AT&T ALBANY, NY AND COMMUNICATIONS WORKERS OF AMERICA	* * * * *	ARBITRATION OPINION AND DECISION SCHEDULING GRIEVANCE #D1-02-2010 ARNOLD M. ZACK, ARBITRATOR DATE OF DECISION: 3/1/11

On June 17, September 24, October 15, November 23, and November 24, 2010, I held hearings in Albany, NY, to hear the issue set forth below. The Company was represented by Letty Alfonso, Esq., and the Union was represented by Atul Talwar, Esq.. I received post-hearing briefs on February 10, 2011.

THE ISSUE

The parties agreed upon the issue to be decided as follows:

> "Did the introduction of the MySchedule tool violated Article 12.2 of the parties' Agreement? If so, what shall be the remedy?

Article 12.2a of the parties' Agreement reads as follows:

> Section 2. The scheduling of hours and days to be worked and any revisions thereof shall be determined exclusively by the Company, however:
>
> a. The Company, except as provided in b. and d. below, will assign work schedules on the basis of seniority as defined in Article 11."

Article 11, referred to therein, reads as follows:

> Section 1 Seniority, as used in this Agreement, is defined as Net Credited Service as determined by the Employees' Benefit Committee.

Section 2. If more than one (1) employee has the same Seniority date, the last four digits of the Social Security Number will be used to establish the ranking. The employee with the lowest number will be considered the most senior."

THE FACTS

The Company operates a number of retail sales offices staffed by bargaining unit personnel. The Company determines the hours of operation of the stores and requisite staffing.

Prior to 2001, when the parties negotiated their first Collective Bargaining Agreement, each store handled its own scheduling. In that initial negotiations, the evidence shows that the parties discussed the creation of tours and number of staff required by the Employer, and the submission of the tour list employees in order of seniority for them to select their preferred (5) tours for that week. The Contract language they agreed to governing the scheduling of hours is in Article 12, as quoted above. That language has continued in effect. The unrebutted evidence shows that following the execution of the Agreement, Rachel Bailey, a Union representative in negotiations assisted a number of store managers in helping them develop the schedules including staffing elements. She testified that after the tours were set, employees were offered their pick by seniority.

Beginning in 2008, the Company began to develop a customized scheduling software application which could forecast customer traffic and generate employee schedules for all U.S. based retail stores. In January 2009, the parties met for contract negotiations but Article 12 remained untouched and continues in effect under the current February 8, 2009 – February 9, 2013 Collective Bargaining Agreement.

In an informational session on January 30, 2009, which was not part of the formal negotiations, the Company presented a Power Point demonstration on a proposed new scheduling tool. There were no official minutes taken of that session. The Power Point presentation was thereafter sent to Union bargaining team members by email and was provided at the negotiating team's next meeting. It was identified as a program which would be initially tried in three New Jersey stores in March and April 2009. Included in the PowerPoint presentation were the following:

Moving to MySchedule for Retail

MySchedule for Retail is focused on serving customer needs by scheduling the right staff at the right time. Tool provides employees an easier opportunity to provide their availability and preferences and also to swap shifts.

Developing Next Generation Scheduling Tool	Align Regions for Schedule Principles, Rules, and Execution
o Solution addresses field pain points - Tough to use. New managers starting every month - Limited visibility for field leadership - Inconsistent execution practices and accountability - No integration with Time and attendance application - Logic for seniority incomplete - No way to compare schedule and actual hours worked o Limited pilot Q109 for Q2009 launch - Significant change management activities may be required, including live application training for RSM, ASM, ARSM - Inclusion of front-line staff as active and responsible participants in the scheduling process for the first time	o Unite all regions under a small but complete set of scheduling guiding principles o Set comprehensive and fair business rules for schedule creation and maintenance o Building the application so as to remove from the manager as many choices regarding how to schedule as possible o Agree on operating model structure - Scheduling execution timeline and stakeholders

