**STATE OF NEW HAMPSHIRE**
**DEPARTMENT OF LABOR**
**CONCORD, NEW HAMPSHIRE**

[redacted]

**V**

**Northern New England Telephone Operations LLC dba FairPoint Communications**

## DECISION OF THE HEARING OFFICER

**Nature of Dispute:** RSA 275:43 I unpaid wages

**Employer:** Northern New England Telephone Operations LLC dba FairPoint Communications, 770 Elm St, Manchester NH 03101

**Date of Hearing:** March 22, 2016

**Case No.:** 52139

## BACKGROUND AND STATEMENT OF THE ISSUES

This hearing was consolidated with the five other wage claim hearings with this employer. Separate decisions have been issued for each hearing.

The claimant asserts he is owed $142.88 in unpaid wages for four hours worked on February 25, 2015.

In his closing, the claimant asked for liquidated damages and attorney's fees.

The employer filed a Motion to Dismiss, arguing this Department lacks jurisdiction because the claimant worked under a collective bargaining agreement (CBA) and has failed to follow the full grievance procedure under the CBA; pursuant to the CBA, the claimant is bound by mandatory arbitration; and any finding by this Department on the merits of this case would require an interpretation of the CBA.

Upon review of the collective bargaining agreement (CBA) effective February 22, 2015, there is no clear direction that the utilization of the grievance procedure in the collective bargaining agreement, or the requirement to file a claim with the Public Employees' Labor Relations Board, is the exclusive remedy available to the claimant. RSA 275:51 V gives the claimant specific rights, which do not appear to be trumped by other statutes.

The language contained in the CBA regarding arbitration reads, in relevant part, "If the Union contends that the intent and meaning of one or more of the Articles of this Agreement (except as otherwise provided in the Agreement) has been violated by the Company, it may demand arbitration….."

The Federal Arbitration Act (FAA), which Circuit City Stores Inc v Adams 532 U.S. 105 (2001), found to include employment agreements containing an arbitration

clause, is preemptive of RSA 275:51 V. However, the arbitration article in the CBA allows that the Union ***may*** demand arbitration. The CBA outlines the steps taken ***if*** arbitration is elected by the Union. There are no requirements for arbitration or exclusive remedies assigned in the arbitration article. The plain reading of the CBA language does not require mandatory arbitration on behalf of either party should a dispute arise.

Therefore, the claimant does not appear to be preempted from his right to file this Wage Claim with the New Hampshire Department of Labor pursuant to RSA 275:51 V.

In Cramer v Consolidated Freightways, Inc., 255 F .3d 683 (9th Cir.2001), the Court opined that a state law claim is preempted if it necessarily requires the court to interpret an existing provision of a collective bargaining agreement ("CBA") that "can reasonably be said to be relevant to the dispute."

In this case, the claim for wages for time worked does not require any interpretation of language contained within the CBA.

For all of the aforementioned reasons, the employer's Motion to Dismiss is respectfully denied.

The employer agrees that the claimant performed the hours worked that he claims. However, because his Department of Transportation (DOT) medical card, which is required for driving certain vehicles, had expired, he is not due wages for hours worked prior to obtaining his DOT medical card.

## FINDINGS OF FACT

The claimant has been employed with this employer for seventeen years and is still employed as of the date of this hearing. He is a Splice Service Technician and receives an hourly rate of $35.72.

The employer called the claimant back to work for February 25, 2015, following a union strike. As directed by the employer, the claimant reported to work at 8:00am. At that time, he, along with other employees, received direction to renew computer passwords that had expired and inventory the tools on the vehicles. The claimant worked a shift of 8:00am to 9:00pm. The employer did not pay the claimant for the first four hours of work. However, they paid the remainder of the hours worked that day and additionally correctly paid overtime hours based on the unpaid four hours having been worked.

The employer notified the claimant, as well as other employees, that his DOT medical card had expired during the strike. The employer made a medical appointment for the claimant to obtain his DOT card. He attended the exam and received his DOT card. The claimant returned to work after the exam and he worked the remainder of the day.

The claimant correctly recorded his time worked on his time record. Prior to receiving his wages, four hours worked on February 25, 2015, were changed from regular time worked to Other Absence UnPaid by someone other than the claimant and without the claimant's knowledge.

The claimant had originally filed a grievance with the Union regarding this issue. The employer denied the grievance and this claim followed.

There is no disagreement that the claimant worked four hours on February 25, 2015, for which the employer failed to pay his wages.

