BEFORE
JOSEPH V. SIMERI
ARBITRATOR

The Arbitration Between UPSEU LOCAL 1222 and PROFESSIONAL TRANSPORTATION, INCORPORATED	FMCS CASE NO. 16-57682-3

ARBITRATION AWARD

This dispute was arbitrated on July 19, 2017, in Indianapolis, Indiana. UPSEU LOCAL 1222 (the "Union") was represented by Robert A. Hicks, Esq., and Richard J. Swanson, Esq. PROFESSIONAL TRANSPORTATION, INCORPORATED, (the "Employer") was represented by Mark J.R. Merkle, Esq. The Union and the Employer presented witnesses and introduced documentary exhibits. Counsel for both parties submitted excellent post-hearing briefs to the Arbitrator on September 6, 2017. This Award is issued within 30 days from the submission of the post-hearing Briefs.

APPLICABLE CONTRACT PROVISIONS

This is a contract-interpretation case. The following provisions of the Contract between the Union and the Employer apply and are the basis for my Award.

PREAMBLE

> This Agreement has been negotiated through the process of collective bargaining and entered into by and between the parties in a mutual effort to stabilize employment conditions and to promote sound labor and management relations.
>
> The Union recognizes that the Employer must keep abreast of business developments, and must operate efficiently and economically to if they are to be able to meet rising costs of operations, including rates of pay and working conditions members of the Union. Accordingly, the Union agrees that it will cooperate with the Employer to the end that his business may be operated efficiently and further agrees that it will not interfere in any way with the Employer's right to operate and manage its business provided that nothing herein will permit the Employer to violate any of the terms and conditions of this Agreement.

ARTICLE 3 ECONOMICS

Section 1. Rates

A. Effective April 1, 2015, the following minimum wage rates shall prevail:

	Years	Increase	Hourly	Mileage	Wait Time	Minimum
Level 1	0 - 60 days	1.25%	7.34	1.01	7.34	14.68
Level 2	61 days - 1 Year	1.5 x 1.25%	7.43	1.01	7.43	14.86
Level 3	1 Year - 3 Years	2%	7.58	1.01	7.58	15.16
Level 4	3 Years - 5 Years	2.5%	7.77	1.01	7.77	15.53
Level 5	5 Years - 9 Years	3.0%	8.00	1.01	8.00	16.00
Level 6	9 Years - 12 Years	1.5 x 1.015%	8.12	1.01	8.12	16.24
Level 7	12 Years and above	1.6 x 1.015%	8.25	1.01	8.25	16.50

	Years	2016 Increase	2017 Increase
Level 1	0 - 60 days		
Level 2	61 days - 1 Year	0.50%	0.50%
Level 3	1 Year - 3 Years	2%	2.00%
Level 4	3 Years - 5 Years	3%	3%
Level 5	5 Years - 9 Years	3%	3.35%
Level 6	9 Years - 12 Years	1.5 x 1.015%	1.5 x 1.015%
Level 7	12 Years and above	1.6 x 1.015%	1.6 x 1.015%

Legacy Level 8 rates will be integrated into the wage scale per mutual agreement.

a. The above rates are minimum rates across all PTI Branch locations. Rates are Branch specific and depend on a number of factors including, state law, area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than another Branch, subject to minimum rates.

ARTICLE 20—GRIEVANCE AND ARBITRATION PROCEDURE

Section 2. Arbitration Procedure

b. ... The arbitrator is prohibited from altering the terms and conditions of this Agreement and the decision of the arbitrator shall be final and binding.

FACTS

If you are not in the railroad industry, you probably have never given thought to the process used by railroads to transport their railroad workers to the rail yards and the trains to which those workers may be assigned from time to time. Well, Mr. Ron Romain thought of that and he formed the Employer, a closely-held company, starting small, but which now provides rail crew hauling services used by railroads in at least 23 states. Employer's drivers, who do the transporting of railroad workers, are represented by the Union. There are the drivers who transport railroad workers over the road and earn pay based on mileage, but not less than the Contract's hourly rate, and the drivers who work in the railroad yards, moving railroad workers to and from yard locations, and are paid the Contract's hourly wage. Drivers also earn "wait time pay" which is a minimum hourly rate while waiting for the crew to be transported to arrive.

Because the terminals exist at various locations throughout the Country, some on the West Coast, some on the East Coast and some in-between, the same wage scale for all employees makes no economic sense. An employee down South can be recruited for less pay than an employee on the East Coast. So, under the Contract, the pay is different for the bargaining-unit employees, depending on their location. There are so many locations, currently around

275, that to separately list the pay scale for each location in the Contract would make the document larger than Tolstoy's *War and Peace*. Instead, the Contract sets forth Levels, 7 of them, each corresponding to the time the employee has been employed by the Employer. This is what we call "seniority". And, then the Contract sets forth "minimum wage rates" applicable to each Level. The following is how it is written in the Contract:

