BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between JELCO WISCONSIN, INC. subsidiary of LAIDLAW TRANSIT, INC. and KENOSHA SCHOOL BUS DRIVERS UNION	Case 12 No. 46664 A-4862

Appearances:

Hanson, Gasiorkiewicz and Weber, S.C., Attorneys at Law, 514 Wisconsin Avenue, Racine, Wisconsin 53403 by Mr. Robert K. Weber, appearing on behalf of the Kenosha School Bus Drivers Union.

Obermeyer, Rebmann, Maxwell and Hippel Law Offices, Packard Building - 14th Floor, Southeast Corner, 15th and Chestnuts Streets, Philadelphia, Pennsylvania, 19102, by Mr. Larry Besnoff, appearing on behalf of Jelco Wisconsin, Inc.

ARBITRATION AWARD

Pursuant to the provisions of a collective bargaining agreement between the parties, the Kenosha School Bus Drivers Union (hereinafter referred to as the Union) and Jelco Wisconsin, Inc., a subsidiary of Laidlaw Transit, Inc., (hereinafter referred to as the Employer) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as the arbitrator of a dispute over the performance of supervisory duties by employee Annette Lippert. Sharon Gallagher Dobish was so designated. Due to Arbitrator Dobish's later unavailability, the undersigned was substituted. A hearing was held on March 18, 1992 in Kenosha, 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. No transcript was made of the hearing. The parties submitted post-hearing briefs, which were exchanged through the undersigned. The record was closed on May 18, 1992. Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following award.

ISSUE

The parties were unable to stipulate to the issue to be decided herein, and agreed that the arbitrator should frame the issue in his award. The Union's formulation of the issue is:

1. Did the Company violate paragraph 4 of the collective bargaining agreement and/or otherwise unreasonably exercise its management rights in assigning Annette Lippert to training and evaluation duties on a year round basis?

2. If so, what is the appropriate remedy?

The Employer's formulation of the issue is:

> Whether Annette Lippert's voluntary trainer duties of giving MVD Third Party Road Tests violates paragraph 4 or paragraph 13 of the collective bargaining agreement? If so, what is the remedy?

The undersigned believes that the issue may be fairly framed as follows:

> Did the Company violate the collective bargaining agreement by allowing Annette Lippert to perform training and evaluation duties? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

> WITNESSETH:
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> . . .
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> 2. The Company hereby recognizes the Union as the exclusive bargaining agent with respect to wages, hours and working conditions for all drivers employed at the Company's Kenosha contract facility at 6015-52nd. Street. The Wisconsin's Employment Relations Commission with the Company's concurrence, has certified the Union as the drivers' exclusive bargaining agent.
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> . . .
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> 4. The Union hereby recognizes that the management of the Company has the right to control the direction of working forces, including the right to direct, plan, and control bus operations; to establish and change working schedules; to hire, transfer, suspend, or discharge employees for just cause; to relieve employees because of lack of work or for other legitimate reasons, including medical reasons; to change existing methods if agreeable to both parties; and

to manage the properties. Further, the Company agrees that the exercise of the management function will not be in conflict with or in violation of the existing Agreement.

. . .

11. During the term of this contract, it is further agreed that should any difference or dispute arise between the Company and the Union in connection with the administration of this Labor Agreement, or between the Company and the Union in connection with the administration of this Labor Agreement, a grievance may be filed "within 14 calendar days after the occurrence of the situation, condition, or action giving rise to the grievance." To be valid, the grievance must be in writing and copies of the grievance must be submitted to the Company and the Union "within 14 calendar days after the occurrence of the situation, condition, or action giving rise to the grievance". An earnest effort shall be made to settle such grievance promptly. The Union member involved in the following steps A, B, C, and D has the right to have one of the Union Officers as he/she designates to represent him/her at any meeting in connection with the grievance. This paragraph 10 and paragraph 11 below will not apply to any difference or dispute between the Company and the Union in connection with the collective bargaining over wages, hours and working condition or in connection with collective bargaining to negotiate another labor agreement. Grievances may proceed only by recourse to the following successive steps.

