BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 43

and

NELSON TRANSFER, INC.

Case 1
No. 59152
A-5873

(Vacation Entitlement)

Appearances:

McNally, Maloney & Peterson, S.C. by **Attorney Charles Magyera**, 2600 North Mayfair Road, Suite 1080, Milwaukee, WI 53226-1309, appearing on behalf of Nelson Transfer, Inc.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P. O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Local 43.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Nelson Transfer, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate the undersigned as arbitrator of a dispute over the vacation entitlement of employees. A hearing was held on November 17, 2000, at the Union's 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. The parties submitted the case on oral arguments at the end of the hearing, whereupon the record was closed.

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

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The issues before the Arbitrator are:

1. Did the Employer improperly fail to pay vacation pay to the Grievants effective October 15, 1999, for calendar year 2000? If so,

2. What is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

(Note: Bold print is in the contract)

ARTICLE 4. SENIORITY

(A) **Seniority shall prevail at all times.**

(B) Length of Service. The term, "seniority rights" shall be defined as that status of the employee, which includes:

(1) His established and unbroken length of service with the Employer from the date of hiring by the Employer, and

(2) His good standing as a member of the Union. Seniority shall be based upon the total time on the payroll of the Employer by years and fractions thereof, since the date of the first employment after the last resignation or discharge of any employee.

. . .

(G) Seniority roster of current employees:
1. George Polanin
2. Joe Ruhl
3. Gary Brown

. . .

ARTICLE 7. WORK WEEK

The work week shall be Monday through Friday. All local work performed on Sunday shall be paid at two (2) times the hourly rate. In the event the Employer obtains overtime rates from a customer for Saturday work, the employee shall receive time and one-half (1/2) for such Saturday work even if the employee has not worked forty (40) hours Monday through Friday.

All local hours in excess of forty (40) hours per week shall be paid for at the rate of time and one-half (1/2) the regular straight time hourly rate.

. . .

The work day shall be continuous except time shall be taken for a lunch period of the (10) minutes in midmorning and a period of not to exceed one (1) hour at noon, except in cases of emergency. A lunch period of ten (10) minutes may be taken in mid-afternoon.

Saturday Work:

A. **Overtime offered by seniority, forced from bottom of seniority list if everyone declines.**
B. **Posting must be up by preceding Wednesday.**
C. **If you sign posting; you have a right to work if work is available.**
D. **If you don't sign posting, you can't bump a junior man.**

Seventy-five percent (75%) of those drivers with higher seniority, and who are full time regular employees, shall be guaranteed forty (40) hours work or pay per week each week in which they are required to report for work. The application of the **seventy-five percent (75%)** rule shall apply:

(1) To all regular full time drivers who are on the payroll.
(2) To **seventy-five per cent (75%)** of those drivers who are scheduled to work during the work week.

The balance of the drivers shall not come under the guaranteed week and may be laid off at any time during the week. When a driver is not available for work during his scheduled hours during the work week, he shall only be paid for actual hours worked.

. . .

FULL TIME EMPLOYEES. Anyone who works in excess of 30 hours per week will be a full time employee. **This will be figured quarterly, based on your last three (3) months weekly average, for insurance eligibility purposes.**

ARTICLE 8. HOLIDAYS

(1) Regular full-time drivers & warehousemen shall not be required to work and shall be paid eight (8) hours pay at the straight time hourly rate for the following six (6) holidays: New Year's Day, Labor Day, Memorial Day, Thanksgiving Day, Fourth of July, and Christmas Day, not worked and regardless of the day of the week on which it falls.

. . .

(6) Regular full time drivers and warehousemen are entitled to holiday pay if the holiday falls within the first thirty (30) days of absence due to illness, non-occupational injury, or within the first six (6) months of absence due to occupational injury, or during periods of permissible absence. This does not apply to employees taking leave of absence for full time employment with the Union.

ARTICLE 9. INSURANCE

Effective October 1, 1999, for drivers and warehousemen, the Employer agrees to provide health & welfare insurance benefits through the RACINE AREA HEALTH & WELFARE FUND for full-time drivers and warehousemen represented by Teamsters Local Union No. 43, who have completed sixty (60) days employment with the Employer. . . .

. . .

ARTICLE 10. VACATIONS

Regular full time warehousemen who have worked at the Company for at least one (1) year will receive one (1) weeks paid vacation per year. In order to qualify for additional vacation benefits such as two (2) weeks, the years of service for warehousemen shall be calculated commencing on **October 15, 1999.**

All regular full time drivers shall receive one (1) week's vacation with full pay in advance after any consecutive fifty-two (52) weeks of service with the Employer.

All regular full time drivers & warehousemen having **three (3)** years of service with the Employer shall receive two (2) weeks vacation with full pay in advance.

All regular full time drivers and warehousemen having ten (10) years of service with the Employer shall receive three (3) weeks vacation with full pay in advance.

All regular full time drivers and warehousemen having **sixteen (16)** years of service with the Employer shall receive four (4) weeks vacation with full pay in advance.

All regular full time drivers and warehousemen having **twenty (20)** years of service with the Employer shall receive five (5) weeks vacation with full pay in advance.

A two (2) week notice for taking vacation is required, unless mutual agreement otherwise. There will be no vacation pay in lieu of vacation. Only one man allowed off per week, unless mutually agreed. Vacation preference will be by seniority.

A calendar of weeks available for vacation shall be posted by January 1st of the vacation year.

A driver or warehouseman shall not be entitled to a vacation when:

1. He terminates his employment with the Employer within one (1) year from date of hire.

2. He fails to give seven (7) days notice of voluntary termination.

If at any time after fifty-two (52) weeks of consecutive employment, a driver or warehouseman ceases employment, he shall receive his pro-rated portion of his vacation pay.

Weekly vacation pay shall be forty-four (44) times the driver's or warehouseman's regular hourly rate.

The Employer shall permit the drivers and warehousemen to signify the vacation period which each desires but shall designate the number who may take vacation at a given time.

Effective 10-15-99, paid vacation benefits for George Polanin shall be three (3) weeks per year. For Joe Ruhl, it shall be two (2) weeks per year. These employees are receiving benefits in excess of their seniority with Nelson Transfer and it is understood that their seniority will be calculated for

future additional vacation benefits based on actual seniority and additional vacation benefits will be earned in accordance with the contractual vacation scheduled.

. . .

ARTICLE 21. DURATION

This Agreement shall become effective as of **October 15, 1999** and shall continue in effect until **October 14, 2001**, and from year to year thereafter unless the Employer or the Union, by notice in writing not less than sixty (60) days prior to the expiration thereof, shall indicate a desire to modify or terminate the same.

In the event of a notice of modification, such proposed modification shall be submitted at the time of notice. During the term of the negotiations of the proposed modification of the Agreement, this Agreement shall remain in effect.

IN WITNESS WHEREOF, the respective parties have hereunto affixed their respective hands and seals this 27 day of **October, 1999**.

. . .

BACKGROUND

The Company, Nelson Transfer, was created on January 1, 1998, after the purchase of the assets of David Nelson, Inc., which had gone bankrupt. The new company was owned by Rick and Linda Nelson, who had worked for David Nelson, Inc. The two retained two employees of David Nelson, Inc., George Polanin and Joe Ruhl. Local 43 had been the bargaining representative for the employees of David Nelson, Inc., and Nelson Transfer agreed to recognize Local 43 as the bargaining representative for its employees and to keep the expired David Nelson, Inc. collective bargaining agreement in effect until a new agreement could be negotiated.

No new contract was reached in 1998, and the old contract remained in effect. Under that contract, Polanin was entitled to five weeks of vacation, by virtue of his 34 years of service with David Nelson, Inc. Ruhl was entitled to three weeks of vacation.

Negotiations reached an impasse in 1999 over the issues of health insurance and vacation benefits and a 16 week long strike ensued. The strike was resolved in a mediation session with the FMCS on October 15, 1999. Present for the Company were the Nelsons and their labor counsel. The Union was represented by Gerold Jacobs, the Secretary-Treasurer of

Local 43, and by all three Union represented employees – Polanin, Ruhl and Gary Brown. The ultimate agreement set a schedule of vacation benefits ranging from 1 week after 52 weeks of service to 5 weeks after 20 years of service, with the years of service including only time worked for Nelson Transfer. This schedule had the effect of significantly reducing the vacation benefits for Polanin and Ruhl, and the final issue in bargaining was language preserving some of their former entitlement to vacation time. The ultimate agreement on this issue was:

> Effective 10-15-99, paid vacation benefits for George Polanin shall be three (3) weeks per year. For Joe Ruhl, it shall be two (2) weeks per year. These employees are receiving benefits in excess of their seniority with Nelson Transfer and it is understood that their seniority will be calculated for future additional vacation benefits based on actual seniority and additional vacation benefits will be earned in accordance with the contractual vacation scheduled.

