BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TAYLOR ENTERPRISES

and

TEAMSTERS LOCAL UNION NO. 43

Case 30
No. 45769
MA-4790
Lyle Ahles

Appearances:

Teamsters Local Union #43, 1624 Yout Street, Racine, WI 53404 by Mr. Charles Schwanke, President, appearing on behalf of the Union.

Mr. Jack Taylor, 1900 Kentucky Street, Racine, WI 53405 appearing on behalf of the Employer.

## ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement for the years 1990-1993, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and Taylor Enterprises (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the refusal of the Company to allow driver Lyle Ahles to select a summer position as a floater. Daniel Nielsen was so designated. A hearing was held on August 2, 1991 at the County Board offices in Racine, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties agreed not to submit post hearing arguments, and the record was closed at the end of the hearing.

Now, having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

## ISSUE

No formal stipulation of the issue was reached. From the grievance, the answer and the arguments presented at the hearing, the issue may be fairly framed as follows:

> "Did the Company violate the collective bargaining agreement, including any enforceable past practice, by denying Lyle Ahles' request to become a floater

during the summer of 1991? If so, what is the appropriate remedy?"

PERTINENT CONTRACT LANGUAGE

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ARTICLE 4. Seniority

Seniority rights shall be observed in each department, except as otherwise provided in this agreement and it is understood that this agreement consists of three departments: (1) Clerical, (2) Mechanics, and (3) Bus Drivers, including Dispatchers.

Employer agrees that seniority lists by department shall be posted in a conspicuous place on the premises of the Employer. In case of lay-off due to business conditions seniority shall prevail, that is, employees shall be laid off in the reverse order of length of time of employment and in rehiring. Employer agrees that employees recalled shall be in order of seniority, that is, employees of greater length of service with Employer shall be recalled before those with less service.

All questions concerning seniority rights shall be referred to the Employer and Union for adjustment and settlement. Seniority applies to full-time employees only. No seniority shall accrue while an employee is a part-time employee. Seniority acquired in classification or department shall not be allowed to be carried over to another department or classification. If a part-time employee passes up the first offer and takes a full-time position later, his date of hire shall be the last time they were offered full-time position which shall become their seniority date.

Part-time employees shall receive their original date of hire when taking the first offered opening on full-time. Routes will be picked according to seniority to be assigned on June 1st and September 1st.

When shift, hour change or route becomes open and available, it will be assigned to the next seniority drivers, below the opening on the posting upon approval of the Union.

A.M. routes will be filled in by P.M. route drivers during vacations or extended illness if the P.M. driver so desires whenever possible. If the relief driver does not accept, the Employer will assign an available driver in accordance with seniority.

A.M. routes will be filled in by P.M. route drivers whenever full week is possible. If the P.M. driver so desires, whenever possible, A.M. drivers are to be asked first when P.M. routes are available.

Employees shall request a trade of working days/days off on forms provided by

management before the requested trade. Any dispute concerning the ability to trade working days/days off shall be resolved by management. Trades may not result in additional overtime pay in accordance with the contract.

Employees who are off because of sickness or injury shall retain their seniority.

If and when a major change in a route takes effect, all routes shall be posted and subject to bump by seniority.

Drivers on indefinite sick leave, who have no return to work release date, will not be allowed to sign the Route Bump Sheet, but can initial your picked route.

The driver returning from extended sick leave will be placed on the shift he had left, providing the driver has enough seniority, bumping the lowest seniority full time driver on their normal work shift. If this is a day work shift, the driver being bumped will then replace the lowest seniority full time driver on their day shift. Other shifts shall be filled in the same manner.

In the posting of a new bump sheet for route picking, the following shall apply:

> If there is a vacancy on any fulltime route due to retirement, quit, extended known illness, etc., with more than three (3) months before the next Route Bump Sheet Pick, a new Route Bump Sheet Pick shall be posted.

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ARTICLE 14. Management Rights

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it under this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

1. To direct all operations of the transit system.
2. To hire, promote, transfer, assign, and retain employees in their position with the transit system and to suspend, demote, discharge and take other disciplinary action against employees for just cause.
3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the agreement.

4, To maintain efficiency of the transit operations entrusted to the Employer.

5. To introduce new or improved methods or facilities.

6. To change existing methods or facilities.

7. To contract out for goods or services; however, there shall be no layoffs or reductions in hours due to any contracting out of work.

