BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL 346	
and	Case 6 No. 43428 A-4572
ROFFERS CONSTRUCTION COMPANY, INC.	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 788 North Jefferson Street, Milwaukee, Wisconsin 53202 by Mr. William S. Kowalski, appearing on behalf of the Union.
Whyte & Hirschboeck, S.C., One East Main Street, Suite 300, Madison, Wisconsin 53701-2996, by Mr. John H. Zawadsky, appearing on behalf of the Employer.

ARBITRATION AWARD

Teamsters Local 346, hereinafter the Union, and Roffers Construction Company, hereinafter the Employer or Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint an arbitrator to hear and decide the instant dispute. The Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. Hearing in the matter was held on March 9, 1990 in Ashland, Wisconsin. The record was not transcribed and was closed on April 23, 1990 upon receipt of post hearing briefs.

ISSUE:

The parties have stipulated to the following statement of the issue:

> Should Haven Livingston been recalled during the construction season of 1989 as a flag person/laborer?

RELEVANT CONTRACT LANGUAGE:

> ROFFERS CONSTRUCTION COMPANY, INC., hereinafter referred to as the "Employer", and the GENERAL DRIVERS, DAIRY EMPLOYEES, WAREHOUSEMEN, HELPERS & INSIDE EMPLOYEES LOCAL UNION NO. 346 of Duluth, Minnesota, of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, representing employees in those classification (sic) covered by this Agreement, hereinafter referred to as the "Union" agree to the following provisions covering wages, hours and working conditions during the period of this Agreement. This Agreement shall supersede and replace all previous agreements between the parties hereto.
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> ARTICLE 1
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> RECOGNITION: A. The Employer agrees to and does hereby recognize the General Drivers Local Union No. 346 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and those persons authorized to and acting in behalf of said Labor Union.
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> REPRESENTATION: B. The Union shall be the sole representative of all classifications of employees covered by this Agreement in collective bargaining with the Employer, and there shall be no discrimination against any employee because of Union affiliation.
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> . . .
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> ARTICLE 4
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> ARBITRATION: In case of any dispute or controversy regarding the interpretation or application of this Agreement which is not adjusted by agreement between the parties, the same shall be referred within five (5) days by either party to the Wisconsin Employment Relations Commission for arbitration by a member of its staff assigned to the Northwest District of the State. The decision of the arbitrator shall be final and binding on both the Union and the Employer and any employees

involved. It is the intent of this Agreement that the arbitrator confine himself to interpretation and application of the terms of the Agreement and shall not have authority to add to or delete from the terms of the Agreement. Payment of the arbitrator's fees shall be shared equally between the union and the employer.

ARTICLE 10

CONDITIONS OF EMPLOYMENT: The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, vacations and other benefits shall be maintained at not less than the highest minimum standard in effect at the time of signing this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in this Agreement.

ARTICLE 22

SENIORITY: A. Seniority rights shall prevail. A list of employees arranged in the order of their seniority shall be posted in the plant and a copy of same forwarded to the Union every six (6) months. In reducing the personnel because of lack of work, the last man hired shall be the first laid off, and in calling men back to work, the last man laid off shall be the first man returned to work.

Section 1. In cases of filling vacancies for new jobs, seniority shall prevail.

. . .

F.An employee shall cease to have seniority if:

1. He does not return to work promptly, or in any event within five (5) days after being given notice by registered mail to return to work at his last known address.

2. Separation from payroll for more than one (1) year except as to employees injured while on duty.

3. If discharged for just cause.

4. Take unauthorized leave and/or fails to notify his employer of cause for an absence of five days or more.

. . .

I. Notwithstanding the provisions of this Article, no employee shall be entitled by reason of seniority to assignment to any job unless he proves within a reasonable time after such assignment that he is qualified to perform the duties incident to that job without impeding the operations of which said job is a part.

J.Notwithstanding any other provisions of this Article:

There shall be no bumping whatsoever from job to job, work assignment to work assignment or vehicle to vehicle by unit employees. The Company agrees that sludge hauling work from November through April shall be equitably assigned to all unit drivers who make a request to share in sludge hauling. The Company will post a sludge hauling sheet on or about October 15 of each year. Employees who desire sludge hauling work must sign up on the sheet by November 1 to be entitled to consideration for sludge hauling work. The company shall have the right to employ temporary or casual employees for general miscellaneous work not related to this contract.

ARTICLE 29

WAGES AND CLASSIFICATIONS: Section 1. Employees will be classified and paid in accordance with the following wage schedule:

Effective May 4, 1987

Truck Drivers . . . . . $10.25 per hour
Truck Mechanics . . . . . $10.55 per hour

Effective January 1, 1988

Truck Drivers . . . . . $10.50 per hour
Truck Mechanics . . . . . $10.80 per hour

Effective January 1, 1989

Truck Drivers . . . . . $10.75 per hour
Truck Mechanics . . . . . $11.05 per hour

. . .

Section 5. Down-time for truck drivers will be paid at the rate of $9.25 per hour through 1987; $9.50 per hour effective January 1, 1988, and $9.75 per hour effective January 1, 1989.

BACKGROUND:

Haven Livingston, hereinafter the Grievant, was employed by the Company as a truck driver from 1974 through the end of the 1987 construction season. In the spring of 1988, the Employer purchased a new model of truck to replace the truck that the Grievant had been using for several years. The Employer determined that the Grievant was unqualified to drive the new truck. Following this determination, the Grievant did not drive a truck during the 1988 construction season. However, the Grievant was assigned flagging and other work such as picking rock and other debris. On June 22, 1988 and October 5, 1988 the Union filed a grievance contesting the Employer's determination that the Grievant was not qualified to work as a truck driver. Thereafter, the matter was scheduled for grievance arbitration. When the parties met to arbitrate the grievance, the parties entered into the following:

AGREEMENT

This agreement is entered into between Local No. 346 (The Union); Haven Livingston (The Grievant); and Roffers Construction Co., Inc. (The Company), as follows:

1. The Grievant and the Union hereby agree to withdraw the grievances filed October 5, 1988 and June 22, 1988 until prejudice (copies attached). 1/

2. The grievant is given until June 1, 1989 to complete any additional truck driving schooling he wishes to pursue.

3. On or before June 1, 1989, the grievant shall notify the company in writing if he intends to have his qualification reassessed.

4. If the grievant elects to attempt to return to work, the company reserves the right to road test the grievant. The grievant will be road tested by Don Cadotte or Larry Shenette. The decision of Cadotte or Shenette regarding the grievant's qualifications as a driver will be deemed final.

5. If the decision is that the grievant is fully qualified to drive pursuant to a valid Wisconsin Chauffeurs License then Mr. Livingston will be entitled to recall pursuant to his seniority rights under the contract.

6. If there is a decision that Mr. Livingston is unqualified to drive any of the company's vehicles, Mr. Livingston will remain eligible for recall to any other unit position for which he might be qualified pursuant to the provisions of the collective bargaining agreement.

7. Haven Livingston hereby does agree to waive any and all other claims and/or remedies which were raised or which could have been raised in the contractual grievance procedure regarding all events giving rise to the attached grievances. Haven Livingston further releases any and all claims he might have possessed regarding the attached grievances against the officers or agents of Roffers Construction Co., Inc., Roffers Construction Co., the officers or agents of Teamster Local 346 and the Union.

On June 8, 1989, Union Representative Niemi issued the following letter to Employer Representative Gary Roffers:

> Regarding the above captioned matter, this letter will confirm our meeting in your office on June 7, 1989, where I asked you to recall Haven Livingston back to work as a flagman/laborer. You indicated that you are not going to call him back to work. I informed you that Haven Livingston has done flagging and labor work in the past, under the terms of this contract, including the Conditions of Employment Article 10, and must be recalled to work immediately.
>
> In the event that you do not do this, this letter shall constitute an official grievance for all lost time, seniority, benefits, etc.

The Employer did not offer the Grievant any flagman/laborer duties during the 1989 construction season.

The Union does not dispute the determination that the Grievant is not qualified to perform work as a truck driver. At issue, is whether the Employer was required to recall the Grievant to work as a flag person/laborer during the construction season of 1989.

POSITIONS OF THE PARTIES

1/ At the arbitration hearing on January 17, 1989, the parties amended Paragraph One to read "The grievant and the Union hereby agree to withdraw the grievance filed October 5, 1988 and June 22, 1988 "with prejudice" as opposed to "until prejudice." (T. p 2-3).

Union

Pursuant to the terms of the labor agreement, the Grievant retained seniority and recall rights for one year from the time he last worked for the Company. The Grievant last worked for the Company in July of 1988 and, therefore, he remained eligible for recall until July of 1989.

As the record demonstrates, there was flagging/laborer work available, which the Grievant had performed previously, for which he was unquestionably qualified, and for which he should have been recalled. The flagging/laborer work in dispute, performed by non-bargaining unit members, included flagging, picking rocks, working on and around the crusher, and spotting trucks.