A. Effective April 1, 2015, the following minimum wage rates shall prevail:

	Years	Increase	Hourly	Mileage	Wait Time	5 Minimum
Level 1	0 – 60 days	1.5%	[illegible]	[illegible]	[illegible]	[illegible]
Level 2	61 days – 1 Year	0.5% / 2.5%	[illegible]	[illegible]	[illegible]	[illegible]
Level 3	1 Year – 3 Years	2%	[illegible]	[illegible]	[illegible]	[illegible]
Level 4	3 Years – 5 Years	2.5%	[illegible]	[illegible]	[illegible]	[illegible]
Level 5	5 Years – 9 Years	3.5%	[illegible]	[illegible]	[illegible]	[illegible]
Level 6	9 Years – 12 Years	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Level 7	12 Years and above	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

	Years	2016 Increase	2017 Increase
Level 1	0 – 60 days		
Level 2	61 days – 1 Year	0.50%	0.50%
Level 3	1 Year – 3 Years	2%	2.50%
Level 4	3 Years – 5 Years	3%	3%
Level 5	5 Years – 9 Years	3%	3.33%
Level 6	9 Years – 12 Years	1.5 x 1.015%	1.5 x 1.015%
Level 7	12 Years and above	1.6 x 1.015%	1.6 x 1.015%

Legacy Level 8 rates will be integrated into the wage scale per mutual agreement.

- The above rates are minimum rates across all PTI Branch locations. Rates are Branch specific and depend on a number of factors including, state law, area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than another Branch, subject to minimum rates

The current Contract, beginning April 1, 2015 and expiring March 31, 2018, is not the first contract between the Employer and the Union. There was a contract from 1999 to 2009; a contract from 2009 to 2012; and a contract from 2012 to 2015. Essentially, every one of these earlier contracts, like the current Contract, referred to minimum wage rates and levels of seniority. And up to the time of this Grievance, under all the earlier contracts, all bargaining-unit employees received negotiated wage increases whether they were earning the minimum rate or greater than the minimum rate. Moreover, in 2015, the first year of this Contract, all bargaining-unit employees received a wage increase, again whatever their pay rate. In 2016, for the first time, this practice changed and the change brought with it this Grievance. In 2016, the only bargaining-unit employees who received an increase in wages were those making the minimum rates, about 30% of the total bargaining unit. The bargaining unit employees earning more than the minimum rates, about 70% of the total bargaining unit, for the first time, received no wage increase.

ISSUE

Neither side specifically framed the issue in their Post-Hearing Briefs. Likely, because I never asked them to do so. And I am the one who must decide this case, so I frame the issue: Did the Employer violate the Contract when it paid wage increases only to those bargaining-unit employees making

the minimum wage rates specified in the Contract? If so, what is the appropriate remedy?

ANALYSIS

In relative terms, whether something is on the floor, a minimum, or on the ceiling, a maximum, depends in large measure if your feet are on the ground or are up in the air. I am not, however, authorized to give a relative answer. Instead, I am required to tell the parties what they meant when they negotiated this Contract even though I was not there. But I do bring to this responsibility my bargaining-table experience, judgment, and common sense. Unfortunately, I do not bring infallibility.

When I am charged with interpreting a contract, my duty is to determine the intent of the parties, not to decide whether one side or the other made a good deal or a bad deal. So, did the parties here intend that all bargaining-unit employees were to receive a 2016 wage increase or just those bargaining unit employees making the minimum rate specified in the Contract?

The Employer tells me, first, that the Contract is clear and unambiguous and that the annual increases only apply to the minimum rates described in

the Contract. I agree that the only rates specifically spelled out in the Contract are what the Contract describes as minimum rates.

But there is more to this story. We know that the wage rates paid by the Employer vary throughout the Country, depending on the location of the Employer branch. You can hire someone doing the same work for less money in Arkansas than in Massachusetts. We know that it would make little sense to list separately the wages for each Employer location in the Contract because of the great number of locations. We know there is the public-relations problem, if you will, arising from specifically telling the Arkansas worker that the person doing the same work as a worker in Massachusetts is worth more than the Arkansas worker.

So, the Contract, while listing only the minimum rates, also states that:

> The above rates are minimum rates across all PTI Branch locations. Rates are Branch specific and depend on a number of factors including, state law, area, trip configuration, PTI's ability to recruit. Rates may be more or less in each category than another Branch, subject to minimum rates.

This language recognizes that the actual wages paid by the Employer under the Contract are not limited to the dollar rates written in the Contract but that those dollar rates are simply minimum rates, the floor, and do not represent all the rates, the ceiling. This language is the parties' attempt to make clear

that employees at the same employment level but working in different locations earn different wages without actually attaching the wage amounts to the Contract. And, again, it would likely cause bargaining-unit disruption for the rural Georgia employee to see what he is earning compared to the Chicago, Illinois employee, both at the same seniority level.

Wage negotiations are the heart of collective bargaining. There may be exceptions, but they are few and they are the exceptions. Here, the bargaining for the 2015 Contract was chiefly centered on wages. Such was the thrust of the testimony of the Union witnesses. The Company offered no evidence to refute it. The likely reason is that the testimony of the Union's witnesses was accurate. So, with that, on the critical issue of wages, the Employer's position must be the negotiations involved only the wages for those employees making the minimum wage in the various States, about 30% of the bargaining unit; or, if the negotiations did involve all the employees, the Union caved and agreed that the wages for the employees making more than the minimum wage, about 70% of the bargaining unit, would be frozen for three years.

