

IN THE MATTER OF ARBITRATION BETWEEN]	DECISION AND AWARD
]	
J.J. TAYLOR COMPANIES, INC.]	OF
]	
(EMPLOYER)]	ARBITRATOR
]	
and]	
]	FMCS CASE: 10-59371-3
]	
INTERNATIONAL BROTHERHOOD OF]	
]	
TEAMSTERS, LOCAL 792]	
]	
(UNION)]	

ARBITRATOR: Eugene C. Jensen

DATES AND LOCATIONS OF HEARINGS: March 23, 2011
 Federal Mediation and Conciliation Service’s Office
 1300 Godward Street Northeast – Suite 3950
 Minneapolis, Minnesota 55413

April 21, 2011
 Telephone Hearing to introduce additional
 evidence.

DATE OF FINAL SUBMISSIONS: May 11, 2011
 Post-Hearing Briefs were submitted electronically.

DATE OF AWARD: June 13, 2011

ADVOCATES: For the Employer
 Paul J. Zech, Attorney at Law
 Felhaber, Larson, Fenlon and Vogt
 220 South Sixth Street, Suite 2200
 Minneapolis, Minnesota 55402-4504

For the Union

Bill Reynolds, President/Business
Agent, Teamsters Local NO. 792
3001 University Avenue Southeast, Suite 408
Minneapolis, Minnesota 55414-3384

GRIEVANT: Danny P. Hunter, Jr.

ISSUE

Did the Employer violate the 2005 – 2010 Collective Bargaining Agreement between the parties when it failed to implement the “eight (8) weeks” pay adjustment provision of Article 14, Section 2 -- Route Changes, following the Grievant’s rebid in April of 2010?

JURISDICTION

In accordance with the National Labor Relations Act and the 2005 – 2010 Collective Bargaining Agreement between the parties, this grievance is properly before the Arbitrator.

PERTINENT CONTRACT LANGUAGEArticle 7 – Seniority

Section 7.2 – Seniority Rights: Seniority rights shall prevail in all matters relating to employment and a seniority list shall be available. Any controversy over the

seniority standing of any employee on the seniority list shall be referred to the Union for settlement. . . .

Section 7.10 – Promotion or Transfer: When a regular job becomes open for any reason in any classification of work covered by this agreement other than as in Section 7.6 above, seniority shall determine who is awarded the job or transfer without affecting their present or future seniority standing. . . .

Section 7.11 – Job Posting: When a regular route or any permanent or temporary job is open, it shall be posted for forty-eight (48) hours. The Employer will advise employees who may be off work due to an illness or injury of the permanent job opening via certified letter or personal delivery[.] The employee shall have two (2) weeks to submit a written job bid to the Employer via certified letter or personal delivery. Any employee who fails to submit a bid within the above period shall have no claim to the position.

Article 14 – Driver and Route Conditions

Section 14.2 – Route Changes: The Management shall confer with drivers and/or Union before adding to, subtracting from, changing[,] modifying, eliminating or splitting a route. However, the parties recognize the ultimate determination on how to structure any route shall be at Management’s discretion. It is further agreed by the Employer that when a route is altered, the driver salesperson whose route is altered shall, for the next eight (8) weeks after the effective date of the change, receive at least the same total earnings that they received during the eight (8) weeks immediately preceding the change provided the employee remains a driver salesperson.

Article 16 – Grievance and Arbitration

Section 16.1 – Definition: The purpose of this section is to provide the sole method for the settlement of complaints raised by any employee, who alleges that a specific provision of this agreement has been violated. Such a complaint shall be defined as a grievance under this agreement and must be presented and processed in accordance with the steps and time limits set forth. . . .

Section 16.2 – Arbitration: In the event the representatives of the Employer and the Union fail to agree upon the selection of an arbitrator within three (3) working days of their first meeting on the matter, the Federal Mediation and Conciliation Service may be required by either party to submit a list of person[s] from which the arbitrator shall be selected by mutual agreement of the Employer and Union representatives. In the event of failure to agree on anyone of the names submitted, the Union and the Employer shall each strike off names alternately, and the person remaining shall be appointed the arbitrator.