Business Rule and Configuration Summary

Business Requirement	Rule Design or Configuration
Bidding	o **Bidding for shift tours will be inherent in the Application** and not require a formal bid process as an additional. Preferences and availability entered before the fact, not competed for after the fact.
Shift Swaps	o Employee can **request shift swap through self-service.** Swaps are permitted only for like for like – job function and duration
Seniority	o **Availability and Preferences respected in descending seniority** order subject to the needs of the business
Limits and Fairness	o **Shift responsibilities applied in ascending order.** Maximum limits will apply
Approval and Visibility	o **ARSMs will actively approve schedules** for release.
Maintenance and Open Shifts	o **Managers will edit active schedules** subject to rules of coverage. These changes will flow through to MyTime
Adhere to State	o **Eliminate risk in accidental violations** of State laws for lunches, breaks and overtime

According to Bill Bates, the Company in that January 30th meeting stated it had had numerous problems with seniority under the prior system and thought that the way to strengthen the system was to make it automatic taking out the preferential treatment by inexperienced young managers and thus avoid problems regarding seniority.

On February 8, 2009, the Company Lead Negotiator sent his Union counterpart, Bill Bates, National Telecom Director, the following email message listing the schedule for introduction of the new system:

> "Dear Mr. Bates:
>
> The Company plans to pilot a new Retail scheduling tool. The COR Retail Scheduling Tool is designed to unite all regions under a complete set of guiding scheduling principles and implement a comprehensive set of business rules for schedule creation and maintenance. We expect testing and reviewing of the proposed configuration in 1Q09. This test will ensure the configuration elements are providing realistic and usable schedules for employees. Ten locations in the Orange contract have been selected representing a sample of the full spectrum of COR locations based on traffic and headcount. Those locations will be clustered in the regions shown below:

LOCATION ID	LOCATION NAME	REGION
CA0382	Santa Clara	West
CA0009	Saratoga	West
CA0316	Folsom	West
CA0303	Creekside	West
MN0008	Riverdale Commons	North Central
MN0014	Southdale Center	North Central
MN0027	Burnsville	North Central
NJ0068	Garden State Plaza	North East
NJ0086	Linwood Plaza	North East
NJ0092	Paramus Route 4 West	North East

> User acceptance testing will commence live on 3/02/09 and is expected to run for a period of two months. Upon completion of the trial, the Company will review the results and consider input from the Union."

At the request of the Union, the parties incorporated the foregoing letter into the current Agreement as a Letter of Agreement #17. Union negotiator Bates testified that he said that he wanted to make sure the Union would have to be

conferred with and that the results of the trial would have to be shared and the Union's input considered.

The Company began with its test of the program in New Jersey and prepared a document with a rollout schedule. On May 7th, Steve Frost for the Company emailed Bates of the Union that the trial had ended and that the Company was implementing the new program. Bargaining unit employees in the Northeast Region were given training in the new scheduling tool in June, and it was formally implemented on June 29, 2009. Each RSC was emailed a Primary Shift Preference Sheet with instructions to complete with time slots for the seven-day week but without shift starting or ending times or numbers of personnel needed. Shift Preference inputs ran up to 85 hours per 40-hour work week. The scheduling tool then generated the schedule for all store employees. At a July 8 or 9, 2009 conference call, the Company shared feedback from Regional Store Managers concerning the trials. The Union apparently raised questions about training and examples of where the tool did not schedule by seniority. The Company replied that it would get back to that individual.

According to David King, the Tool was programmed with certain hard rules assuring two employees present at store openings and closings, no work scheduled on an employee's vacation day, 5½ hours work entitling an employee to a 45-minute lunch period, assuring that everyone worked 40 hours, that they not work within 8 hours of their prior shit, that they be scheduled for a minimum of five days and be prohibited from working seven days, that they be scheduled for not less than five or more than 10 hours per shift, and that they work no more than six days in a row during any two-week period. Initially, he testified the Tool was programmed with two "soft rules" in August for September 2009 schedules, which were eliminated for the next scheduling after negative feedback:

1) no employee could be scheduled for more than six weekends in a four-week month,

2) no employee would close more than four nights in a single week.

Further adjustments were made into the Fall of 2009. In August 2009, after the parties were unable to resolve their differences for the schedule assignments by seniority, the Union proceeded to file a grievance which was thereafter appealed to arbitration.

POSITION OF THE UNION

The Union contends that Article 12 of the parties' Agreement requires the Company to assign schedules based on selection by seniority, and that the bargaining understanding and the practice for nine years since the date of the first Agreement until the AT&T-imposed MySchedule, had been for employees to select their tours from known schedule options.

In asserts that the parties agreed to a two-step process where Management would determine numbers of employees and hours for tours as provided in the introductory sentence of Article 12(2), and that employees would select from their offerings in order of seniority. It notes that that two-step practice was in effect from January 2001 until August 2009 when the MySchedule tool was introduced to usurp seniority rights and that the Company relied upon Rachel Bailey to help introduce that two-step procedure in its various offices through various processes, all of which included the senior employees being able to bid on a known schedule.

The Union argues that inputting preferences into MyShedule denies senior employees the right to be assigned to their work schedule of choice by denying employees the ability to select from real and specific tours.

The Union further contends that letter of Agreement #17 does not alter the seniority protection of Article 12, that it does not mention seniority or change Article 12 in any way, that it was merely an agreement to be a trial and that while it seeks to address the creation and maintenance of realistic and usable schedules, it in no way overcomes the seniority guarantee of Article 12. It notes that the Company never properly informed the Union how preferences were going to work, that the Union was never provided the applicable PowerPoint presentation or its appendices, that its assurance to the Union that seniority bidding was built into the tool was not borne out by the facts, that the Union had no impact into the develop of the tool, and that the Union had no way of knowing the problems inherent in the current functioning of the tool until it was put into use.

POSITION OF THE COMPANY

The Company contends that the Union has failed to meet its burden of proving the Company has violated the parties' Agreement, that there is no recorded

evidence of the Company violating any aspect of the Agreement, and that the undisputed evidence demonstrates that the Company's scheduling tool determines scheduling based on seniority while honoring the hard rules dictated by the Agreement and assuring the Company's business needs are met.

The Company further contends that the Union has failed to prove a Company violation of Article 12, Section 2a, of the parties' Agreement by utilizing the Retail Scheduling Tool.

The Company further contends that the Company tool does indeed assign schedules on the basis of stated preferences in seniority order as required by the Agreement. It argues that Article 12, Section 2a protects employee seniority in the assignment of schedules but contains no requirement with respect to bidding as the Union would like to believe, that the tools algorithm was designed to and does in fact assure the employee's seniority as a hard rule to assign RSC's with a schedule, that as best as possible, matches individual employee preferences. While senior employees are not always assigned the exact hours or dates they elect in their preference forms, it continues, it is abundantly apparent that their preferences when the same or similar to those of junior employees, are given priority. The Company points out that the Company is not required to assign senior employees with the exact hours and days off that may be their preference, but is required merely to assign employees their shift on the basis of seniority which it asserts it did. It claims the Union failed to accept that the application of seniority rights does not trump the needs of the business in establishing the schedules. The Company argues that there is no contractual obligation on the Company to provide a bidding system or to distribute the schedule in advance of employees stating their preferences. It emphasizes its contractual right to schedule hours and days and to assign schedules, that there is no contract ban to its implementing a scheduling software application to generate employee schedules by maintaining a consistent ratio between customers and RSC's, and that the Union stood by offering no protest to the implementation of the scheduling tool reasonably leading the Company to believe its actions were fully sanctioned by the Union.

