UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

PROFESSIONAL TRANSPORTATION, INC., Plaintiff, v. UNITED PROFESSIONAL & SERVICE EMPLOYEES UNION LOCAL 1222, Defendant.	)	Case No. 3:17-cv-00176-RLY-MPB

APPEARANCE OF COUNSEL

To: The clerk of court and all parties of record

I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for Plaintiff Professional Transportation, Inc.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
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PROFESSIONAL TRANSPORTATION, INC., Plaintiff, v. UNITED PROFESSIONAL & SERVICE EMPLOYEES UNION LOCAL 1222, Defendant.	)	Case No.: 3:17-cv-00176-RLY-MPB

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I am admitted or otherwise authorized to practice in this court, and I appear in this case as counsel for Plaintiff Professional Transportation, Inc.

/s/ Mark J. R. Merkle
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Attorney for Plaintiff Professional Transportation, Inc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

PROFESSIONAL TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3 :17-cv-00176-RLY-MPB
	)	
UNITED PROFESSIONAL & SERVICE EMPLOYEES UNION LOCAL 1222,	)	
	)	
Defendant.	)	

CORPORATE DISCLOSURE STATEMENT OF PLAINTIFF PROFESSIONAL TRANSPORTATION, INC.

Pursuant to Rule 7.1 of the Federal Rule of Civil Procedures, Plaintiff Professional Transportation, Inc. discloses that it has no parent corporation and there is no publicly held corporation that owns ten percent (10%) or more ownership interest in Professional Transportation, Inc.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

PROFESSIONAL TRANSPORTATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 3:17-cv-176
	)	
UNITED PROFESSIONAL & SERVICE EMPLOYEES UNION LOCAL 1222,	)	
	)	
	)	
Defendant.	)	

COMPLAINT TO VACATE ARBITRATION AWARD

Plaintiff Professional Transportation, Inc. ("PTI"), by counsel, brings this action against Defendant United Professional & Service Employees Union Local 1222 (the "Union"), and alleges and states as follows:

NATURE OF THE ACTION

1. This is an action pursuant to Section 301 of the Labor Management Relations Act (the "LMRA"), 29 U.S.C. § 185, to vacate the October 3, 2017 Arbitration Award (the "Award"), issued by Arbitrator Joseph V. Simeri (the "Arbitrator") through Federal Mediation and Conciliation Service, in connection with an arbitration between PTI and the Union. A true and correct copy of the Award is attached hereto as Exhibit A.

2. The Award is subject to a Collective Bargaining Agreement between the parties to this action (the "CBA" or the "Agreement"). A true and correct copy of the CBA is attached hereto as Exhibit B.

3. The Award holds that PTI was obligated to apply the annual percentage wage increase identified in the CBA to raise all Level 2 through Level 7 employees' wages on April 1, 2016, regardless of whether the wages were already above the minimum rates set out in the CBA. In reaching this conclusion, the Arbitrator did not dispute that the CBA is clear and unambiguous, and he acknowledged that the Agreement only describes raises to *minimum* wage rates for Level 2 through Level 7 employees who were receiving the minimum rates. But the Arbitrator nonetheless added terms to the CBA that expanded application of the percentage wage increases to *all* wage rates for *all* Level 2 through Level 7 employees, not just those employees being paid the minimum wage rates set forth in the Agreement. The Arbitrator altered the terms of the CBA based on PTI's past practice – under prior collective bargaining agreements with the Union – of paying wage increases to all bargaining unit employees.

4. The Award must be vacated because it draws its essence solely from the extra-contractual conduct of the parties, disregards and contradicts the clear and unambiguous language of the CBA, and imposes an obligation on PTI not bargained for by the parties as expressed in their Agreement. The CBA prohibits the Arbitrator from altering the terms and conditions of the Agreement. Yet this is precisely what the Arbitrator did when he gave legal effect to past practice that finds no support within the four corners of the CBA. The Arbitrator thus exceeded his authority under the CBA and, as a result, the Award cannot stand.

PARTIES

5. PTI is a citizen of the State of Indiana. It is an Indiana corporation with its principal place of business located in Evansville, Indiana. PTI is in the business of transporting railroad crews to and from various destinations along certain railway lines. PTI maintains hundreds of branch locations in 23 states and the District of Columbia. PTI employs thousands of drivers throughout the country, typically drawn from cities and towns where the railroad yards are located. PTI employs over-the-road drivers who transport railroad crews by van to and from the railroad yards. PTI employs designated yard van drivers who shuttle railroad personnel by van within the confines of a single railroad yard or short distances between the yard and local establishments. PTI employs other types of drivers and branch administrators with driving responsibility.

6. The Union is a labor organization representing employees in an industry affecting commerce as defined in Section 2 of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 152, and Section 301 of the LMRA, 29 U.S.C. § 185. The Union is "the exclusive Collective Bargaining Agent for all drivers . . . and Branch Administrators in their capacity in performing their driving responsibilities at all of [PTI's] locations throughout the United States except Shelby, Kentucky; Martin, Kentucky; Russell, Kentucky; Baltimore, Maryland; Cumberland, Maryland; Jacksonville, Florida and Bennings, District of Columbia." (CBA, Art. 1). Although the Union is headquartered in Ronkonkoma, New York, its representatives regularly conduct business in the Southern District of Indiana.

JURISDICTION AND VENUE

7. Section 301 of the LMRA gives federal courts jurisdiction to hear suits over violations of collective bargaining agreements, including those challenging arbitration awards issued pursuant to collective bargaining agreements. *See Smart v. International Broth. of Elec. Workers, Local 702*, 315 F.3d 721, 724 (7th Cir. 2002); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 357-58 (7th Cir. 1997). Because the Award is subject to a collective bargaining agreement, PTI brings this action under Section 301 of the LMRA.

8. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 in that PTI's action arises under Section 301 of the LMRA. *See* 29 U.S.C. § 185(a).

9. This Court has personal jurisdiction over the Union because its representatives engage in sufficient contacts with the State of Indiana such that the Union should reasonably anticipate being haled into court here. The Union is a labor organization with national jurisdiction representing employees who are employed by a corporation headquartered in Evansville, Indiana. Some of these employees work in Evansville, Indiana or at other branch locations within Indiana. The Union regularly and frequently communicates with personnel at PTI's headquarters in Evansville, Indiana. These contacts include, among other things, those giving rise to this action, including negotiation of the CBA itself. The Union initially filed a charge against PTI with the Region 25 Office of the National Labor Relations Board in Indiana (the "NLRB"). The Union ultimately participated in an

arbitration of that charge in Indiana, which was presided over by an Indiana-based arbitrator. The Union attended the arbitration hearing in Indiana and submitted post-hearing briefs to the Arbitrator at his business address in Indiana.

10. Venue is proper in this Court because the Union's duly authorized officers and agents are engaged in representing or acting for employees of PTI in the Southern District of Indiana, PTI resides in this district, and a substantial portion of the events at issue occurred in this district. *See* 29 U.S.C. § 185(c); 28 U.S.C. § 1391(b).

FACTUAL AND PROCEDURAL BACKGROUND

The Economics Of PTI's Business

11. PTI maintains hundreds of branch locations in 23 states and the District of Columbia and employs thousands of drivers throughout the country. Given the nationwide scope of PTI's business, PTI must have flexibility in setting and adjusting wages for its employees across its hundreds of locations.

12. There is no uniformity in wage rates across PTI's hundreds of branch locations. Wage rates vary from branch location to branch location because of differences in state minimum wage laws, PTI's ability to attract workers in a particular location, and other factors unique to a location, its routes, and the area that it serves. The CBA contains specific language to this effect.

The Clear And Unambiguous Terms Of The CBA

13. PTI and the Union entered into the CBA on April 30, 2015. The CBA covers the period from April 1, 2015, to and including March 31, 2018.

14. The CBA, on its face, recognizes PTI's flexibility to set and adjust wages by branch location, rather than be constrained by a single wage scale (and corresponding percentage wage increases) for all employees across all locations.

15. The CBA contains what is clearly and unambiguously denominated a *minimum* wage rate table as follows:

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	.160	7.34	14.68
Level 2	61 days – 1 Year	L1 x 1.25%	7.43	.168	7.43	14.86
Level 3	1 Year – 3 Years	2%	8.21	.175	8.01	16.02
Level 4	3 Years – 5 Years	2.50%	8.41	.185	8.05	16.10
Level 5	5 Years – 9 Years	2.50%	8.50	.200	8.07	16.14
Level 6	9 Years – 12 Years	L5 x 1.015%	8.62	.203	8.19	16.38
Level 7	12 Years and above	L6 x 1.015%	8.75	.206	8.31	16.62

	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%	3.35%
Level 6	9 Years – 12 Years	L5 x 1.015%	L5 x 1.015%
Level 7	12 Years and above	L6 x 1.015%	L6 x 1.015%

Legacy Level 6 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.

(CBA, Art. 3, § 1(A)) (underlining in original).

16. Therefore, the CBA establishes only the *minimum* wage rates – i.e., the wage payment *floor* – for different levels of employees categorized by seniority across all branch locations. (*Id.*). So long as PTI pays an employee *at least* the minimum wage rate established by the CBA, PTI has the flexibility to determine an employee's pay based on factors specific to the location in which the employee works. (*Id.*).

17. Likewise, the percentage increases identified in the CBA correspond to and apply solely with respect to the *minimum* wage rates set forth in the Agreement. (*Id.*). The CBA contemplates two annual percentage increases to the Agreement's minimum wage rates for Level 2 through Level 7 employees on the anniversary date of the Agreement: one on April 1, 2016 and one on April 1, 2017. (*Id.*). The percentage increases identified in the CBA merely *raise the floor* for those Level 2 through Level 7 employees being paid the minimum wage rates set forth in the Agreement. (CBA, Art. 3, §§ 1(A) and (B)).

18. There is nothing in the CBA that extends application of the percentage increases described in the CBA beyond the minimum wage rates established by the Agreement. There is nothing in the CBA that directs application of the percentage increases described in the CBA across the board, across all Level 2 through Level 7 employees across all branch locations, regardless of their pay rate. There is nothing in the CBA that requires PTI to grant a Level 2 through Level 7 employee who is being paid more than the minimum wage rate established by the CBA a percentage

increase as described in the Agreement. PTI's only obligation under the CBA was to "provide each [branch] location a Wage Table that reflects the contractual increases *contained in this [A]greement* prior to April 1 of each contract year." (CBA, Art. 3, § 1(B)) (emphasis added).

19. The fact that the CBA sets the minimum wage rates and corresponding percentage increases to those minimum wage rates – and nothing more – is further underscored by the plain language in Article 3, Section 1(C) of the CBA, which provides for a "Guaranteed Scale above Minimum Wage." This provision states that Level 1 rates – the rates for employees who have been employed with PTI for 60 days or less – "will be a minimum of 1.25% above any state/federal minimum wage," and that "[a]ny Level 1 rate already above this amount will not be adjusted." (CBA, Art. 3, § 1(C)). In other words, the CBA sets the floor for its contractually negotiated minimum wage rates just slightly above the statutorily required minimum wage rates. Any setting and adjustment of wages above the floor remains within the sole discretion of PTI and beyond the purview of the CBA. (CBA, Art. 3, §§ 1(A)-(C)).

20. Indeed, the Union explicitly recognized in the CBA

> that [PTI] . . . must operate efficiently and economically if they are to be able to meet rising costs of operations, including rates of pay and working conditions to members of the Union. Accordingly, the Union agrees that it will cooperate with [PTI] to the end that [its] business may be operated efficiently and further agrees that it will not interfere in any way with [PTI's] right to operate and manage its . . . business provided that nothing herein will permit [PTI] to violate any of the terms and conditions of this Agreement.

(CBA, Preamble).

21. The terms of the CBA are clear and unambiguous. Accordingly, those terms are conclusive and must be strictly enforced and applied as written. They cannot be construed or interpreted through extrinsic evidence.

22. The CBA is a fully integrated agreement. There is no language in the CBA giving an arbitrator the authority to rely on extrinsic evidence – such as evidence of the extra-contractual conduct of the parties – as a ground for varying the terms of the Agreement. On the contrary, the Arbitrator is expressly "prohibited from altering the terms and conditions of this Agreement[.]" (CBA, Art. 20, § 2(A)(b)). Union "understood and agreed . . . that *except as abridged by a specific provision of the Agreement*, [PTI] reserves and retains the right to exercise solely and ultimately all its inherent rights as provided by law." (CBA, Art. 17) (emphasis added).

The Union's Grievance/Charge Against PTI

23. On April 1, 2016, the first year anniversary of the CBA, PTI awarded the percentage increases identified in the CBA to only those Level 2 through Level 7 employees being paid the minimum wage rates set forth in the Agreement. PTI did not award the percentage increases identified in the CBA to any Level 2 through Level 7 employees making more than the minimum wage rates set forth in the Agreement. This was consistent with the clear and unambiguous terms of the CBA.