- a. The Union and the Employer shall share all fees and expenses of the impartial arbitrator.
- b. All decisions of the arbitrator made within the scope of the submission and within the authority of the arbitrator, as defined herein, shall be final and binding on the Employer, the Union and the employee(s).
- c. The arbitrator shall have no right to require of the Employer, the Union, or any employee of the Employer, any act it, or he/she feels is not required by law or by this Agreement to perform.
- d. The arbitrator shall be without power to change, alter or amend the language of this Agreement or any written supplement hereto, to set or change any wage rate, or

other benefits of administrative rule or decision, or governmental regulation.

Section 16.3 – In case of [a] grievance involving loss of time or wages or any other claimed grievance, the parties may agree to, or the arbitrator may order, reinstatement and/or back wages in any amount not to exceed the amount actually lost by the aggrieved party, except that retroactive wages lost shall not be awarded if the grievance was not within ten (10) calendar days of its occurrence. Wages within the meaning of this article shall mean all wages lost by the employee due to the violation of the agreement by the Employer including vacation pay, holiday pay, or other such cost item if the question in arbitration involves such items.

BACKGROUND

The Employer is J.J. Taylor Distributing Company of Minnesota, INC. The Union is the International Brotherhood of Teamsters, Local 792. The Employer initiated a “total route bid” in April of 2010. The Grievant was unable to maintain his route (route 2) following the bidding. A more senior employee bid on his route, and he subsequently bid on route eight (8). The commission compensation for route eight (8) is less than the compensation the Grievant enjoyed with route two (2). The Union, citing the contract language in Article 14.2, filed a grievance on behalf of the Grievant, and that grievance is the subject matter for this arbitration.

JOINT EXHIBITS

1. The July 1, 2005 – June 30, 2010, Collective Bargaining Agreement [CBA] between the parties.
2. A grievance filed by the Union on July 12, 2010, on behalf of the Grievant, alleging that the Employer violated the CBA when it did not apply Article 14, Section 2 to the Grievant's move from Route two (2) to Route eight (8).
3. An August 5, 2010, grievance response letter from John Schellenbach, Vice President Operations, to Bill Reynolds, the Union's President/Business Agent, in which the Employer denies that a contractual violation occurred:

On April 5th, 2010, JJ Taylor did a complete rebid of the routes. Prior to implementing the rebid, we met with the stewards and many of the drivers to let them know that we were rebidding the routes. Due to a reduction in case volume on all of the trucks, we reduced the total number of routes from 38 to 35. The total case volume was spread across the 35 routes. The rebid increased the volume on all of the remaining routes.

Section 14.2 guarantees a driver's commission for 8 weeks when a route is altered and the driver's commission gets negatively impacted on that route. During a rebid, this section does not guarantee the commissions of a driver, who has lower seniority,

from getting bumped off of a higher paying route by a driver with more seniority. In this case, Dan [the Grievant] was the bid driver for route 2. At the rebid, a driver with more seniority bid on route 2 and Dan had to bid on route 8 which was a lower commission route compared to route 2. If this section was in place to guarantee commissions after a rebid, I feel there would have been language specifically stating that. In addition, we have had many rebids of the routes over the years and we could not find an example of paying out the 8 week guarantee due to a rebid.

In this case, paying the 8 week guarantee is not justified and therefore the grievance is denied.