Finally, the Company contends that the Union has failed to prove the Company violated any past practice by introducing the scheduling tool, that the so-called past practice in many key respects did not change under the scheduling tool system, that the Company retained and exercised the direction to determine available shifts and numbers of employees to be scheduled on each shift, that the more effective forecasting capability of the scheduling tool might provide greater variety in shifts than in the past, but that as before, the Company continues to have

the authority to formulate schedules and numbers of employees on each shift. It argues that the parties alleged past practice, is sporadic and inconsistent as shown in only a handful of stories, and is irrelevant, where as here, the Contract terms are unambiguous.

The Company emphasizes that the assignment of schedules is the Company's exclusive right and there is nothing in the parties' Agreement that requires employees have the benefit of knowing the schedules before being assigned and that imposing such a requirement would improperly legislate new language replacing the role of the parties in negotiating their Agreement provisions.

The Company notes that it advised the CWA that bidding for particular schedules would be done away with under the new system, that the CWA requested no bargaining over any aspect of the scheduling tool, and made no effort to memorialize any claimed practice. Accordingly, the Company urges the grievance be denied.

DISCUSSION

There is no question that Management has the sole authority to schedule tours of duty, days of work, and numbers of staff effectively and efficiently to operate its retail stores. That is set forth in the explicit language of Article 12.2 of the parties' Collective Bargaining Agreement which has remained unchanged since its first adoption.

But, there is also no question that the parties in recognizing that managerial authority also agreed to a condition on that unfettered right to schedule hours and days of work, i.e., that in assigning the foregoing work schedules to its staff it "will" do so on the basis of seniority.

The issue in this case is whether that mandated deference to seniority is to occur after the shift schedules are created by Management by offering the choice of scheduled shifts in the order of seniority, or before the shift schedules are created by employees submitting their preferences prior to the schedule creation which are then reflected in assignments made by the Employer once the schedule is created.

The evidence shows that in the period following the parties' Agreement to Article 12.2, there was a practice in the stores for which testimony was provided of the Employer creating the schedule and then offering the selection of tour option to the covered employees on the basis of their seniority. Thus, the most senior

employee had the right to select an option of working or not working weekends or working or not working starting or store opening shifts depending on which tours were the most appealing. If that most senior employee opted to take the only schedule that had tours scheduled for Saturday, that option was foreclosed to the next senior employee who had to choose among the remaining tours. Even if that evidence doesn't rise to proof of a binding practice, it is the only credible evidence of how at least some stores the parties applied that new Article 12 language.

The parties' Agreement granted the Employer the exclusive authority to create "scheduling of hours and days to be worked". As I read the Agreement, the creation of the schedules is an essential pre-condition to the right of the bargaining unit members to exercise their seniority in choosing such schedules. While it is certainly within the Employer's discretion to permit bargaining unit members to set forth their preferences by groupings of hours and days of work, those solicited preferences do not constitute a schedule selection if made before the schedules are created. The preferences may be for a starting time between 8am and 10am, and for working weekends, but do not provide the choice by seniority which entails judgment which can only be exercised by choosing among available schedule options, in order of seniority.

If, for instance, the Company had scheduled two employees who had indicated preference for work on weekends, and one employee's scheduled for Saturday work and the other scheduled for Sunday work, the preference for both would be satisfied, with the Employer presumably making its assignment of the senior to either Saturday or Sunday work. That choice, however, under the Contract, is not to be made by the Employer or its computer program. It is a choice reserved to the senior employee, a choice which the Employer denies by its reliance on preference rather than by schedule choice by the employee based on their seniority. Similarly, if the employee's preference is submitted as being the shift start between 8am and 10am, or even between 8am-9am, if the Employer starts one tour at 8am and the other at 8:30am, those two tours are within the preference choice of the more senior and another employee, but without knowledge of the starting time or the two schedules, one at 8am and the other at 8:30am, the more senior employee is deprived of the requisite information to make a choice from the two available schedules.

