

**IN THE MATTER OF ARBITRATION
BETWEEN**

**Associated Hotels Duluth, Inc. d/b/a
Radisson Hotel**

Employer,

and

**Chicago and Midwest Regional Joint
Board, Workers United, Local No. 99**

Union.

**OPINION AND AWARD
(Shift Preference)**

FMCS Case No. 100714-58285-3

December 9, 2010

**A. Ray McCoy
Arbitrator**

Appearances

For the Employer

Mr. Joseph J. Roby, Jr.
Attorney
Johnson, Killen & Seiler, P.A.
800 Wells Fargo Center
230 West Superior Street, Suite 800
Duluth, MN 55802

For the Union

Mr. Ronald M. Willis, Esq.
Dowd, Bloch & Bennett
8 South Michigan Avenue
Suite 1900
Chicago, Illinois 60603

Jurisdiction

The Parties agreed to consolidate several grievances and submit them to the arbitrator as a class action on behalf of all servers represented by the Union. The Parties processed the individual and class action grievances through all relevant steps of their grievance procedures. The Parties notified the arbitrator of his selection by letter dated July 29, 2010 and selected October 5, 2010 for the hearing of this matter. The Parties agreed the matter was properly before the arbitrator for resolution. The Parties were given a full and fair opportunity to present their respective cases including the examination of witnesses and introduction of documents in support of their positions. At the close of the hearing, the Parties elected to submit post-hearing briefs. The briefs were sent to the arbitrator for exchange as agreed on November 8, 2010. The record was closed at the time. The Parties defined the scope of the arbitrator's authority as follows:

“Provided the employee and Union have complied with the time limits set forth in this Article, the employee's grievance shall be referred to the selected arbitrator for disposition and the disposition shall be binding on the Union, employee and Employer. The arbitrator shall not have the power to add to, ignore or modify any of the terms or conditions of this Agreement. His/her decision shall not go beyond what is necessary to interpret and apply the terms of this Agreement to the specific grievance at issue. The arbitrator shall not substitute his/her judgment for that of the parties in the exercise of rights granted or retained by this Agreement. The award of the arbitrator shall be made within thirty (30) days following the close of the hearing.” (Collective Bargaining Agreement between Associated Hotels Duluth, Inc. d/b/a/ Radisson Hotel and Chicago & Midwest Regional Joint Board Workers United Local Union #99, May 1, 2010 to April 30, 2013, Article 15.2(B); hereinafter “Agreement”)

Issue

The Employer submitted the following issues for determination: (1) Does the Union bear the burden of proof? (2) Did the Union carry its burden of proving that the collective bargaining agreement grants servers the unconditional right to seniority-based shift preference scheduling? (3) Did the Union carry its burden of proving that despite those “needs of the business,” the Hotel (Employer) violated the collective bargaining agreement by the way it scheduled server

shifts? The Union described the issue as follows: Whether the Employer has met its burden of demonstrating there is a direct nexus that makes scheduling by seniority inconsistent with business needs.

Relevant Contractual Provisions

ARTICLE 4

MANAGEMENT RIGHTS

- 4.1. The Employer and the Union specifically agree that Management shall have the right to direct the work force and to determine the policies and methods of operating its hotel, except as expressly limited by the specific provisions of this Agreement. Such management rights and responsibilities shall include, but not be limited to, the following: the right to select the employees it will hire; the right to establish or revise schedules; to determine the size and composition of its working force; to determine the number and type of equipment, material, products and supplies to be used or operated; to discipline or discharge employees for just cause; to maintain efficiency of employees; to determine assignments of work; to discontinue all or any part of its business operations; to expand, reduce alter, combine, or transfer, assign, or cease any job, department or operations, and to otherwise generally manage the hotel, except as expressly restricted by the provisions of this Agreement.
- 4.2. The Union agrees to uphold the rules and regulations of the Employer in regard to punctual and steady attendance; the performance of work in an efficient and economical manner, the employees' conduct on the job; and all other reasonable rules and regulations established by the Employer which are not in conflict with this Agreement. The Union agrees to cooperate with the Employer in maintaining, safeguarding and conserving the equipment, supplies, materials, vehicles, and machinery, buildings, and other property used by employees in connection with their work assignments.

ARTICLE 9

HOURS OF WORK, OVERTIME & PREMIUM PAY

- 9.10 Work Schedules. Work schedules for all departments except Banquet will be posted by 5:00 PM ON Thursday prior to the scheduled work week beginning the following Sunday. The Banquet Department schedule will be posted by 2:00 p.m. Any challenges regarding seniority must be made within 48 hours of the work schedule posting or it will be assumed the schedule is acceptable for seniority and/or bumping. Employees will not change their assigned schedule without approval of the department head/manager. Changes can be made to the schedule if satisfactory to the Employer and the employee.

Any changes made will be done based on classification seniority and as much advance notice as possible will be given to the affected employee(s).

ARTICLE 10
SENIORITY

- 10.2 During layoffs or a reduction in hours or shifts, the employee with the least seniority in the job classification in the department affected shall be laid-off or reduced in hours or shifts first, provided more senior employees in the classification are available and willing to work such hours and shifts. When the working force is again increased , employees on layoff or reduced in hours or shifts shall be recalled or increased in hours or shifts in the order of their job classification seniority, unless circumstances have occurred during the layoff which make them disqualified. Nothing shall guarantee employees who are recalled or having their hours increased that they shall be returned to their former shift or days if those shifts or days have been filled by more senior employees. Ability to perform the work available shall be a determining factor in the following the principle that the last employee laid-off will be the first employee rehired.
- 10.5 Application of Seniority. The Employer and Union agree to recognize seniority in the following areas:
- A. Layoffs and recall.
 - B. Scheduling and vacation time.
 - C. It is understood that an employee's classification seniority shall be given reasonable consideration with respect to shift preference and day off preference as long as it is consistent with the needs of the business. Employees by classification seniority shall be entitled to any available hours up to and inclusive of forty (40) hours per week provided they have not previously declined those available hours and are qualified to perform the work available. If an employee has previously declined available work they must notify the Employer in writing if they thereafter are available to reestablish their rights to said hours. It is expressly understood that the needs of the business are paramount and any conflicts in availability are secondary thereto unless specified written exception has been granted by Management.
 - D. Offering of overtime and requiring in reverse order.
 - E. Where practical and consistent with the needs of the business, regularly scheduled hours within the bargaining unit will be offered to employees based upon their classification seniority before such hours are offered to any casual, intermittent or temporary employees.
 - F. Preferential Rooms/Stations/Floors: To the extent it is practical, room attendants shall be assigned to clean on the same floor or floors to eliminate as much traveling as possible.

Where practical and consistent with the needs of the business, the Employer agrees to make a good faith effort to offer hours to bargaining unit employees based upon their classification seniority before calling in casual, intermittent or temporary employees.

Findings of Fact

The Employer is Associated Hotels Duluth, Inc. d/b/a the Radisson Hotel – Duluth. (Hereafter “Employer” or “Hotel”) The Hotel is located in downtown Duluth. The 16-floor Hotel has a 100 seat rotating restaurant and lounge on its top floor, called JJ Astor, with impressive views of the Duluth waterfront. The Hotel employs the usual array of workers such as bartenders, cooks, dishwashers, servers etc. The Chicago & Midwest Regional Joint Board Workers United Local Union #99 represents the servers. The Agreement between the Hotel and the Union has been in place since the early 70’s. The most recent Agreement is effective from May1, 2010 through April 30, 2014.

The JJ Astor was formerly known as The Top of the Harbor restaurant. The Employer decided that after 40 years of operation as the Top of the Harbor, the restaurant had lost its appeal and business had declined significantly as a result. The Employer concluded that something had to be done because The Top of the Harbor was losing market share to competitors which also represented a decline in lodging occupancy. The Employer first made drastic cuts in the operating hours of The Top of the Harbor, then reduced hours of operation and eliminated lunch offerings a couple of days per week. The cutbacks forced layoffs. Finally, the Employer decided that The Top of the Harbor was no longer viable and closed the restaurant on March 22, 2010. The Employer retained the Puccini Group, a restaurant consulting firm to assist it with developing a new brand and concept. The Puccini Group recommended renaming, re-branding, and remodeling the restaurant with the goal of offering a more upscale dining experience. The Puccini Group study and recommendations cost the Employer approximately \$35,000. The Employer decided to proceed with the Puccini Group’s recommendation.

On June 11, 2010, the Employer reopened the restaurant as JJ Astor. The creation of JJ Astor cost the Employer hundreds of thousands of dollars in structural changes, new décor, new china, tables, chairs as well as new employee uniforms. The Employer hired a professional chef, developed a new menu, expanded and upgraded its wine and beer offerings and implemented an

on-line reservation system. The Employer provided training to all of its servers to help them understand and implement the new branding concept, menu and approach to selling. Because the new brand was designed to be an upscale dining experience, the Employer trained servers to understand and describe food preparation to customers, make recommendations for combinations of food and drink and basically to encourage customers to spend more than they intended or to “upsell.” All servers passed the training and were awarded a certificate indicating passage that could be used to demonstrate their skill level if they sought employment at other restaurants. The Puccini Group also provided training for the servers. During that training, servers worked with actual dishes, learned how to open a bottle of wine at the table and present selection ideas to customers. All the servers who went through the training were evaluated and tested. Two servers did not pass but were retested and eventually passed.

Once the servers were trained to present the new concept and brand the Employer was ready to begin shift scheduling. The instant conflict resulted from the manner in which the Employer decided to schedule shifts given the new brand and concept for its JJ Astor restaurant as compared to the manner in which it scheduled shifts when the restaurant was known as The Top of the Harbor. When the restaurant operated under the name The Top of the Harbor the Employer scheduled shifts by first posting an “availability sheet” twice each year. Servers completed the availability sheet by listing the shifts for which they were available to work. In other words, servers indicated their shift preferences and days off preferences on the availability sheet. The Employer then scheduled shifts. In doing so, the Employer assigned shifts based on the server’s seniority classification. In other words, the more senior servers would get their preferred shifts with junior servers having to take whatever shifts were left.

Following the re-branding and reopening of the restaurant as JJ Astor, the Employer decided that scheduling should be done somewhat differently. The Employer’s primary reason for wanting to schedule differently was to secure the most talented servers for the dinner shift. The dinner shift was the busiest shift and the most lucrative. The amount of money spent by customers on the dinner shift was obviously greater than expenditures on either the breakfast or lunch shifts. Because the Employer was committed to recouping as much of the cost of the re-branding and remodeling as possible and as quickly as possible, it embarked on a scheduling

process that while similar to the previous one differed in one significant way. The most senior employees were no longer necessarily awarded their shift preference in deference to their seniority classification. Now, the Employer determined that its “business needs” required it to schedule according to the ability of the server to meet its requirement of upselling. In other words, the Employer asked “which server could, at least on paper, provide the best customer service for the shifts in question in terms of customer satisfaction, selling skills, and increased revenue.” The Employer also determined that it needed to schedule differently in order to evaluate how servers performed on each shift. The Employer determined that it needed to assign all servers to a breakfast, lunch and dinner shift to see how they performed on each shift regardless of their seniority or preference.

In short, the Employer determined that its business needs were to evaluate the servers’ performance on the job in order to identify the best among them. Once identified, the Employer’s intent was to assign its best servers to the dinner shift in order to maximize revenues. The Employer made clear that its goal was to track server performance by way of customer surveys, sales receipts and “shadowing.” The new scheduling process resulted in some junior servers being assigned to the dinner shift even though senior servers were available and preferred that shift.

The Union filed grievances on behalf of three servers and a fourth grievance representing a class comprised of all servers including the three named in the individual grievances. The grievances are all aimed at getting the Employer to revert to its pre-JJ Astor practice of giving deference to seniority in shift scheduling and days off. The Employer denied the grievances on the grounds that the Agreement allows it to schedule on a basis other than seniority-based preference when the needs of the business require it to do so. The Parties processed the grievances through the relevant steps and stipulated that the matter is properly before the arbitrator for resolution.

Positions of the Parties

Employer's Position

1. An important management right is at stake. The Employer bargained for and obtained language confirming its management right to schedule server shifts based on “the needs of the business,” after giving reasonable consideration to seniority. The Employer lawfully invoked that right based on its bona fide business judgment regarding “the needs of the business.”
2. The Union insists that seniority always prevails. As important as seniority is, it is not a universal preemptive employee right that exists in the abstract, apart from the labor contract. The servers’ seniority rights exist only to the extent that the Agreement says they exist.
3. Under arbitral law, in contract interpretation cases the employee bears the burden of proof. This case is a contract interpretation case. Therefore, the Union bears the burden of proof. The Union must prove that servers have an unconditional right to seniority-based shift preference scheduling. The Union must also prove the Employer violated the Agreement as interpreted.
4. Nothing in the Agreement supports the Union’s contention that the servers have the unconditional right to shifts of their preference, based on seniority. The Agreement gives every express and implied indication that there is no such thing as an unconditional right to seniority-based shift scheduling. The Agreement shows that shift scheduling is a management right based on the “needs of the business” with seniority entitled to “reasonable consideration.” All contract and operational rights belong to management, unless a specific right is contracted away in the Agreement.
5. The management rights clause of the Agreement confirms several specific management rights such as the right to establish or revise schedules, to determine assignments of work and to expand, reduce, alter, and assign any job. The right to establish and revise schedules and the right to determine server work and assignments, include the right to determine which server will work each shift.

