his Digital Technician supervisor to inventory the plug-in cards. Several Digital Technicians had already been trained in using a scanner to perform an inventory of plug-in cards. See Mr. Bjork's

testimony, R. 118-119. The supervisor said his group would do the work. See R. 118-119. The following day one of the Digital Technicians suggested to Mr. Bjork that instead of Digital Technicians, WS 32 employees, doing the work it could be done by Service Technicians, WS 30 employees. See Mr. Bjork's testimony, R. 123. Mr. Bjork decided to use Service Technicians because the work load for Service Technicians was much lighter than that for Digital Technicians in the March 2002 period when the comprehensive inventory was to be done. See Mr. Bjork's testimony, R. 123-125.

In accord with Mr. Bjork's decision the Company assigned Grievant and three other Service Technicians to receive a two day training course in the use of the scanner to take a comprehensive inventory of plug-in cards in the Raleigh, North Carolina area. See Grievant's testimony, R. 49. The training consisted of one classroom day and one day of field work. The Service Technicians learned how to use a scanner attached to their portable computers and the LEBCI software program to inventory all the plug-in cards in central offices and at remote terminals; and how to download the information that they had entered in their computers to a different database than the one that they normally downloaded their truck inventory to. See Grievant's testimony, R. 52. Grievant performed the comprehensive inventory work for the period from March to August 2002 and then for some time in 2003 and 2004. While doing this work he reported to the Digital Technicians' supervisor, Mr. Robert Doreauk. See Grievant's testimony, R. 55-56 and 58. Grievant and the other Service Technicians were paid at their regular wage scale, Wage Scale 30.

In September 2002 a grievance was filed claiming that Grievant was entitled to a differential for working on a higher rated job in accordance with Section 407(I)(1) of the Agreement. See Jt. Ex. 2. The Company denied the grievance stating that "Performing the inventory of subscriber line

carrier channel units is not higher rated work for an ST (Service Technician) and therefore not due a differential. Company position sustained." See Jt. Ex. 2. The Union responded that "This work has traditionally been performed by WS32." See Jt. Ex. 2. When the Parties were unable to resolve their dispute in the grievance procedure this arbitration followed. A hearing, which was reported in a transcript of 176 pages, was held on January 27, 2005. The Arbitrator received the Parties' briefs on April 19, 2005, on which date the case was submitted for decision.

III. Decision

The Union strongly urges that the issue of whether the comprehensive inventory work performed by Grievant is higher rated work has already been settled by a prior arbitration award which is binding on the Parties; and that therefore Grievant is entitled to the differential provided for in Section 407(I)(1) of the Agreement. Its brief states, "The Union does not have to prove that PICS Inventory work is higher rated work. Nor does the Arbitrator have to make such a determination. That issue has already been decided." See U. Brief, p. 11.

The Union relies on the decision of Arbitrator F. Jay Taylor dated April 18, 1997 in a case between the same Parties in Grievance No. B-3-96-085. In that case in which employees were scanning plug-in cards for entry in the Company's inventory, the issue before the Arbitrator was stated differently by the two Parties. The two formulations of the issue were as follows:

> "The Union Version:
> Is this issue properly before the Arbitrator pursuant to Article 15 of the Collective Bargaining Agreement?
>
> The Company Version:
> Whether the appropriate wage scales for the Equipment Inventory Coordinator job title is wage scale 25, assigned by the Company, or wage scale 32, as proposed by the Union. The NTP (Neutral Third

> Party) must select either the wage schedule submitted by the Company or the Union." See Taylor Award, p. 2.

After a thorough review of the history of the Parties' efforts to resolve the question of the appropriate wage scale for the Equipment Inventory Coordinator job title, Arbitrator Taylor held that the Union had correctly stated the issue before him. His award stated:

> "The issue is not properly before this NTP under the provisions of Article 15.
>
> The parties are directed to return to the bargaining table to seek a permanent resolution of this issue.
>
> Until resolution is mutually agreed upon the inventory work in question shall remain at a wage scale 32 job." See Taylor Award, p. 18.