The Union's position is supported by the disposition of the William Carrington grievance. Carrington was hired by the Company in the summer of 1988. During that time period, Carrington drove the Company's water truck and performed various flagging/laborer work. Following the Company's failure to call Mr. Carrington to work in the summer of 1989, the Union filed a grievance. Carrington was recalled to work, to work the Company scales. Carrington did no driving when he was recalled in the summer of 1989. When Carrington was put to work on the scale, he displaced an employe who was not a unit member.

The Company argues that it has never had a Teamster member perform only flagging/laborer work. However, Carrington, a driver, was recalled in the summer of 1989 to work only on the scales. While the Union in this case makes no contention that the Grievant was qualified to be recalled to work on the scale, the point is that the Grievant, or any driver for that matter, remains eligible to be recalled to do whatever work is available and which has been performed by bargaining unit employes in the past.

The Union does not assert that the Company should be required, when a driver's truck is down, to recall the Grievant to perform the two or three hours of work that the driver would otherwise be assigned. Rather, it is the Union's position that the Grievant should be assigned the available flag person/laborer work, pursuant to his contractual rights, before temporary or seasonal individuals are hired off the street. It is irrelevant as to whether or not individuals working as flag persons/laborers have historically been included in the bargaining unit. In Plumbing Contractors Association of Baltimore, Maryland, Inc., et al, 93 NLRB 1081 (1951), the Board stated:

> ...A Board certification in a representation proceeding is not a jurisdictional award; it is merely a determination that a majority of the employees in an appropriate unit have selected a particular labor organization as their representative for purposes of collective bargaining...unlike a jurisdictional award, this determination by the Board does not freeze the duties or work tasks of the employees in the unit found appropriate. Thus, the Board's unit finding does not per se preclude the employer from adding to, or subtracting from, the employee's work assignments. While that finding may be determined by it does not determine, job content...

Thus, the fact that individuals working as flag persons/laborers have not been included in the bargaining unit does not preclude the Arbitrator from finding that individuals within the bargaining unit have, in the past, performed similar work and that these same individuals have contractual recall rights to perform that work.

As the testimony of Roy Niemi demonstrates, during discussions with Company representatives leading to the settlement agreement, Niemi told Company representatives specifically that the language, "any other unit position" referred to flagging/laborer work. Since by the Company's own admission, the Grievant was unquestionably unqualified to work as a mechanic, and because the portion of the settlement agreement concerning the Grievant's right to recall would come into play only if he were found to be unqualified to work as a driver, the phrase, "any other unit position" is meaningless and superfluous unless the Union's position in the grievance is sustained. The only other work which the Grievant performed in the past, and for which he was qualified, is the flagging/laborer work. Thus, the parties, by including the language "any other unit position" in the Agreement, obviously intended that the Grievant would be eligible for recall to flagging/laborer work if he were found to be unqualified to drive.

Despite the Company's assertions to the contrary, the Arbitrator clearly has authority to construe and enforce the terms of the settlement agreement. See e.g. Lockeed Aircraft Service Company, 44 LA 51, 59 (Roberts, 1965), in which it was found that question of compliance with a settlement agreement raises an arbitrable issue. In Royal McBee Corp., 40 LA 504 (Turkus, 1963), the arbitrator found that an alleged breach of the terms of the settlement agreement "gives rise to a new grievance for the failure to comply with the settlement, and for appropriate relief in consonance with the terms and

provisions of the settlement." The factual setting in Royal McBee is identical to the setting in the instant case.

The Company's contention that the flag person/laborer is essentially a temporary position, often filled by students and other seasonal workers, does not preclude the Grievant from exercising his contractual recall rights to perform such work, especially where he has performed it in the past. Where, as here, a full-time unit member is on layoff and where temporary workers have been employed to perform work which has often been performed by unit members, the Company should be required to recall the unit member before hiring temporary or seasonal workers.

The Union respectfully requests that the grievance be sustained, and that the Grievant be awarded backpay for those hours of work lost by the Company's failure to recall him during the construction season of 1989.

Employer

The Union's position as articulated at hearing is at best unclear. At hearing, the Union counsel conceded that the Union was not claiming that the flag person/laborer position had been accreted into the bargaining unit. In other words, as a general rule, flag persons/laborers are not in the bargaining unit and are not covered by the parties' agreement. Apparently, the Union is advancing a Haven Livingston exception premised upon the terms of the Union contract and the terms of a separate settlement agreement which the parties reached in an earlier arbitration.

