

AMERICAN ARBITRATION ASSOCIATION  
Voluntary Labor Tribunal

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In the Matter of the Arbitration :  
: :  
-between- : :  
: OPINION AND AWARD  
TRANSPORT WORKERS UNION OF AMERICA :  
LOCAL 252 : AAA 1-20-0015-5491  
-and- : (Meal Delivery)  
: :  
FIRST STUDENT, INC. :  
\_\_\_\_\_ X  
Before: Carol A. Wittenberg, Neutral Arbitrator

The undersigned, having been designated by the parties, pursuant to the collective bargaining agreement, was selected to serve as Arbitrator of the dispute described below. A hearing was held on March 4, 2021 virtually on ZOOM. The Union was represented by Edward Groarke, Esquire. The Company was represented by Andrew R. Joppa, Jr., Esquire.

The parties had a full and fair opportunity to present evidence and oral argument and to examine and cross-examine witnesses. The hearing was declared closed on April 7, 2021, following receipt of post-hearing briefs.

The issue before the Arbitrator is:

Did the Employer breach the collective bargaining agreement ("CBA") when it assigned large school bus drivers represented by the TWU to deliver meals throughout the community serviced by the William Floyd School District ("District") for no additional compensation commencing on September 30, 2020? If so, what shall be the remedy?

## RELEVANT CONTRACT PROVISIONS

### Article 1. Recognition

The Company recognizes...the Union as the sole and exclusive representative of all full time and regular part time drivers, driver's assistants and school bus trainers operating out of the Employer's premises...

### Article 5. Seniority

Section 2. Seniority Date: All bargaining unit employees shall have terminal seniority rights as determined according to length of service with the Employer.

### Article 6. Grievances

Section 4. Grievances shall be handled in the following manner:

- a) The aggrieved Driver shall present his or her grievance orally to his or her immediate supervisor within ten (10) workdays after it arose.

### Article 11. Section 6

The Company will follow the current practice regarding payment for extra work. Extra work constitutes anything outside the picked package.

### Article 16. Picking Runs Schedules

Schedules shall be arranged with picks containing run packages estimated pre-calculated hours pursuant Article 11, Sections 4, 6 and 9 shall be posted... The scheduling shall contain runs which are to be picked and the Driver and driver assistants shall pick their runs on each schedule and in order of their seniority.

- 1) Dispatch must make up Availability Lists for Driver's and Drivers Assistants for Extra Work by school time slots in seniority order by the fourth week of the new school year.

## BACKGROUND

First Student, Inc, the ("Company") services the William Floyd Union Free School District in Long Island, providing

drivers to transport students to and from school. The Union represents bus drivers, driver assistants and school bus trainers, all of whom provide school bus transportation services to the District.

The Union and the Company are parties to a CBA, whose terms ran from August 1, 2015 through July 31, 2018 and were extended and modified through a Memorandum of Agreement in effect through July 31, 2022. Due to the COVID pandemic, in or about March 2020, the District ceased in-person classroom instruction for the vast majority of its students. As a result, most students no longer required transportation to and from school.

On March 19, 2020, the District's Assistant Superintendent informed Company Area General Manager Tom McEnany that the District would continue to pay for school bus services per the terms of their contract so long as the Company did not lay off any drivers and "if needed, busers and drivers will be available to assist with delivery of food, instructional materials or other items as needed." The District forwarded specifics for its food delivery program, including the number of buses and drivers needed. Food deliveries were scheduled to commence on March 25, 2020.

Union President Debra Hagen testified that, due to the seriousness of the pandemic, the Union partnered with the Company

to assist the needs of the community they service by providing meal services. Thus, with the Union's agreement, drivers delivered meals to students on a daily basis from March 25, 2020 through the end of the school year in June. Drivers not needed to deliver meals were paid their minimum guarantee as per the CBA. Volunteers were first sought to do meal delivery, after which the seniority list was utilized from the bottom up.

Beginning with the new school year in September 2020, the District adopted hybrid learning two days a week, with Wednesdays as a virtual learning day except for the District's special needs students, who attended school five days per week. The Company notified the Union that drivers would be required to deliver meals on Wednesdays, the virtual learning day.

Pursuant to Article 16 of the CBA, drivers "pick" their runs in August. The CBA requires the Company to send pick "packages" to the Union prior to their posting. The original "packages" provided to the Union did not indicate meal delivery. However, when the Union learned that meal delivery was probably going to continue on the virtual day, the parties agreed that the words "Virtual Day is Meal Delivery" be added to each of the "packages." Prior to the pick, the parties also agreed that anyone who selected a package to transport special needs students would not be assigned to do meal delivery because these students were scheduled to attend school five days per week.