8. To determine the methods, means and personnel by which such transit operations are to be conducted.

9. To take whatever action must be necessary to carry out the functions of the transit system in situations of emergency.

10. To take whatever action is necessary to comply with City, State or Federal law.

In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive rights of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the Employer to consult or negotiate with the Union concerning the above areas of discretion and policy.

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ARTICLE 24. Grievance Committee

The Employer and the Union agree to process all grievances through duly authorized representatives of the Employer and the Union.

Every grievance must be reduced to writing and filed with the party against whom it was made within five (5) working days after the occurrence of the event which is made the subject matter of the grievance and if the grievance is not filed in writing within such time limitation it will be barred.

Any decision between the Employer and the Union shall be final and binding at any step of the grievance procedure.

ARTICLE 25. ARBITRATION

> In the event that the Employer and the Union cannot mutually agree to a settlement of any unresolved controversy which may arise concerning any matter or the interpretation of this Agreement, such unresolved controversy shall be reduced to writing and shall be referred to the Wisconsin Employment Relations Commission to have an arbitrator appointed for settlement.
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> The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.
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> The Employer and the Union agree that the decision of the arbitration committee shall be final and binding upon both parties. The Employer and the Union agree that Union membership shall not be a matter subject to arbitration.

BACKGROUND FACTS

The Employer operates the Belle Urban System busses in Racine, Wisconsin. In so doing, it employs personnel in the classification of Driver, who are represented for the purposes of collective bargaining by the Union. The grievant, Lyle Ahles, is employed as a Driver.

From approximately Labor Day through Memorial Day each year, the Employer has 55 drivers. During the summer months, the number of routes are reduced and only 47 drivers are employed. The eight excess drivers are called upon to fill-in for more senior drivers who are absent due to sick leave, vacations or other reasons. In 1989, the Union's steward, Raymond DeHahn, had a discussion with Jack Taylor, manager of the company. He requested that more senior drivers who wished to do so be allowed to bid on these "floater" positions for the summer months. Taylor agreed to allow it, and senior drivers were permitted to bid for floater jobs in the summers of 1989 and 1990.

In negotiations over the 1990-93 collective bargaining agreement, the Union proposed to add a section to the contract:

> "Article E Floaters. All fulltime drivers shall be eligible for the eight (8) floating positions available on the summer schedule. (June 1 thru August 31). Seniority shall prevail. The dispatcher to notify floaters of all open runs prior to their pick. Floaters will pick open runs on a weekly basis."

The Employer presented a written response, refusing this demand:

> "NO. There are no available summer floating positions."

The proposed new Article was withdrawn as negotiations progressed, and agreement on a new contract was reached in November of 1990.

In April of 1991, Driver Lyle Ahles attempted to exercise his seniority to become a floater during the summer months. The A.M. Supervisor, Steve Rogstad, told him that he would not be allowed to float, and that only the eight least senior employees would become floaters. Rogstad directed Ahles to pick a specific route. Ahles did not sign for a route, and his name was signed to the last available route by Jack Taylor. Ahles filed a grievance over the Employer's refusal to let him float, contending that past practice required the use of seniority for selecting floaters. He amended the grievance shortly thereafter to include a challenge to Taylor's right to sign his name to the route pick list. The grievance was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, are set forth below.

## POSITIONS OF THE PARTIES

### The Position of the Union

Acknowledging that the contract makes no mention of floating by seniority, the Union takes the position that Employer's right to schedule employees under the Management Rights Clause is limited by the past practice of allowing Drivers to float by seniority in 1989 and 1990:

> "The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it under this agreement or the work rules established by the Employer."
> [Article 14, emphasis added]

While the Employer suggests that the Union's proposal on floaters in the 1990 negotiations is evidence of the lack of any such right in the contract, the Union argues that its contract offer was merely intended to address problems with the floating system, such as those caused by Drivers with physical restrictions who wanted to float but could only operate power steering busses. When the Employer objected to including the new article, the Union withdrew it, but only because it was generally satisfied with the way floating had worked in 1989 and 1990, and understood that it would continue to operate in that fashion unless modified in negotiations. Thus, the Union argues, the 1990 negotiations had no bearing on the existing practice of floating by seniority and the past practice should bind the Employer. The grievance should be granted and the practice of floating by seniority should be continued.