The Grievant is not entitled to any backpay relief. As the Grievant testified at hearing, he was employed for eight weeks with Gregory and Cook during the 1989 construction season and netted over $6,000 in pay from that employment. No flag person/laborer employed at Roffers during the 1989 construction season ever grossed that amount. The parties further stipulated that since the contract has terminated, the Arbitrator is without jurisdiction to order the Company to recall the Grievant.

On July 26, 1989, the National Labor Relations Board issued a Decision and Order finding that the Union's claim to represent flag persons/laborers without merit. In issuing this decision, the National Labor Relations Board took note of both the Union's grievance which is at issue in this proceeding and the Settlement Agreement. The National Labor Relations Board first ruled that it would "decline to defer to arbitration the issue of whether flag persons and or laborers should be included in the existing unit, as requested by the Union." The NLRB went on to find (1) that the positions were in existence prior to the negotiation of the last agreement (2) that the positions have been in existence for over 30 years (3) flag persons/laborers have historically been excluded from the unit and (4) there is no evidence of a recent change in job duties and responsibilities of flag persons/laborers. Based upon these facts and the additional fact that the contract was still in effect, the National Labor Relations Board dismissed the petition. The dismissal of the petition is a decision against the Union and is a decision on the merits. Steelworkers Local 392 (BP Minerals), 293 NLRB No. 111 (1989). If there was a reason to include persons in the bargaining unit, even during the term of a contract, then the Board would clarify the bargaining unit to expressly bring these additional persons into the bargaining unit. (Cites omitted)

The findings of the National Labor Relations Board confirmed that the Union has never represented flag persons/laborers at Roffers. The National Labor Relations Board's findings of fact in a unit clarification proceeding are binding (A. Dariano & Sons v. Council 33, 130 LRRM 3890 [9th Cir. 1989]). This decision of the National Labor Relations Board must be given preeminence in this proceeding. Hutter Construction Company v. Local 139, 129 LRRM 3034 (7th Cir. 1988); Teamsters Local 682 v. Bussen and Quarries, 129 LRRM 2287 (8th Cir. 1988). An arbitrator is precluded from issuing a ruling at direct odds with a National Labor Relations Board award. J.F. White Contracting Company v. Local 103, 132 LRRM 3033 (1st Cir. 1989).

The Company has not violated the collective bargaining agreement. The provisions of the contract clearly and unambiguously provide that truck drivers and truck mechanics are in the unit. Indeed, Union representative Niemi conceded that the contract only applies, on its face, to truck drivers and truck mechanics. The express terms of the Agreement mandate dismissal of this grievance.

Roy Niemi concedes this non-inclusion; Union witness Marlin Hegg confirms that such classifications have not been covered for the last 20 years; and the Company witnesses confirm a practice of exclusion over the past 30 years. The evidence of past practice overwhelmingly establishes that flag persons/laborers have never been part of the Teamster unit.

The Union has never requested recognition as a representative of flag persons/laborers in contract negotiations and the Union has never filed a grievance protesting the Company's failure to include flag persons/laborers in the bargaining unit represented by the Union. Thus, the evidence of

negotiation history and contract enforcement further underscores the non-inclusion of such individuals. Additionally, industry practice is that the flag person/laborer classification is represented by the Laborers Union.

Contrary to the argument of the Union, the Carrington grievance is not dispositive. As the record demonstrates, Carrington was "signed up" by Niemi while driving a water truck. Carrington was "not recalled" to a unit job. Rather, Carrington was hired to work as a scale person and while employed as a scale person was not paid under the Union Contract.

There is no basis to assert any right to recall into a non-unit position. Sperryrand Corp. v. NLRB, 492 F. 2nd 63 (2nd Cir.), Cert. denied, 419 US 831 (1974); Teamsters Local 54 v. Young & Hay Transport Company, 522 F. 2nd 562 (8th Cir. 1975). Unions are restricted to representing employes included within and negotiating within the frame work of the recognized bargaining unit. Teamsters Local 46, 236 NLRB 111 60 (1978).

An analysis of the parties' contract and the January 17, 1989 Settlement Agreement fails to provide any tenable support for a violation of either document. The Union referred to Article 10 in its grievance letter of June 8, 1989 and made oblique references to Article 29, para. 5, at hearing. The Union's attempt to create a right to recall based upon the provisions of Article 10 and/or 29, para. 5, are without merit.