GRIEVANCE STEPS AS REFERENCED IN PARAGRAPH 10 ABOVE AS FOLLOWS

. . .

D. Any differences or disputes in connection with the grievance not settled by the above procedures may be submitted to arbitrator by either party. The parties agree to request the Wisconsin Employment Relations Commission to appoint a arbitrator staff. The arbitrator's decision will be submitted to the Company and the Union in writing and shall be binding on both parties. The party petitioning for arbitrator shall submit to mediation within thirty (30) days after completion of the third step in the grievance procedure. If it is determined by the arbitrator that each party is a certain percent at fault, each party will pay the percent of the costs to which it is at fault.

E. If the arbitrator rules in favor of the grieving Union member or members, he/she will determine the appropriate remedy.

. . .

13. The procedure for administering the Work Rules listed in paragraphs A through M below will be as follows:

Minor violations to work rules will begin with a verbal warning and explanation of work rules and procedures. Minor violations will be removed from employee's file after 1 year.

Other than minor violations the first violation will be a written notice from the Manager to the driver.

The second violation will be written notice from the Manager to the driver.

The third violation of a similar work rule within 1 year period will call for dismissal.

Extraordinary serious violations to work rules and safety may result in immediate termination, or accelerated violation procedures.

. . .

21. SENIORITY

. . .

C. All driving classifications covered in the Labor Agreement shall be assigned on the basis of seniority, including all charters. Recall after summer layoff shall be on the same basis.

. . .

BACKGROUND FACTS

The Employer operates a bus terminal in Kenosha, Wisconsin providing transportation for students of the Kenosha Unified School District, as well as charter services. The Union is the exclusive bargaining representative for the Employer's drivers. In addition to driving, the

Employer has other work that must be performed, such as washing buses, cleaning the terminal, painting, maintenance, parts inventory, and groundskeeping around the terminal. This work is regularly made available to drivers, but is not covered by the collective bargaining agreement and is not paid at contract rates. The Employer also hires drivers as bus aides for trips during the summer, again outside the contract.

Bus drivers in Wisconsin are required to have a commercial driver's license (CDL). In order to obtain this license, a person must pass a test administered either by the Department of Motor Vehicles or any individual certified by the state to do road testing.

Prior to the summer of 1991, training for new drivers and experienced drivers preparing for a retest was performed by a variety of employees, including management personnel and unit drivers. In the summer of 1991, Annette Lippert, a driver in the bargaining unit obtained a license to give the MVD Third Party Road Test needed to obtain the CDL. The Company began to rely primarily on Lippert to perform training and allowed employees to take the CDL test either from Lippert or from the Department of Motor Vehicles. New applicants for driving positions were required to take training with Lippert, while current drivers desiring additional training remained free to obtain it wherever they wished.

The Union objected to the use of Lippert as a trainer and tester, on the grounds that a bargaining unit member should not be in the position of testing and evaluating other bargaining unit members. The parties discussed the issue, but were unable to resolve the conflict. The instance grievance was filed and was referred to arbitration for resolution.

Additional facts as necessary will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Union

The Union takes the position that the Company violated the collective bargaining agreement in assigning ongoing training and evaluation duties to Ms. Lippert. The Management Rights provision of the contract gives management the authority to change existing methods "if agreeable to both parties". Trainers and testers have been provided in the past, but only in situations where there was an extreme shortage of drivers and then with the consent of the Union. The Company lacks any inherent management right to make unilateral changes such as the transformation of the training and testing position into an ongoing duty. Thus its actions in this case are a violation both of the express terms of the contract and of the past practice of using trainers and testers only in emergency situations.

The Union notes that the position in question is essentially a management position. The parties to a contract have a general obligation to act reasonably in applying that contract, and the

assignment of a bargaining unit person to a management position is both unreasonable and inconsistent with the overall intent of the collective bargaining agreement. The Union has a duty of fair representation to its membership and if one of Ms. Lippert's negative evaluations adversely affected another member of the bargaining unit, the Union would be in the untenable position of defending one Union member by attacking the credibility or conclusions of another. The supervisory nature of this job is made clear when one considers that Ms. Lippert is directing members of the workforce while engaged in training and/or evaluating drivers, and exercises independent judgment while performing such training and/or evaluation.

In the alternative, the Union argues that the "driver/trainer" position involves skills primarily possessed by members of the bargaining unit and work which is performed during regular working hours. Thus, it is different in character from the painting, maintenance or bus washing positions that the Company has routinely filled without posting in the past. Given the identity of interests between this position and the bus driving positions represented by the Union, the job should have been filled by reference to the seniority provisions of the collective bargaining agreement.

For all of the foregoing reasons, the Union asks that the grievance be sustained and that a cease and desist order be entered directing the Company to revert to its prior practice of using drivers as trainers and evaluators only in cases of emergency.

The Position of the Company

The Company takes the position that the grievance is without merit and should be denied. There is a long term practice of using experienced, qualified drivers to train new employes and to retrain current employes. For at least seven years, drivers have acted as trainers without protest by the Union. The only distinction between this work and that performed by the grievant is that Ms. Lippert is qualified to give MVD Third Party Road Test. Since the trainers in the past have always given mock tests, the work of this position is indistinguishable from that of past trainers. The validity of the past practice is demonstrated by the fact that the Union was unable to cite any provision of the contract which was violated by Ms. Lippert's job assignment.

The Company argues that it has the right to assign anyone it wants to perform non-bargaining unit work. The driver/trainer position is analogous to having an outside service perform the training work. The training is only done at times outside the normal bus runs and does not interfere with any regularly scheduled work of the driver/trainer. It is simply extra work, beyond the normal bargaining unit work performed by Ms. Lippert. In this respect it is exactly the same as the bus washing, bus cleaning, office cleaning, errand running, painting, inventory work, and bus aide duties which have routinely been assigned to bargain unit members over the years. Inasmuch as the assignment of that work has never been challenged by the Union, it must be concluded that the Company is within its authority in assigning non-unit work to unit employes and the instant grievance should therefore be denied.

The Company notes that there is no prejudice to the Union or to any employe by having this training available. The presence of an on-site driver/ trainer is in fact a benefit to everyone. Applicants benefit by having free training, probationary employees by having retraining available and current employes by being able to keep their skills current. Current employees also benefit by having the option of taking their CDL tests on the premises, rather than having to go through the inconvenience of taking the tests at the Department of Motor Vehicles. Balanced against these tangible benefits is the complete lack of any adverse affect on unit members from the creation of the driver/trainer position. No current employe has ever been disqualified from work by the driver/trainer. The uncontested testimony of management representatives at the hearing was that the trainer is not involved in any decisions concerning hiring, firing, or discipline.

For all of the foregoing reasons, the Company asks that the grievance be denied.

DISCUSSION

At issue in this case is whether the employment of Lippert as a driver/ trainer contravenes either the contract or the generally accepted principles of labor management relations. I conclude that it does not, and therefore deny the grievance.

The facts show that Lippert is performing on a regular basis some duties -- namely training of potential employees and retraining of existing employees who request such retraining -- that have intermittently been performed by both bargaining unit personnel and management representatives in the past. As with Lippert's performance of the work, training has always been paid outside the contract, and has not been posted for bidding by bargaining unit members. Lippert also has certification to administer the test for the Commercial Driver's License, and both potential employees and experienced drivers have the option of having Lippert give them the test or going to the Motor Vehicle Department for the test.

The Union asserts that the employment of a driver/trainer represents a change in methods which may only be accomplished with the consent of the Union:

> "The Union hereby recognizes that the management of the Company has the right to control the direction of the working forces including the right to . . . change existing methods if agreeable to both parties. . . "

This language is certainly susceptible to the interpretation urged by the Union. However, all business functions are accomplished through the application of "methods". Some go directly to the wages, hours and working conditions of the drivers. Other "methods" do not implicate the working conditions of drivers in any way. The use of an employee to perform the training function for job applicants during non-duty time has no discernable impact on represented drivers.