### The Position of the Employer

The Employer acknowledges that floating by seniority was allowed in 1989 and 1990, but argues that it was confusing for the dispatchers and caused other problems, leading to its position in 1990 negotiations that summer floating would not be allowed. Taylor specifically told the Union that the practice would be discontinued, and this was the basis for rejecting the Union's contract proposal on floaters. The Union withdrew its proposal in the face of this information, thus indicating agreement with the Employer's position. The Employer notes that only the grievant attempted to post as a floater in the summer of 1991, and infers that every other employee understood that floating would not be allowed. Since the contract is silent on floating, and since the Union knew that the past practice was being discontinued, the Employer argues that it has no obligation to allow floating by seniority. Therefore the grievance should be dismissed.

DISCUSSION

The Management Rights clause gives the Employer the right to assign work and operate the transit system, but requires that these rights be exercised in a manner consistent with the past practices in the work place. Since there is no question but that the parties established a mutual practice in 1989 of allowing senior drivers to float, the Employer is bound to continue the practice unless it can show that the practice was modified or eliminated. The essence of this dispute is whether the practice of allowing Drivers to use their seniority to elect to become floaters in the summer of 1989 and 1990 was effectively eliminated in the 1990 contract negotiations.

Practices bind employers and unions as implied terms of contract where they relate primarily to employee benefits rather than managerial functions, and where there is strong proof of mutual agreement on the practice. The enforcement of such practices serves the goal of stability in labor relations, and recognizes the practical fact that parties position themselves in negotiations in part on the basis of what benefits they already enjoy. Thus a practice relating to leave time, for example, may lead to scaled back demands for vacation. It would be manifestly unfair to allow an Employer to unilaterally terminate such a practice during the contract term, since the Union relies upon and is influenced by the practice in bargaining. 1/

In this case, the practice of allowing job bids by seniority is indisputably a benefit to employees and, since it was created by an express agreement between the steward and the manager, is plainly mutual. As such, it was enforceable during the contract term during

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1/ This is not to suggest that practices may not be regulated, modified or even terminated where the conditions underlying the practice change. See Chapter 12, Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed., (BNA 1985), hereinafter referred to as "Elkouri".

which it arose. It is generally acknowledged, however, that even well established practices may be terminated upon expiration of the agreement, where notice is given in negotiations. The timely giving of such notice undercuts the reasons for enforcing practices in the first place. There can be no inference of mutuality where one party has stated its intention to abandon the practice. More importantly, notice during negotiations eliminates the element of unfairness that prevents termination during the contract term. The Union cannot be presumed to have executed the agreement on the assumption that the practices would be continued where the Employer has specifically repudiated the practice. Instead, the burden shifts to the Union to negotiate the practice into the contract in the form of express language.

During the 1990 negotiations, the Union proposed specific language which would have formalized the senior drivers' right to bid for summer floating:

> "Article E Floaters. All fulltime drivers shall be eligible for the eight (8) floating positions available on the summer schedule. (June 1 thru August 31). Seniority shall prevail. The dispatcher to notify floaters of all open runs prior to their pick. Floaters will pick open runs on a weekly basis."

Contrary to the Employer's argument that this constitutes an admission that the right to bid did not exist, merely making and withdrawing this proposal has little bearing on the outcome of the case. Some contract proposals are simply intended to clarify existing rights, and withdrawal of a proposal is not necessarily an admission. 2/ What is significant about the negotiations is that the Employer's response to this proposal not only rejected the language, but included specific statements that the practice would not be continued in the future. Withdrawal of the proposal in the face of these statements must be read as acquiesence by the Union to the Employer's position. If the Union wished to preserve the summer floating by seniority, it should have reasonably understood that it needed specific language in the contract to replace the informal practice. 3/

On the basis of the foregoing, and the record as whole, the undersigned makes the

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2/ Here the Union claims that the language was intended to resolve some problems with the floater system, such as the inability of drivers with physical restrictions to operate all of the equipment. This might well have been the purpose of the language, although nothing in the contract proposal can be reasonably read as accomplishing that end. Instead it appears to simply formalize the practice as it had existed.

3/ The grievance also challenges Taylor's right to sign the grievant's name to the route assignment sheet. The grievant's name was written into the only available routes after he had refused to pick. All parties concede that the failure to pick will result in such an assignment, and whether the employee or the employer writes in the name has no practical effect. Thus this issue is not addressed.

following

## AWARD

The Company did not violate the collective bargaining agreement, nor any enforceable past practice, by denying Lyle Ahles' request to become a floater during the summer of 1991. Accordingly, the grievance is denied.

Signed and dated this 4th day of August, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator