BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

J.W. PETERS AND SONS, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 17
No. 59619
A-5907

Appearances:

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appearing on behalf of the Union.

Mr. Robert P. Frederickson, Senior Consultant, Labor and Employee Relations Employers Association, Inc., 9805 45th Avenue, North, Plymouth, Minnesota 55442, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and the Union are parties to a collective bargaining agreement that provides for the final and binding arbitration of certain disputes. Pursuant to a request of the parties, the Wisconsin Employment Relations Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator to resolve the instant dispute. Hearing in the matter was held on May 16, 2001, in Burlington, Wisconsin. The hearing was not transcribed. The record was closed on June 23, 2001, upon receipt of post-hearing written argument.

ISSUES

The parties were unable to stipulate to a statement of the issue.

The Union frames the issues as follows:

Is the grievance arbitrable?

Did the Company violate the collective bargaining agreement by eliminating three power units from its fleet?

If so, what is the appropriate remedy?

The Employer frames the issues as follows:

Is the removal of leased equipment from the fleet subject to the grievance and arbitration procedure outlined in the Agreement and,

If so, was the decision to return the power units at the end of their one-year lease a violation of the Agreement, and if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

J.W. PETERS AND SONS, INC.

PRESTRESS ROAD DRIVERS AGREEMENT

This Agreement made and entered into as of the June 1, 1999, by and between the undersigned, J.W. PETERS & SONS, INC., of Burlington, Wisconsin, Party of the First Part, hereinafter called the "Employer", and TEAMSTERS LOCAL UNION NO. 43, Racine, Wisconsin, of the International Brotherhood of Teamsters, Party of the Second Part, hereinafter called the "Union".

W I T N E S S E T H

That the parties hereto, for and in consideration of the mutual promises and obligations hereinafter imposed and mutual benefits derived, agree to and with each other as follows:

ARTICLE 1. INTENT AND PURPOSE

In order to prevent strikes and lockouts and to insure a peaceful adjustment and settlement of any and all grievances, disputes and differences which may arise between the parties to this Agreement without stoppage of work both parties have entered into this Agreement.

ARTICLE 2. SCOPE OF OPERATIONS AND RECOGNITION

The Employer recognizes and acknowledges that Teamsters, Chauffeurs & Helpers Local Union No. 43 of I.B. of T, is the exclusive representative of employees employed as road drivers for the prestressed operations and any other operation requested by employer operating out of Racine, Kenosha and Walworth Counties, Wisconsin, except employees employed in the production and maintenance and quarry and pit units of the Company, supervisors as defined in the Act, Guards and all other employees.

ARTICLE 3. UNION SECURITY

. . .

Section 3.

(a) Work Assignments. The Employer hereby assigns all work involved in the operation of the Employer's truck equipment during the operation, loading and to the employees in the bargaining unit here involved. The Employer agrees to respect the jurisdictional rules of the Union and shall not direct or require their employees or persons other than the employees in the bargaining unit here involved, to perform work which is recognized as the work of the employees in said unit. This is not to interfere with bona fide contracts with bona fide unions.

(b) The Employer agrees that he will not enter into any leasing devise or subterfuge of any kind to avoid or evade the terms and conditions of this contract.

. . .

ARTICLE 6. CHANGE IN OPERATIONS

Before the Employer introduces major changes in operations, which might result in loss of employment for regular, full-time employees, the Employer shall meet and review such changes with the Union in an effort to minimize the possible economic hardship involved for all parties.

. . .

ARTICLE 26. UNION ACTIVITIES

An employee, member of the Union, acting in any official capacity whatsoever shall not be discriminated against for his acts as such officers of the Union, nor shall there be any discrimination against any employee because of Union membership or activities.

ARTICLE 31. GRIEVANCE AND ARBITRATION

Section 1. If any differences arise between the Employer and the Union or any employee as to the interpretation, application or alleged violation of the provisions of this Agreement, such differences shall be resolved in accordance with the procedure herein provided.

. . .

Section 7. If the grievance involves a determination of the feasibility of repairing or eliminating power equipment, the list of arbitrators shall consist of a qualified person in the field of truck service and sales.

. . .

ARTICLE 32. SUBCONTRACTING

The Employer may hire additional trucking after all of their power units are fully utilized.

In the event the Employer removes equipment from the fleet, such matters shall not be subject to the grievance procedure.

ARTICLE 33. MAINTENANCE OF STANDARDS

Section 1. The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement.

. . .

ARTICLE 38. MANAGEMENT RIGHTS

The Employer shall have the right to manage the business and direct the work forces; to assign employees to work; to determine the number of employees required; to plan, direct and control operations and production schedules; to control raw materials, semi-manufactured and finished parts which may be incorporated in the products manufactured at the locations determined by the Employer; to introduce new or improved methods, tools, equipment or facilities; and to continue to enforce reasonable rules and regulations; and shall have such other normal and inherent rights of management as are not limited by this Agreement.

The Company retains the right to hire, suspend, discharge, demote, discipline for just cause, transfer and the right to relieve employees from duty because of lack of work provided that in the exercise of these rights the Company will not violate any of the terms of this Agreement.

. . .

ARTICLE 40. DURATION OF AGREEMENT

This Agreement shall be in full force and effect from June 1, **1999** to and including May 31, **2002**, and shall continue in full force and effect from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

> It is further provided that where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to June 1, **2002**, or June 1st of any subsequent contract year, advising that such party desires to continue this Agreement, but also desires to revise or change terms or conditions of such Agreement.
>
> Dated this 5th day of May, **2000**.

BACKGROUND

The parties reached a tentative agreement on their June 1, 1999 to May 31, 2002 collective bargaining agreement in May or June of 1999. The Union ratified this tentative agreement in May or June of 1999. The Union prepared copies of this collective bargaining agreement and submitted a copy to the Employer in early 2000. Representatives of both parties signed this collective bargaining agreement on May 5, 2000.

Effective November 23, 1999, the Employer leased three trucks for a period of twelve months. The lease included the following:

> The equipment described above shall be in the exclusive possession, control and use of the lessee during the term of the lease, and the lessee hereby assumes full responsibility to the public, the shippers, and all regulatory agencies having jurisdiction, for the operation of the above listed vehicle during the entire period of the lease.
>
> The driver of this vehicle is an employee of the lessee, and the lessee thereby assumes responsibility for his wages, unemployment and workmen's compensation insurance, and social security insurance.

Thereafter, the Employer hired Bradley Howe, Raymond Rigney, and Rex Badger as Truck Drivers and assigned each of these individuals to drive a leased truck. In November of 2000, the Employer decided to not renew the leases on the trucks. On or about November 20, 2000, Howe, Rigney and Badger were notified that they would be laid-off effective November 22, 2000.

The Employer prepared the following letter, dated November 22, 2000, for distribution to each of these individuals:

It is my unfortunate duty to advise you that effective today you are being placed in a lay-off status. Due to business conditions we have made the decision not to renew the lease on the truck you have been driving.

Your paycheck accompanies this letter as does your vacation pay that you have qualified for. Your check for this week's work will be available for you after 2:00 PM on Tuesday, November 28, 2000. If this check is not picked up by the close of business it will be placed in the U.S. Mail.

You will be eligible for Unemployment Compensation in accordance with Wisconsin Laws governing that benefit. For your information we will not be "allocating" your vacation pay, thus you should be able to file a claim beginning Sunday November 26, 2000. Our Human Resources Manager can further clarify this matter for you before you leave. The address and phone numbers that you will need for this are in the enclosures with this letter. We have also enclosed information about the Racine Workforce Development Center who can be helpful in your search for new employment.

Though you will maintain recall rights in accordance (sic) the Labor Agreement we do not at this time anticipate any recall in the foreseeable future.

Your health insurance and dental insurance will be continued through December 31, 2000 at the expense of JWPeters. Your portion of the weekly premium has already been deducted from your vacation check. You should receive documents from the Teamsters Health and Welfare Fund relative to continuation of your Health and Dental Insurance under the COBRA law; if this does not happen, you should contact Local #43. You should contact your Union Steward Dan Koldeway relative to any other matters concerning this lay-off.

On behalf of JWPeters, I would like to thank you for your service and wish you well as you seek other employment.

Kraig Hackbarth
Trucking Superintendent

Cc: File
B. Hassey
S. Rieckhoff
D. Koldeway
Local #43

Attached to each letter were documents explaining how to apply for unemployment benefits.

On or about November 28, 2000, a grievance was filed on behalf of Howe, Rigney and Badger. This grievance alleges that the Employer has violated Article 2, 3, 6, 26, 32, 33, 38 and "All Articles and Sections Relevant to this Grievance" because "Bargaining unit work has been subcontracted thereby causing unwarranted layoffs." The remedy requested was "Immediate recall and to be made whole for all losses due to this unwarranted layoff."

On December 11, 2000, representatives of the Union and the Employer met to discuss the grievance. Attendees on behalf of the Employer were Bob Hassey, Brad Schalburg, Scott Rieckhoff, and Kraig Hackbarth. Attendees on behalf of the Union were Dan Koldeway, Rex Badger, and Tim Wagner. On December 20, 2000, Employer representatives signed a written response to the grievance that states, in relevant part:

> RESPONSE:
> Correction Requested: The Union had knowledge of this action on Monday, November 20, 2000 as opposed to the indicated date of Wednesday, November 22, 2000.
>
> Under the terms of Article 32, paragraph 2; the Company may remove equipment from the fleet at any time and such action is not subject to the grievance procedure. Therefore, the remainder to (sic) the Union's arguments are moot.
>
> "ARTICLE 32. SUBCONTRACTING
>
> In the event the Employer removes equipment from the fleet, such matters shall not be subject to the grievance procedure."

The grievance was thereafter submitted to arbitration.

POSITIONS OF THE PARTIES

Union

As the party challenging arbitrability, the Company bears the burden of proving that the current grievance is not arbitrable. Because of the presumption favoring arbitrability, the Company's burden is a heavy one. It is generally recognized that doubts as to arbitrability should be resolved against forfeiture of a grievance, especially when not raised until the final step of the grievance procedure, the arbitration stage. Where there are competing clauses in a contract – one which gives a right to arbitration and one which seemingly takes it away – effect should be given to the clause that provides the right to arbitration.

In light of Article 31, Section 7, Article 32 is not an effective bar to grievance arbitration. Assuming *arguendo* that Article 32 bars arbitration over some fleet reductions, by the Company's own admission Article 32 is inapplicable to this situation. Robert Hassey testified that he interpreted Article 32 as barring arbitration only where the Company determines that its own equipment is too old to repair, or the Company decides to sell its own equipment. Thus, there is no bar to arbitration over eliminating leased equipment.

Regardless of how the arbitrator interprets Article 32, the grievance and arbitration provisions clearly contemplate arbitration over eliminating power equipment, which includes trucks. To find that the grievance is not arbitrable, the arbitrator would have to void Article 31, Section 7.

Article 33, a broad maintenance of standards clause, obligates the Company to maintain "all conditions of employment. . .relating to wages, hours of work, overtime differential and general working conditions" in effect when the parties signed the contract. Removing work from the bargaining unit immediately reduces wages and hours of work and, thus, certainly degrades the general working conditions.

The maintenance of standards clause provides for maintenance of standards in effect when the collective bargaining agreement is signed. No other contract provision contradicts the maintenance of standards clause. No provision gives the Company an explicit right to terminate truck leases and lay off drivers. The management rights clause is silent on subcontracting, thus implicitly confirming that there was no right to subcontract bargaining unit work when the parties signed the Agreement. The lay-off of the three drivers violates the maintenance of standards clause.

The Company made no showing of bad faith by the Union. If the Company was concerned about the length of time the Union was taking to finalize the three collective bargaining agreements, the Company could have lent a hand with the task of editing and printing all three collective bargaining agreements. The Company had no editing, drafting or printing responsibilities, but yet, still took nearly four months to review the finalized Agreement.

Article 6 requires the Company to "meet and review" major changes before it makes such changes. The Company's layoff of the three drivers caused a 30% reduction in the size of the bargaining unit. Assuming *arguendo* that the Company had a right to subcontract the drivers' work, the Company violated the contract by subcontracting without first meeting and conferring with the Union as required by Article 6.

The Company provided no advance notice of its lay-off decision and when the Union contacted the Company to discuss the decision, the Company showed no willingness to discuss alternatives to layoff. The Company simply told the Union that the decision was irrevocable. When the parties did meet to discuss the situation, it was in response to the Union grievance. By meeting with the Union to discuss the grievance, the Company complied with the steps of the grievance procedure, but did not fulfill its obligations under Article 6.

To claim that "meet and review" is not negotiating or bargaining, strips the phrase of its commonsense interpretation. The contractual requirement to meet and review "in an effort to minimize the possible economic hardship involved," demonstrates that the contract requires more than simple notice to the Union.

The detailed Company notes, upon which the Company relies so heavily, make no mention of any offer of alternative employment. Moreover, two of the drivers testified that they received no such offer of alternative employment. The Company's alleged offer of alternative employment to the laid-off drivers is not a substitute for bargaining with the Union. Moreover, the one job the Company vaguely offered was a laborer position that would have involved a significant decrease in income for the driver.

The Arbitrator should sustain the grievance and order the Company to cease and desist from subcontracting the Grievants' work. Additionally, the Company should be ordered to return the Grievants to work with back pay and benefits.

Employer

The second sentence of Article 32 states "In the event the Employer removes equipment from the fleet, such matter shall not be subject to the grievance procedure." The Company testified and the Union confirmed that the Company did in fact remove three leased power units from the fleet when it chose not to renew the leases on those three power units.

The grievance is inappropriate and must be denied on the basis of the plain language of Article 32, in which the Union negotiated away its right to grieve the removal of this equipment. The Union made no claim that it misunderstood the intent of this language. Nor did it offer testimony or proof to support its position that this is a proper matter for the grievance procedure.

Section 7 of Article 31, relied upon by the Union, is extremely limited in its scope and application. Moreover, if it is the Union's contention that this language has any bearing on the matter now before the Arbitrator, it has failed to live up to the language which states, in part, "the list of arbitrators shall consist of a qualified person in the field of truck service and sales." No such stipulation was made or requested by the Union.

Article 31, Section 7, has no bearing on Article 32 which, in its entirety, deals with the hiring of additional trucking and removal of equipment from the fleet. Where two contract clauses bear on the same subject, the more specific should be given preference.

In testimony, Company witnesses denied knowledge of any violation or potential violation of Article 2 of the collective bargaining agreement. The Union failed to challenge this Company position and/or offer proofs of a violation of this Article.

Company witnesses testified that it notified the Union and employees as soon as management made the decision to not renew the leases. The Company testimony further demonstrates that the Company made several attempts to "minimize the economic hardship" called for in Article 6, including offers of other employment at the Company. These offers were not to settle the grievance, but rather, were in keeping with the clear language in Article 6.

The language "meet and review" does not mean negotiate with the Union over the changes. The Management Rights article further clarifies the parties' intentions relative to changes in Company operations. The Company has not violated Article 6.

Company witnesses testified that the Union was informed of the option of alternative employment and rejected that offer. The Company made its offer in good faith, directly to Union representatives of the employees at a meeting especially called for the purpose of discussing this layoff. If, in fact, the employees knew nothing of this offer, it is at the hands of the Union and its employees.

Company testimony denied knowledge of any violation or potential violation of Article 26 of the collective bargaining agreement. The Union has failed to challenge the Company's position and/or offer proof of a violation of this Article.

The first sentence of Article 32 is clear in its language and intent. The Union offered no proof or testimony to contradict Company testimony that all of their power units were in fact fully utilized before, during, and after leasing the three additional units. The Company has always contracted with trucking companies to provide the majority of the hauling of its products to various work sites.

Arbitrators generally recognize that management has the right, if exercised in good faith, to subcontract work to independent contractors (the work thus being done by non-employees of the employer) unless the Agreement specifically restricts this right. The Company has lived up to any restrictions on subcontracting placed on it by the contract.

The effective date shown in the Agreement is June 1, 1999. This is the effective date for each and every Article and section contained in the Agreement. Testimony by the Union and Company witnesses confirms that the delay in signing did not delay the implementation of the contract. The Union's attempt to argue that Article 33 has a different effective date is without merit.

The "status quo" that is required to be maintained under Article 33 must be read consistently with other Articles of the contract, which clearly indicate that changes are permitted during the term of the Agreement. Given the language of Article 32 and 38, it would be a significant stretch of the language to conclude that truck leasings and levels of employment fall within the confines of "wages, hours of work, overtime differentials and general working conditions" controlled by Article 33. The Maintenance of Standard article can not, and should not, override clear and concise language in other Articles of the Agreement.

Even if these arguments are not compelling, the Company has offered proof that the "status quo" was in fact that the trucks were leased for a one-year period, i.e., from November of 1999 through November of 2000. The Company, therefore, did not change the status quo because it did not change the lease.

In testimony, the Company denied knowledge of any violation or potential violation of Article 38. The Union failed to challenge the Company's position and/or offer proofs of a violation of this Article. As the Company testified, it is a basic business decision to temporarily add equipment to meet the needs of its customers. The language in this Article itself should defeat any and all claims of a contract violation relative to this grievance.

As confirmed by the testimony of Company witnesses, the laid-off employees were not made promises or commitments of employment extending beyond the lease period of the truck. The Company has not acted in bad faith.

The Union has failed to satisfy the burden of proof through testimony and/or documentation. The Company did not violate the contract, and the grievance should be denied. The remedy requested by the Union is not appropriate even if the grievance is sustained.

DISCUSSION

Arbitrability

The Employer, contrary to the Union, argues that the issue presented in the grievance is not substantively arbitrable. Prior to deciding whether or not the issue presented in the grievance is substantively arbitrable, the undersigned must first determine what issue is presented in the grievance.

At hearing, the parties were not able to stipulate to a statement of the issue. In its brief, the Union frames the issues as follows:

> Is the grievance arbitrable?
>
> Did the Company violate the collective bargaining agreement by eliminating three power units from its fleet?
>
> If so, what is the appropriate remedy?

In its brief, the Employer frames the issues as follows:

> Is the removal of leased equipment from the fleet subject to the grievance and arbitration procedure outlined in the Agreement and,
>
> If so, was the decision to return the power units at the end of their one-year lease a violation of the Agreement, and if so, what is the appropriate remedy?

The grievance, as filed, addresses the issue of subcontracting and lay-off. It is not evident that this grievance was amended as it was processed through the grievance arbitration procedure. Nonetheless, neither party's statement of the issues directly references subcontracting or lay-off. Rather, each party, in its own fashion, addresses the contractual right of the Employer to reduce its fleet. For reasons that become apparent when one examines the language of the parties' collective bargaining agreement, the Union prefers to call this reduction in the Employer's fleet "an elimination of three power units," while the Employer prefers to call this reduction in the Employer's fleet a "removal of leased equipment."

A review of each party's statement of the issues demonstrates that the parties agree that the leased trucks are "power units" and that these "power units" were part of the Employer's fleet. Giving consideration to these agreements, the undersigned is persuaded that the most appropriate statement of the issues presented and litigated at hearing is the following:

Is the grievance substantively arbitrable?

Did the Employer violate the collective bargaining agreement when, in November of 2000, it reduced the Employer's fleet by three "power units?" If so, what is the appropriate remedy?

In arguing that the matter before the Arbitrator is not substantively arbitrable, the Employer relies upon the second sentence of Article 32, which states as follows:

> In the event the Employer removes equipment from the fleet, such matters shall not be subject to the grievance procedure.

The most reasonable construction of the plain language of this provision is that the Union may not use the contractual grievance procedure to challenge the Employer's decision to remove equipment from the fleet.

As discussed above, in formulating its statement of the issue, each party has recognized that the three leased trucks were part of the Employer's fleet. Moreover, the second sentence of Article 32 does not distinguish equipment based upon whether it is owned, or leased, by the Employer. The undersigned concludes, therefore, that, when the Employer did not renew the lease on the three trucks in November of 2000, the Employer removed equipment from its fleet. Under the plain language of Article 32, such a removal is not subject to the grievance procedure and, thus, is not substantively arbitrable.

The Union argues, however, that Article 32 does not stand alone, but rather, must be construed in conjunction with the language of Article 31, Section 7, which states as follows:

> **Section 7.** If the grievance involves a determination of the feasibility of repairing or eliminating power equipment, the list of arbitrators shall consist of a qualified person in the field of truck service and sales.

The Union further argues that the language of Section 7 demonstrates that the parties contemplated arbitration over the elimination of power equipment; that power equipment includes the leased trucks; and that, therefore, to conclude that the grievance is not arbitrable, would be to void Article 31, Section 7.

It is axiomatic that an Arbitrator should avoid a contract construction that would void another provision of the contract. The plain language of Article 31, Section 7, recognizes that there is a right to grieve an issue that involves "a determination of the feasibility of repairing or eliminating power equipment."

The Union relies upon the testimony of Company President Robert Hassey to argue that Article 32 bars arbitration only where the Company determines that its own equipment is too old to repair or the Company decides to sell its own equipment. The undersigned, however, finds Hassey's testimony with respect to his unilateral interpretation of Article 31, Section 7, and Article 32, to be confusing and contradictory. Neither Hassey's testimony, nor any other record evidence, demonstrates that the parties mutually intended the language of Article 31, Section 7, and the language of Article 32 to be given any meaning other than that reflected in the plain language of the Articles.

The uncontradicted testimony of the Employer's management establishes the following facts. Historically, the Employer has depended upon outside haulers to meet all trucking needs that could not be met by the use of Employer owned trucks. In 1999, the Employer leased three trucks because outside haulers were not available to meet all trucking needs that could not be met by the use of Employer owned trucks. In 2000, the Employer decided to not renew the lease on the three trucks because outside haulers were available to meet all trucking needs that could not be met by the use of Employer owned trucks.

It is evident that the condition of the power equipment, i.e., the three leased trucks, had nothing to do with the decision to eliminate this power equipment from the fleet. Thus, the instant case does not present a "a determination of the feasibility of repairing or eliminating power equipment." Accordingly, as the Employer argues, the language of Article 31, Section 7, is irrelevant.

In summary, when the Employer decided to not renew the lease on three trucks in November of 2000, the Employer removed equipment from its fleet. Under the plain language of Article 32, the Employer's decision to remove this equipment from its fleet is not subject to the grievance procedure and, thus, is not arbitrable.

To be sure, under Article 3, Section 3(b), the Employer has agreed that it "will not enter into any leasing devise or subterfuge of any kind to avoid or evade the terms and conditions of this contract." The record, however, does not demonstrate that the Employer's decisions to lease the three trucks and, then to not renew the lease on the three trucks, were motivated by a desire to avoid or evade the terms and conditions of the parties' labor contract.

Although the Employer's decision to remove the three leased trucks is not subject to the grievance procedure, the Union's grievance is not limited to a challenge to the Employer decision to remove equipment from the fleet. Rather, as discussed above, the grievance challenges the right of the Employer to subcontract bargaining unit work and to layoff the three employees that had been assigned to drive the three leased trucks. These issues are not barred by the language of Article 32 and, thus, are substantively arbitrable.

Merits

In Article 33, Maintenance of Standards, the Employer has agreed "that all conditions of employment in his individual operation relating to wages, hours of work, overtime differentials, and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement." (Emphasis supplied) Thus, contrary to the argument of the Employer, it is the date of the signing of the Agreement, i.e., May 5, 2000, and not the effective date of the Agreement, i.e., June 1, 1999, that gives rise to Article 33 protections.

To be sure, there was an unusually lengthy delay between the ratification of the Agreement, in May or June of 1999, and the signing of the Agreement in May of 2000. It is not apparent, however, that either party objected to this delay prior to the execution of the Agreement. Nor is it apparent that either party sought to circumvent the terms of the Agreement by delaying the signing of the Agreement. Thus, the evidence of the delay does not provide a reasonable basis to ignore the clear language of Article 33 and interpret the term "at the signing of the Agreement" to mean "on the effective date of the Agreement."

As the Union argues, at the time of the signing of the Agreement, the Employer had leased the three trucks and had hired three employees to drive those trucks. As the Union also argues, by removing the three leased trucks and laying-off the three drivers that were hired to drive these leased trucks, the Employer has altered the "wages, hours of work, overtime differentials, and general working conditions" of bargaining unit employees. However, to determine whether or not this alteration is in violation of the "highest standards" required to be maintained by Article 33 one must look to other provisions of the Agreement. The reason being that, as the Employer argues, Article 33 must be construed in a manner that is consistent with the other provisions of the Agreement and may not be construed to deny rights that are guaranteed in the other provisions of the Agreement.

Notwithstanding the Union's argument to the contrary, the Agreement does address the issue of subcontracting. Article 32, which is entitled "Subcontracting," expressly permits the Employer to hire additional trucking after all of its power units are fully utilized.

As is more fully discussed above, under the Article 32 "Subcontracting" language, the Employer's decision to remove the three leased trucks from the fleet is not subject to grievance arbitration. Thus, the "Subcontracting" language of the parties' agreement expressly recognizes that the Employer has an unfettered right remove the three leased trucks from the fleet. As discussed above, Article 33 may not be construed to deny rights that are guaranteed in the other provisions of the Agreement. Thus, the "highest standards" required to be maintained by Article 33 were not violated when the Employer removed the three leased trucks from its fleet.

Once the Employer decided to remove the three leased trucks from its fleet, these trucks were no longer Employer "power units." The Union does not claim and the record does not demonstrate that, following the removal of these three leased trucks, that any remaining Employer "power unit" was not fully utilized. Thus, the Employer's use of "subcontractors" is consistent with its rights under Article 32. As discussed above, Article 33 may not be construed to deny rights that are guaranteed in the other provisions of the Agreement. Accordingly, the "highest standards" required to be maintained by Article 33 were not violated when the Employer subcontracted work after removing the three leased trucks from its fleet.

As discussed above, the record does not demonstrate that, following the removal of the three leased trucks, any remaining Employer "power unit" was not fully utilized. Thus, it must be concluded that the three employees who drove the leased trucks were laid-off due to lack of work.

Article 38 expressly provides the Employer with the right to "relieve employees from duty because of lack of work provided that in the exercise of these rights the Employer will not violate any of the terms of this Agreement." To be sure, the parties' collective bargaining agreement incorporates the following "Letter of Understanding":

LETTER OF UNDERSTANDING
BETWEEN
J.W. PETERS AND SONS, INC.
PRESTRESS DRIVERS
AND
TEAMSTERS LOCAL UNION NO. 43

> It is hereby understood and agreed by J.W. Peters & Sons, Inc., herein called the Employer, and Teamsters Local Union No. 43, herein called the Union that the following provisions shall be in full force and effect between the parties as a Letter of Understanding to the contract know (sic) as the J.W. Peters & Sons, Inc. Prestress Road Drivers' Agreement 1999-2002, to which the Employer and the Union are signatory parties.
>
> It is agreed that all employees on the seniority list at this time shall remain on the seniority list. The present seniority list shall be eliminated through retirement, quits, discharges or attrition.

As the testimony of Union Business Agent Wagner confirms, the seniority list referenced in this "Letter of Understanding" refers to the list that was in existence on June 1, 1999, the effective date of the agreement. Thus, any protections against lay-off afforded by this "Letter

of Understanding" are not applicable to the three Grievants because they were hired months after June 1, 1999.

To be sure, there was no lack of work in the conventional sense because the Employer continued to employ outside haulers to perform work that the laid-off bargaining unit members were capable of performing. However, as is recognized in Article 32, the bargaining unit work that is protected in this contract is the work that can be performed by the use of the Employer's fleet. Inasmuch as there was no work that could be performed by the laid-off employees by the use of the Employer's fleet, the Employer's lay-off of the three employees did not "violate any of the terms of this Agreement."

Notwithstanding the Union's argument to the contrary, the lay-off of the three employees was consistent with Employer rights that are guaranteed by the contract. As discussed above, Article 33 may not be construed to deny rights that are guaranteed in the other provisions of the Agreement. Accordingly, the "highest standards" required to be maintained by Article 33 were not violated by the lay-off of the three employees.

Article 6, Change in Operations, states as follows:

> Before the Employer introduces major changes in operations, which might result in loss of employment for regular, full-time employees, the Employer shall meet and review such changes with the Union in an effort to minimize the possible economic hardship involved for all parties.