This language was drafted by the Union and placed in the contract at the end of the vacation article.

In 2000, Polanin and Ruhl were advised that they had not earned any vacation in 1999. The Company took the position that they did not qualify for vacation because paid vacation is available only to "regular full-time" employees. The Company pointed to that portion of Article 7 of the contract, which defines "full-time:"

> FULL TIME EMPLOYEES. Anyone who works in excess of 30 hours per week will be a full time employee. **This will be figured quarterly, based on your last three (3) months weekly average, for insurance eligibility purposes.**

Because of the strike, neither Polanin nor Ruhl worked 1560 hours between January 1, 1999 and December 31, 2000. Polanin had 1591 hours in pay status, but the Company discounted 128 hours of vacation and 32 hours of holiday, leaving 1431 hours. Ruhl had 1424 hours in pay status, from which the Company deducted 48 hours of vacation and 32 hours of holiday, leaving 1344 hours. The Company's rationale was set forth in a July 10th letter from Linda Nelson to Gerold Jacobs:

. . .

> The first paragraph of Article 10. Vacations, in the Labor Agreement between Nelson Transfer, Inc. and Teamsters Local Union #43 effective 10/15/99, reads: Regular full time warehousemen who have worked at the Company for at least one (1) year will receive one (1) weeks paid vacation per year. The Labor Agreement also defines a Full Time Employee as anyone who works in excess of 30 hours per week. Based on the above, it is my interpretation, as well as

Chuck Maygera's that a full time employee is required to work for the company for at least one (1) year and work 1560 hours per year to qualify for paid vacation the following year, using the employees' start/hire date as the basis for calculating.

We have employees requesting paid vacation that have not met these requirements. You indicated that the reason for the shortage of hours is due to the lengthy strike in 1999. You are also asking that we pay the employees 100% of their vacation pay this year and move on.

I was informed by one employee that they had to strike. How did their choice to strike make it our responsibility to make concessions now? The strike was not beneficial to Nelson Transfer, Inc. and I do not feel it should always be a give give situation.

I also have strong concerns about this issue and the effects they have on Nelson Transfer. Inc. when it comes to setting precedence.

After discussions with both Rick Nelson and Chuck Maygera, I propose a voluntary prorating by Nelson Transfer, Inc. of 2000's vacation pay on a non-precedent basis for the full time employees who participated in the 1999 strike. Vacation pay for 2000 as follows:

Gary Brown 36.50 hrs.
(1296.25 hrs. worked/ 1560 required = 83% x 44.0 hrs.)

George Polanin 120.00 hrs.
(1431.25 hrs. worked/1560 required = 91% x 132.0 hrs.)

Joseph Ruhl 75.75 hrs.
(1344.00 hrs. worked/1560 required 86% x 80.0 hrs.)

. . .

The offer of a pro-ration was not accepted and the grievance was not resolved in the lower steps of the grievance procedure. It was referred to arbitration and a hearing was held on November 17, 2000. At the hearing, in addition to the facts recited above, the following testimony was taken:

Gerold Jacobs testified that he was concerned during the mediation session that Polanin and Ruhl would lose very substantial vacation benefits relative to what they had earned with David Nelson, Inc., and that the Union was seeking to cushion that loss. In the course of mediation, he and his team questioned the mediator about the meaning of the proposed

compromise language and the mediator told them that Polanin would get three weeks of vacation eligibility as of the date of the settlement and Ruhl would get two weeks. The third employee, Brown, would have to wait until he had a full year of service to receive any vacation. There was never any reference to a 1560-hour threshold for vacation benefits during mediation or at any time in negotiations. The topic of eligibility was never discussed, as the negotiations over vacation focused on the length of the available benefit. On cross-examination, Jacobs acknowledged that it was the mediator, not any Company representative, who said the benefits would be available to employees immediately. He stated that his understanding was that the new contract made vacation calculations based upon October 15th, rather than the anniversary of hire, though that subject was not specifically discussed either.