6. Because the management rights clause confirms the Employer's right to schedule the servers' shifts as it did, the question becomes: Did the Employer contract away this management right somewhere else in the Agreement? The answer is no. The Agreement confirms the management right to schedule servers' shifts. The on-point language ranks seniority-based conflicts in availability as secondary to "the needs of the business," which are "paramount."
7. The Union's binding practice argument is legally irrelevant and factually unsupportable.
8. Arbitral law requires strong proof of a practice in order to make it binding. Declaring a practice to be binding is the equivalent of grafting a new sentence or paragraph onto the labor contract, even though it was not agreed to, or even discussed at the bargaining table. For that reason, the practice, to be binding, must be shown to be unequivocal, clearly enunciated and acted upon over a reasonable period of time. Additionally, the practice must be the product of "mutuality," meaning that circumstances assure that the practice has been understood and accepted by both.
9. The Employer did, for the most part, follow a practice of scheduling server shifts according to the servers' seniority-based preferences prior to the change to JJ Astor. But, a practice and a binding practice are two different things. There are five reasons why the prior practice is not now, if it ever was, a binding practice.
 - a. First, evidence of a practice can be used only to "interpret ambiguous contract language" or to fill a "gap" where the contract is silent on the subject. But, where the Agreement is not ambiguous or silent, the plain meaning principle of contract interpretation will refuse to consider evidence of a past practice.
 - b. Second, the "needs of the business" exception to strict seniority-based shift scheduling, has been in the Agreement, unchanged, for at least 16 years. If a right is explicitly provided for in the Agreement, the nonexercise of that right does not amount to a "negative past practice." Therefore, even if the Employer had never exercised its right to put the needs of the business ahead of the seniority-based shift preference of servers, the right to do so was not forfeited. The Employer maintained the right to police the Agreement and to exercise the clause at any

point.

- c. Third, practices that confer “a ‘benefit’ of peculiar personal value to the employees” are more likely to be construed as binding practices. But, practices involving “methods of operation or direction of the work force” are less likely to be construed as binding practices. Here, deciding which server should work each shift is a decision involving the authority and discretion of management to control methods of operation and direct the workforce.
 - d. Even assuming the Union proved a binding practice existed before the rebranding of the restaurant and the changes to its operating concept, the Union failed to prove the applicability of the binding practice after the restaurant reopened. Binding practices don’t last forever. Working at The Top of the Harbor required only basic server knowledge and skills. JJ Astor, on the other hand, requires new and elevated knowledge and skills. So many operational changes occurred that whatever was the basis for the practice of seniority-based shift preference scheduling no longer supports the practice.
 - e. Fifth, the Union’s industry practice argument is legally irrelevant. As a matter of law, what other employers and other bargaining units agree to do, either expressly or impliedly, is legally irrelevant. The Union attempted to show an industry practice with respect to seniority-based shift scheduling by pointing to only two other Employers. The Union did not introduce a collective bargaining agreement for the two Employers it used to try and demonstrate an industry practice. There is no way to evaluate the claim of the Union that an industry practice existed or exists. One of the Employers is no longer in business and the other is a vastly different operation than the JJ Astor. Therefore, the needs of the businesses differ.
10. The Employer underwent major changes to its physical plant, menu, beverage selection and ways of doing business. The Hotel ascertained and addressed how those major changes affected “the needs of the business.” The Union did not carry its burden of proving that despite those “needs of the business,” the Hotel violated the Agreement by the way it scheduled server shifts. The Employer, not the Union has the right and

the responsibility to ascertain and address the “needs of the business,” consistent with the Agreement. Whenever an employer makes a bona fide business judgment about the technicalities and particularities of its business needs, that judgment is entitled to considerable latitude. The Employer’s bona fide business judgment about the “needs of the business” and how to address them is the only judgment that matters for purpose of this case, as long as that judgment is consistent with the Agreement.

11. The needs of the business justified the Employer’s exercise of its management right to schedule server shifts as it did without violating the Agreement.
12. The re-branding of the restaurant from The Top of the Harbor to JJ Astor, and the new operating concept that came with it, made significant changes to the product offered to the customer and, therefore, to the servers’ knowledge and skills. Too much time has been spent, and too much money has been invested, to give each shift anything less than the very best effort by all concerned. It is no exaggeration to say that the success of the re-branding of the restaurant, and the new operating concept that came with it, rests on the shoulders of the servers. This reality is a crucial “need of the business” that the Employer has every right to recognize and address by the way in which servers are evaluated and scheduled.
13. The Employer gave “reasonable consideration” to the servers’ seniority-based preferences when scheduling server shifts. Bargaining unit servers, taken as a whole, have not been disadvantaged. In compliance with Article 10.5(C) of the Agreement, the Employer has made sure that senior servers are given “any available hours up to and inclusive of forty (4) hours per week provided they have not previously declined those hours.
14. The remodeling and re-branding process was far different and should be distinguished from prior redecorating projects. This year, the project involved not only decorating, but also the hiring of a nationally renowned restaurant expert, the Puccini Group, the hiring of a professional culinary chef, as well as a structural change to the facility, new furniture, new fixtures, new equipment, new table settings, new uniforms, new and expanded menus, new and expanded beverage selection, new ways of serving the

customer and extensive server training. This year, “the needs of the business” changed, including changes in how servers do their jobs, given the new menu and beverage selection.

15. The Arbitrator must deny the Grievance.

Union’s Position

1. Article 10.5(C) of the collective bargaining agreement requires the Employer to give preference according to seniority in scheduling unless giving more senior employees preference in scheduling is inconsistent with the needs of the business, the only exception to seniority.
2. The record does not support the Employer’s claim that the “paramount needs” of the business require it to no longer give preference to more senior servers in establishing schedules. The Employer cannot demonstrate that scheduling senior employees is inconsistent with business needs or that it is necessary to schedule a junior server to the detriment of a senior server when both are available to work.
3. The facts do not support allowing the Employer to deviate from its practice as well as industry practice for over nineteen years. That practice is characterized by granting preference in schedules based upon seniority, in essence scheduling available shifts based upon employee preference in order of seniority. The Employer’s practice has been to deviate from granting preference in order of seniority only in individual cases where it could demonstrate that doing so would be inconsistent with demonstrable, objective business needs. For example, on a holiday or on busy weekends all employees may be needed to work regardless of their seniority and preferences.
4. The business need exception has been a limited exception and has never been understood to allow the Employer to schedule a junior server on a shift for which the senior server is available and has asserted a preference.
5. The Employer has violated the collective bargaining agreement by its scheduling practice. Seniority is the governing principle in Article 10.5 and the business

exception has been a limited application.

6. To give proper interpretation to the language in dispute, it must be analyzed in the context of the particular language used, how the language has been interpreted and applied by the Parties and how the language is related to language in other parts of the Agreement. There is not a clear definition of what the interaction of seniority being consistent with business needs means. The Union believes it means that seniority rules must be followed except in limited circumstances. The exception applies when the Employer is able to demonstrate unique circumstances applicable to a particular employee.
7. Where qualified senior servers are available and staffing needs do not require all servers to work, the “business need” exception does not provide a basis for the Employer to disrespect seniority and grant a junior employee available shifts to the detriment of the senior employee.
8. There is not a “business needs” nexus, as that term has been applied and understood by the Parties under years of application, which allows the Employer to bypass seniority in the scheduling of shifts.
9. Granting the preference of senior employees for shifts and days off is only inconsistent with business needs when it is necessary to insure adequate staffing and recognizing those preferences would not allow for the staffing.
10. The Employer cannot simply assert broad generalizations about the needs of the business in order to justify discounting seniority of individual employees in selecting shifts. The Employer is not entitled to change the entire scheduling process on the basis of some broad assertion that the remodel of the restaurant requires an entire new staffing mechanism that adversely affects the earnings of senior employees.
11. The Union believes the Agreement requires the Employer to follow seniority unless a unique circumstance arises, which requires the senior employee to accept additional hours or a certain schedule to insure adequate staffing. The Employer violates the Agreement if it fails to schedule a senior employee according to his/her preference when there is availability for that employee and instead awards the available shift to

the junior employee.

12. While the clause in question is not a pure seniority clause, it is drafted in a manner, where its clear language, without reference to or guidance based upon the application of other principles imposes a burden on the Employer. Article 10.5 uses the terms “employees” and “shall.” It states that an employee’s classification shall be given reasonable consideration. The precise language by using the singular, “an employee,” when referencing whose seniority is to be considered, demonstrates that the examination is on an individual by individual employee basis. In essence the clause, as written, requires that the Employer demonstrate there is a reason that the preference of a senior employee is inconsistent with the particular business needs.
13. By using the word “shall,” the Parties have imposed a mandate requiring the Employer to give reasonable consideration to seniority. That obligation is required as long as honoring seniority is not inconsistent with the needs of the business.
14. The Employer has the burden of demonstrating that on an individual case by case basis that in each situation there is a clear nexus to the business need cited in order to establish it has not infringed on the seniority rights of an individual employee in failing to honor shift preference in the scheduling of shifts.
15. The Employer cannot argue, as it has done here, that the business needs in general allowed it to disregard all the senior employees’ preferences when there are available openings on the shift the employee desires. It cannot argue that it can deviate from the established scheduling method of giving shift preference by seniority based upon the institution of broad policies requiring all employees to work a day shift and all employees to rotate into cocktail service and not work the nights or other shifts which are available and for which they had preference and seniority to claim.
16. Where all the employees had the ability to perform, as the Employer admitted, the Employer cannot refuse to honor seniority because of some generalized operating principle which it applies as a general matter to all employees.
17. The disputed language in Article 10.5 must be interpreted in light of other contract language. It is a basic principle of contract interpretation that the collective

bargaining agreement must be interpreted as a whole. By examining the contract as a whole it is possible to determine the intent of the Parties.

18. Article 9.10 of the collective bargaining agreement pertains to work schedules. It states in part that “Any challenges regarding seniority must be made within 48 hours of the work schedule posting or it will be assumed the schedule is acceptable for seniority and bumping.” This clause would have no meaning if the Employer were not required to honor seniority when initially scheduling shifts and days off.
19. Article 9.10 goes on to state “any changes made will be done based on classification seniority and as much notice as possible will be given to the affected employee(s).” This sentence pertains to changes to the schedule made by the Employer. The language permits the Employer to make scheduling changes but the changes must be on the basis of seniority classification. This requirement is absolute. There is no business need exception in Article 9.10. If changes to the schedule must be made on the basis of seniority then the original schedule must be made on the basis of seniority.
20. Article 10.2 is also relevant. It governs what occurs in a layoff situation. Under Article 10.2 senior employees are retained provided they will work available hours with the least senior employees receiving fewer hours. The clause also states: “Nothing shall guarantee employees who are recalled or having their hours increased that they shall be returned to their former shift or days if those shifts or days have been filled by more senior employees.” This clause gives senior employees who assume hours and shifts vested rights to keep those shifts assumed during the slow period. If the Employer were able to take away these shifts under the guise of the assignment provisions of Article 10.5(C) then 10.2 would have no meaning or purpose.
21. Article 10.5(C) must be interpreted in a manner that is consistent with 10.2.
22. Servers are unlike hourly workers in that they are tipped employees. Their earnings are directly tied to the shifts to which they are assigned. Shift preference by seniority affords the server the opportunity to work at multiple venues and to increase their earnings based on longevity. When the Employer denies a senior employee a dinner

- shift when one is available, the servers' earnings are directly impacted. Also, a constant rotation of days or shifts prevents servers from having a regular work schedule and working at other venues to supplement their income.
23. The purpose of Article 10.5(C) is to provide a benefit for seniority. The benefit is the ability to maximize earnings and to be able to plan one's life.
 24. The Parties' practice as well as industry practice supports the Union's interpretation. Union exhibits showing that the Employer acknowledged that it gave preference to more senior employees in shift scheduling and that no claim of business needs was raised demonstrates the Union's interpretation is proper. The Employer even used phrases like "their shifts" or "Jeff's shift" and the right of a more senior employee to a particular shift.
 25. The Union had two other collective bargaining agreements with Employers in Duluth and both contained the same scheduling language. The language required that available shifts and days off be filled in order of seniority. Business needs could arise on an intermittent basis whereby changes had to be made because all employees needed to work. Junior employees were never given preference over senior employees.
 26. The Employer failed to demonstrate that its change in scheduling fell within the business needs exception. The Agreement does not allow the rotation of servers into and out of shifts or positions because the Employer believes some sort of rotation is better than not. The Employer has the burden of demonstrating on an individual basis that there is a clear nexus between the business needs and seniority. There is no evidence in the record that following seniority with regard to shift scheduling is inconsistent with business needs. Inconsistency is the test. The Employer is required to show that following the seniority of an individual employee regarding preference for a shift or a day off would be inconsistent with business needs. It has the burden of showing that scheduling according to seniority is inconsistent with business needs.
 27. The Employer provided no evidence to show how the extensive remodeling made scheduling by seniority inconsistent with business needs. The remodel is irrelevant to

the issue before the arbitrator. The Employer has admitted that all the servers were trained and passed the appropriate test. Thus there is no evidence that scheduling the current servers according to seniority is inconsistent with business needs.

28. The only business need provided at the hearing by the Employer was the need to evaluate the performance of servers on each of the shifts. The Employer acknowledged that it had not conducted on the job performance evaluations and had not implemented any system for observing or judging whether employees were adequately performing their jobs. The evaluation business need was nothing more than a pretext to avoid giving preference to senior employees.
29. The Union requests the grievance be sustained.

OPINION AND AWARD

Burden of Proof

First, it is important to consider the issue of which party has the burden of proof. In broad terms, this case requires an analysis of the meaning of long standing contractual language that seeks to balance the interest of the Employer in maintaining maximum control over hotel operations and the Union's interest in protecting seniority privileges secured through bargaining. A review of the contractual language at issue in this case will assist with the allocation of the burden of proof. Article 10.5 (C) states:

“It is understood that an employee's classification seniority shall be given reasonable consideration with respect to shift preference and day off preference as long as it is consistent with the needs of the business. Employees by classification seniority shall be entitled to any available hours up to and inclusive of forty (40) hours per week provided they have not previously declined those available hours and are qualified to perform the work available. If an employee has previously declined available work they must notify the Employer in writing if they thereafter are available to reestablish their rights to said hours. It is expressly understood that the needs of the business are paramount and any conflicts in availability are secondary thereto unless specified written exception has been granted by Management.” (Agreement at p. 11)

On its face, this language obligates the Employer to give “reasonable consideration” to an employee's seniority, shift preference and days off preference. The language also makes plain that the employees shift and days off preferences must be consistent with the needs of the

business. If they are not, the needs of the business will take priority over employee's shift and days off preferences regardless of seniority. The Parties do not dispute the meaning of this language, at least to the extent that it is defined thus far. Also, the Parties do not dispute the fact that for several decades the Employer consistently scheduled shifts and days off for servers by first asking them to state their preferences and then preparing the schedule in order of their seniority. Under this practice a junior server was not awarded a shift or day off preferred by a more senior bargaining unit member. It was the Employer's decision to change the manner in which it scheduled servers, at least to the extent that junior servers could be granted a shift preferred by a server with more seniority, that prompted the Union to initiate the class action grievance and pursue it to arbitration. Against this backdrop, the arbitrator believes that the burden of proof should shift from one party to another. First, the Union is obligated to demonstrate that the Employer's approach to shift scheduling after the opening of JJ Astor placed a seniority privilege in jeopardy. Once the Union does so, Article 10.5 (C) requires the burden to shift to the Employer to show either that it gave "reasonable consideration" to seniority based preference in scheduling shifts or that it had a legitimate business need that warranted deviation from scheduling by seniority. The Employer, given the language of the Agreement, cannot simply describe the Union's offer of proof as inadequate but must demonstrate that it met its contractual obligations or show that a contractual exception applies. The burden then shifts to the Union to demonstrate that the reasons advanced by the Employer are a pretext or are otherwise invalid. The true nature of the dispute and thus the manner in which it is to be resolved is much more accessible when each side has a responsibility for bringing forth proof relevant to the interpretation each seeks to have endorsed through arbitration. The allocation of the burden of proof should not require the Union to define the "needs of the business" that led to the change in scheduling procedure. As the Employer said:

"Someone, therefore, must ascertain what "the needs of the business" are and how to address them for server shift scheduling purposes. Under the CBA's management rights and seniority clauses, that someone is the Hotel, not the Union. Not only does the Union not have any right under the CBA to ascertain or address "needs of the business," the Union has neither the data, expertise, time, nor resources needed to do so. Nor is the Union accountable for the outcome of doing so." (Employer Brief at p. 25)

This is especially important given the Employer's argument that its "bona fide business judgment about the technicalities and particularities of its business needs" should be given considerable latitude. (Id at 25) Accordingly, the issues submitted by the Employer may require some revisions. The first issue presented by the Employer has been answered. The burden of proof is not simply on the Union but shifts after the Union makes its initial case that a right guaranteed by the Agreement is in jeopardy as a result of the Employer's actions. Here, the Union demonstrated that the Employer revised its scheduling practices following the reopening of its restaurant and the Employer admitted that it did so. The Union filed three individual grievances on behalf of servers who expressed a preference for a particular shift and the Employer denied that preference saying it had the right to meet the needs of the business "with the appropriate employee in the appropriate shift." In other words, if the Employer decided a junior employee was better suited to work the dinner shift than a more senior employee, it had the right to so schedule. The Employer does not dispute that fact. The burden therefore shifts to the Employer to demonstrate that it met its obligation to give "reasonable consideration" to seniority with regard to the three bargaining unit members for whom the Union submitted grievances. In the alternative, the Employer must satisfy its burden to demonstrate that the needs of the business permitted it to bypass more senior employees in shift scheduling in favor of junior employees. Because the Parties agreed to combine the three grievances into a class action, it will be necessary for the Employer to demonstrate just how it gives "reasonable consideration" to seniority in scheduling shifts and days off and/or what specific business needs exist that require it to disregard seniority. Following that, the Union must carry its burden to rebut the Employer's offer of proof. This basically follows the process used during the hearing of this matter. The Union presented its case first, the Employer's presentation followed and focused almost exclusively on the needs of the business in light of the remodeling and re-branding of its restaurant. The Union then challenged the reasons given and both sides had an opportunity in post-hearing briefing to summarize and expand on their respective positions.