24. Shortly thereafter, the Union filed a grievance under the CBA, as well as a charge with the NLRB. In both its grievance and its charge against PTI, the

Union alleged that PTI had violated the terms of the CBA by failing to implement the April 1, 2016 percentage wage increases across the board for *all* Level 2 through Level 7 employees, regardless of whether they were being paid the minimum wage rates established by the Agreement. In advancing this claim, the Union relied on PTI's past practice – under prior collective bargaining agreements with the Union – of paying wage increases to all bargaining unit employees.

25. The CBA requires PTI and the Union to arbitrate disputes arising out of the Agreement. (CBA, Art. 20, § 2(A)).

26. PTI and the Union agreed to arbitrate the Union's grievance and charge against PTI, and agreed to the selection of an arbitrator to preside over this dispute and render a decision.

The Arbitration

27. The arbitration hearing took place before the Arbitrator on July 19, 2017.

28. PTI's presentation of evidence, witnesses, and legal arguments focused on the clear and unambiguous terms of the CBA.

29. The Union's presentation of evidence, witnesses, and legal arguments focused on PTI's historical practice under prior collective bargaining agreements between the parties. PTI maintained that its historical practice under prior collective bargaining agreements with the Union and the other extra-contractual conduct of the parties outside the four corners of the CBA were irrelevant and inadmissible in light of the clear and unambiguous terms of the Agreement.

30. The parties submitted post-hearing briefs on September 6, 2017.

The Award

31. On October 3, 2017, the Arbitrator issued his Award.

32. In his Award, the Arbitrator conceded that the CBA "sets forth 'minimum wage rates' applicable to each Level [of employee]." (Award, p. 5). The Arbitrator did not dispute PTI's contention that the CBA is clear and unambiguous. (Award, pp. 7-8). In fact, the Arbitrator "agree[d] that the only rates specifically spelled out in the [CBA] are what the [CBA] describes as minimum rates." (Award, p. 8). As the Arbitrator correctly observed, "[t]he language [in the CBA] recognizes that the actual wages paid by [PTI] under the [CBA] are not limited to the dollar rates written in the [Agreement] but that those dollar rates are simply minimum rates, the floor, and do not represent all the rates, the ceiling." (Award, p. 8). The Arbitrator recognized the parties' intent to cooperate in the efficient and economical operation of PTI's business as reflected in the Preamble of the CBA, "subject to *the actual Articles in the [Agreement].*" (Award, p. 13) (emphasis added).

33. But the Arbitrator did not stop there with his analysis, because he felt "there is more to this story" than the terms of the CBA. (Award, p. 8).

34. Despite acknowledging the plain wording of the minimum wage rate table in the CBA, and despite the lack of any finding that the CBA was vague and ambiguous – indeed, implying quite the opposite – the Arbitrator proceeded to consider extrinsic evidence in order to alter the terms of the Agreement. As the Arbitrator explained in his Award:

> 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 [PTI's] words that the prior [collective bargaining agreements between the parties] provide only historical context and are of no help in resolution of the dispute arising under this [CBA]. I have evidence, action, that [PTI] and the Union, negotiated labor agreements since 1999.

(Award, p. 11).

35. "Based on the evidence submitted at the Arbitration Hearing, both testimonial and documentary," the Arbitrator held that PTI was obligated to grant the percentage wage increases identified in the CBA to *all* Level 2 through Level 7 employees across all branch locations on April 1, 2016, regardless of their pay rate. (Award, pp. 13-14). The Arbitrator thus added terms to the CBA that expanded application of the percentage wage increases to *all* wage rates for *all* Level 2 through Level 7 employees, not just those employees being paid the minimum wage rates set forth in the Agreement. The Arbitrator altered the terms of the CBA based on PTI's historical practice – under prior collective bargaining agreements with the Union – of paying wage increases to all bargaining unit employees. (Award, pp. 11-14).