It is evident from the testimony offered by witnesses at the hearings, both as to the negotiations and as to the unrebutted evidence of practice, in at least some of the stores for years thereafter, that the presentation of the Management-constructed scheduling of hours and days was a pre-condition to the employee's

choice of work schedule from among those developed and offered by the Employer. The evidence shows that before the introduction of the scheduling tool there was no solicitation of preferences. The Company's introduction of solicited preferences with the arrival of the scheduling tool in no way constitutes contractually authorized substitute of the accepted post-scheduling selection of individual schedules by seniority. If the parties intended to abandon or replace the schedule specific selection process with a pre-schedule preferential range of choices, it was incumbent upon them to so negotiate. It is clear that no such negotiations took place in their most recent Contract negotiations. The Letter of Agreement #17 which the parties did agree to insert in their Contract document is a recognition of their then on-going testing of the new scheduling tool, and not a license to substitute actual schedule selection by seniority from those schedules constructed and offered by the Employer. That Letter of Agreement gave no license to the Employer to abandon the seniority based choice of specific schedule; it merely expressed a commitment to consider Union input at the conclusion of the trial tests. I do not read it as providing Union acquiescence to the test results or to any determination made by the Employer as to how to proceed after the trial period. Article 12 remains controlling as agreed to; its provisions and restrictions continue to be binding on the parties and it is no way replaced or altered by the language in the Letter of Agreement #17.

That testing and introduction of the scheduling tool was certainly a legitimate exercise of the Employer's managerial authority, but there is no evidence that it was undertaken as a joint effort to revise or replace the system utilized prior thereto. The evidence shows to the contrary, that the introduction of the testing tool was solely a management initiative without full involvement of the Union. If the Employer sought the scheduling tool as a means of altering its commitments under Article 12.2, it was its burden to secure the Union's agreement thereto.

The evidence shows no credible evidence of intent to make the scheduling tool and its application a joint development. Indeed, despite the Company's argument that the existing system contained no required bidding component, the PowerPoint presentation by the Employer is explicit in the slide entitled, "Business Rules and Configuration Summary", that "Bidding for Shift Tours will be inherent in the application, although declining to identify it as "a formal bid process". Clearly, the Employer in that slide recognized the expectation that employees would continue to be able to choose by seniority the specific schedule they would be working. With or without the use of the word "bid" or "bidding", the term "Assignment... on the basis of seniority" constitutes a commitment to offer first to

the most senior employee and then the next most senior employee their choice of available schedules. That selection procedure is often referred to as bidding. But, it is the concept of senior choice that controls and the parties never changed their contractual obligation to implement it. The Union was under no obligation to challenge or request bargaining over the Employer's introduction of a scheduling tool that was to facilitate its authority to establish schedules of hours or days. Its concern was over the access by seniority, to shift schedules, and that concern continued and was enforceable regardless of the tools used by the Employer in creating those schedules.

I agree with the Company that "just because a senior employee wants to work on Sundays does not mean that an Employer must create a shift for him or her, that does not exist", or that "the Employer must create a schedule to give him or her Saturday off if the Employer needs all the employees to work that day". As noted earlier, the creation of the work schedules is solely within the prerogative of the Employer regardless of the employees' submitted preferences. What Article 12.2 provides is that the Employer "will" assign work schedules on the basis of seniority. That selection requires as a pre-condition that the Company offer its employees the various available tours it has created through its scheduling tool or otherwise. Without knowing the available tours, an employee is deprived of his or her right to utilize seniority in selecting the preferred work schedule. The Union was within its right to wait until the implementation of the Management initiated scheduling tool before initiating the present grievance. In the light of the foregoing, this grievance is sustained.

DECISION

The introduction of the MySchedule tool did violate Article 12.2 of the parties' Agreement. The Company shall provide employees their choice of schedule on the basis of seniority from those tours made available by the Employer.

Arnold M. Zack