The second issue as presented by the Employer must be rephrased. The Employer asked:

“Did the Union carry its burden of proving that the collective bargaining agreement grants sever the unconditional right to seniority-based shift preference in scheduling?” This is not the proper question given the explanation of the shifting burdens laid out above and because the record demonstrates that the Union did not claim an unconditional right to seniority-based shift preference scheduling. The Union said it recognizes that there are times when the needs of the business will require seniority-based shift preferences and day off preferences to be set aside. On its face, Article 10.5 (C) clearly does not provide an unconditional right. In light of the above, the second issue as raised by the Employer must be rephrased to read: Did the Union meet its initial burden? If it did then the issue becomes whether the Employer met its burden of demonstrating that it gave “reasonable consideration” to seniority and/or that business needs prevented it from granting seniority based preferences in shift scheduling. The Union’s framing of the issue addressed this point. Namely, the Union asked whether the Employer met its burden of demonstrating there is “a direct nexus that makes scheduling by seniority inconsistent with business needs.” Finally, if the Employer did meet its burden, the question becomes whether the Union met its burden to demonstrate that the Employer’s reasons were invalid.

The Merits

As noted above, the Union met its initial burden of demonstrating that a right guaranteed by the Agreement was placed in jeopardy by the Employer’s actions. In this case, the Employer acknowledged that after it remodeled and reopened its restaurant under the name JJ Astor, it began to schedule in such a manner as to, in some instances, place junior servers on shifts that senior servers preferred and were available to work. The Employer acknowledged doing so. The Union claims the change in the Employer’s scheduling practice placed the benefits of seniority secured in Article 10.5 (C) in jeopardy because for at least 16 years, the Employer has honored employee seniority-based preferences in scheduling. The Employer admitted:

“Before the rebranding of the restaurant and the changes to its operating concept, the Hotel did, for the most part, follow a practice of scheduling server shifts according to the servers’ seniority-based preferences.” (Er. Br. at p. 9)

Both the Union and Employer acknowledged that while seniority-based preferences in shift scheduling was the norm, there were times when deviating from that preference was

required. The Employer notes that when the shift preferred by the senior server was unavailable due to low customer traffic the server's preference could not be granted. Likewise, when the Employer needed more servers than usual to work due to an extremely busy period such as Easter weekend, senior servers who preferred not to work those shifts were required to do so regardless of seniority. The acknowledged deviation from the long-standing practice is sufficient to satisfy the initial burden placed upon the Union. The arbitrator acknowledges the long standing scheduling practice not for the purpose of attempting to revise or add to existing contractual language but merely as evidence that the Employer interpreted and applied contractual language in a manner it believed satisfied agreed upon obligations. The Employer by its own admission behaved in such a manner as to give a clear indication as to how it interpreted the contractual language in dispute here. Its sudden movement away from that practice without any prior notice or warning provided sufficient reason for the Union's concern. In other words, the Union carried its initial burden that a right it believed was guaranteed by the Agreement was placed in jeopardy.

In meeting its burden, the Union also pointed to the places in the Agreement wherein the plain language makes clear that the Parties intended to grant certain benefits to employees who remained with the Employer for a significant number of years. The Union, in other words, bolstered its offering not simply with expressions of concern regarding the Employer's movement away from a long-standing scheduling practice but with the plain language of the Agreement. That language represents a clearly expressed intent by the Parties to provide benefits to employees based on seniority in a number of ways. Here, the Parties expressed an unambiguous intent to give priority to the most senior servers when it comes to layoffs, scheduling, vacation time, overtime, the ability to work a 40 hour week if the hours are available and in the selection process to fill new positions when applicants are equally qualified. The unambiguous intent as expressed represents a limitation on the Employer's right to simply schedule as it pleases. The Parties, therefore, agreed that management's scheduling rights, among others, were not absolute but were limited by specific provisions of the Agreement. Article 10.5 (C)

retains unto management the right to schedule shifts but limits that right by requiring the Employer to give “reasonable consideration” to seniority-based preferences when doing so. The Employer cannot simply assert, therefore, that it has the right to schedule in order to meet the needs of the business but must demonstrate that it gave “reasonable consideration” to seniority in scheduling and/or determined that given the needs of the business, it was simply not possible to schedule according to seniority.

The Employer’s burden, therefore, requires it to demonstrate that it simply could not give consideration to seniority given the need it had to address or that it gave what it believed to be “reasonable consideration.” The Employer’s offer of proof is straightforward and easy to understand. The Employer produced a great deal of evidence showing it invested a considerable sum of money into the remodeling and rebranding of its restaurant. Therefore, the business need was the need to recoup as much of its investment as possible. In order to do so, the Employer determined that it needed to figure out which of its servers were truly capable of putting the new brand into action most successfully. That new brand, at least as far as the servers’ responsibilities are concerned, requires them to upsell. The dinner shift, the most lucrative in the restaurant industry, is the key to the Employer’s effort to recoup its investment. Servers working the dinner shift must be able to upsell as naturally as they are able to greet the customers upon arriving at the restaurant. Servers, as the Employer explained, must also know how to build enthusiasm for the dining experience by bringing suggestions for combinations of wine with specific entrees and by helping the customers understand the method of food preparation including the best possible combination of courses given their tastes, requirements and/or restrictions such that the server becomes a trusted friend and ally in the dining experience.

The Employer determined that given the amount of money invested in the new restaurant and the need to recoup its investment that it needed to identify the best of the best of its servers. The Employer maintains that the needs of the business require it to identify those servers most capable of presenting the new brand and to schedule them accordingly. However, to accomplish this goal, the Employer decided that it needed to

see how each server performed on each available shift. In other words, the Employer's new scheduling process required it to determine whether junior servers were actually better at communicating the new brand to customers than were more senior servers. The only method to accomplish this goal, according to the Employer, was to observe all employees on each of the available shifts. In order to carry out this evaluation process, the Employer needed to cease scheduling by seniority preference. In other words, to discover how well junior servers could communicate the new brand, the Employer needed to schedule them on the dinner shift as well as the breakfast and lunch shifts. The specific business reason identified by the Employer was that the rebranding and new operating concept required the servers to have greater skill than when the restaurant was known as "The Top of the Harbor." The Employer said the servers needed training because their jobs were changing and the servers would need "new knowledge and new skills, especially during the evening shift, when business was the most hectic and customers were the most demanding." (Er. Br. at p. 6) The Employer described the "needs of the business" as the need to identify those servers who could best perform, meaning those who could most effectively promote the new brand and concept or upsell during the dinner hour in order to maximize profit.