36. The Arbitrator compounded this improper exercise of his authority under the CBA by seemingly penalizing PTI for not coming forward with any extrinsic evidence outside the four corners of the CBA, and for not disputing the Union's extrinsic evidence. The Arbitrator speculated that PTI did not refute the Union's testimony with the testimony of one of its "representative[s] who was

actually present at the bargaining table during the negotiations" leading up to execution of the CBA, because it was "likely . . . the testimony of the Union's witnesses was accurate." (Award, pp. 9-10). The Arbitrator drew the inference from PTI's lack of extrinsic evidence that such evidence "would not have helped [PTI's] position." (Award, p. 10). The Arbitrator's assessments ignore PTI's stated position – at the arbitration hearing and in its post-hearing brief – that extrinsic evidence outside the four corners of the CBA was irrelevant and inadmissible in light of the clear and unambiguous terms of the Agreement.

CLAIM FOR RELIEF

37. PTI incorporates paragraph 1 through 36 above as though fully set forth herein.

38. The Arbitrator conceded that his powers to arbitrate the parties' dispute over the CBA was limited, and that he was "prohibited from altering the terms and conditions of [the Agreement]." (Award, p. 3) (quoting CBA, Art. 20, § 2(A)(b)). The Arbitrator exceeded the powers delegated to him by the parties under the CBA.

39. The Arbitrator exceeded his authority because the Award fails to draw its essence from the CBA. A review of both the relevant terms in the CBA and the Arbitrator's own words in the Award makes it apparent that the basis for the Award is non-contractual. Rather than interpret the text of the CBA, the Arbitrator looked to the extra-contractual conduct of the parties to impose an obligation on PTI that is unsupported by and inconsistent with the clear and unambiguous terms of

the Agreement. The Arbitrator openly declared that he was looking beyond the terms of the CBA and relying on extrinsic evidence in reaching his Award. In so doing, the Arbitrator gave legal effect to past practice that finds no support within the four corners of the CBA.

40. In short, there is no possible interpretive route from the language of the CBA to the Award. The only way to arrive at the decision the Arbitrator made is to disregard the clear and unambiguous terms of the CBA and expand its provisions beyond what appears on the face of the document.

41. Not only did the Arbitrator exceed the confines of interpreting and applying the CBA, but he also injected into the Award his own brand of industrial justice. The Award is not founded in a bona fide contractual interpretation of the CBA and its terms, but on the Arbitrator's own "bargaining-table experience, judgment, and common sense" view of "the bargaining history between [the parties]." (Award, pp. 7, 12).

42. PTI's action to vacate the Arbitrator's Award does not challenge whether the Arbitrator misinterpreted the CBA. Rather, PTI's concern is limited to whether the Arbitrator went beyond, or outside, the bounds of interpreting the CBA that was before him while fashioning his Award. The question is not whether the Arbitrator misinterpreted the CBA, but whether his Award disregards and alters the very language of the Agreement itself. It does.

43. The Arbitrator having exceeded his authority as described herein, the Award cannot stand and must be set aside.

WHEREFORE, Plaintiff Professional Transportation, Inc. respectfully requests that this Court:

(A) vacate the Award;

(B) declare that the CBA only obligated PTI to apply the percentage wage increases identified in the Agreement to Level 2 through Level 7 employees being paid the minimum wage rates established by the Agreement;

(C) declare that the CBA did not require PTI to apply the percentage wage increases identified in the CBA to raise all wage rates for all Level 2 through Level 7 employees effective April 1, 2016, as determined in the Award; and

(D) grant PTI such further relief as the Court deems just and proper.

Respectfully submitted,

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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:

[redacted]

	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%	3.35%
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%

[redacted] will be integrated into [redacted]

B. [redacted]

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	Midwest	Work Week	Minimum
Level 1	0 – 60 days	1.25%	[illegible]	[illegible]	[illegible]	[illegible]
Level 2	61 days – 1 Year	1.5x 1.25%	[illegible]	[illegible]	[illegible]	[illegible]
Level 3	1 Year – 3 Years	2%	[illegible]	[illegible]	[illegible]	[illegible]
Level 4	3 Years – 5 Years	2.50%	[illegible]	[illegible]	[illegible]	[illegible]
Level 5	5 Years – 9 Years	2.50%	[illegible]	[illegible]	[illegible]	[illegible]
Level 6	9 Years – 12 Years	1.5 x 1.0125%	[illegible]	[illegible]	[illegible]	[illegible]
Level 7	12 Years and above	1.6 x 1.0125%	[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%	3.50%
Level 6	9 Years – 12 Years	1.5 x 1.0125%	1.5 x 1.0125%
Level 7	12 Years and above	1.6 x 1.0125%	1.6 x 1.0125%

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.

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