The Company assumed that with the addition of these words to the packages, that it had the Union's agreement to continue meal delivery on Wednesdays through the 2020-2021 school year. The Union denied that it agreed to continue meal deliveries during the next school year, insisting that the issue became a constant dialogue with the Company, both with Kyle Manfre, the District Manager, as well as with Corey Betancourt, the Terminal Manager and Melissa Pisacan, the Head of Security.

Route picks occurred on August 26 and 27, 2020. The Company created pick "packages" consisting of morning and afternoon runs. Each package sheet included the following language - "Virtual Day is Meal Delivery." There were approximately 29 meal runs on Wednesdays. As a result, a limited number of drivers were assigned to deliver meals.

The School year commenced on September 8, 2020. Drivers and Assistants received at least their guaranteed contractual minimums for the Wednesday meal deliveries, whether they delivered meals or not. Drivers who transported special needs students and also delivered meals on Wednesdays, thereby working more than their guaranteed minimum number of hours, were paid for all hour worked.

On September 29, 2020, Union President Hagan emailed Manfre to inform him that the assignment of drivers to meal delivery was

"unacceptable." The Union demanded that the Company inform drivers that they would no longer be required to deliver food on Wednesdays. When the Company declined to do so, the Union filed a grievance on September 30, 2020 alleging violations of Articles 1, 5, 11 and 16 of the CBA.

On or about January 2021, the 39 meal delivery routes were condensed to 29 routes. As a result, additional stops were added to drivers' meal routes.

#### POSITION OF THE UNION

The Union contends, at the outset, that meal delivery was never contemplated by the parties when they negotiated the CBA or MOA. Further, drivers never performed meal delivery, and no one could have envisioned the Pandemic. In addition, despite having economically disadvantaged students within the District who received meals, they were never delivered by school bus drivers. The Union argues that at a minimum, the introduction of meal delivery constituted a unilateral implementation of a term or condition of employment requiring negotiations with the Union, something that never occurred.

Second, meal delivery is outside the bargaining unit members' scope of work. The Union cites Article I of the CBA, the Recognition Clause, which refers to "...all fulltime drivers,

regular part time drivers, school bus drivers, and driver's assistants..." The Union asserts that, by definition, school bus drivers are involved in pupil transportation and not meal delivery.

Third, the Union claims that its position is supported by the Employee Handbook, which references the Company as a pupil transportation company and not a meal delivery service. The Union also relies on the job description, which is incorporated into the CBA, that describes the "primary responsibility" of a driver "...to safely transport passengers..."

Fourth, the Union contends that meal delivery constitutes "extra work" as defined in the CBA, necessitating additional compensation. Thus, the Union claims that any work performed for the Company outside the routes and times picked is compensable "extra work," payable over and above drivers' daily minimum guarantee. The Union also cites Article 11, Section 6, which provides that drivers and assistants pick their times and routes annually by seniority.

Further, the assigned meal delivery routes covered a different geographic area than drivers' picked routes and included an increase in the number of stops. As such, meal delivery was "outside the employee's picked package."

The Union asserts that its interpretation that meal delivery

is "extra work" is supported by a prior arbitration decision that found that when drivers picked up students late morning and delivered them to their homes, it constituted "extra work" because the pickup time was earlier than drivers' usual afternoon runs.

Fifth, the Union asserts that the Company violated drivers' pick rights when they assigned them meal delivery routes, noting that drivers never selected the meal delivery routes and times to which they were assigned. The Union charges the Company with violating Articles 5 and 16 by not offering the "extra work" for meal delivery first to senior drivers.

The Union argues that under the CBA, the Company was obligated to provide the Union with advance notice and post the runs for selection by drivers in seniority order. The Company further violated an agreement not to have drivers who transported special needs pupils delivery meals because these students attended school five days per week. Nevertheless, some of these drivers were required to deliver meals when such students elected to attend school remotely.

Sixth, the Union contends that under Article 37, Complete Agreement, any supplemental agreements between the parties, "oral or written," must be agreed to "in writing" and "signed by the parties." There is no such supplemental agreement in writing permitting the Company to assign meal delivery to drivers.

The Union requests the following remedies: (1) declaration that meal delivery is outside the scope of work; (2) order the Company to cease and desist from assigning meal delivery; (3) order back pay for "extra work" by drivers and assistant who performed meal delivers as well as available senior employees wrongfully not offered these assignments; and (4) retain jurisdiction of the Award.