The obstacle to my acceptance of the Employer's position, besides common sense, is that the Employer was unable to present testimony from any Employer representative who was actually present at the bargaining table during the negotiations. I do not believe this was an oversight from

Employer's respected and very able Counsel. The inference I do draw is that such testimony would not have helped the Employer's position.

The only evidence I can weigh from the Employer on this key issue is the testimony of the Employer's Controller. But he was not involved in the negotiations, in person or, like the Wizard of Oz, even behind the curtain. The Controller, a credible person, presented only his opinion of the Contract's meaning. In his opinion, an opinion formed without the benefit of participating in the bargaining, the Contract means the parties negotiated only a minimum rate the Employer would pay. Each year, on the Contract's anniversary date, the minimum rate would be raised, with the Employer reserved to itself the unbridled discretion to award a wage increase to those making more than the minimum or not.

However, the Union's witnesses, also credible, actively participated in the Contract's negotiation. They dispute the Employer opinion interpretation. I credit the Union testimony because the Union witnesses did the actual bargaining.

Both sides do agree the wage language in this Contract is not new. It is essentially the same language used by the parties since 2009. Based on that consistent language, all bargaining-unit employees, in all prior years, whether earning the national minimum wages or the higher branch specific rates,

received the annual negotiated wage increases. In fact, in 2015, the first year of this very Contract, all employees received the negotiated 2015 rate increase.

Your mother, or a teacher, or some other respected person in your life, may have told you we are judged not by our words but by our actions. Thus, I have difficulty accepting the Employer's words that the prior contracts provide only historical context and are of no help in resolution of the dispute arising under this Contract. I have evidence, action, that the Employer and the Union, negotiated labor agreements since 1999. In every other labor agreement between them, consistently, the negotiated wage increase applied to all the employees in the bargaining unit, not just to those making the national minimum wage. The wage article in each of those earlier contracts is not significantly different than the language in this Contract. Parties only change the contract language perceived by one or the other or both to be a problem. With essentially the same language in this Contract as in all the others before it, why would the Union even think the negotiated wage increases in this Contract would be applied, for the first time, to only a small percentage of the bargaining unit?

One can moniker the Employer's lengthy history of paying the increases to all the bargaining-unit employees, under the same language over successive

contracts as "consistent usage" or "consistent practice" or "consistent term of employment" or "implied contract integration" or simply "past contract practice." The name doesn't matter. What matters is that this Employer and this Union consistently applied the wage articles of their bargains to mean wage increases applied to all bargaining-unit employees, those making the national minimum wage and those making more than the national minimum wage.

So, with that, the party wanting to change the consistent application of this wage article, the Employer here, had the duty to notify the other, the Union, during the bargaining of this Contract, of the proposed change. In this case, I find that based on the bargaining history between them, the Employer had the obligation to notify the Union that it would no longer interpret and apply the wage article the way it had been interpreted and applied during all the preceding contracts. The Employer gave no such notice.

All of us, if we are somewhat "normal", usually act based on reason. What was the reason the Employer deviated from its long consistent application of the wage article in 2016? The answer is economics, in the vernacular, money. You see, in March 2016, one month before the April 2016 wage increase was to take effect, Employer through no fault of its own, lost most of its business with CSX railroad. This cost the Employer, about

$50,000,000 in revenue, which is certainly not "chump change." So, when the Employer's Controller, as he was required to do, requested the consent of Mr. Romain to apply the 2016 wage increases, Mr. Romain, for the first time ever, refused. And when Mr. Romain speaks, all in the Employer hierarchy listen.

To support its position, the Employer also relies on the Contract's Preamble. That says, in part, that the Union will cooperate with the Employer so the Employer can operate its business efficiently. And the Union will not interfere with the Employer's right to manage its business. But the Preamble also states that "... nothing herein will permit the Employer to violate any of the terms and conditions of this Agreement".

A preamble is no more than an introductory statement, not a contract condition. Here, all the Preamble does is express the desire of the parties to cooperate, but subject to the actual Articles in the Contract. It's sort of like the "let's reach across the aisle" platitude espoused by members of the United States Congress, which has not resulted in any substantive change to partisanship. Thus, I find the Employer's reliance on the Preamble's wish too slim a reed to support the Employer's position.

Based on the evidence submitted at the Arbitration Hearing, both testimonial and documentary, and having considered the arguments submitted by Counsel for the parties, I enter the following:

AWARD

A. The grievance is sustained.

B. The Employer must grant the April 2016 wage increase specified in the Contract to all Level 2 through Level 7 employees who did not receive it, whether or not such employees are still employed by the Employer.

C. Interest on the past due amount of pay is not awarded.

D. Payment of the amounts due under this Award must be made within 45 days of the date of this Award.

E. I retain jurisdiction over this case for implementation of the remedy.

Joseph V. Simeri, Arbitrator

October 3, 2017

Date