The arbitrator's role here is to assess whether the Employer reason complies with its contractual obligations or put differently to determine whether the Employer met its burden of proof that it either gave reasonable consideration to seniority or that it had a legitimate business need requiring it to set seniority considerations aside. The arbitrator finds that the Employer did not meet its burden. First, the arbitrator finds that the Employer did not explain what specific steps it took to give "reasonable consideration" to seniority in scheduling servers. What is clear is that the Employer continued its practice of posting an "availability sheet" allowing servers to sign up showing the days they were available to work and the shifts they preferred. It is also clear that in scheduling, it seems that some of the most senior servers did, in fact get the shifts they preferred. However, for those who did not get their seniority-based preference, the Employer failed to demonstrate what consideration it gave to their seniority or what need was addressed by

placing a senior server on the breakfast or lunch shift. The Employer did say that it needed to observe all of the servers on each of the available shifts in order to continue its assessment of the skill level of its servers or their ability to promote the new brand and concept. This reason, however, simply does not explain how scheduling in such a manner would identify the servers best able to upsell during the dinner shift. The Employer did not make such an offer of proof but simply said that it has the right to schedule without regard to seniority, if in its own assessment, scheduling by seniority was incompatible with the needs of the business. However, the plain language of the Agreement acts to limit the Employer's right to abandon seniority in scheduling without a showing that it actually tried to figure out how to provide the seniority-based preferences when scheduling and found that it could not do so consistent with the needs of the business.

For example, the Employer provided the example of three servers who all signed up for the same shift. However, only two servers were needed for that shift. According to the Employer, it is not obligated to grant the shift to the two most senior servers. The Employer reasoned that "...the language (Agreement) makes seniority a "consideration" when it comes to shift preference but only if "consistent with the needs of the business." (Er. Br. at p. 17) However, in its example, the Employer failed to explain how it would demonstrate that it gave "reasonable consideration" in granting the shift to the least senior servers. The same problem exists in the case of the grievances filed in this matter. The flaw in the Employer's position is that it made no effort to explain just how it met or intended to meet its obligation under Article 10.5 (C), namely that it give "reasonable consideration" to seniority in shift scheduling.

That language requires the Employer to affirmatively state what it did to honor the Parties' intent to grant a privilege to more senior servers in exchange for their long service. In the alternative it requires the Employer to demonstrate that legitimate business needs could not be met if it were required to grant seniority-based preferences. Even if the Employer was correct in stating that the language at issue makes seniority simply a "consideration" in scheduling, it does not follow that the Employer is not required to make a showing of just how it "considered" seniority when making the schedule. The arbitrator finds that the phrase "reasonable consideration" means a great deal more than simply "considering" or thinking about it as the

schedule is developed, especially if that schedule grants junior servers preferences over more senior servers. The Employer understood this to be required by the Agreement prior to the creation of the JJ Astor. The changes that the Employer paid for to create the new brand, train the servers and bring JJ Astor online simply did not change the servers' responsibilities enough to claim that giving "reasonable consideration" to seniority in scheduling following the opening of JJ Astor was impractical or inconsistent with the needs of the business.

According to the Employer, following the opening of JJ Astor servers needed to learn or become familiar with the new layout and the new menu. Servers were required to memorize and recall food items, food specials, and food preparation and be able to describe the same to customers. In addition, the Employer said following the opening of JJ Astor that servers needed to be able to address the customer's food quality concerns, memorize and recite combinations of entrees and side dishes and familiarize themselves with the timing of various meal courses. Of course, the Employer noted that following the opening of JJ Astor servers had to acquire the knowledge and skill to upsell the customer to a more expensive entrée, side dish, "small plate" or desert. Likewise, the servers had to demonstrate similar knowledge with regard to the Employer's expanded wine and liquor selection. The Employer made clear that it trained all of the servers interested in working the dinner shift and all passed the training. Having acknowledged that all servers were successfully trained by the specialist brought in specifically for that purpose, it is even more important that the Employer explain how it gave reasonable consideration to seniority in shift scheduling. However, the Employer offered no such explanation. The Employer did say:

"There is no evidence in the record impugning the Hotel's motives or *bona fide* business judgment when giving "reasonable consideration" to seniority. Therefore, not surprisingly, senior servers often find themselves working their preferred shifts."

What the Employer failed to do is to explain exactly how it gave "reasonable consideration" to seniority in scheduling. The fact that some of the most senior servers actually were scheduled for the shifts they preferred simply raises the question as to why all of the most senior servers could not have been given their preferences. What was it that made doing so impossible or impractical? The Employer simply maintained that the "needs of the business" required it to schedule as it

did. At the heart of this matter lies the Employer's belief that the Article 10.5 (C) gives it unrestricted right to schedule as it sees fit. The Employer said for example:

“...it is critical for the Hotel to insure the best fit between server and shift. Too much time has been spent, and too much money has been invested, to give each shift anything less than the very best effort by all concerned. For the customer, the server is the face of JJ Astor. It is no exaggeration to say that to a significant extent the success of the rebranding of the restaurant, and the new operating concept that came with it, rests on the shoulders of the servers. This reality is a crucial “need of the business” that the Hotel has every right to recognize and address by the way in which servers are evaluated and scheduled.”

The problem with the approach urged by the Employer is that it seeks to rewrite relevant language in the Agreement and to essentially demote servers without just cause. First, it is unnecessary to abandon the clearly stated intent of the Parties to reward long service. It is absolutely clear that the goal of the Employer is to create an upscale dining experience with the overwhelming focus on the dinner shift. It is also abundantly clear that in this industry the servers work for a minimal base wage and rely heavily on tips to secure a living wage. Therefore, it was essential that Unions representing servers seek contractual language during bargaining that makes working in the industry worthwhile. In this case, the Union secured that language in bargaining with the Employer. The Parties agreed to acknowledge long service by giving preference in scheduling and days off to those servers who have committed themselves to the Employer for the longest period of time. These benefits should not be taken away without clear justification. If the Employer is simply unable to accommodate the seniority-based preference because there are simply not enough customers to justify the number of senior employees expressing a preference for the same shift, then so be it. However, if the Employer's goal is to observe which server is the most capable of carrying out the new brand and concept, it must do so in a manner that reflects the limitation imposed upon it by the relevant language. Here, granting junior servers shifts preferred by senior servers for the sole purpose of evaluating the junior server on the dinner shift is insufficient reason to set seniority-based preferences aside. Specifically, if the Employer is not certain the servers can do the job, more training or shadowing might be in order. There are numerous ways to both identify the best of the best servers and to document that the most senior servers are not performing adequately. However, without

documenting a performance deficit, the Employer is simply electing to cut the wages of the more senior employees without just cause. As importantly, the Employer is attempting to rewrite the Agreement in such a way that allows it to undercut language that actually protects the wages and dependability of the scheduling process for the most senior servers. Doing so directly undermines the intent of Article 10.5 (C). The relevant language implies that the Employer's proffered reasons for abandoning seniority-based preferences are subject to review. If the announced business needs cannot withstand scrutiny then they cannot be implemented. Here, the proffered business need is to secure the greatest income by placing servers on the dinner shift most capable of implementing the new brand. However, the Employer acknowledged that it had not conducted on-the-job observations designed to identify which employees were the best at implementing the brand. Yet, seniority-based preferences were set aside, even though there was no evidence presented to support the scheduling decision. There was nothing about the scheduling process that could be said to result in the placement of the most effective server on the dinner shift. Since all servers passed the training who desired to work the dinner shift, scheduling according to seniority-based preferences as required by Article 10.5 (C) did not possibly interfere with the needs of the business. In short, there was no basis for the Employer to conclude that scheduling a junior employee promoted the needs of the business in such a way that scheduling by seniority could not. The Employer, therefore, failed to show how it gave "reasonable consideration" to seniority in scheduling as required by the Agreement or that it had a valid business need requiring it to set seniority aside in scheduling.