Article 10 only pertains to financial benefits. Other terms and conditions of employment are outside the scope of this clause. Moreover, the financial benefit must have been "in effect at the time of the signing of this agreement." This agreement was signed on May 8, 1987. The temporary assignment of the Grievant to laborer/flag person duties did not occur until June, 1988 and, thus, the provision is not applicable.

The Grievant was not treated as a unit employe while performing flag person work and was paid at a rate substantially less than his truck driver rate. It is noteworthy that neither the Grievant nor the Union ever filed a grievance protesting the fact that the Grievant was paid $3.00 an hour less than "scale" while employed as a flag person. Article 29, para. 5, pertains to "down time." The Company does not dispute that the presence of a "down time" rate shows that truck drivers occasionally perform other duties. As the record demonstrates, truck drivers are from time to time assigned to laborer/flag person duties for short periods of time on an ad hoc basis. Marlin Hegg stated that a de minimis amount of his employment was "down time." The Grievant estimated that he spent about three hours a year performing flag work during the last seven years of his employment. The performance of such a miscellaneous task does not make that work "unit work" Dollinger Corp., 67 LA 755 (McKelveg, 1976) It borders on the absurd to contend that because drivers occasionally perform certain make-work jobs when their jobs are idle that laid off drivers somehow have acquired a right to such work. The fact that the Company gives consideration to its employes by assigning such "make-work" does not negate the fundamental rights reserved to the Company in its management rights clause. Among those rights that the Company retains are the right to "select and determine, and from time to time redetermine the number and qualifications of employes to be hired, to assign work and determine the amount and quality of work to be performed by employes in accordance with requirements determined by management."

The Arbitrator does not have jurisdiction to construe or apply the Settlement Agreement of January 17, 1989. Article 4 of the parties' agreement reads, in relevant part: "It is the intent of this agreement that the arbitrator confine himself to interpretation and application of the terms of the agreement and shall not have authority to add to or delete from the terms of the agreement." "The agreement" refers to the parties' collective bargaining agreement. There is no authority to consider any other agreements between the parties.

The grievances which were the basis for this Settlement Agreement were withdrawn with prejudice and the arbitrator with jurisdiction over the Settlement Agreement closed the hearing. Under these circumstances, the only appropriate forum to seek enforcement of the Settlement Agreement is in federal court, under Section 301 of the Labor Management Relations Act.

The instant situation is analogous to the settlement of a court proceeding. As the Seventh Circuit recently ruled in this regard "if the parties want the district judge to retain jurisdiction they had better persuade him to do so." Steelworkers v. Libby 133 LRRM 2627, 2629 (7th Cir. 1990).

Under the express terms of the Settlement Agreement, the Grievant is only eligible for recall to a unit position for which he is qualified. That unit position must be "pursuant to (under) the provisions of the collective bargaining agreement." There are only three unit positions at Roffers. The driver position for which the Grievant is unqualified; the mechanics position which the Union concedes is not in issue; and the mechanics helper position, which the Union also concedes is not in issue in this proceeding. Accordingly, there can be no violation of the Settlement Agreement.

Under the terms of the Settlement Agreement, the Grievant must be "qualified" pursuant to the contract. It must be emphasized that it is necessary that a flag person/laborer be qualified to perform all components of the position. An individual may be shifted from flag duties to laborer duties to scale duties and back. An inability to perform even one of these three components of a position disqualifies that person from consideration as a flag person/laborer. At hearing, it was shown that flag persons must be able to read and thoroughly understand two detailed traffic control manuals. The Grievant's limitations with respect to reading and writing preclude him from mastering these booklets. Further, Gary Roffers testified that, in his opinion, the Grievant was not physically capable of performing the tasks of a "laborer" position on a sustained basis. Under the management rights clause of the parties' Agreement, the Company's determination regarding physical qualifications are given substantial weight. The Union has presented no evidence to challenge the propriety of the Company's determination that the Grievant is not qualified to be a flag person/laborer.

Under the terms of the Settlement Agreement, the Grievant's recall rights are to be determined pursuant to the provisions of the contract. The Grievant had no recall rights under the contract at the point in time when this grievance was filed. Article 22, Section F (2) provides that an employe's seniority is lost if there was a "separation from payroll for more than one (1) year." A separation from payroll necessarily means that an employe does not perform unit work for which he/she is remunerated by the Employer for a period of one year. The last pay period for which the Grievant received compensation for performing bargaining unit work was in November, 1987. The Grievant lost his seniority, and all of his recall rights, in November, 1988. The Grievant's loss of seniority rights provides still another basis for dismissal of this grievance. The grievance must be dismissed.