George Polanin testified that he was present during the negotiations and at the mediation session. The mediator told the Union's bargaining team that the Company had agreed to guarantee him three weeks of vacation and Ruhl two weeks of vacation. He questioned the mediator about it, asking him "So October 15, 1999, I get three weeks?" and the mediator told him that was correct. On cross-examination, Polanin said that he had five weeks of vacation from 1998 on the books and had only used 32 hours, leaving a balance of just over four weeks. After the strike, he was allowed to use three weeks of vacation, so he never got to use the remaining 1998 balance. When asked whether the "effective October 15, 1999" language in the contract might have been intended to protect him against losing his prior vacation balance, Polanin expressed skepticism, noting that he had already earned that under the old contract. Polanin stated that he had never been told that vacation benefits were subject to working a minimum number of hours.

Polanin testified that he received all of the paid holidays listed in the contract in 2000 up to the point of the hearing, despite the fact that holidays, like vacation, are available only to full-time employees.

Linda Nelson testified that she had worked for David Nelson, Inc. for about five months as the office manager before the Company went bankrupt. She was not responsible for contract administration, although she had discussed those issues with her husband. She stated that David Nelson, Inc. had the same minimum hours requirement for vacation eligibility as Nelson Transfer, and cited several cases in which employees were denied insurance coverage because they failed to work enough time. She denied that Nelson Transfer had ever agreed to provide vacation benefits without respect to the 1560 minimum hours requirement or to immediately provide vacation benefits to Ruhl or Polanin upon settlement of the contract. The only purpose of the mediation session was to reduce the amount available to Polanin and Ruhl. Nelson did not know whether the 1560 hours requirement had been mentioned to the mediator during negotiations, but she was sure she had mentioned it to Gerold Jacobs.

Nelson stated that vacation entitlements had to be calculated on the basis of anniversary dates and could not be figured using October 15th, since that would not yield a 52-week period for calculation purposes. She opined that the employees had plenty of chances to reach the

1560-hour threshold despite the strike, but that they declined to work available overtime. She also observed that Ruhl limited his own hours by failing to get an unrestricted commercial CDL, thus disqualifying himself from some work opportunities. Turning to Polanin's claim that he had worked more than 1560 hours in 1999, Nelson noted that the contract defined full-time employment in terms of hours worked, not hours paid, and that vacation and holiday hours could not be figured in.

Nelson agreed that she had given Polanin paid holidays in 2000 because he had been a full-time employee the year before, or at least had been considered a full-time employee. She agreed with counsel that she might have waived her right to insist on the minimum hours requirement of holidays in that instance because it was hard to keep a running calculation of hours worked. In general, she said, the Company gave paid holidays to anyone who tried to come to work every day and was more lenient in that regard than with vacations.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that much of the Company's evidence is beside the point. The Company may resent the employees' unwillingness to work weekends and may be critical of some employees' attendance, but that has nothing to do with this grievance. Neither does the practice under the David Nelson, Inc. contract have anything to do with this case. The collective bargaining agreement before the Arbitrator is the contract between Local 43 and Nelson Transfer, and that agreement came into existence on October 15, 1999. It was finalized in a mediation session and in the course of that session, vacation benefits were the last issue on the table. The deal was struck through the mediator and the mediator assured the Union's bargaining team that the benefits promised in the clear language of Article 10 were the benefits they would immediately be entitled to receive.

The Company agreed to a vacation provision that specifically provided three weeks of vacation to George Polanin and two weeks to Joe Ruhl "effective 10-15-99." If the Company wanted to place a limit on this benefit, such as the 1560 hours per year requirement it now claims is applicable, it should have made that clear either across the table or through the mediator. It did not do so and it cannot now claim that the settlement of a 16-week strike was subject to some unstated condition. The Company's position is a transparent effort to penalize employees for going on strike and it should not be permitted.

The 1560-hour threshold was intended to apply to eligibility for insurance benefits and that is the only benefit to which it applies. Even the Company, through its own actions, admits that it does not apply to holidays, even though those are only available to regular full-time

employees. The Company cannot pick and choose among its benefits, doling out those it wishes and denying others on the basis of the definition of a full-time employee.

Even if the Arbitrator were to agree that a 1560-hour threshold applies to vacation benefits for Polanin and Ruhl, the evidence is that Polanin met this requirement. The Company's argument that vacation hours are not counted towards the 1560-hour threshold is illogical and lacks any support outside of the mere assertion that those hours do not count. If those hours are counted, as they must be, Polanin is entitled to his vacation benefits under either party's theory of the case.

The Position of the Company

The Company takes the position that it is not penalizing anyone for striking. Instead, it is merely administering the contract as written. It is the words of the contract that control this case and the Union's claims that a mediator told them they would get more than was promised in writing is irrelevant. The contract distinguishes between the benefits available to full-time employees and less than full-time employees and it sets forth in clear terms what constitutes full-time. An employee is full-time if he or she works 30 hours per week, measured from the anniversary of the date of hire. In the cases of Ruhl and Polanin, that date is January 1, 1998, the date on which the Company came into existence. The contract's reference to vacation benefits being "effective 10-15-99" merely safeguards the employees against the retroactive loss of the higher vacation benefits they previously enjoyed under the old David Nelson contract. It does not somehow redefine their anniversary dates.

The Union cannot escape the clear language tying paid vacation to full-time status, nor can it escape the clear definition of full-time as 1560 hours per year. This minimum threshold is critically important to the Company and the claim that the Company just abandoned it for some reason is simply implausible. The language does not suggest that and the Company's negotiator denies it. The 1560 hours threshold has continued to be applied to insurance benefits and while the Company has been lenient on holiday benefits, there is no evidence that they intended to give full vacation benefits to employees without regard to how much time they worked. The Union's interpretation simply makes no sense at all and the Arbitrator cannot reasonably read the new language as setting a looser standard for vacation eligibility than was used under the old system. The only arguable issue presented in this case is whether Polanin's vacation and holiday hours can be treated as time worked and the Company's exclusion of those hours is a reasonable interpretation of the contract language. Thus, neither grievant is entitled to any remedy and the grievance must be denied in its entirety.

DISCUSSION

There are three issues before the Arbitrator in this case. The first is whether paid vacation is generally limited to "full-time" employees, and what "full-time" means in the context of Article 10. If there is a general limitation, the question is whether that general limitation applies to George Polanin and Joe Ruhl, for whom specific individual vacation benefits were bargained in a mediation session. If the general limitation is applicable to the two men, the issue is whether Polanin's met or exceeded the hours requirement in 1999, and was thus entitled to vacation in 2000.

Is There a General Hours of Work Threshold for Vacation Benefits?

According to the contract, paid vacation benefits are available to regular full-time employees and they vary according to the employee's length of service with the Company. The contract defines a full-time employee as anyone "who works in excess of 30 hours per week." Grievants Ruhl and Polanin had both been full-time employees of David Nelson, Inc. for over a decade before it went out of business and were full-time employees of Nelson Transfer during 1998. Because the parties had agreed to keep the old contract in effect, Polanin was entitled to five weeks of vacation and Ruhl was entitled to three weeks. In 1999, however, the Grievants were on strike for 16 weeks, primarily over the issues of vacation and insurance. As a result of the strike, they were not physically present at work for an average of 30 hours per week in that calendar year (52 weeks x 30 hours = 1560 hours).

The Union asserts that the requirement of 30 hours per week for benefit eligibility is applicable only to insurance and that insurance was the only context in which that requirement was discussed during bargaining. In connection with this, the Union notes that holidays were granted to Polanin in 1999, even though they are supposedly available only to full-time employees.

With regard to the argument that the 30 hours per week language in Article 7 is only applicable to insurance benefits, this may well have been the understanding of the Union's bargaining team, but it is not what the collective bargaining agreement says. The second sentence of the relevant provision does address the manner of calculation for insurance purposes, but the first sentence is a general description of what constitutes a full-time employee:

> FULL TIME EMPLOYEES. Anyone who works in excess of 30 hours per week will be a full time employee. **This will be figured quarterly, based on your last three (3) months weekly average, for insurance eligibility purposes.**

If the only references to full-time status appeared in this definition and in the insurance provisions, the Union's interpretation would make sense. However, the contract makes repeated reference to benefits and perquisites that are available to full-time employees. 1/ The Union's argument that the term "full-time" has meaning only in the insurance provision requires me to interpret the term as being meaningless in the other areas of the contract in which it appears. Parties are presumed to have chosen their words carefully when they negotiate a contract and the principles of interpretation very strongly disfavor any reading that renders language meaningless.

1/ For example, Article 4 – Seniority, Sections C, D and E give full-time employees superior rights to part-time employees in the event of layoff and recall; Article 7 – Work Week, gives full-time drivers the opportunity to have a guaranteed 40-hour work week and provides call-in pay benefits for full-time drivers; Article 8 – Holidays, grants paid holidays to full-time employees; Articles 9 – Insurance and 10 – Vacations, of course make reference to full-time status, and Article 15 – Hired Trucks, prohibits the use of hired trucks unless full-time drivers are already working; and finally, Article 18 – Military Clause, addresses how the seniority of full-time employees is affected by military service.

The Company did pay holidays to Polanin in 2000, and this is inconsistent with its argument that he was not a full-time employee. However, this is not necessarily an admission by the Company that it is wrong on the vacation issue. There are two reasons for this. First, Nelson testified that she waived the full-time requirement because Polanin has generally been full-time and also said that the Company paid holidays for any employee that it believed was trying to come to work every day. A party can knowingly waive the exercise of a right granted by explicit contract language without forfeiting that right in the future.

The second, and more significant response to the holidays argument, is that the contract can reasonably be read to allow an employee to be full-time for some purposes and not for others. The contract makes reference to 30 hours per week as the threshold for full-time status. It does not refer to 1560 hours. The fact that 1560 hours may be the appropriate measure of full-time status for calculating vacation eligibility is solely due to the annualized nature of that benefit. Vacation is either available in a given year or it is not, and the employee's full-time status must therefore be determined by using a year as the period for measurement. Holidays are not pre-paid and are not a benefit that is only available on an annualized basis. While the 30 hours per week language cannot be plausibly read as meaning that an employee can switch back and forth between full-time and part-time status on a weekly basis, neither does it demand 1560 hours in the preceding calendar year before an employee can be treated as full-time for every contractual purpose. Without purporting to define how full-time status is determined for every purpose under the contract, I conclude that the treatment of Polanin as full-time for holiday purposes is not necessarily inconsistent with treating him as less than full-time for vacation purposes.

Finally, the Union's claim that the only discussion of an hours threshold for benefits in negotiations concerned insurance is credible, but not particularly relevant. Obviously, insurance was a principle point of disagreement between these parties and it is not surprising that they focused their attention on that issue, including the negotiation of a three month snapshot period for determining insurance eligibility. However, they also negotiated a contract in which the term "full-time" is specifically defined and is then used to describe the status required for various benefits. Whether they had extensive discussions about this or not, the words used in the contract are clear and they cannot be ignored just because they were not thoroughly explored.

Likewise, Polanin's testimony that he was never aware of an hours threshold for vacation under the David Nelson, Inc. contract is believable but beside the point. Polanin was a full-time employee of David Nelson, Inc., as was Ruhl. Thus, it is not clear why either of them would have had experience one way or the other with the working definition of "full-time" under that contract. Even if they did have some experience with how the term was interpreted under the former company's contract, that experience does not bear on the meaning of this agreement. The David Nelson, Inc. contract was clearly the starting point for these negotiations and provided the context in which the parties made their changes. However, this is not a successor agreement. Nelson Transfer is a new company and it is not bound by the practices arising under the David Nelson, Inc. agreement. The essence of a practice is mutuality and there cannot have been mutuality by the owners of Nelson Transfer in the practices of another company. Thus, Polanin's general testimony that there was no practice of using an hours threshold under the David Nelson contract is not relevant. For the same reason, Linda Nelson's equally general claim that there was such a practice can be given no weight in this proceeding.

The parties have agreed that vacation benefits are available to full-time employees, and the necessary implication of this is that they are not available to less than full-time employees. Full-time is defined as 30 hours per week. Because vacation is an annualized benefit, the threshold set by the contract for that purpose must be annualized, and the mathematically correct extrapolation is 1560 hours per year. Because the language is clear, and because parties are presumed to have intended that the clear language they used in their contract be construed as having meaning, I conclude that there is a minimum hours threshold for vacation eligibility under Article 10, and that that threshold is 1560 hours per year. The question then becomes whether this general threshold was intended to apply to Polanin and Ruhl.

Is the General Hours of Work Threshold Applicable to the Grievants?