The Union raised many of these concerns in an effort to meet its burden to show that there was no reason the business needs as expressed by the Employer could not be satisfied while simultaneously adhering to the requirements of Article 10.5 (C). For example, the Union pointed to the Employer's admission that all servers were provided both a general training and specific hands-on training in preparation for the opening of JJ Astor. In addition, the Union demonstrated by way of cross examination of Employer witnesses that the experts responsible for the training acknowledged that the matrix they prepared for use in identifying which servers might be most effective at carrying forth the new brand was not a reliable tool for scheduling. Finally, the person responsible for carrying out the scheduling process for the Employer acknowledged that

the she was unable to do any on-the-job evaluations because she was too busy. Therefore, the Employer's stated reason for not honoring seniority-based preferences in scheduling was not being executed. The Employer's scheduler testified that the goal was to engage in shadowing to see if servers were executing the new brand. However, one person could conduct such observations and the scheduler acknowledged that responsibility fell to her. Therefore, senior servers were being denied the seniority-based preference for a reason that had yet to be implemented. Overshadowing the Employer's stated business needs is the fact that its scheduler acknowledged under oath that all of the servers having been properly trained should be able to do the work required to advance the new brand. In other words, the goal of evaluating each employee to determine if they were being effective in advancing the new brand was unnecessary.

The arbitrator finds that the relevant contractual language is very clear. The language is clear on its face. The Parties have a long standing record of effectively acting on that clear language. The Arbitrator finds that server responsibilities before and after the rebranding of the restaurant are essentially the same. Even if a higher skill level is required, the work of a server remains the same. The successful training provided by the Employer and its ability to offer additional training, if it is necessary provide a sound method of both meeting the needs of the business and honoring the commitment to schedule according to seniority-based preferences. Furthermore, the daily meetings held prior to each dinner shift provide additional training for servers and up to the minute information that will assist them to carry forth the new brand. The move away from scheduling according to seniority-based preferences took away a right bargained for and agreed to by the Parties. It cannot be written out of the Agreement. Management's right to schedule must be recognized as limited by the relevant language here. In order to deviate from seniority based preferences in scheduling, the Employer must demonstrate that a legitimate business need exist that makes it impossible to schedule according to seniority. This does not provide an unconditional right to senior-based preferences. The Agreement does provide a method of honoring lengthy service while acknowledging that if the business is to be successful there may be times when seniority has to be set aside in order to accommodate the needs of the business. That process requires the Employer to announce its stated business need that requires an exception to the goal of honoring seniority in scheduling. The Union is permitted

the opportunity to challenge that stated need. The language of the Parties' Agreement requires this system. Otherwise, the Employer would simply be able to dismiss the bargained for seniority benefit by announcing without explanation that the needs of the business require it.

However, the Arbitrator finds that language requires a much more interactive and transparent process so that the Union can clearly understand and respond to the stated business need before it is implemented. The Union argued and the Arbitrator agrees that seniority-based preferences in scheduling is the norm and the exceptions require a clear explanation and will generally be narrowly tailored to respond to a very specific and identifiable business need. For example, if there are too few customers to warrant granting all senior servers there preference an exception will be granted. If the needs of the Employer are so great that the seniority based preference for days off must be set aside in order to have all servers report for work, then seniority will be set aside. There will most certainly be other business needs that crop up from time to time that when explained to the Union will clearly represent a business need that requires setting seniority aside for the moment. But, the language of the Agreement does not permit, as the Employer sought to implement here, the wholesale, open-ended declaration that its' rebranding and remodeling requires it to conduct scheduling in an entirely different way and one that wipes out seniority-based preferences. That approach simply rewrites the Parties' Agreement and avoids the collective bargaining that must precede such a rewrite. As stated above, it also cannot be understated that the Employer's approach to scheduling in this instance, for the purpose of evaluating performance, was carried out in a punitive manner since it clearly deprived the most senior servers who were denied their preference for the dinner shift of income without a finding that their performance was in fact inadequate. Such a punitive evaluation process cannot be upheld given the clear contractual statement: "The Employer and Union agree to recognize seniority in the following areas: A. Layoffs and recall. B. Scheduling and vacation time." (Agreement at p. 11)

In every article of the Agreement where the Parties address seniority and how it should be treated in the context described therein, it is clear that their intent was to reward lengthy service. Article 10.5 (C) is no exception. The language imposes an obligation which can only be put aside when a very specific and clearly identifiable need makes rewarding lengthy service

impractical or impossible. In this case, the needs advanced by the Employer cannot be credited as valid or sufficient cause to abandon the Parties intent to give senior servers an advantage in shift scheduling.

Award

Based on the foregoing and the record as a whole, the grievance is **SUSTAINED**. The Employer must adhere to seniority-based preferences in shift scheduling unless there is a demonstrable business need requiring it to set aside the agreed upon preference. In exercising the business needs exception, the Employer will be required to specify to the Union just how it gave reasonable consideration to seniority and why it must set aside the stated preference in order to meet a legitimate business need. This process should resemble the scheduling procedure used by the Employer prior to the conversion of the restaurant to JJ Astor. The Employer must cease scheduling junior employees for shifts for which qualified senior employees have expressed a preference and indicated availability. Further, the Employer will cease all scheduling practices that do not conform to the requirements of Article 10.5 (C) including rotating serves through the cocktail, breakfast and lunch shifts for the purpose of evaluating or familiarizing all servers with those shifts. As this is a class action grievance designed to settle the meaning of contractual language and the record does not include any specific verification of loss by individual senior servers denied the dinner shift in favor of junior servers, the Arbitrator declines to award any monetary relief. The Arbitrator retains jurisdiction to assist with clarification and implementation of the award if necessary.

Respectfully submitted,

A Ray McCoy
Arbitrator

Date: December 9, 2010