DISCUSSION

Jurisdiction

As the Employer argues, the Arbitrator's jurisdiction is conferred by Article 4 of the parties' collective bargaining agreement, which by its terms was effective from January 1, 1987 through December 31, 1989. Article 4 provides the arbitrator with jurisdiction over "any dispute or controversy regarding the interpretation or application" of the parties' 1987-1989 collective bargaining agreement.

During the term of the parties' 1987-89 collective bargaining agreement, the parties entered into the January 17, 1989 Settlement Agreement, which agreement, inter alia, addressed the Grievant's recall rights, rights which are also addressed in the parties' 1987-89 collective bargaining agreement. To determine whether or not the Employer properly applied the recall provisions of the parties' 1987-89 collective bargaining agreement to the Grievant, it is necessary for the arbitrator to determine whether or not the parties have modified these rights in the January 17, 1989 Settlement Agreement.

The dispute over the January 17, 1989 Settlement Agreement does give rise to a controversy regarding the interpretation or application of the Grievant's recall rights under the parties' 1987-89 collective bargaining agreement. Accordingly, the undersigned does have jurisdiction to construe and enforce this Settlement Agreement.

Merits

The parties recognize that Article 22, Seniority, provides bargaining unit employes, such as the Grievant, with recall rights for a one-year period following layoff. 2/ At issue is whether these contractual recall rights entitled the Grievant to be recalled as a flag person/laborer.

Article 22 does not define the work for which a bargaining unit employe is entitled to be recalled. In the face of such silence, it is reasonable to conclude that the work for which a bargaining unit employe is entitled to be recalled is that work which, historically, has been performed by bargaining unit employes.

In the preamble of the parties' 1987-89 collective bargaining agreement, the Union is recognized as the representative of those classifications covered by the agreement. Article 29, Wages and Classifications, recognizes two classifications, i.e., Truck Drivers and Truck Mechanics. The parties are in agreement that the Union also represents one other classification, i.e., Mechanics Helper. While the Employer has employed flag person/laborers for many years, the parties are in agreement that employes occupying such positions have not been included in the Union's collective bargaining unit and have not been covered by the Union's collective bargaining agreement.

2/ The parties disagree as to when the Grievant's layoff occurred. The arbitrator, however, has not found it necessary to decide this issue.

It is true that bargaining unit employes, i.e., Truck Drivers, have performed work performed by the flag person/laborer. Such work, however, has been performed on a sporadic basis and as an adjunct to the Truck Driver's primary duty, i.e., driving truck. 3/ Specifically, Truck Drivers have performed flag person/laborer work when the truck was in for repairs, waiting to be unloaded, and, early and late in the construction season, when the Truck Driver did not have sufficient truck driving duties to occupy a full day's work. 4/

The evidence of the use of bargaining unit employes to perform flag person/laborer work does not demonstrate that the Grievant has a contractual right to be recalled to a flag person/laborer position. To the extent that the Union may have a claim to flag person/laborer work, the claim is as fill-in work for Truck Drivers. An employe who performs only flag person/laborer duties is not performing bargaining unit work.

Nor does the evidence of the employment history of William Carrington warrant the conclusion that the parties have mutually recognized that members of the Union's collective bargaining unit have a contractual right to be recalled to flag person/laborer positions. According to Ron Roffers, Company President, Carrington was hired in 1988 to work as a laborer on black topping. As Roffers acknowledged, Carrington occasionally drove a truck. On one of these occasions, he was observed by Union Representative Niemi and was signed-up as a Teamster member by Niemi, who thought Carrington had been hired as a Truck Driver. According to Roffers, however, the Employer never considered Carrington to be in the Union's bargaining unit.

Roffer's testimony concerning Carrington's employment status is supported by the payroll records of the 1988 construction season, which records indicate that Carrington was employed to perform flag person and laborer work. For performing this work, Carrington was paid at the flag person and laborer rates, rather than at Truck Driver rates. Carrington was not listed on the Teamsters Local 346 seniority list in 1988 and it is not evident that Carrington received the benefits of the Union's collective bargaining agreement at any time during the 1988 construction season.

Carrington was not called back to work at the beginning of the 1989 construction season. Prior to July 27, 1989, Carrington called Niemi to ask why he was not called back to work. Niemi telephoned Gary Roffers to ask that he return Carrington to work. Niemi followed up this telephone call with a letter dated July 27, 1989 which stated as follows:

> Regarding the above captioned matter, this letter will confirm our phone conversation where I called you last week and asked that you put Mr. Carrington to work immediately, as he has seniority and there are several employees working (less seniority, new employees). Mr. Carrington drove the water truck last summer, jumped stakes (reading grade stakes for the blade operator), flagging, brushing, cleaning culverts and other labor work, etc.
>
> If you have not already returned Mr. Carrington to work, please do so immediately.
>
> In the event that you have not already done so, this letter shall constitute an official grievance for the return of Mr. Carrington to work with full seniority and all lost wages and benefits, under the collective bargaining agreement by and between the parties.
>
> I will be in Ashland on August 1st and 2nd, please contact me to arrange a grievance meeting.

Following the issuance of the letter, Carrington dropped his grievance to go to work as a scale person, which position is not represented by the Union. Carrington worked the scales for two days and quit. Carrington was paid at the scale person's wage rate and not as a Union Truck Driver.

Carrington's placement in the scales person position occurred after the issuance of Niemi's letter of July 27, 1989 and Carrington withdrew his grievance to work as a scales person. It is not evident, however, that

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3/ For example, the Grievant estimates that he flagged twenty (20) hours in seven years. The only other Truck Driver to testify at hearing, Marlin Hegg, stated that he had not flagged but had done laborers work when his truck was down.

4/ When performing this work, employes were paid at the down-time rate set forth in Article 29, Section 5 of the collective bargaining agreement, unless the work was being performed during a short interruption from driving duties.

Carrington's withdrawal of the grievance was pursuant to a settlement agreement between the Employer and the Union. Nor is it evident that, following the issuance of Niemi's letter of July 27, 1989, that Union representatives and Employer representatives had any discussions wherein the Employer acknowledged that Carrington had been recalled to work pursuant to rights granted by the parties' collective bargaining agreement. While it is evident that Niemi believed Carrington to be a Truck Driver and, thus, a member of the Union's collective bargaining unit, it is equally evident that the Employer considered Carrington to be a laborer, and, thus, not a member of the Union's collective bargaining unit. Given this difference of opinion concerning Carrington's bargaining unit status, the undersigned does not consider Carrington's return to work as a scales person to reflect a mutual understanding between the Union and the Employer that Carrington was a Union bargaining unit member or that Carrington had a contractual right to be recalled to a laborer position.

At hearing, Gary Roffers confirmed Niemi's testimony that in the summer of 1988 Niemi asked Roffers to assign the Grievant to flagging tasks. According to Roffers, he agreed to this request because he wanted to find work for the Grievant because he had been a long-term employe and he was trying to resolve the grievance concerning the determination that the Grievant was unqualified to drive truck. However, neither Roffers' nor Niemi's testimony suggests that there was any discussion that the Grievant had a contractual right to perform flag person work. As Niemi stated at hearing, at that time, the Union was disputing the Employer's failure to use the Grievant as a driver and not the Employer's failure to use the Grievant as a flag person. Given these circumstances, it is not reasonable to conclude that the Employer's decision to assign the Grievant flag person duties in 1988 resulted from any belief that such duties were bargaining unit duties or that the Grievant had a contractual right to work as a flag person.

Article 10, Conditions of Employment, is a maintenance of standards clause which maintains conditions of employment relating to wages, hours of work, overtime differentials, vacations and other benefits in effect at the signing of the agreement, i.e., May 8, 1987. Assuming arguendo, that recall is a condition of employment governed by Article 10, the provisions of Article 10 would not provide the Grievant with the right to be recalled to a flag person/laborer position. The reason being that it is not evident that, at the time of the signing of the agreement, any bargaining unit employe had ever been recalled to a flag person/laborer position, or to any other non-bargaining unit position.

Moreover, contrary to Niemi's assertion in his letter of June 8, 1989, it is not evident that, at the time of the signing of the 1987-89 agreement, that the Grievant's conditions of employment included working in a flag person/laborer position. As the Grievant stated at hearing, he was hired as a Truck Driver in 1974 and continued in that position until he was determined to be unqualified to drive truck in the spring of 1988. According to the Grievant, while he was employed as a Truck Driver, he spotted trucks when his truck was being repaired, he swept once when he completed his hauling duties earlier than ususal, flagged approximately 20 hours in seven years, and performed other laborer work when his truck was down. At the time of the signing of the 1987-89 agreement, the Grievant had never occupied a flag person/laborer position. 5/ To the extent that the flag person/laborer duties were a condition of the Grievant's employment, it must be concluded that such duties were ancillary to his truck driving duties. Since the Grievant no longer drives truck, he does not have an Article 10 right to be assigned flag person/laborer duties.

In the Settlement Agreement of January 17, 1989, the parties agreed to a procedure by which the Grievant could qualify for truck driving. There is no claim that this procedure was violated and the parties are in agreement that the Grievant is not qualified to drive truck. At issue is the application of Paragraph Six of the Settlement Agreement which provides as follows:

> 6. If there is a decision that Mr. Livingston is unqualified to drive any of the company's vehicles, Mr. Livingston will remain eligible for recall to any other unit position for which he might be qualified pursuant to the provisions of the collective bargaining agreement.

The Settlement Agreement does not define "unit position." The undersigned is persuaded, however, that the most reasonable interpretation of the plain language of Paragraph Six is that "unit position" means a position within the Union's collective bargaining unit. At the time that the parties entered into the Settlement Agreement, the collective bargaining agreement expressly recognized two classifications, i.e., Truck Drivers and Truck

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5/ As the Employer argues, the assignment of flag person/laborer duties to the Grievant in the summer of 1988 occurred after the parties signed the 1987-89 agreement and, thus, such assignment is not probative of the Grievant's Article 10 rights.

Mechanics. As the testimony of Union Representative Niemi demonstrates, the parties also recognized one bargaining unit position of Mechanics Helper. All of the witnesses are in agreement that the position of flag person/laborer was never included in the bargaining unit represented by the Union. Accordingly, assuming arguendo that the Grievant was qualified to perform flag person/laborer work, the plain language of the Settlement Agreement of January 17, 1989 did not provide the Grievant with any right to be recalled to a flag person/laborer position.

At hearing, Union Representative Niemi testified that, prior to signing the Settlement Agreement of January 17, 1989, he had a discussion with Gary Roffers, in the presence of Ron Roffers, the Union's attorney and the Employer's attorney, in which Niemi indicated that the Grievant was qualified to perform flagging and laborer work. Niemi further stated that the Employer representatives did not take issue with his statement that the Grievant could be recalled to flagging/laborer work.

In response to Niemi's testimony, Ron Roffers, President of the Company, stated that he did not remember any statements regarding flag persons and he denied that either he or Gary Roffers stated that they would take the Grievant back as a flag person. Ron Roffers further denied that the Employer and the Union had any understanding that the Employer had an obligation to recall the Grievant as a flag person.

Gary Roffers, Vice-President of the Company, did not recall that Niemi made any representations about either flag persons or laborers and stated that he did not make any representations to Niemi regarding flag persons or laborers. According to Gary Roffers, flag person and laborer work had never been at issue, but rather, the discussion was centered on the Grievant's right to return as a Truck Driver.

Assuming arguendo, that Niemi's recollection of the discussion is correct, Niemi's testimony does not demonstrate that the Employer acknowledged that the Grievant had any right to be recalled to a flag person/laborer position. Neither Niemi's testimony, nor any other record evidence, demonstrates that the parties mutually agreed that the position of flag person/laborer was a "unit position" within the meaning of Paragraph Six of the Settlement Agreement of January 17, 1989, or that the parties mutually intended Paragraph Six to be given any meaning other than that reflected in its plain language.

In summary, Paragraph Six of the January 17, 1989 Settlement Agreement provides the Grievant with the right to be recalled to positions within the Union's collective bargaining unit for which the Grievant is qualified. At all times material hereto, the positions within the Union's collective bargaining unit have been Truck Driver, Truck Mechanic and Mechanic's Helper. Assuming arguendo, that the Grievant was qualified to perform flag person/laborer work, the Settlement Agreement of January 17, 1989 does not provide the Grievant with the right to be recalled to a flag person/laborer position. Contrary to the argument of the Union, such a construction does not render the provision of Paragraph Six meaningless. Rather, its meaning is to clarify that the Settlement Agreement was not intended to deprive the Grievant of any contractual right to be recalled to a bargaining unit position other than Truck Driver.

For the reasons discussed supra, the undersigned is not persuaded that the Settlement Agreement of January 17, 1989 has modified the Grievant's contractual recall rights with respect to the issue presented herein, i.e., entitlement to a flag person/laborer position. For the reasons discussed supra, the provisions of the parties' 1987-89 collective bargaining agreement did not provide the Grievant with a right to be recalled as a "flag person/laborer."

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. Haven Livingston should not have been recalled as a flag person/laborer during the construction season of 1989.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin this 20th day of July, 1989.

By _____
Coleen A. Burns, Arbitrator