As the Employer argues, the requirement that "the Employer shall meet and review such changes with the Union" is not a requirement to negotiate with the Union, nor is it a requirement to obtain any Union agreement. It is, however, a requirement to meet with the Union to explain "major changes in operations, which might result in loss of employment for regular, full-time employees" prior to introducing the change.

One effect of the Employer's decision to remove the three leased trucks from the fleet was to lay-off one-third of the Employer's drivers. Thus, the removal of the three leased trucks from the fleet was a "major change" in operations, which might result in loss of employment for regular, full-time employees. Accordingly, as the Union argues, the Employer had an Article 6 duty to meet and review this "major change in operations" with the Union in an effort to minimize the possible economic hardship involved for all parties prior to introducing the change.

To be sure, prior to the Grievants' lay-off the Employer provided termination letters in which the Employer offered to not contest certain unemployment benefits and to pay certain vacation or holiday benefits. While the letters may have been an Employer attempt to

minimize economic hardship, they do not constitute a meeting with the Union. Similarly, a discussion between Employer representatives and a laid-off employee regarding the possibility of work in the yard does not constitute a meeting with the Union.

As the Union argues, by meeting with the Union, after the fact and in response to the grievance, the Employer has not complied with the requirements of Article 6. Thus, Article 6 would be violated, regardless of whether or not the Employer made offers of alternative employment during this grievance meeting,

In summary, it is evident that the Union received notice of the impending lay-offs a few days before the effective date of the lay-offs. It is not evident, however, that the Employer met with the Union to review the "major change in operations", i.e., the removal of the three leased trucks from the fleet, prior to introducing this major change. Accordingly, the Employer has violated Article 6.

Conclusion

In conclusion, the grievance as filed, alleges that the Employer has violated Articles 2, 3, 26, 32, 33, and 38. As the Employer argues, not all of these alleged violations were addressed in the Union's brief. The Arbitrator considers the allegations that have not been addressed in the Union's brief to be abandoned by the Union. Accordingly, the Arbitrator has given consideration only to those alleged contract violations that have been addressed in the Union's brief.

For the reasons discussed above, of the contract violations addressed in the Union's brief, the Arbitrator has found only a violation of Article 6. The Union requests, as a remedy, that the Arbitrator order the Employer to cease and desist from subcontracting the work of the three Grievants and to order the Employer to return the three Grievants to work with back pay and benefits.

Article 6 imposes a procedural duty upon the Employer, i.e., to meet and review "major changes in operations" prior introducing the changes in operations. Article 6, however, does not provide a penalty for a failure to meet this procedural duty.

Absent language demonstrating that the parties intended a violation of the Article 6 procedural duty to forever bar the Employer from implementing a substantive right, i.e., the introduction of "major changes in operations," the Arbitrator does not consider such a bar to be an appropriate remedy. Inasmuch as the remedy requested by the Union essentially forever bars the Employer from introducing the "major change in operations", i.e., the removal of the three leased trucks from its fleet, the remedy requested by the Union is not an appropriate remedy for a violation of Article 6.

Under other circumstances, it would be appropriate to remedy a violation of Article 6 by requiring the Employer to cease and desist from implementing "major changes in operations" until it complies with the provisions of Article 6. However, in this circumstance, the "major change in operations" was the Employer's decision to remove the three leased trucks from the fleet. As discussed above, this decision is not subject to the grievance procedure. Thus, the Arbitrator is without authority to delay or block the implementation of the Employer's decision to remove the three leased trucks from the fleet. Accordingly, in the circumstances of this case, it would not be appropriate to order the Employer to cease and desist from implementing the "major changes in operations" until it complies with the provisions of Article 6.

In summary, the Arbitrator is without authority to order the remedy requested by the Union. Nor is the Arbitrator otherwise able to effectively remedy the contract violation of the Employer.

Based upon the foregoing, and the record as a whole, the undersigned issues the following

AWARD

1. The grievance is substantively arbitrable.

2. The Employer violated Article 6 of the collective bargaining agreement when, in November of 2000, it reduced the Employer's fleet by three "power units" prior to meeting with the Union to review this change in operations.

3. There is no remedy for the Employer's violation of Article 6.

Dated at Madison, Wisconsin this 19th day of October, 2001.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

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