Uncontradicted testimony establishes that the Company made no effort since the Taylor Award to negotiate a Wage Scale for performing comprehensive inventory of plug-in cards work. See testimony of Mr. Paul C. Jones, Union Local President, R. 84. The Union strongly contends that Arbitrator Taylor's decision is final, that the Company and the Union have agreed to abide by that decision, and that it is therefore established that plug-in inventory work is Wage Scale 32 work. See U. Brief, pp. 13-15.

The Arbitrator agrees with the views expressed by Arbitrator Ellmann in General Telephone Company of Ohio. Arbitrator Ellmann stated

> "Grievance arbitration provides a rational and common sense method for resolution of differences, such as the parties contemplated in ... their agreement and pledged themselves to utilize in Article [23]. But the arbitration process ill serves the parties' mutual needs if awards are disregarded because they are unpalatable or because the losing party thinks that another arbitrator might take a more sympathetic view. However acute the differences may be, however important the issue, each side has a heavy stake in making sure that the "settlement" ultimately determined by the arbitrator be conclusive of the dispute and be binding upon winner and loser alike, unless and until the parties themselves see fit to revise it by mutual agreement.

> The recognition that the arbitral decision be "final and binding upon the parties" is explicitly confirmed in Section [23.01(E)] of the agreement to which both sides solemnly subscribed." See 70 LA 240, 244 (E. B. Ellmann 1978).

In the General Telephone case Arbitrator Ellmann applied the res judicata principle and dismissed the grievance for lack of arbitrability because he found that "the issues herein [were] foreclosed by prior award" of another arbitrator. In applying the res judicata principle Arbitrator Ellmann pointed out that

> "The issues presented to me can now be seen to be in essence the same issues which were presented to Arbitrator Dean and determined by him adversely to the Union's contentions. The same interpretation of Section 7.14 urged upon him was urged upon me. The same claim of established custom and practice rejected by him was presented, perhaps at greater length, in the hearing before me. The same claim that the negotiating history constituted recognition of the Union's position, made before me, was apparently that to which Arbitrator Dean alluded in his opinion and which he found unpersuasive evidence of the Union's position...." See 70 LA at p. 244-245.

Arbitrator Ellmann thus expressed his recognition of the well established rule that the principle of arbitral res judicata has important limitations and found that these limitations did not apply in the case before him. As stated by Arbitrator Alan Miles Ruben,

> "Preclusive effect may be given to a prior award only where the issues are identical and the subsequent dispute cannot be distinguished from the one earlier ruled upon.
>
> Thus, the second arbitrator must first be satisfied that the issue he is required to decide is identical to that presented in the previous case...." See Burnham Corp., 88 LA 931, 935 (A. M. Ruben 1987).

Accord: Elkouri & Elkouri, How Arbitration Works, p. 577 (6th ed. 2003).

These well established principles make it clear that the res judicata principle is not applicable in this case, and that Arbitrator Taylor's award in Grievance No. B-3-96-085 should not be given

res judicata effect. The only issue decided by Arbitrator Taylor was the one proposed by the Union, i.e., "Is this issue properly before the Arbitrator pursuant to Article 15 of the Collective Bargaining Agreement?" See Taylor Award, p. 2. And Arbitrator Taylor held that "The issue is not properly before this NTP under the provisions of Article 15." See Taylor Award, p. 18. The substantive issue in the instant case is entirely different. It is whether the Service Technicians were doing higher rated work of Digital Technicians when they performed the comprehensive inventory of plug-in cards in 2002 and 2003 and, as the grievance clearly states, it involves the interpretation of Article 4.07(I) of the Agreement. See Jt. Ex. 2. Arbitrator Taylor was asked to decide whether the pay scale for employees performing comprehensive inventory work of plug-in cards should be decided in an Article 15 proceeding or by collective bargaining. In the instant case the Arbitrator must decide whether Service Technicians who are performing comprehensive inventory work on plug-in cards are doing the work of a higher rated job classification and are therefore entitled to a differential under Section 4.07(I)(1). Since the issues and the bargaining agreement provisions involved in the instant case are entirely different than the issues and the collective bargaining agreement section involved in the case decided by Arbitrator Taylor's award, the Arbitrator holds that Arbitrator Taylor's award will not be given res judicata effect in this case. See Armstrong Corp. Co., 34 LA 890, 894 (R. H. Morvant 1960); Butler Mfg. Co., 42 LA 304, 306 (J. R. Johnston, Jr. 1964); Allison Steel Mfg. Co., 54 LA 1200, 1201-1202 (T. T. Roberts 1970); Central Telephone Co. of Illinois, 82 LA 528, 532 (H. M. Berman 1984); Arch at West Virginia, 90 LA 1220, 1222 (M. M. Volz 1988).

Turning to the merits of the case, the Arbitrator must apply and interpret Section 4.07(I)(1) of the Parties' Agreement. That provision is as follows:

I. Working on Higher-Rated Job.

1. An employee working temporarily on a higher-rated job classification within the bargaining unit shall receive a differential of 10% above his/her basic hourly rate of pay for such time worked provided he/she performs such work for 2 or more hours during the calendar week. (See 2.06 for wage computation.) Differentials are limited to those instances in which an employee is substituting in a job carrying a higher top basic weekly rate than the job on which the substituting employee normally works...." See Jt. Ex. 1, August 5, 2001 Agreement, Section 4.07(I)(1).

As the Company points out in its Brief, "The key requirement that the parties' Agreement imposes on the issue of paying a differential is that the employee actually substitute in the higher-rated job, not just perform some overlapping duties. Past arbitral authority between the parties has established that this is a strict requirement and a difficult one for the Union to meet." See Co. Brief, p. 7.

The decision which established this "key requirement" is Arbitrator Patrick Hardin's November 27, 1996 decision in Grievance No. B93-157-3603, the Carolyn Price Grievance. In that case Arbitrator Hardin found that Ms. Price was doing tasks about 15% of her time which higher-rated job employees performed. He then went on to say

> "That conclusion would lead to an Award in the Union's favor, and a modest supplement to the earnings of Ms. Price in the interval since the grievance was filed, but for one further difficulty. The language of Section 4.07.I.1. includes a very specific limitation:
>
> > Differentials are limited to those instances in which an employee is substituting in a job carrying a higher top basic weekly rate than the job on which the substituting employee normally works....
>
> The explicit "substitution" requirement of the Section is completely unmet in this case. Ms. Price has never been "substituting" for a COIRT in any realistic sense of the word when she has performed the job tasks described above. Rather, when she performs job duties which COIRTs also perform, she is performing the described duties of her NAA position. Rather than substituting for a COIRT, she is

simply performing "the job on which [she] normally works ..." to use the language of Section 4.07.I.1.

> This is not a case in which the Company has regularly taken Ms. Price out of her normal assignment, sent her to perform work normally done by COIRTs, then denied her the ten percent differential.... But Section 4.7 does not deal with overlapping job duties, it deals with "substitutions". Thus, the total absence of any "substitution" is an absolute barrier to the Award which I would otherwise render." See Arbitrator Hardin's Award, p. 8-9.

Arbitrator Hardin's decision was followed in later cases between the Parties. See Arbitrator James J. Odom, Jr.'s award in Grievance No. B95-069-3314 at p. 8-9 (November 3, 1999); and Arbitrator William H. Holley, Jr.'s Award in Grievance No. B01134-3122 at pp. 24-25 and 29-30 (May 18, 2004). See also Arbitrator Lloyd L. Byars' Award in Grievance No. B01022-3120 (February 18, 2003).

The instant case differs from the cases decided by Arbitrators Hardin, Odom, Byars and Holley in that it does not involve overlapping duties of Service Technicians and Digital Technicians. The work of taking a comprehensive inventory of plug-in cards using a scanner does not involve the job responsibilities of either job title with respect to installing and maintaining POTS and installing and maintaining digital services and complex premises equipment. See U. Exs. 1 and 3. See Grievant's testimony, R. 39-40; and Mr. Bjork's testimony, R. 137, and 138-144. Nor did the comprehensive inventory of plug-in cards work involve the normal use of LEBCI by Service Technicians and Digital Technicians in their day-to-day activities to maintain a running inventory of plug-in cards.

Instead the training to perform the comprehensive inventory involved training on how to use "the scanner" using LEBCI and then downloading the information into the SIM. Mr. Bjork testified that the training for performing the comprehensive inventory of plug-in cards involved training on

> "The handheld scanner. We've been using LEBCI for a while, the technicians, but this is different. I mean, you got – when you've got a scanner and the process, you got to go through what I just told you and tell it, here's what I want you to do. Here's how this works. Here's where you plug it in. Here's where you find a matrix to figure out which type system you're working on. You got to tell people about it. It's not how the digital system works, it's how the scanner works. And that's what the training consists of." See Mr. Bjork's testimony, R. 118.

And Mr. Bjork testified that whether Digital Technicians or Service Technicians were going to do the work of the comprehensive inventory of plug-in cards they would have to have had or be given the same training that Grievant and the other Service Technicians received. See Mr. Bjork's testimony, R. 119.

Thus, this case does not involve a question of overlap of duties of Service Technicians and Digital Technicians; but the question of whose work it was to perform a comprehensive inventory of plug-in cards using scanners. Otherwise stated, whether Service Technicians or Digital Technicians "normally work[ed]" at that task..

The Arbitrator finds that the evidence establishes that the work of taking a comprehensive inventory of plug-in cards using a scanner was the work of Digital Technicians, and that in performing that work the Service Technicians were "substituting" for the Digital Technicians. The grievance must therefore be sustained.

The evidence that the work of performing a comprehensive inventory of plug-in cards using scanners is the work of Digital Technicians is clear from the record. First, Mr. Bjork testified that

when he was tasked with doing the comprehensive inventory of plug-in cards he "walk[ed] down to the DLC group supervisor who works for me, and I say, I got a report here that says we're in trouble. Go inventory those plugs." When asked why he talked to the Digital Technician supervisor, he answered "This is DLC function. They do DLC work. So I said, ya'll go do it. And he said, yes, sir. Very good answer. I like the answer." See Mr. Bjork's testimony, R. 118-119. Thus, the Area Manager did not weigh the relative merits of whether ot assign the work to Service Technicians or Digital Technicians. He knew that this was Digital Technician work.

Second, uncontradicted testimony establishes that before the comprehensive inventory to which this grievance gave rise, the only employees trained in the use of the scanner in taking a comprehensive inventory of plug-in cards were Digital Technicians and Electronic Technicians, both at Wage Scale 32. See testimony of Mr. Paul C. Jones, Union Local President, R. 83-87; and Mr. Bjork's testimony, R. 119.

Third, while performing the work, the Service Technicians were supervised by the Digital Technician supervisor to whom they turned for answers to problems. See Grievant's testimony, R. 56. Thus, in this case, as distinguished from the Carolyn Price Grievance, the Company took Grievant and other Service Technicians out of their normal assignment of performing POTS work and sent them to perform work normally performed by Digital Technicians i.e., taking a comprehensive inventory of plug-in cards using scanners. Compare Arbitrator Hardin's decision at p. 9. Grievant and the other Service Technicians performing the comprehensive inventory work were therefore substituting for Digital Technicians when they performed the work of taking a comprehensive inventory of the Company's plug-in cards using scanners. Grievant and the other

Service Technicians performing the comprehensive inventory of plug-in cards are therefore entitled to a differential for that work in accordance with the provisions of Article 4.07(I)(1).

IV. Award

The grievance is sustained.

The April 18, 1997 award of Arbitrator F. J. Taylor in Grievance No. B-3-96-095 entitled "Equipment Inventory Coordinator: Wage Rate" does not have res judicata effect in this case.

The Company violated the August 5, 2001 Agreement when it failed to pay Grievant a differential pursuant to Section 407(I)(1) when he performed comprehensive inventory of plug-in cards work in 2002 and 2003.

In accordance with the Parties' stipulation, the Parties shall jointly determine how much differential pay is due to Grievant. The Arbitrator retains jurisdiction to resolve any dispute concerning the remedy which the Parties are unable to resolve. See R. 10.

Benjamin M. Shieber
Arbitrator

Baton Rouge, Louisiana

June 7, 2005