BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TAYLOR ENTERPRISES and TEAMSTERS LOCAL UNION NO. 43	Case 32 No. 47758 A-4951 Raymond Prudhom - Retirement

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 monies owed by or owing to driver Raymond Prudhom upon his retirement. Daniel Nielsen was so designated. A hearing was held on November 11, 1992 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

The parties did not reach a formal stipulation of the issues in this case. On reviewing the record, it is apparent that the issues are:

(1) Is the grievant required to return all uniforms from his 16 year career as a Driver upon his retirement?

(2) Is vacation pay under the contract earned in the year prior to which it is taken or, in the alternative, is it earned on a current year basis?

(3) Depending upon the answers to questions (1) and (2), what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

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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 15. Uniforms

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The Employer shall furnish and pay for two (2) complete uniforms plus two (2) additional shirts for all new drivers after completion of the probationary period. Additional uniforms purchased by the drivers must be identical in every respect, color, design and specifications of the Employer furnished uniforms. The Employer shall, after one (1) year pay a maximum replacement cost of one hundred thirty-two dollars ($132.00) each succeeding year provided damaged or worn uniform items are presented to the Employer for inspection and approval. Closed shoes with low heel shall be required.

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ARTICLE 16. Vacation & Holiday Pay

Vacation pay for all full-time employees shall be paid and computed by the formula as follows:

After one year	10 days	80 x employees current hourly rate
After two years	11 days	88 x employees current hourly rate
After three years	12 days	96 x employees current hourly rate
After four years	13 days	104 x employees current hourly rate
After five years	14 days	112 x employees current hourly rate
After six years	15 days	120 x employees current hourly rate
After seven years	16 days	128 x employees current hourly rate
After eight years	17 days	136 x employees current hourly rate
After nine years	18 days	144 x employees current hourly rate
After ten years	19 days	152 x employees current hourly rate
After eleven years	20 days	160 x employees current hourly rate

Part-time employees who work more than twenty (20) hours each week shall be paid one-half (1/2) of the above amounts computed by the above formula.

Vacation pay shall be made to eligible employees on the regular pay day preceding the beginning of their scheduled vacation.

Employees having earned two weeks or more of vacation shall take a minimum of two weeks of vacation between June 1 and September 1, except as otherwise mutually agreed to by the Employer and Union. Vacations shall be on a staggered basis to maintain full service to the public.

Should two (2) or more employees request the same time for vacations, seniority will govern. Seniority will be honored unless a junior seniority employee requested far in advance the same date. In that instance, the grievance committee will decide.

Time lost due to sickness or injury shall be counted as time worked for the purposes of determining vacation eligibility and seniority.

Vacation must be taken in the year earned. The anniversary date is to be used for vacation periods. All earned vacations must be taken.

Vacation shall be posted in January of each year. After March 1st, employees will have chosen by seniority and entitled to those dates.

Vacation taken prior to wage increases in the calendar year, will be paid at the wage rate that is in effect at the time of vacation only. Vacation checks will be paid by week whenever possible. The Employer will pay up to three checks for employees splitting their vacation periods.

Vacation and layoff shall not jeopardize the employee's seniority rights.
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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.

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, Raymond Prudhom, was employed as a Driver from 1976 until his abrupt retirement in June of 1992.

Prudhom's anniversary date for vacation purposes was in October of each year. On January 17, 1992 he received $1,665.60 in vacation pay. He retired on June 5, 1992. After his retirement, the Company sent him a letter demanding that he return all of the uniforms he had been provided during his career, or reimburse the Company for the cost of the uniforms. The letter also demanded the return of a pro-rated share of this 1992 retirement pay, since he had not worked through his anniversary date. The grievant responded with the instant grievance, claiming that vacations are paid in the year after they are earned, and demanding pro-rata vacation pay for the period between October of 1991 and June of 1992. He also attempted to return the uniforms in his possession, but the company refused to accept them because they were not all of the uniforms from his 16 year career.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The Position of the Company

The Company notes that the grievant signed an agreement when he began work in 1976, promising to either return his uniforms upon termination, or pay the Company for their cost:

> AGREEMENT
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> It is understood and agreed that the uniform(s) which I have received for use in my employment with Taylor Enterprises Inc. in the Belle Urban System (BUS) is the sole property of the City of Racine.
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> It is further agreed that upon my termination of my employment with Taylor Enterprises, Inc., for any reason whatsoever, I will return the uniform(s) to Taylor Enterprises, Inc.

In the event that I fail for whatsoever reason to return the uniform(s) as required above, I hereby authorize a deduction from my final paycheck to cover the cost of the uniform(s) not returned.

/s/ Raymond P. Prudhom

The Company argues that this agreement is fully enforceable, and that it is well within its rights in demanding the return of every uniform ever issued to the grievant or paid for by the Company, or compensation for those not returned.

On the question of vacation pay, the Company asserts that the contract provides for vacations to be paid on a current basis. The Company has a long standing policy of allowing employees to receive vacation pay early in the year, before it has been fully earned, which is what the grievant did in 1992. It is ridiculous to claim that this grievant would have waited until January of 1992 to claim his vacation pay if he had been entitled to it in October of 1991. Since the grievant received his full vacation pay for the year, but did not work through his anniversary date, he must return a portion to account for the period between his retirement in June and his anniversary date in October.

The Position of the Union

The Union takes the position that it is ridiculous to demand the return of 16 years worth of uniforms upon retirement. While the Company has the right to demand the return of uniforms when employees claim their annual uniform allowance, the Company stopped accepting used uniforms some time ago, claiming that they had an entire shed full of them. The Union argues that other employees have left the Company and have either distributed their uniforms to active employees or retained them for their own use. The Company has never before demanded that an employee produce the used uniforms or pay for them at the end of a career. As for the individual agreement signed by the grievant in 1976, the Union argues that it has no knowledge of any such agreements, and has not sanctioned them. The grievant has offered to return all of the uniforms he still possesses, and this should satisfy any obligation he has to the Company.

As for the vacation pay issue, the Union argues that the contract provides for payment of vacation in the year after it is earned. The grievant received his pay for 1991 in January of 1992. Since he worked during the period from his anniversary date in October 1991 until his retirement in June of 1992, he should receive payment for the vacation earned during that time.

DISCUSSION

Uniforms

The Company has the right to manage and control its property, and there is no dispute that

the uniforms provided to drivers are the property of the employer. The Company's effort to safeguard its investment in uniforms through individual agreements represents an exercise of this right to manage its property. Even assuming that these individual agreements are consistent with the duty to bargain only with the exclusive representative, however, the terms of the individual agreement appear to be at odds with the collective bargaining agreement.

Article 15 of the contract addresses the Company's duty to provide uniforms and the employees' obligation to return uniforms:

> The Employer shall furnish and pay for two (2) complete uniforms plus two (2) additional shirts for all new drivers after completion of the probationary period. Additional uniforms purchased by the drivers must be identical in every respect, color, design and specifications of the Employer furnished uniforms. The Employer shall, after one (1) year pay a maximum replacement cost of one hundred thirty-two dollars ($132.00) each succeeding year provided damaged or worn uniform items are presented to the Employer for inspection and approval. Closed shoes with low heel shall be required.

The Management Rights Clause of the contract requires that the Company exercise its rights in a manner consistent with the other terms of the contract and with the past practices of the parties. Article 15 provides provides for a yearly return of uniforms when the annual uniform allowance is claimed. The evidence is undisputed that the Company stopped accepting returned uniforms several years ago. Both the provision for an annual return of uniforms and the practice of not accepting those uniforms are inconsistent with the Company's claim that the grievant must return 16 years worth of uniforms upon his retirement.

Having failed to exercise its rights under Article 15 of the contract, the Company cannot fall back upon an inconsistent individual agreement to make a monetary claim against this grievant. The Company's demand for the return of uniforms purchased after the payment of the last uniform allowance would be consistent with Article 15. The grievance is granted to the extent that it seeks relief from the Company's claim for uniforms acquired prior to the last payment of the annual uniform allowance.

Vacation

The dispute between the parties on vacation pay is more substantial than the uniform issue, and presents the common question of whether vacation is earned on a current year basis, as claimed by the Company, or is paid out in the year after it is earned, as contended by the grievant. Neither party presented any reliable evidence of how this question has been addressed in the past. 1/

1/ Clearly a past practice would have great persuasive value in deciding what the parties

The formula for computing vacation pay is set forth in Article 16 of the contract, and speaks in terms of entitlements "after" so many years of service:

> Vacation pay for all full-time employees shall be paid and computed by the formula as follows:
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> After one year 10 days 80 x employees current hourly rate
> ***
> After eleven years 20 days 160 x employees current hourly rate

This formula is ambiguous in that it leaves open the question of when the vacation is actually earned. However, later in the vacation article the contract provides that "Vacation must be taken in the year earned." The right to vacation pay is co-extensive with the right to vacation time, and this provision is rather clearly a statement that vacation is earned in the same year in which it is paid out.

The grievant received a vacation payout of $1,665.60 in January of 1992. The parties agree that the Company has historically allowed advance payment of vacations. There is no evidence in the record that the Company has also followed a practice of withholding payments until the year after the vacation was earned, nor is it likely that employees would acquiesce in any such arrangement. Given this, there is no way in which the January payment can be interpreted as other than an advance on the grievant's vacation pay for 1992. Since he did not work the time required to earn the full amount of vacation pay, the Company was within its rights when it sought pro-rata reimbursement of the overpayment. Thus the grievance is denied insofar as it seeks additional vacation pay and/or relief from the Company's claim for partial repayment of the January 1992 vacation payment.

Remedial Jurisdiction

The grievant in this case, a retired employee, sought relief from monetary claims made the Company as well as an order directing the Company to pay his claim for additional vacation pay. At the hearing, the Company made it clear that it was seeking an order requiring the grievant to make payments on its monetary claims. The arbitrator's jurisdiction extends to determining rights

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intended when they negotiated their vacation schedule. No examples were provided to show how other employees leaving the Company have been compensated or charged for vacations. The Company presented what it claimed was a record of the grievant's vacation payouts. This record did not include information on any payments during his first three years of employment. It is therefore impossible to draw any conclusions from this document about the appropriate schedule for vacation accrual and payment.

under the collective bargaining agreement and resolving disputes between the Union and the Company. The decision of the arbitrator binds both of those parties.

In addressing both the uniforms issue and the question of vacation pay, the undersigned has defined the rights of the Company and employees under the contract. The arbitrator's remedial jurisdiction does not, however, reach to ordering the grievant to make payments to the Company. The grievant is a retired employee. He is no longer a member of the bargaining unit, nor is he an individual signator to the arbitration agreement. Thus the Award in this case is limited to a resolution of the grievance, a determination of what the grievant was entitled to receive in vacation pay for 1992 and a declaration that efforts by the Company to recover monies that it advanced to the grievant in excess those to which he was entitled under the contract do not constitute a violation of the collective bargaining agreement.

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

AWARD

(1) The grievant is not required to return all uniforms from his 16 year career as a Driver upon his retirement. The collective bargaining agreement allows the Company to recover used uniforms on an annual basis, and the grievant's obligation to return his uniforms is limited to those acquired after he received his last payment of a uniform allowance under Article 15. The grievance is granted insofar as it seeks relief from any claim for used uniforms beyond those acquired after the last payment of the uniform allowance.

(2) Vacation pay under the contract is earned on a current year basis. The contract only entitled the grievant to receive payment during the period from October 1991 through his retirement for a proportion of his annual vacation pay that equalled the proportion of the vacation year that he remained an employee of the Company. The grievance is denied insofar as it claims payment for additional vacation pay and relief from claims by the Company for repayment of a portion of the January 1992 advance on vacation pay.

(3) The Company does not violate the collective bargaining agreement by seeking repayment of a portion of the January 1992 advance on vacation pay it made to the grievant.

Signed this 17th day of November, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator