

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TAYLOR ENTERPRISES

and

TEAMSTERS LOCAL UNION NO. 43

Case 29
No. 45768
MA-4789
Nathaniel Nicks

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 pay Driver Nathaniel Nicks eight hours pay for a day on which he was scheduled to work, but was sent home prior to the shift 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 issues was reached. From the grievance, the answer and the arguments presented at the hearing, the issues may be fairly framed as follows:

1. Was the grievance filed in a timely fashion? If so,
2. Did the Company violate the collective bargaining agreement, including any enforceable past practice, by sending Nathaniel Nicks home on his regularly scheduled work day, April 9th, and paying him two hours of reporting pay? If so,
3. What is the appropriate remedy?"

PERTINENT CONTRACT LANGUAGE

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.

ARTICLE 13. Work Week

Full-time employees shall be scheduled for a minimum forty (40) hour week. Employees for health reasons, proof from a medical doctor required, may work less than forty (40) hours per week and enjoy full-time classification by agreement

between the Employer and the Union. Part-time drivers may be scheduled for any available work that cannot be scheduled for full time drivers.

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.

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.

The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.

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.

ARTICLE 27. WAGES

Time and one-half shall be paid for all time worked in excess of forty (40) hours in any one (1) work week. This provision does not cover instances where employees exchange off days to accommodate a fellow employee and in these instances only straight time hourly rate will be paid. Further, any exchange of off days must have prior approval of the Employer. Holiday pay shall be considered as time worked.

Part-time drivers shall be scheduled for available hours of work not included in the full-time driver's schedule. To clear up rotation of overtime so that after starting with the top seniority driver the pick should continue until everyone has a chance to work overtime.

Upon signature of this agreement, full-time drivers will notify the company of their position to or not to work overtime other than their regular schedule.

Daily full-time driver hours shall be posted on a weekly basis for the previous week and totaled weekly.

Daily part-time driver hours shall be posted on a weekly basis for the previous week and totaled weekly.

Overtime drivers hours for full time drivers shall be posted on a weekly basis for the previous week.

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, Nathaniel Nicks, is employed as a Driver.

The grievant is normally scheduled for a Tuesday through Saturday work week. On Monday, April 8, 1991, he was called in to work because of another driver's absence. He worked eight hours. The next day, Tuesday, April 9th, was the beginning of his regularly scheduled work week. When he reported for work, he was sent home because he had worked the previous day. He worked each of the remaining days in his regular schedule.

The grievant received his paycheck on April 18th. The check showed two hours of reporting pay for April 9th, and 43.75 hours total pay for the week. The instant grievance was filed on April 22nd, asserting that the grievant was entitled to pay for his normal schedule of eight hours for April 9th. The Employer asserts that supervisor Steve Rogstad told the grievant on April 9th that he would receive only two hours' pay. The grievant maintains that Rogstad was not even present on April 9th, and that he first learned he was receiving two hours of pay rather than eight hours when he received his check.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Position of the Union

The contract requires that grievances be filed within five working days after the occurrence of the event giving rise to the grievance. The grievant was sent home on April 9th, and filed the grievance on April 22nd. The Union takes the position that the grievance is timely, since the employee could not know of the violation until he received his check on April 18th.

The grievant's normally scheduled work week is Tuesday through Saturday. The Employer has the right to ask the grievant to work excess hours, but may not, the Union argues, offset those hours by sending the grievant home on his normally scheduled day of work. The grievant is entitled to work his normal work schedule, and should receive eight hours of pay for April 9th.

The Position of the Employer

The Employer takes the position that its supervisor, Steve Rogstad, told the grievant on April 9th that he would receive only two hours of reporting pay for showing up. Thus the grievance is untimely and, under the contract, should be barred.

On the merits of the dispute, the Employer argues that its only obligation under the contract is to give the employees forty hours of work. In the week of April 8th, the grievant worked for 43.75 hours. Thus there is no contract violation, and the grievance should be dismissed.

DISCUSSION

Timeliness

The contract requires that a written grievance be submitted within "five (5) working days of the occurrence of the event" giving rise to the grievance. The Employer demands dismissal of the grievance, arguing that Rogstad told the grievant on April 9th that he would receive only two hours of pay for showing up. The grievant denies that Rogstad was even present on the 9th, and claims that he first learned that he wouldn't receive eight hours for the 9th when he received his paycheck on the 18th. With the permission of the parties, the undersigned contacted two other employees who were claimed to be witnesses. Dispatcher Jane Pangborn stated that she was not present on the 9th, and Driver Carol DeGroot stated that she could not remember any conversation that might have taken place on that day. The record provides no principled basis on which the dispute over what was or was not said on April 9th may be resolved. As the party challenging the procedural arbitrability of the grievance, the Employer bears the burden

of proof on this point, and the undersigned must find that it has failed to prove a lack of timeliness. 1/ Thus the grievance may be considered on its merits.

The Merits

The central issue in this case is whether the employer may unilaterally change the work schedule of a driver by switching his off days so as to avoid the payment of overtime. On the record presented in this case 2/, I conclude that it may not.

No work week is set forth in the contract, other than the specification of a forty hour week in the Wage article. Routes and work schedules are apparently subject to seniority under Article 4, 3/ and the parties have agreed that "seniority rights shall be observed in each department, except as otherwise provided in this agreement.." In any event, the schedule is set in advance, as is evidenced by the dictate in Article 4 that:

"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."

The above cited provision very strongly indicates that a non-emergency change in days off after the schedule is established must be initiated, or at least agreed to, by the employee. While the Employer retains the right to schedule employees under the Management Rights article, that article also incorporates a pledge not to use the retained rights "to interfere with rights established under this agreement." Reading the wage clause and the seniority clause in conjunction with one

1/ The undersigned would note that there is, in any event, a strong line of cases for the proposition that a dispute becomes ripe for a grievance when the allegedly improper action is actually taken, rather than when it is announced. See, Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed., (BNA 1985) at page 196. Thus the actual payment of the wages on the 18th would arguably constitute the grievable event, even if Rogstad had announced his intention to pay only two hours of reporting time on the 9th.

2/ The hearing in this case consisted largely of an informal presentation of background facts and brief statements of the parties' positions. No evidence was presented of past practices or bargaining history, nor did either party cite any specific provisions of the collective bargaining agreement. This Award reflects the limitations of the record.

3/ "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."

another, the undersigned concludes that one of the rights established under the agreement is the right to rely upon the established schedule of days off. In ordering the grievant home on his scheduled day of work and, in effect, unilaterally substituting Tuesday for Monday as his off day, the Employer violated the agreement. The appropriate remedy is an order making the grievant whole for his losses. In this case, that would be the payment of an additional six hours of pay at time and one half his regular rate.

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

AWARD

1. The grievance was timely filed in accordance with the collective bargaining agreement.

2. The Company violated the collective bargaining agreement by sending Nathaniel Nicks home on his regularly scheduled work day, April 9th, and paying him two hours of reporting pay.

3. The appropriate remedy is to make the grievant whole, by immediately paying to him the amount of wages he would have received had he not been sent home. On the record in this case, the backpay is six hours' pay at time and one-half.

Signed and dated this 22nd day of August, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator