BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

B & T MAIL SERVICE, INC.

and

THE EMPLOYEES ASSOCIATION OF B & T MAIL SERVICE, INC.

Case 1 No. 58041 A-5802

Appearances:

Attorney Michael Aldana, Quarles & Brady, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Company.

Attorney George Graf, Murphy, Gillick, Wicht and Prachthauser, Attorneys at Law, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, appearing on behalf of the Employees Association.

ARBITRATION AWARD

The above-captioned parties, hereinafter B & T or Company, and the Employees Association or Union, respectively, were signatories to a collective bargaining agreement which provided for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear two grievances. The two grievances were denominated by the parties as Grievance 797 and 857. A hearing, which was not transcribed, was held on November 3, 2000, in Milwaukee, Wisconsin. Afterward, the parties filed briefs, whereupon the record was closed on December 14, 2000. Based on the entire record, the undersigned issues the following Award.

ISSUE(S)

The parties were unable to stipulate to the issue(s) to be decided in this case. The Union framed the issue for both Grievance 797 and 857 as follows:

Did the Company violate the collective bargaining agreement by unilaterally cutting the wages paid to employees for various routes and deducting money from the employees' checks without authorization? If so, what is the appropriate remedy?

The Company framed the issues as follows:

Grievance No. 797

Did the Company breach the 1997-2000 collective bargaining agreement by reducing by one hour the trip run by Terry Feene that it had previously overpaid him? If so, what should be the remedy?

Grievance No. 857

Did the Company violate the 1997-2000 collective bargaining agreement by providing the drivers with unpaid breaks? If so, what should be the remedy?

Having reviewed the record and arguments in this case, the undersigned finds the Company's issue appropriate for purposes of deciding Grievance 857. Consequently, the Company's wording of the issue for Grievance 857 is adopted. With regard to Grievance 797, I have essentially adopted the Company's wording of the issue, but have expanded it to cover more than just Feene. Specifically, I have also included Olejnik in same. Consequently, the issue which will be decided in Grievance 797 is this:

Did the Company violate the 1997-2000 collective bargaining agreement by reducing the time it paid to Feene and Olejnik for their Wausau mail routes? If so, what should be the remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1997-2000 collective bargaining agreement contained the following pertinent provisions:

ARTICLE III - SCOPE

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Section 3.3 Management Rights

The management and conduct of the business of the Company and the direction of its working force are the right of the Company. Without limiting the generality of the foregoing, the Company shall have the right, subject to the terms of this Agreement, to hire and lay off Drivers or any other employees of the Company, and to classify, assign, transfer and promote them, to demote or suspend or otherwise discipline or discharge same and, in general, to maintain discipline, order and efficiency at its facilities and in its business. The Company reserves the right to publish reasonable rules and regulations from time to time as it deems necessary and proper for the conduct of its business so long as the same are not inconsistent with the terms of this Agreement.

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ARTICLE IV - EMPLOYEE COMPENSATION

[Although not reproduced here, this seven-page article spells out how drivers are paid.]

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ARTICLE VII - DISCIPLINE AND DISCHARGE

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Article 7.6 Seniority

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(c) All new permanent U.S. Postal Mail Routes that the Company is awarded or openings shall be posted allowing all Drivers the opportunity to bid on a route. A driver must meet all postal and B & T Mail Service, Inc. qualifications in order to be awarded a route. The qualified senior driver bidding on the route shall get it. If there is a question of being qualified, it will be brought in front of the EA for review. If a driver takes a route, he/she shall stay on that route for a minimum of one year or until the route ends, whichever comes first.

BACKGROUND

B & T Mail Services is a family-owned trucking company headquartered in New Berlin, Wisconsin. It employs approximately 140 full and part-time employees. About half of its business is mail hauling, with the other half being freight hauling. Tom Gutenberger is the Company's president. The Employees Association of B & T Mail Service is the bargaining representative for all drivers employed by B & T. For purposes of this arbitration, the relevant collective bargaining agreement is the parties' 1997 through 2000 contract.

The Company gets its mail hauling work through contracts with the United States Postal Service. It obtains these mail hauling contracts through a bidding process (i.e. it bids on contracts).

The mail route involved in this case is known as the Wausau route. That particular route goes from Milwaukee to Wausau and back to Milwaukee. The Company's contract with the U.S. Postal Service for the Wausau route was awarded effective in July, 1998. The term of that contract was July, 1998 through June, 2002. The Wausau contract calls for B & T to run numerous round trips to and from two Milwaukee post office facilities (namely the Downtown main facility and the Oak Creek Annex) to the main post office in Wausau. The basic duties for a driver assigned to one of these routes on the Wausau contract are this: first, the driver reports to the Company's yard in New Berlin and prepares his truck for the trip. Then, he drives to either the Milwaukee Annex or the Downtown facility, picks up a mail trailer and has it attached to his truck. Then he drives to Wausau, where he drops off the trailer and has a new trailer attached to the truck. Finally, he returns to Milwaukee. The drivers have no duties while at any Post Office facilities, other than ensuring that the trailers are properly attached to their trucks.

The following specifics about the Wausau contract are relevant here. Like other mail hauling contracts, the Wausau contract specified the times that drivers needed to be at the various facilities. It also provided for a specified amount of time between facilities. Under the Wausau contract, the time which the Post Office allows for travel between facilities (and on which it based its contract rate and payments to B & T) is greater than the actual amount of time needed to travel those routes. As an example, in the Wausau contract the amount of time which is allocated for the trip between downtown Milwaukee and Wausau is 3 hours and 50 minutes. In actuality though, that trip usually takes less time than 3 hours and 50 minutes to complete. It generally takes between 3¼ and 3½ hours.

After the Company was awarded the Wausau mail route, Gutenberger announced news of same to bargaining unit drivers in a written posting on May 14, 1998. That posting described the number of routes which would be available for bidding, a chart which specified the amount of time which the Company would pay for those routes and the hourly rate of pay.

The portion of the chart which is pertinent to this case is the part which specified that the Company would pay 11½ hours for Trips 3/4.

This posting was done pursuant to the posting provision of the collective bargaining agreement. That provision, which is found in Article 7.6(c) of the agreement says that the Company must post all new permanent U.S. Postal Mail routes. In order to post for a mail route, the driver must meet all postal and B & T qualifications. The posting provision further specifies that the route is to be awarded to the most senior, qualified driver.

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Mail drivers and freight drivers are paid differently. An overview of their pay follows.

Mail route drivers are paid a flat rate for each trip. This flat rate is determined by taking the amount of time which the Company sets for each trip, and multiplying it by the hourly pay rate which is specified in Article IV of the collective bargaining agreement. For example, if the time which the Company sets for a given route is 10 hours, and the driver's hourly pay rate is \$15 an hour, then the driver is paid a flat rate of \$150 for the trip. The driver is paid this amount even if it takes him less time to complete the trip. Thus, in the example just given, the driver would be paid \$150 for the trip even if it took him, say, $9\frac{1}{2}$ hours to complete the trip. If a driver takes more time than is scheduled to complete a route because of inclement weather, vehicle problems or delays at the postal facilities, he can request additional pay by submitting a written request. This latter situation is not involved in this case.

While mail route drivers are paid a flat rate for each trip, freight route drivers are not. Freight route drivers are paid based on the actual amount of time driven. Thus, freight drivers are paid hourly.

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On April 12, 1999, the Company notified drivers in a written memo that drivers on certain Wausau mail routes were being overpaid by the Company. One of the routes so specified in the memo was Trip 19/20. With regard to Trip 19/20, the memo specified that henceforth, the Company would pay 9½ hours for that route. Prior to that memo, the Company had paid 10 hours for that particular route. The reason the Company reduced the pay for the trip from 10 hours to 9½ hours was because the route changed. Originally, the route included two delivery stops in the Milwaukee area. At some point though, the post office changed the route and eliminated one of the two Milwaukee stops and shortened a layover in Wausau. One effect of these changes was that it took less time for the driver to complete the route. The driver who was driving the route at the time this reduction was implemented was Mike Wolf. This half-hour reduction was implemented in April, 1999. In August, 1999, Wolf complained to the Company in writing about his half-hour time reduction.

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The two grievances which are referenced in the following <u>FACTS</u> section both involve pay disputes. Both grievances claim the Company took time, which translates to money, from the drivers.

FACTS

Grievance 797

On June 16, 1999, the Union filed Grievance 797 on behalf of Terry Fenne. The phrase "add all Wausau driver[s]" was subsequently added. In litigating this grievance, the Union contended that the Company improperly reduced Fenne's pay by one hour per trip and Wally Olejnik's pay by a half-hour per trip.

The facts pertaining to Fenne are as follows. Fenne posted for, and was awarded, a Wausau mail route. Specifically, he was awarded Trip 3/4. This trip originated at B & T's New Berlin yard, then went to the USPS' downtown Milwaukee and annex facilities, then proceeded to Wausau, and finally returned to New Berlin.

Fenne subsequently drove the Milwaukee to Wausau route for over a year. His Tripmaster records (which are taken from a computer in the truck) indicate that his work routine for that trip was as follows. His scheduled start time was 1600 hours (4 p.m.) After he left the New Berlin yard, he would drive to the Milwaukee post office annex. According to the USPS contract, he was to be at the annex by 1700 hours (5 p.m.). He would then drive to Wausau, drop off his trailer, get a new trailer and return to the Milwaukee area. Before reporting to the Milwaukee post office, he would take a break in Wauwatosa so that he was not early to the post office. After leaving the Milwaukee post office at 0205 hours (2:05 a.m.), he would return to the New Berlin yard. He routinely returned to the New Berlin yard around 0230 hours (2:30 a.m.). He would be clocked out by 0245 hours (2:45 a.m.).

The foregoing numbers show that Fenne's start time was 1600 hours (4:00 p.m.) and his end time was usually no later than 0245 hours (2:45 a.m.) The time difference between these two figures is $10\frac{3}{4}$ hours. This figure of $10\frac{3}{4}$ hours includes a half-hour unpaid break. When that half-hour is deducted from the $10\frac{3}{4}$ hour figure, the total time becomes $10\frac{1}{4}$ hours. The Union does not expressly dispute the foregoing numbers.

For over a year, the Company paid Fenne for 11¼ hours each time he drove the Wausau route. It did so because Fenne completed a time card each time he drove the Wausau route which said "Wausau Trips 3 and 4 11¼ hours." Fenne used this figure (11¼) on his time card because it was the one which the Company had specified it would pay for that trip in

the May, 1998 posting. During that one year period, Fenne's Tripmaster records indicated that he was arriving back at the Company's New Berlin yard by 0230 hours (2:30 a.m.).

Sometime in mid-1999, the Company's payroll person, Pete Dickinson, informed Gutenberger that while the Company was paying Fenne 11¼ hours for the Wausau route, it was only taking him 10¼ hours to complete it.

After reviewing the situation, Gutenberger concluded that the Company had overpaid Fenne for Trips 3/4, and was continuing to overpay him by one hour each time he drove the Wausau route. Gutenberger subsequently took the position that the reference on the May 14, 1998 posting which had listed Trips 3/4 as paying 11¼ hours was a "clerical error", and should have instead listed the hours as 10¼, not 11¼.

Gutenberger subsequently directed Dickinson to tell Fenne that he (Fenne) had been overpaid by an hour for each Wausau trip he had made in the last year and that, to remedy same, the Company was going to cut his pay prospectively for the Wausau trip by one hour. For reasons not identified in the record, that never happened. Thus, Dickinson never talked with Fenne about the matter or gave him advance notice that the Company was going to reduce his pay prospectively for the Wausau trip by one hour. After the pay reduction was implemented by the Company, Fenne noticed the change in his paycheck and complained to Gutenberger about it (i.e. the pay reduction). Gutenberger responded that the one-hour pay reduction was warranted because the trip did not take 11¼ hours to run, but rather took 10¼ hours. Gutenberger asserted that Fenne had been mistakenly overpaid by an hour each time he made the trip. Fenne told Gutenberger that he knew the 11¼ figure was a mistake, but argued that he could not afford a pay cut.

On July 15, 1999, Gutenberger sent out a written memo to all drivers which, in pertinent part, notified them that the Company had made a mistake in paying for Trips 3/4. The memo provided thus:

... The Company has also discovered that we have been over paying trips #3/4 on the Wausau Contract. Effective immediately this trip will only pay 101/4 hours (if ran in its entirety).

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The facts pertaining to Olejnik are as follows. Olejnik assumed a Wausau mail route in the summer of 1999. It can be surmised from the record that he posted for it, but it is unclear which route he posted for. Sometimes it was referenced as Trips 1/2, while other times it was referenced Trips 19/20. Additionally, sometimes it was referenced as Mike Wolf's old route, while other times it was referenced as Bob Kasian's old route. The posting for the route

Olejnik assumed is not contained in the record, nor is the time which the Company established for the route (i.e. how much it would pay a driver to drive that route). In any event, the first week Olejnik drove the Wausau route in July, 1999, the Company paid him 11 hours for the trip. Thereafter though, the Company paid him $10\frac{1}{2}$ hours per trip. It is unclear from the record why the Company reduced by a half-hour the time it paid Olejnik for his route.

Grievance 857

On August 27, 1999, the Union filed Grievance 857 on behalf of all drivers. It alleged that the Company forced drivers to take breaks and that "no where in contract or handbook it states mandatory break." In the "Article and Section Claimed Violated" portion of the grievance form, the phrase "785.16 Part B" was listed. That is apparently a reference to United States Department of Labor regulations for the Fair Labor Standards Act. No provision of the parties' collective bargaining agreement was cited as being violated.

While it is not referenced anywhere on the face of the grievance, this grievance involves two matters which are currently part of the Company's operation: one is the Company's on board computer tracking system and the other is a de facto work rule known as the seven minute rule. Each is addressed below.

The Company uses an on board computer tracking system which is known as the Tripmaster System. The Tripmaster tracks the physical location of a truck through satellite tracking, shows the amount of time traveled, the number of miles traveled, and the number of hours on-duty. Whenever a driver stops, the Tripmaster can identify where the driver stopped and the duration of the stop. For example, if a driver stops at a restaurant, the Tripmaster will show the location of the stop and its duration. The reason the Company knows the location of the stop is because the Company has entered the locations of gas stations, restaurants and the like into the Tripmaster program.

The Tripmaster records this information for both mail drivers and freight drivers.

The Company uses this information from the Tripmaster to determine the nature of the driver's stop.

If a stop is for what the Company considers a work-related reason, the driver is paid for the duration of the entire stop. Some of the reasons which the Company considers workrelated are filling the vehicle with fuel, weighing the vehicle, or doing maintenance or repair to same. If a stop is for a reason that the Company considers a non-work related reason though, and is longer than seven minutes, the Company treats it (i.e. the stop) as an unpaid 15-minute break.

The foregoing has come to be known as the seven-minute rule. This rule has never been put in writing, but nonetheless has become a de facto work rule because Company representatives tell drivers when they are hired that they will not be paid for non-work related stops which last longer than seven minutes. The record does not indicate how long this rule has existed, but it was instituted by Gutenberger's father when he was president of the Company (which was ten years ago). Pursuant to this rule, freight drivers who take non-work related stops longer than seven minutes have the stop treated as an unpaid 15-minute break. Thus, in those instances, the Company essentially docks the driver's pay by 15 minutes. This obviously results in the employee being paid less than if they had not been docked.

The seven-minute rule applies only to non-work related stops; it does not apply to work-related stops. Additionally, the seven-minute rule applies only to freight drivers, not mail drivers, because mail drivers are paid a flat rate for each trip while freight drivers are paid hourly.

The record herein does not contain any instance of pay deductions (via the seven-minute rule) which the Union considers improper. Additionally, the record does not contain any specifics such as the number of drivers who were affected by the seven-minute rule, how many times it had occurred and on what routes, the amount of time and/or pay deducted, and what the reasons for the stop were.

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In September, 1999, the above-captioned grievances were appealed to arbitration. An arbitration hearing was subsequently scheduled for November 18, 1999. That hearing was cancelled at the Union's request after the Union filed an unfair labor practice charge against the Company with the National Labor Relations Board (NLRB). The NLRB subsequently deferred the matter to arbitration. After the NLRB took this action, the arbitration of the above-captioned grievances was reactivated.

POSITIONS OF THE PARTIES

Union

The Union contends that both grievances are meritorious and should be sustained. It elaborates as follows.

With regard to Grievance 797, the Union asserts at the outset that the record establishes that the Company reduced Fenne's pay by one hour per trip and Olejnik's pay by ½ hour per trip. Building on that premise, the Union attacks these pay reductions on two fronts: first, the legitimacy of the pay cuts and second, the unilateral nature of the action (i.e. the fact that the Company docked the employee's pay without giving them any forewarning of same.) The Union contends that the Company did not have the right under the collective bargaining agreement or "existing labor law" to make these changes. According to the Union, the only time the Company can change the amount it pays a driver is when there is either a change in the assigned duties or is a verifiable clerical error. It avers that neither occurred here. With regard to the former, it asserts that neither driver's route changed. With regard to the latter, it contends that Gutenberger's claim that he merely corrected a "clerical mistake" in Fenne's route cannot withstand scrutiny. In the Union's view, that claim is "pure nonsense" because the Company knew, through its computer system, every move that Fenne made. Specifically, it knew when he started, when he stopped, when he arrived at various destinations and when he checked out. Finally, the Union calls the arbitrator's attention to the fact that the Company paid Fenne at the figure listed on the posting for over a year (i.e. 1114 hours per trip). The Union argues that the parties have to live with that figure (i.e. 11¹/₄ hours per trip) unless a change is negotiated between the Company and the Union.

With regard to Grievance 857, the Union contends that the Company once again took time (which translates to money) from the drivers. The Union asserts it did so by imposing the seven-minute rule. According to the Union, that rule was a change from what had occurred earlier. Building on that premise, the Union attacks the seven-minute rule on two fronts: first, the legitimacy of the rule and second, how the Company implemented it. With regard to the latter, the Union objects to the Company's unilateral implementation of same.

The Union asks that the arbitrator sustain the two grievances and issue what it calls "an appropriate remedial Order." As the Union sees it, that Order should provide a ruling that the unilateral action taken by the Company violated both the legal obligation to bargain over wage rates (which are a mandatory subject of bargaining) as well as the terms of the collective bargaining agreement itself. The Union also asks that the Company be ordered to make whole any employees who have suffered monetary losses as a result of the Company's actions. Finally, the Union requests that the Company be ordered to maintain the agreed upon rates and hours of pay unless and until the Company negotiates a change with the Union.

Company

The Company contends that it did not violate the collective bargaining agreement by its actions herein. In its view, neither grievance has merit. It elaborates as follows.

With regard to Grievance 797, the Company acknowledges that it reduced Fenne's and Olejnik's pay. The Company asserts that the reason it did so was to correct a mistake and have the pay for the trips they were driving conform with the amount of time it actually took them to drive the trips. It argues that the Union's contention that the Company is essentially stuck with the hours it originally sets for a given route has no basis in the parties' collective bargaining agreement or in real life. The Company contends that the fact that it first announced Trips 3 and 4 would take 11¼ hours is not binding. The Company notes in this regard that the duration of the trips was not bargained with the Union and is not part of the contract.

The Company maintains that in order for a contract violation to be found, some provision of the contract must have been violated. It first calls attention to the fact that the grievance does not cite a contract provision which the Company is alleged to have violated. According to the Company, without any citation to a contract provision allegedly violated, or even some sort of alleged past practice violation, the arbitrator has no basis on which to determine a violation.

Aside from that, the Company asserts that its actions herein were appropriate and within its management rights. In making this argument, it notes that the first sentence of the management rights clause specifically reserves to B & T the right to "conduct. . .the business of the Company and the direction of its working force." That same clause also gives management the right to "maintain. . .order and efficiency and its facilities and in its business." The City avers that the right to set the amount of time a job should take is within B & T's management rights. It notes in this regard that nothing in the collective bargaining agreement addresses how long a given mail route to a certain destination should take or how much the Company has to pay for a certain route. Building on that premise, the Company asserts it can adjust the hours it pays for a specific route (which is what happened here). The Company stresses that after it corrected its mistaken overpayment to Fenne, it was still paying him for the time he worked (i.e. 10¼ hours). The Company maintains that when the Union argues that Fenne should be paid 11¼ hours for his Wausau route, what it is seeking is pay for time he did not work.

The Company argues that its reduction in the amount of hours set for Trips 19/20 was also consistent with B & T's rights to set the amount of time it would pay for a certain job. The Company submits that once it learned that the scope of the trip had been reduced by the post office, and that the route did not take the amount of time originally thought, it had the right to reduce the hours allocated for the trips.

As the Company sees it, what the Union seeks for a remedy in this case is a windfall since the Union wants the arbitrator to pay certain drivers for work they admittedly did not perform. According to the Company, a "clerical error" and a change in the nature of the trips should not be grounds for a windfall to the grievants.

Turning now to Grievance 857, the Company argues it is moot and therefore should be dismissed. In the alternative, the Company contends that the Union failed to point to any contractual provisions which the Company allegedly violated with the seven-minute rule. Finally, assuming that the Union did establish a contract violation, the Company avers that the Union failed to produce any evidence of damages. It notes in this regard that none of the Union's witnesses could state how many drivers were allegedly affected by the "seven minute rule," how many times, on what dates, what the reasons for the breaks were, or even the most fundamental piece of evidence: what the total amount of back pay is that they are seeking.

The Company therefore asks that both grievances be denied and dismissed.

DISCUSSION

Grievance 797

The Company acknowledges that it changed the hours it paid for two of its Wausau mail routes. This "adjustment", as the Company calls it, was not upward, rather it was downward. This "adjustment" therefore reduced the drivers' compensable hours, which in turn, reduced their pay.

At issue here is whether the Company violated the collective bargaining agreement by its actions. The Union contends that it did, while the Company disputes that assertion.

In deciding this contractual dispute, I will first address the contract language. After that discussion is completed, attention will be turned to other arguments raised by the Union.

Inasmuch as the basic subject matter of this case involves pay for mail routes, I think that the logical starting point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with same. That question is answered as follows. A review of the collective bargaining agreement, particularly Article IV, indicates that it does specify what the hourly wage rate is for drivers. Since freight drivers are paid hourly, Article IV conclusively answers the question of how much they (the freight drivers) are paid. Specifically, they are paid the hourly rate listed in Article IV times the actual amount of time driven. The foregoing has been noted simply for comparison purposes because this case does not involve freight driver pay – it involves mail driver pay. Mail route drivers are paid pursuant to a different formula. Their formula is this: the hourly pay rate listed in Article IV is multiplied by the amount of time set for each mail route. Thus, if a driver's hourly pay rate is \$15 an hour, and the time set for his route is 10 hours, then the driver gets paid a flat rate of \$150 for the trip. Obviously, a big part of this formula is the amount of time set for each trip.

The next question is to ask rhetorically whether the parties have negotiated over the amount of time set for each trip. That question is answered in the negative. A review of Article IV indicates it does not contain language specifying how long a given mail route to a certain destination should take or how much the Company has to pay for a certain mail route. This contractual silence means that the parties have not included language in their collective bargaining agreement dealing with how long a given mail route to a certain destination is to take or how much the Company has to pay a driver for driving a certain mail route. That being so, there is nothing in the collective bargaining agreement which dictates the amount of time the Company has to pay to mail drivers for the Wausau routes. As a practical matter, this explains why the Union did not cite a particular contractual provision to support its case.

When a collective bargaining agreement contains no express provision on the subject being addressed (i.e. the situation present here), arbitrators routinely look to the contractual management rights clause, if there is one, to see if it provides any guidance. In accordance with that generally-accepted notion, the undersigned will next look to the contractual management rights clause.

The first sentence of the management rights clause specifically reserves to B & T the right to "conduct. . .the business of the Company and the direction of its working force." That clause also gives management the right to "maintain. . .order and efficiency at its facilities and in its business." This language is certainly broad enough to give management the right to determine the length of time a given job should take. Building on that premise, this language can further be interpreted to give management the right to unilaterally set the amount of time a delivery job should take, and correspondingly the number of hours it will pay to a mail driver for a specific mail route.

Feene's Reduction

The following facts are repeated because they are relevant to the discussion which follows. The Company originally set the time it would pay for Trips 3/4 at 11¼ hours. Feene assumed the route and drove it for over a year. Each time he did so, he was paid the amount of time which the route was posted at, namely 11¼ hours. About a year after he assumed the route, the Company reduced the time it paid for the route. Specifically, it reduced the time by one hour to 10¼ hours. The Company's reason for doing so will be addressed later.

The foregoing facts demonstrate that the Company twice unilaterally set the number of hours for Trips 3/4. The Union does not object to the Company's setting the first figure; it only objects to the second. Thus, the Union cries foul over just the reduction. Their arguments concerning same are addressed below.

The Union's first argument in challenging Feene's reduction is that since the Company originally set the hours for Trips 3/4 at 11¼, it cannot adjust it; essentially, it should be stuck with the hours it originally set. The undersigned could accept the Union's premise if there was a contractual basis for the 11¼ figure. However, there is not. As previously noted, that figure was not bargained with the Union, and thus is not part of the collective bargaining agreement. Instead, it was unilaterally set by the Company. As the Union is well aware, when the Company unilaterally creates something outside the parameters of the collective bargaining agreement, it can generally unilaterally take it away. While there are certainly exceptions to the general principle just noted, none of them are present here. Consequently, the fact that the Company originally set the figure at 11¼ hours does not make it contractually binding.

Next, the Union argues that even if the Company can make a subsequent change in the number of hours set for a mail route, it should only be able to do so when there is a change in the route or a verifiable clerical error. The Union avers that neither occurred here.

I begin my discussion on this point by agreeing with the Union that neither of the foregoing occurred here. First, insofar as the record shows, nothing about Trips 3/4 has changed. It still involves the same number of stops as it did when it was posted. That being so, the route itself has not changed. Second, while the Company characterized the original listing of 11½ hours as a "clerical error", the record evidence does not support that assertion. I am convinced that when the Company originally posted the time it would pay for Trips 3/4, the figure which it intended to put in the posting was 11½. That was, in fact, the figure which was typed in.

That said, I do not agree with the Union that because no change in the route or clerical error was shown, this means that the Company cannot change the number of hours. In my view, there is at least one more instance where the Company can change the number of hours it sets for a route. It is when a mistake is made which the Company subsequently wants to correct. That is what happened here. The Company originally thought it would take a driver 11¼ hours to complete Trips 3/4. It turned out that this estimate was wrong because it actually takes an hour less than that. One way to characterize the foregoing is to say that the figure of 1114 hours was a mistake. Even the driver of the route, Feene, ultimately acknowledged as much to Gutenberger. When the Company makes a mistake in the number of hours it sets for a given mail route, it can either live with the consequences of the mistake or correct it. The Company chose the latter course of action rather than the former. I find that it had the contractual right to make that managerial decision because the management rights Additionally, nothing in the collective bargaining clause implicitly gave it that right. agreement explicitly restricts it from doing so (i.e. correcting what the Company considers a mistake concerning the number of hours it pays for a mail route).

Finally, the Union calls the arbitrator's attention to the way the Company decided to implement Feene's pay reduction, namely 1) unilaterally and 2) without any advance notice to Feene. These points will be addressed in inverse order. With regard to the second point (i.e. the lack of advance notice), the record indicates that Gutenberger told Dickinson to tell Feene that his pay was going to be cut prospectively. However, for unknown reasons, Dickinson dropped the proverbial ball and did not get this news to Feene before the pay cut was implemented. As a result, Feene was blindsided by the pay cut. Obviously, it would have been better if Feene had been given notice of the reduction before it was actually implemented. However, the fact that he did not get advance notice of the reduction does not somehow turn the Company's act into a contract violation. With regard to the first point (i.e. the fact that the Company acted unilaterally), the undersigned believes that point has already been addressed in the previous analysis. It therefore suffices to say here that since the management rights clause gives the Company the right to set the hours for mail routes, and nothing in the collective bargaining agreement restricts this right, the Company had the right to unilaterally implement changes to same.

Olejnik's Reduction

Attention is now turned to the reduction in Olejnik's hours. Olejnik, like Feene, had his time reduced on a Wausau route. Olejnik's time was reduced by a half hour shortly after he assumed the route. It is unclear from the record which route he was driving when his time was reduced. It is also unclear from the record why the Company reduced the time it paid Olejnik for his route. One possible explanation (and the one proffered by the Company) is that Olejnik assumed Wolf's old route which had the time cut because of a route change. Another possible explanation is that, like Feene's situation, the Company simply made a mistake in estimating the amount of time it took to complete the route. Either way though, the outcome herein is the same. The reason is this: I believe that my previous finding concerning Feene's reduction in hours also apply to Olejnik's reduction in hours. While the facts are obviously different in Olejnik's situation than they were in Feene's situation, the contractual analysis is identical. With regard to Feene's reduction, I found that the Company had the right to reduce the time it paid for his mail route because it had retained the right, via the management rights clause, to set the time it pays for mail routes. The same reasoning and outcome applies to Olejnik's reduction.

Consequently, it is held that the Company did not violate the collective bargaining agreement by reducing the time it paid to Feene and Olejnik for their Wausau mail routes.

Grievance 857

In this grievance, the Union contends that the Company once again took time (which translates to money) from the drivers via the seven-minute rule.

The following facts are repeated because they are relevant to the discussion which follows. The seven-minute rule applies only to non-work related stops; it does not apply to work-related stops. Additionally, the seven-minute rule applies only to freight drivers, not mail drivers, because mail drivers are paid a flat rate for each trip while freight drivers are paid hourly. The seven-minute rule has not been reduced to writing. That being so, it was necessary for both side's witnesses to testify about their understanding of the rule and its application. Based on their collective testimony concerning same, the undersigned believes the seven-minute rule can fairly be stated thus: If a freight driver makes a stop for a reason that the Company considers a non-work related reason, and the stop lasts longer than seven minutes, the Company treats it (i.e. the stop) as an unpaid 15-minute break. In those instances, the Company essentially docks the driver's pay by 15 minutes.

In deciding this contractual dispute, I will first address the applicable contract language.

Since the application of the seven-minute rule results in a forced break, I think that the logical starting point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with breaks. That question is answered in the negative. A review of the collective bargaining agreement indicates it does not address the topic of breaks. This contractual silence on same means that the parties have not included language in their present agreement dealing with breaks.

Since the basic subject matter of this grievance involves a work rule, the second point for purposes of discussion is to ask rhetorically whether there is any contract language dealing with the issuance of directives or work rules by management. There is. A review of the collective bargaining agreement indicates that the only contract language dealing with same is found in the contractual management rights clause. It says:

. . . The Company reserves the right to publish reasonable rules and regulations from time to time as it deems necessary and proper for the conduct of its business so long as the same are not inconsistent with the terms of this Agreement.

In my view, this language gives the Company the right to unilaterally establish work rules which it deems necessary for its business so long as they are 1) reasonable and 2) not inconsistent with the collective bargaining agreement.

In this case, the Union does not expressly challenge the reasonableness of the sevenminute rule, or contend that it is inconsistent with a provision of the collective bargaining agreement. Instead, the Union challenges the seven-minute rule on the grounds that it was a change from what had occurred earlier. The problem with this contention is that the record evidence shows otherwise. Gutenberger's uncontradicted testimony on this point was that the seven-minute rule was unilaterally instituted by his father when he was president of the Company (which was ten years ago). At a minimum, this establishes that the seven-minute rule is not new. Additionally, it appears from the record that freight drivers are told of the rule when hired, and that it (the rule) has been applied to them since it was instituted.

If the Union is contending that the Company's application of the seven-minute rule was improper in a certain instance or set of instances, it did not prove same. Consequently, no contract violation has been shown concerning the seven-minute rule. In so finding, it is expressly noted that the management rights clause gives the Company the right to create reasonable work rules, and the seven-minute rule has not been shown to be unreasonable. Additionally, that rule does not conflict with the collective bargaining agreement. As a result, the seven-minute rule passes contractual muster.

It is therefore held that the Company did not violate the collective bargaining agreement by providing the drivers with unpaid breaks.

. . .

Having disposed of the Union's contentions that the Company's actions violated the collective bargaining agreement, the final question is whether the Company's actions violated what the Union called "existing labor law". Arbitrators are usually reluctant to delve into statutory questions unless the parties specifically ask them to do so. In this case, the parties did not stipulate to the contractual issues to be decided, much less expressly ask me to address, and resolve, the question of the Company's compliance with a federal statute. That being so, I have not been empowered by the parties to address the Company's compliance with, as the Union put it, "existing labor law." As a result, I have limited my discussion to the contractual claims, and have not addressed any statutory claims.

In light of the above, it is my

AWARD

Grievance 797

That the Company did not violate the 1997-2000 collective bargaining agreement by reducing the time it paid to Feene and Olejnik for their Wausau mail routes. That grievance is therefore denied.

Grievance 857

That the Company did not violate the 1997-2000 collective bargaining agreement by providing the drivers with unpaid breaks. That grievance is therefore denied.

Dated at Madison, Wisconsin this 12th day of March, 2001.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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