While employees in general must work 1560 hours before earning vacation, the Union argues that the specific language addressing the benefits for these two employees, by its express terms, grants them vacation benefits without regard to any qualifying hours and that

this understanding is supported by the statements of the mediator when the language was negotiated. The specific language the Union cites appears at the end of the Vacations article:

> Effective 10-15-99, paid vacation benefits for George Polanin shall be three (3) weeks per year. For Joe Ruhl, it shall be two (2) weeks per year. These employees are receiving benefits in excess of their seniority with Nelson Transfer and it is understood that their seniority will be calculated for future additional vacation benefits based on actual seniority and additional vacation benefits will be earned in accordance with the contractual vacation scheduled.

There are two ways of reading this language, representing the two different positions in this case. The Union's view is that this is an immediate entitlement to these two men and that it trumps the other provisions of Article 10 specifying that only "full-time" employees receive vacation. In support of this, it recites the mediator's assurance than they would receive the benefits as of the day of the settlement. The Company's view is that it modifies only the schedule of benefits, not the pre-conditions for receiving vacation. In support of this, it cites Nelson's testimony that she never promised benefits without regard to how many hours were worked and never agreed to change the use of anniversary dates for calculating eligibility.

The parties' citations of what they told the mediator and what the mediator told them are not particularly probative. Assuming both parties are telling the truth, it appears that they came away from mediation with somewhat different understandings of the vacation language applicable to Polanin and Ruhl. Bargaining history is of value in resolving ambiguity because it sheds light on what the mutual understandings were, or should have been, at the time that the language was negotiated. Here, there were no direct exchanges. The Union cannot say that the mediator relayed their questions to the Company word-for-word, nor can the Company say that the Union was fully apprised of their intentions. In making this observation, I am not suggesting that the mediator misrepresented his discussions in either room. For one thing, the issue here arises from the use of the term "full-time" in describing who receives paid vacations and that term was already agreed and was not under discussion by the time the mediator became involved. He was focused on the benefit levels and would have had no way of knowing that there might be a limitation of the right to use the benefits elsewhere in the contract language. Thus, the mediator would have had no reason to factor that in when briefing the Union on what the disputed paragraph meant for each employee. For another thing, given the Company's view that "full-time" is measured on a calendar year basis for vacations, it could not have said in October of 1999 whether either Polanin or Ruhl would reach the threshold before the end of the year. I am not convinced that either party considered, much less discussed with the mediator, the implication of the "full-time" language when they bargained the benefit levels for Polanin and Ruhl.

Inasmuch as the bargaining history sheds no light on the dispute, the answer must be determined by the language used. In reading the provision as a whole, I am persuaded that the Company's interpretation is the more plausible. This is principlely because the second portion

of the language refers to the benefits in the first two sentences as being "in excess of their seniority" with the Company, and specifies that future increases in benefits will be based upon actual seniority according to the general vacation schedule. This very strongly indicates that the exceptions stated in the first two sentences are exceptions to the vacation schedules themselves and not to the vacation article's general requirements. As for the reference to "Effective October 15, 1999" immediately before the entitlements are stated, this appears to be the result of the parties' prior agreement to honor the David Nelson, Inc. labor contract until a new contract was reached. The effect of this language is to safeguard the two men's vacation accumulations under the old schedule for the period from January 1, 1999 through October 14, 1999. 2/ Again, the fact that the parties expressed an intent to follow the general scheme for additional vacation benefits, including actual seniority, would preclude an interpretation that uses October 15th as a new anniversary date. Using actual seniority, both Polanin and Ruhl would become entitled to additional vacation on January 1, not in mid-October.

2/ Thus, Polanin's vacation for 1999 would have been calculated on the basis of five weeks for 80% of the year (yielding 20 days) and three weeks for 20% of the year (3 days), while Ruhl's would have been 14 days (15 days x 0.8 = 12 days plus 10 days x 0.2 = 2 days).

Buttressing this reading of the contract is the practical effect of adopting the contrary interpretation. Under the Union's view of the language, what the Company agreed to do was to give these two employees a fixed amount of vacation every year, no matter how many hours they did or did not work for the Company. Thus, whether Polanin worked 2000 hours or 20 hours, he would receive three weeks off and 132 hours of vacation pay. No matter how many hours Ruhl worked, he would receive two weeks off and 88 hours of vacation pay. This compares to the old contract, under which they had greater seniority and thus greater entitlements to time off, but were still required to be full-time employees. As a general proposition this would be a very unusual benefit. In the context of a negotiation where the Company took a sixteen week strike over benefits, it is extremely difficult to believe that the Company settled by granting these two employees what would be in important respects an improvement in their right to take vacation.