RSA 275:43 requires every employer to pay all wages due to employees within 8 days including Sunday after expiration of the week in which the work is performed, except when permitted to pay wages less frequently as authorized by the commissioner pursuant to paragraph II, on regular paydays designated in advance by the employer and at no cost to the employee.

RSA 279:27 requires an employer to keep a true and accurate record of the hours worked by each and wages paid to each. Lab 803.03 (f) Pursuant to RSA 279:27 and RSA 275:49, VI, relative to record keeping requirements, every employer shall:

> (1) Record payroll information so that time records, showing the time work began and ended including any bonafide meal periods, shall support individual pay sheets and that payroll sheets, in turn, shall support canceled checks or cash receipts;
>
> (2) Require that time records with entries that are altered shall be signed or initialed by the employee whose record was altered;
>
> (3) Not make use of automated time keeping devices or software programs that can be altered by an employer without the knowledge of the employee, or that do not clearly indicate that a change was made to the record;

The employer illegally changed the time record of the claimant without his knowledge or consent. The remedy for this action is a civil penalty, which is not dealt with through this Decision.

RSA 275:50 Waiver Prohibited. –

I. Except as provided in RSA 275:53, no provision of this subdivision may in any way be contravened or set aside by private agreement.

II. Except as provided in RSA 279, an employer and employee may not enter into any agreement, whether written, oral or other, that work may be performed for less than the applicable minimum wage.

As there is no dispute that the claimant worked the hours claimed and RSA 275:50 prohibits private agreements waiving the provisions of RSA 275:43, the Hearing Officer finds the claimant proved by a preponderance of the evidence he is due the claimed wages of $142.88.

In his closing, the claimant asked for liquidated damages and attorney's fees, for the first time.

Lab 204.02 Specification of Issue. Hearings before a hearing officer shall be scheduled for the determination of specified issues duly listed for hearing on the hearing notice. The department shall expand the scope of a scheduled hearing if notice of the added issues, with necessary documentation is given to all parties at least 14 calendar

days prior to the assigned hearing date. Issues may be added at any time without such notice with the consent of all parties.

At no time prior to the claimant's closing statement did the claimant address liquidated damages or attorney's fees. As the issues were not noticed for the hearing, they cannot be heard.

Even if the issue for liquidated damages could have been addressed at the hearing, claimant would not prevail.

RSA 275:44 Employees Separated From Payroll Before Pay Days. –
I. Whenever an employer discharges an employee, the employer shall pay the employee's wages in full within 72 hours.
II. Whenever an employee quits or resigns, the employer shall pay the employee's wages no later than the next regular payday, as provided under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, except that if the employee gives at least one pay period's notice of intention to quit the employer shall pay all wages earned by the employee within 72 hours.
III. When work of an employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the employer shall pay in full to such employee not later than the next regular payday, as designated under RSA 275:43, either through the regular pay channels or by mail if requested by the employee, wages earned at the time of suspension or layoff.
IV. If an employer willfully and without good cause fails to pay an employee wages as required under paragraphs I, II or III of this section, such employer shall be additionally liable to the employee for liquidated damages in the amount of 10 percent of the unpaid wages for each day except Sunday and legal holidays upon which such failure continues after the day upon which payment is required or in an amount equal to the unpaid wages, whichever is smaller; except that, for the purpose of such liquidated damages such failure shall not be deemed to continue after the date of filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition.

Liquidated damages are only appropriately addressed for wages after an employee has separated from payroll. The claimant continues to be employed with this employer.

Further, RSA 275:51 V does not authorize this Department to award attorney's fees or costs. This is distinct from RSA 275:53 III that allows "costs of the action, and reasonable attorney's fees", but by a "court of competent jurisdiction". The New Hampshire Department of Labor is an administrative agency and a part of the executive branch of government. The Department is not a "court of competent jurisdiction". Therefore, no fees or costs can be awarded through this decision.

## DECISION AND ORDER

Based on the testimony and evidence presented, as RSA 275:43 I requires that an employer pay all wages due an employee, and as this Department finds that the claimant proved by a preponderance of the evidence that he is owed the claimed wages, it is hereby ruled that the Wage Claim is valid in the amount of $142.88.

The employer is hereby ordered to send a check to this Department, payable to Scott Hayes, in the total of $142.88, less any applicable taxes, within 20 days of the date of this Order.

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Melissa J. Delorey
Hearing Officer

Date of Decision: April 12, 2016

Original: Claimant
cc: Employer
Peter Perroni, Esq, Nolan Perroni PC, 73 Princeton St, The Mill Ste 306, Chelmsford MA 01863

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