4. A forty-nine (49) page document that the Employer produced after the hearing.

Some of this information resulted from an agreement the parties reached on the day of the hearing; some of the information was at the request of the Arbitrator; and, some of the information was discovered when the Employer did the research necessary to produce the requested documentation. The following summary/analysis is based on some of these documents:

- Dan Dahlberg's pay stub for pay period ending June 14, 2003, indicates the following commission rates were in place prior to July 1, 2003:
 - Code 24 - 18 paks, 412 paks X .1837=75.68
 - Code 25 - 24 paks, 2,950 paks X .245=722.75
 - Code 26 - ¼ barrel, 1 barrel X .74=.74

- Dan Dahlberg's pay stub for pay period ending June 28, 2003, verifies these same commission rates just before the switch to the new rates effective July 1, 2003:

- Code 24 – 18 paks, 555 paks X .1837=101.95
- Code 25 – 24 paks, 4779 paks X .245=1,170.86
- Code 26 – ¼ barrel, none sold

- Dan Dahlberg's pay stub for pay period ending July 5, 2003, indicates that two different commission rates were used: (please refer to Joint Exhibit 4, pages 7&8 when examining this pay stub)

- Rates for Monday June 30, 2003, were the same as the rates above:

Code 24 – 18 paks, 120 paks X .1837=22.04

Code 25 – 24 paks, 841 paks X .245=206.05

Total commission for Monday (6/30/03)= \$228.09

- Rates for Tuesday through Friday were the new higher rates:

Code 24 – 18 paks, 330 paks X .1913=63.13

Code 25 – 24 paks, 2,212 paks X .255=564.06

Code 28 – ½ barrel, 2 barrels X 1.555=3.11

Total commission for Tues-Fri = \$630.30

- Adding the following numbers equals the total compensation for that pay period:

Regular pay	210.00
Monday commission	228.09
Tues – Fri Commissions	630.30
<u>Holiday pay</u>	<u>42.00</u>
Total Gross Pay	\$1,110.39

UNION EXHIBITS

1. Eight (8) weekly pay stubs for the Grievant covering the period of time from February 19, 2010, through April 9, 2010. One pay stub reflects a vacation week where no commissions were paid. I excluded that week from my calculations. Total commission for the seven remaining weeks equals \$7,682.41, or an average of \$1,097.49 per week.

2. Eight (8) weekly pay stubs for the Grievant covering the period of time from April 16, 2010, through June 4, 2010. One pay stub reflects a vacation week where only a nominal commission was paid. Another pay stub reflects a week where the Grievant took one day of sick leave. *I have pro-rated the week where the Grievant took the sick leave and excluded the vacation week from my

calculations. Total commission for the seven weeks equals *\$5,618.39, or an average of \$802.63 per week.

EMPLOYER'S EXHIBITS

1a. Five (5) weekly pay stubs for Daniel Dahlberg covering the period of time from July 3, 1999, through July 31, 1999. One pay stub reflected a week when there was a holiday; I pro-rated that week and arrived at an average commission of \$1,299.46 per week.

1b. Six (6) weekly pay stubs for Daniel Dahlberg covering the period of time from July 8, 2000, through July 31, 2000. One pay stub reflected a vacation week. Another pay stub reflected a week when there was a holiday and a vacation day. I excluded the vacation week and pro-rated the holiday/vacation week and arrived at an average commission of \$1,223.64 per week.

1c. Four (4) weekly pay stubs for Daniel Dahlberg covering the period of time from July 7, 2001, through July 28, 2001. One stub reflected a week when there was a holiday, and I pro-rated that week and arrived at an average commission of \$1,247.23 per week.

UNION'S WITNESSESAndrew Lottie

A thirty-three (33) year employee of J.J. Taylor. The last eighteen (18) years he has worked in the warehouse. Prior to that, he was a driver. He filed the grievance at issue in this arbitration. He stated that he received twelve (12) weeks of supplemental income as the result of a total rebid. He said the contract provided for twelve (12) weeks at that time, rather than the eight (8) week period in Article 14.2 of the current agreement. This witness acknowledged that the rebid he testified about occurred more than twenty (20) years ago, and he did not remember if any other parts of Article 14, Section 2 had changed since that time.

Danny Hunter

Mr. Hunter is the Grievant in this matter. He has worked for the Employer for seven (7) years full-time and was a supplemental employee prior to that for one and one-half (1 ½) years. His first driving route was route two (2). There was a rebid of the routes in 2009, and his route was changed: they added Franklin Avenue and took away the Dinky Town area. He successfully bid and retained route two (2) in that process.

In 2010 there was another total rebid and a more senior driver bid on route two (2). The only route left for the Grievant was route eight (8). There was less volume on the new route and his

income was reduced. Union Exhibit 1 contains the Grievant's pay stubs for the last eight (8) weeks of his time on route two (2). Union Exhibit 2 contains the Grievant's pay stubs for the first eight (8) weeks on his new route (route 8). There was a significant decrease in commissions as a result of the rebid.

He asked his supervisor about the language of Article 14, Section 2. His supervisor got back to him approximately three (3) weeks later and stated that he was not eligible for the supplemental income. He then filed the grievance at issue in this Arbitration.

Dan Dahlberg

Mr. Dahlberg is a seventeen (17) year employee of the Employer. He successfully bid on several different routes during his time with the Employer. He testified that ten (10) to twelve (12) years prior to the arbitration hearing he went from route twenty-two (22) to route twenty-eight (28). *[Arbitrator's Note: the parties later ascertained that the bid occurred in 2003]* He said that he received additional money on a later check and it was listed as "other". He assumed that this additional money was due to Article 14, Section 2.

EMPLOYER'S WITNESS

Jeff Ruprecht

Mr. Ruprecht has been the Director of Delivery for J.J. Taylor for the past nine (9) years. Prior to that, he was a helper and a driver. He could not recall anyone being paid the eight (8) weeks

of supplemental income since he has been the director. He indicated that the supplemental income would be paid if an individual route was restructured and that restructuring resulted in a loss of income for the driver. He also stated that Article 14.2 discourages the Employer to restructure routes downward. He further testified about the reason for the 2010 rebids: they eliminated two keg routes and put a small number of kegs on a case route. Route 2 was improved but the Grievant did not have enough seniority to successfully bid on it. He talked to the Grievant about the pay change on the new route and whether 14.2 applied. He told him he did not qualify because it was a complete rebid.

UNION'S ARGUMENT

The Union argues in its post-hearing brief that the Employer has utilized the eight (8) week supplement of 14.2 in the past:

Andy Lottie testified that he had received this guarantee, even if it was years ago
...” (p. 1)

[And],. . . the testimony of Dan Dahlberg clearly shows that the Company had paid the 8 week guarantee in 2003. There was a route re-bid in 2003 and Dahlberg chose to change routes from route 22 to route 28. Then in July of 2003, Dahlberg received additional commission on his paycheck. This amount of \$228.09 clearly shows that the guarantee was paid. (p. 2)

The documents that were provided by the Company and sent by e-mail on April 6, 2011, also shows that all the drivers were compensated for the adjustments that were done by a re-bid. (p. 2)

In addition, the Union argues that “[t]he language is clear and unambiguous to its meaning. When a route or routes are altered a driver salesperson shall receive the 8 week guarantee.”

(p. 2)

In essence, the Union argues that the language of Article 14.2 clearly provides relief for employees who suffer commission losses following a total re-bid, and that the Employer has a past practice of reimbursing employees for such losses.

EMPLOYER’S ARGUMENT

The Employer argues two main points in its post-hearing brief:

1. Nothing in Section 14.2 supports any contention that its provisions would be applicable to the Company’s routine, wholesale restructuring of all of its route operations. Section 14.2 makes reference to those circumstances “when a route is altered”: It simply references those circumstances of “adding to, subtracting from, changing, modifying, eliminating or splitting a route.” If the parties had intended this provision to apply to rebids, they certainly could have, and would have, included language to that effect. (p. 4)

2. At the hearing the Union contended, without any supporting documentary evidence, that the Company has historically paid the eight week guarantee even as a result of such company-wide rebidding. In contrast, the Company testimony established that the Employer has never paid an eight week guarantee in such a situation.