Making Lippert available to represented drivers who voluntarily elect to use her to either prepare for a retest or to administer the test has only the most marginal of impacts on represented drivers. In order to find that the cited contract provision prohibits this work assignment, it must be read as a ban on virtually all unilateral changes in business methods, whether they primarily relate to what are normally considered mandatory topics of bargaining or relate primarily to traditional areas of management discretion. The record is devoid of any evidence concerning the intent of this language, and I am reluctant to give it such a broad and unusual interpretation without more proof than the simple assertion in the Union's brief that it applies to this situation. Without drawing any firm conclusion on the correct interpretation of this language, I do not conclude that the Union has not proven that the management rights clause requires mutual consent for changes in business methods which do not relate primarily to wages, hours and working conditions.

Turning to the Union's argument that assigning supervisory duties to a bargaining unit member is inherently unreasonable conduct and is inconsistent with the implied covenant of good faith in collective bargaining agreements because it may pit worker against worker with the Union caught in between, I believe that several observation need to be made. First, I am skeptical of the claim that Lippert is functioning in a supervisory capacity when she works as a tester or a trainer. Lippert's testing of drivers is presumably performed in accordance with the standards developed by the State of Wisconsin, which certified her to administer its test. Furthermore, the record indicates that potential employees and current employees decide for themselves whether and when they will take the CDL test with Lippert. Employees who fail the test have the option of retesting with Lippert or the MVD and, according to terminal manager Dan Grey, no employee has ever been disciplined for failing the exam. None of this bespeaks the degree of authority, discretion and independent judgment normally associated with supervisory status.

With respect to the Union's concern that its duty of fair representation may be compromised by a potential conflict between Lippert and another employee, I have already noted that any such conflict must arise from Lippert's voluntary choice to serve as driver/trainer and the employee's voluntary choice to use her as a tester or trainer. 1/ Granting that the potential for conflict between bargaining unit members does exist, that fact standing alone does not raise doubts about the Union's ability to meet its duty of fair representation. The degree of conflict is no greater than commonly experienced by a Union in posting or layoff cases where competitive seniority puts employees at odds, or in discipline cases where the opinion of a lead worker or the testimony of a fellow employee may be brought in by the employer. Inasmuch as Lippert's role as a driver/trainer does not render her a supervisor, and since the potential for conflict between her

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1/ Applicants apparently have the option of getting training and testing elsewhere, given Gray's testimony that possession of the CDL, however acquired, is the primary qualification for employment. In any event, applicants are not employees. They are potential employees, and any dispute between Lippert and an applicant would not implicate the Union's duty of fair representation.

and other unit members is not so great as to put the Union in an untenable position in administering the contract, I conclude that the Company has not acted in bad faith in creating the position of driver/trainer nor in assigning this work to a person who is also a bargaining unit member.

Addressing finally the Union's claim in the alternative that Lippert's work is bargaining unit work, and should have been filled by seniority, I note that the recognition clause narrowly defines the bargaining unit as consisting of "drivers". Training work, whether performed intermittently by management personnel or unit members, has never before been considered driving. It certainly involves the skills used in driving, and in that sense is closer in character to unit work than is bus washing, maintenance, painting and the other work customarily performed outside of the contract. There are, however, significant distinctions between the training and testing work and the normal duties of drivers. It does not directly involve the

transportation of passengers. It is performed outside of the normal driver work hours and is paid differently. Training is not performed regularly, but is instead largely concentrated in the summer months when potential drivers are being considered for employment. Testing requires a certification which is not required of drivers. As with the Union's argument over the scope of the management rights clause, I do not conclude that the recognition clause could not sustain an interpretation which would include training and testing as unit work, but I do find that there are sufficient distinguishing characteristics to prevent me from reaching the opposite conclusion. The term "drivers" does not on its face include trainers and testers, and absent some evidence that the parties intended that it include such positions when they negotiated their recognition clause, I find that the Company did not violate the collective bargaining agreement by treating the work as falling outside the contract.

On the basis of the foregoing, and the record as a whole, I have issued the following

AWARD

The Company did not violate the collective bargaining agreement by allowing Annette Lippert to perform training and evaluation duties. The grievance is denied.

Signed this 29th day of July, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator
Post Office Box 1375
Racine, WI 53401-1375