I have no doubt of the sincerity of the Union's position nor of the Grievants' belief that they secured a guarantee of specified amounts of vacation time as of October 15, 1999. At the same time, I do not view the Company's position as retaliatory. This is a good faith dispute over the meaning of an ambiguous contract provision, generated by the interaction of that ambiguous language with another portion of the vacation article that was not under discussion when the final agreement was reached. Reading the language as a whole and applying the general principles of interpretation, I conclude that the Company's reading of the contract is correct. Thus, the vacation benefits under the contract, including the benefits specifically negotiated for Polanin and Ruhl, are subject to the requirement of full-time status, or 1560

hours of work in the calendar year. As Ruhl did not meet that requirement in 1999, the Company did not violate the contract when it denied his 2000 vacation request. The remaining issue is whether Polanin met the 1560-hour threshold.

Did Polanin Meet the 1560-Hour Threshold in 1999?

George Polanin was paid for 1591 hours in 1999, including work time, vacation and paid holidays. The Company takes the position that he was not entitled to be treated as a full-time employee based on these hours because vacation and holiday hours are excluded from the calculation. Aside from the mere assertion, there is little to support this argument and it leads to anomalous results. The contract speaks in terms of full-time employees being anyone who "works" 30 hours per week. However, there is no distinction drawn elsewhere in the contract between hours worked and hours paid and there is nothing to indicate that the parties used this as a term of art in their negotiations. Nelson conceded in her testimony that full-time distinction is principlely important as a disincentive to employees who fail to report regularly. That purpose is not served by penalizing employees for using the vacation and holiday benefits they have earned, particularly since they earn these benefits by being reliable enough to be considered full-time.

In addition to being inconsistent with the avowed purposes of the full-time definition, I note that there are odd practical results to accepting the Company's interpretation. The vacation benefit under the contract tops out at five weeks. If an employee reaches that level, he or she has 220 hours of vacation pay. At the same time, the contract uses a quarterly measurement of hours to determine full-time status for insurance eligibility. Under the Company's theory, a senior employee averaging 40 hours per week who used his or her vacation in one quarter, even if no holidays fell in that quarter, would fall below full-time status and would lose insurance. Even an employee with three weeks of vacation, such as Polanin, would lose insurance if he used his vacation in a quarter containing one paid holiday. Every quarter contains at least one paid holiday. As a general proposition, under the Company's theory, senior employees who have earned more vacation time would have to work more hours in their non-vacation weeks than would junior employees to maintain their full-time status. These are absurd results in a system designed to reward faithful service.

The exclusion of Polanin's vacation and holiday hours from the calculation of full-time status is inconsistent with the purpose of the full-time hours threshold and leads to absurd results. It is not mandated by the clear language of the contract and there is no evidence that the parties contemplated or intended this result when they bargained the language. The more plausible interpretation of the contract, and the one I accept, is that the 30-hour per week average must be calculated using vacation and holiday hours. Accordingly, I conclude that Polanin was a full-time employee in 1999 and was entitled to vacation benefits. As discussed above, the benefit earned in 1999 is based on the five week benefit provided in the David Nelson, Inc. contract in effect prior to October 15th, and the three week benefit provided in the

Nelson Transfer contract in effect from October 15th through December 31st. The appropriate remedy, therefore, is to treat Polanin as full-time for 2000, based on his 1999 hours and to credit him with 23 days of earned vacation time.

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

AWARD

1. The Company did not violate the collective bargaining agreement when it failed to pay Grievant Joe Ruhl for vacation in calendar year 2000 based on his hours of service in calendar year 1999. His grievance is denied.

2. The Company violated the collective bargaining agreement when it failed to pay Grievant George Polanin for vacation in calendar year 2000 based on his hours of service in calendar year 2000. His grievance is granted.

3. The appropriate remedy is to classify Grievant George Polanin as full-time in calendar year 2000 and credit him with 23 days of paid vacation for that year.

Dated at Racine, Wisconsin, this 8th day of January, 2001.

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator

DN/ans
6176.doc