#### POSITION OF THE COMPANY

At the outset, the Company contends that the Union's grievance is time barred. The Company relies on Article 6, Section 8 of the CBA that requires a grievance to be filled within 10 working days after the incident giving rise to the grievance.

The Company points out that drivers were delivering meals beginning on March 25, 2020, more than six months before the grievance was filed. Further, even assuming that the resumption of the meal delivery program for the 2020-2021 school year qualified as a new event, the Union did not file its grievance until September 30, more than five weeks after becoming aware of the Company's intentions to continue meal delivery.

The Company asserts that the CBA permits the assignment of

meal delivery work to the drivers. Specifically, the Company cites Article 20 of the CBA, which incorporated the driver job description into the CBA. The job description at issue states that drivers are expected to perform "Other specialized functions as required by contract." The Company argues that this language was clearly meant to capture unforeseen but reasonable customer demands, such as the District's demand to transport meals to students. Further, the revenue contract between the Company and the District required that the Company provide "extra transportation services or changes in the transportation services as (William Floyd) may find necessary or desirable."

Moreover, the District demanded that, in exchange for payment on the revenue contract and a promise not to lay off workers, that the Company agree to assist with food delivery. The Company maintains that the District's request was reasonable, in light of the fact that it would continue to pay the Company the full amount of the contract even without in-person school on Wednesdays. Thus, the Company was contractually obligated to provide meal delivery services on Wednesdays.

The Company also relies on Article 4, Management's Rights, in providing the Company the right to assign transportation work to its drivers and monitors without any specific limitations.

The Company also contends that the Union agreed to allow

meal delivery prior to its implementation. The Company went out of its way to include the Union in the planning process. The Union did not object to drivers and assistants performing meal delivery from March 2020 through June 2020. In August, the parties agreed to continue meal delivery and also agreed on how to present the requirement to drivers in advance of the pick. The Union suggested, and the Company agreed, to include meal delivery within the pick packages, something evidenced by emails between the parties, indicating that meal delivery on the virtual day would be part of many pick packages.

The Company maintains that the Union never objected to the pick process before drivers and assistants picked their packages and that everyone had full knowledge that meal delivery was included in a driver's picked package. Thus, the grievance should be denied on the basis that the parties reached an agreement regarding meal delivery in order to meet the needs of its customer, the William Floyd School District and surrounding community.

The Company disputes the Union's claim that meal delivery constitutes "extra work" as defined by the CBA. "Extra work" is defined as "anything outside the picked package." Since the picked package included meal delivery on virtual days, the Company claims that meal delivery was clearly part of the picked

package. Thus, drivers were not entitled to extra pay beyond the six-hour day minimum already received and/or time worked. The Company asserts that granting the grievance would effectively provide drivers with approximately nine to ten hours of pay for a day in which they performed less than four hours of work on average.

In addition, the Company denies the Union's claim that it failed to follow seniority in the pick process, noting that the Union contention was not supported by any documentary evidence or testimony at the hearing. Further, the Company notes that the Union never raised any concerns related to seniority to drivers who performed meal delivery outside of their picked package, namely, drivers who transported special needs students. For all of these reasons, the Company asks that the grievance be denied.

#### OPINION

As a threshold matter, the Company contends that the grievance is not arbitrable because it was not filed within 10 working days after the incident giving rise to the grievance occurred, noting that drivers began delivering meals on March 25, 2020. The Company asserts that even if one considers September 8, 2020 as the first day of school, the Union did not file its grievance until September 30, 2020, more than five weeks after becoming aware of the Company's intentions to continue meal

delivery.

The Arbitrator finds that the grievance was timely filed. The Union's agreement to do meal delivery from March 2020 until the end of the school year in June 2020 does not constitute an agreement to continue to perform this work in perpetuity. Thus, the Union had the right to file a grievance when the Company insisted that meal delivery would commence again in September 2020 despite receiving a cease-and-desist order from the Union. Furthermore, the Union was not obligated to file until meal delivery commenced on September 30, 2020 having spoken with Company representatives prior to that time about its concern regarding the pick, including the routes and route selection. Thus, the Arbitrator finds that the grievance is properly before her.