In essence, the Employer argues that neither the language of the Agreement, nor the parties' past practice supports the Union's claim that Article 14, Section 2 – Route Changes should apply to the Grievant's situation.

DISCUSSION

This case centers on the meaning of Article 14, Section 2 -- Route Changes. If the Arbitrator interprets its meaning to be consistent with the Union's view, he would rule in favor of the Union. If he interprets its meaning to be consistent with the Employer's view, he would rule for the Employer.

Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over "rights" under such agreements. In these cases the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions. (Elkouri and Elkouri, "How Arbitration Works," Third edition, p. 296)

The actual language at issue in this arbitration:

. . . when a route is altered, the driver salesperson whose route is altered shall, for the next eight (8) weeks after the effective date of the change, receive at least the same total earnings that they received during the eight (8) weeks immediately preceding the change provided the employee remains a driver salesperson.

I shall first examine the text of this provision:

- “. . . when a route is altered . . .”

The language is singular: it identifies a route, not routes *[underlined for emphasis]*

- “. . . the driver salesperson whose route is altered . . .”

Again, the language is singular. In addition, it suggests the possession of a single route by a single driver.

- “. . . provided the employee remains a driver salesperson . . .”

Once again, the language is singular.

The Arbitrator must conclude that the contract negotiators would have written this language differently, had they meant to include route modifications following a total rebid. For example, they could have agreed to the following text: *[amended language is underlined for clarity]*

- ‘when a route or routes during a total rebid is/are altered’, or ‘when a route(s) is/are altered’
- ‘the driver salesperson or driver salespersons during a total rebid whose route(s) is/are altered’, or more simply and more common, ‘the driver salesperson(s) whose route(s) is altered’
- ‘provided that the employee(s) remains a driver salesperson(s)’

It is much more likely that the language was intended to provide an eight (8) week “safety net” for individual drivers whose routes are unilaterally changed by the Employer, than for total rebids where seniority rights determine the outcome.

However, despite the seemingly clear language of an agreement, there are rare instances where the parties may proffer a different interpretation of the words through their mutual understandings and practices. In these exceptional cases, an arbitrator may rule contrary to that which is apparent. These *rare* instances, however, require consistency of actions and mutuality of understanding, such that they supersede a common interpretation of the language. Elkouri and Elkouri, in “How Arbitration Works,” cite two arbitrators’ opinions regarding such interpretations:

While Arbitrator Harry H. Platt has emphasized that the evidence of past practice “is wholly inadmissible where the contract language is plain and unambiguous,”

he has also recognized that, on the basis of very strong proof, the clear language of the contract may be amended:

“While, to be sure, parties to a contract may modify it by a later *agreement*, the existence of which is to be deduced from their course of conduct, the conduct relied upon to show such modification must be unequivocal and the terms of modification must be definite, certain, and intentional.” (p. 410)

Arbitrator Hamilton Douglas has declared that a party contending that clear language has been modified must “show the assent of the other party and the minds of the parties must be shown to have met on a definite modification.” (p. 410)

The Union’s evidence did not meet these stringent standards. No consistent and mutually agreed upon practice or understanding emerged through the evidence. Nor did the parties amend the language, despite years of bargaining and years of total rebids, to make it more consistent with the Union’s interpretation. Therefore, the Union’s position in this matter is harmed twofold: 1) the clear and unambiguous language of the agreement, and 2) the lack of a consistent, mutually agreed upon past practice to support its claims.

AWARD

After carefully reviewing and analyzing all the evidence, both written and verbal, the Arbitrator, for the reasons cited above, denies the Union's grievance. The Grievant is not eligible for the financial relief afforded in Article 14, Section 2 – Route Changes.

Respectfully submitted this 13th day of June, 2011

Eugene C. Jensen

Neutral Arbitrator