At the outset, there is no dispute that the Union agreed to deliver meals within the District commencing March 25, 2020 through the school year. There was a quid pro quo between the parties concerning meal delivery. The Company continued to receive its contractual payment for its transportation contract with the District as long as it did not layoff drivers and drivers continued to be paid their minimum guarantee for continuing to be employed, regardless of whether or not they worked delivering meals. The Union partnered with the Company in

response to the COVID pandemic, understanding the need for students, who were doing their schoolwork remotely, to receive meals. Volunteers were first sought to do meal delivery, after which the seniority list was utilized from the bottom up.

Prior to the commencement of the new school year in September 2020, the District announced that it was adopting hybrid learning two days a week, with the exception of special needs students, who would attend five days a week. The District informed the Company that it would require meal delivery on Wednesdays, the virtual learning day, and the Company informed the Union that under its contract with the District, Wednesday meal delivery would be required.

There is a dispute as to whether the Union agreed that drivers would continue to perform meal deliveries on Wednesdays. However, there is no dispute that prior to the scheduled pick of packages in August, the Union demanded and obtained an agreement from the Company that the words "Virtual Day is Meal Delivery" be added to each package.

The Union contends that it engaged in a constant dialogue with Company managers regarding meal delivery through the August pick and up to September 29, 2020, when the Union informed the Company that the assignment of drivers to meal delivery was "unacceptable." On September 30, 2020, the Union filed a

grievance alleging violations of Articles 1, 5, 11 and 16 of the CBA., the same day that meal delivery was scheduled to commence.

The Arbitrator finds that the Company had good reason to assume that the Union agreed to have drivers deliver meals again during the 2020-2021 school year based on the agreement to insert the words "Virtual Day is Meal Delivery" in the packages and not clearly notifying the Company of its objection to meal delivery until after the school year commenced in September 2020. Thus, the Arbitrator finds that the Union agreed to continue meal delivery on virtual Wednesdays. However, even if the Union agreed that drivers could continue to deliver meals on Wednesdays, there is no evidence that the Union agreed to having routes that did not comport with drivers' picked routes or agreed that drivers would be assigned routes rather than be allowed to bid on specific routes. These items are in addition to the Union's position that the performance of meal delivery was outside drivers' responsibilities and should have been regarded as "extra work," compensable above and beyond the minimums.

The Union's initial argument is that requiring drivers to deliver meals is outside the members' scope of work, which is pupil transportation and not meal delivery. As such, the Union asks for a finding that meal delivery is not drivers' work. In support of its position, the Union relies on the driver job

description stating the primary responsibility of a driver is "...to safely transport passengers..." The job description also lists a series of major responsibilities of a driver including, completing bus inspections, assisting students in loading and unloading, communicating with school personnel, parents and students and conducting emergency evacuation among other duties, including "other specialized functions as required by contract."

The Company relies on the reference to "other specialized functions" in arguing that meal delivery is within the scope of employment. The Company notes, in this regard, that its contract with the District required meal delivery and specifically provided that it could require "extra transportation services or changes in the transportation services as (William Floyd) may find necessary or desirable."

Clearly meal delivery was never contemplated when the parties negotiated the CBA. Further, these duties were never contemplated when the job description was drafted. The need for meal delivery was a result of the pandemic and the Arbitrator finds that any agreement between the Union and the Company to deliver meals was in response to the pandemic and not an agreement that meal delivery would become a part of the regular job duties of a school bus driver.

Drivers are engaged to primarily transport students. To the

extent that their job description requires them to perform "other specialized functions," those duties must represent a reasonable extension of their regular and normal duties. The language upon which the Company relies does not give them the unfettered right to assign drivers to any functions simply because the District requested them.

That meal delivery is inconsistent with the duties of a school bus driver is further evidenced by drivers being required to deliver meals to members of the community at large, having nothing to do with whether these individuals were students or parents of District students. Further, the language in the Company's contract with the District is subordinate to the Company's responsibilities to the Union through the terms of the CBA.

In light of the finding that the Union agreed to meal delivery during the 2020-2021 school year, the Arbitrator's ruling that this work is outside the scope of employment is effective going forward, meaning following the end of the current school year in June 2021. The Union has argued that any agreement to continue meal delivery during the 2020-2021 school year violated Article 37 of the CBA, which requires that any supplemental agreements must be agreed to "in writing." In the absence of a written agreement, the Union maintains that it was

not bound by any agreement to continue to have bus drivers deliver meals on Wednesdays during the 2020-2021 school year. The Arbitrator finds that it was unnecessary for the parties to sign a supplemental agreement concerning meal delivery because there was no agreement to continue the work in perpetuity. Instead, the Union's oral agreement was in response to the pandemic and thus, time limited. The Union is correct in arguing that any agreement to continue to deliver meals after June 2021, the end of the current school year, would have to be in writing and signed by the parties.

The Union has also asserted that drivers who were required to deliver meals during the 2020-2021 school year were entitled to be compensated for "extra work." The Arbitrator finds that the Union put the Company on notice concerning its belief that delivering meals was "extra work," subject to additional compensation when it filed its grievance in September 2020. The Union also claimed a violation of drivers' seniority rights by failing to define meal routes and allow drivers to bid on the routes in order of their seniority.

The Arbitrator turns to the issue of whether meal delivery constituted "extra work" under Article 11, Section 6 of the CBA, compensable above and beyond a driver's minimum guarantee. The Arbitrator finds that meal delivery was "extra work" for the

following reasons. "Extra work" is defined as "..anything outside the picked package." The Arbitrator is convinced that the addition of words referring to meal delivery in the package did not insulate the Company from having to compensate drivers for "extra work." The words, "Virtual Day is Meal Delivery" without the posting of the meal routes and allowing drivers to bid on those routes was insufficient to consider that meal delivery was included in the picked package. There is no question that when drivers pick their packages, they do so with a clear understanding of the routes they will be driving. In this case, the packages did not include a description of the meal delivery routes, the times of delivery were not the same as drivers' normal transportation routes and drivers were not given an opportunity to select routes.

The CBA provides that the Company "will follow current practice regarding payment for extra work." The parties' practice supports a finding that drivers who delivered meals on Wednesdays performed "extra work" and were entitled to extra pay. The Arbitrator is buttressed in her finding that meal delivery constitutes "extra work" by the arbitration decision of Arthur Rigel, who found that drivers who were required to pick up students in the later morning, earlier than their afternoon runs, and delivery them home, constituted "extra work."

The Arbitrator, having found contract violations, turns next to the remedy. The Union seeks a cease-and-desist order and the Arbitrator is prepared to grant such an order effective following the last day of school in June 2021. Thereafter, if the District wants the Company to continue to deliver meals to its students, the parties need to negotiate an agreement to continue meal delivery and reduce the agreement to writing.

The Union also asks that drivers who performed meal delivery during the 2020-2021 school year on Wednesdays be compensated for "extra work."\* The Arbitrator finds that drivers shall be entitled

to extra compensation for only a part of the current school year, namely, from January 2021 through the last day of school in June 2021. This is because the Union's grievance was not filed until the end of September, nearly one month after school commenced, not giving the Company sufficient time to resolve the contract violation issues. However, by the time that the Christmas holidays commenced, the Company had ample time to take steps to rectify the contract violations, including specifying meal delivery routes and times, the number of stops and use of the seniority clause to pick those routes. Instead, in January 2021, the Company increased the number of stops per meal route and did nothing to remedy the other contract violations. Thus, meal delivery became more onerous beginning January 2021.

The Arbitrator finds that senior drivers who did not deliver

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\*Drivers who transported special needs students and also delivered meals were paid for "extra work" under the CBA and are not entitled to any further remedy.

meals are not entitled to "extra pay" compensation since there is no evidence that any particular driver(s) sought the work and were denied the opportunity to deliver meals.

In sum, the Arbitrator finds that although the Union agreed to continue meal delivery on virtual Wednesdays during the 2020-2021 school year, the Union challenged the way in which meal routes were constructed and selected as well as the Company's refusal to pay drivers for "extra work." However, due to the Union's delay in notifying the Company that it planned to file a grievance over meal delivery, the Company deserved sufficient time to remedy the contract issues. However, the Company should have been able to do so by January 2021. Thus, the Arbitrator finds that drivers who delivered meals on virtual Wednesdays shall be entitled to be compensated for "extra work" beginning the first day of school in January 2021 through the final day of school in June 2021.

#### **AWARD**

The grievance is sustained. The Arbitrator grants the following remedies consistent with the Opinion herein:

- 1) The Company shall cease and desist from requiring school bus drivers to deliver meals after June 2021. Any agreement to continue meal delivery shall require negotiations by the parties, resulting in a written agreement.
- 2) School bus drivers who delivered meals on virtual Wednesdays between September 30, 2020 and the last day of school in June 2021 shall be entitled to be compensated for "extra work."
- 3) The Arbitrator shall retain jurisdiction of the remedy in the event the parties are unable to agree.

May 5, 2021

Carol Wittenberg

STATE OF NEW YORK

ss:

COUNTY OF NEW YORK

I, CAROL WITTENBERG, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

5/5/2021

(Date)

Carol Wittenberg

(Signature)