

In the Matter of Arbitration:

YELLOW TRANSPORTATION, INC.  
YRC, INC.

and

TRANSPORTATION COMMUNICATIONS  
INTERNATIONAL UNION

Seniority (Hialeah, FL)

Before: Ira F. Jaffe, Esq., Impartial Arbitrator

APPEARANCES:

For the Union:

William H. Haller, Esq.  
(Associate General Counsel, IAMAW)  
Maria A. Roeper, Esq.  
(Assistant General Counsel, IAMAW)  
Joseph P. Condo, International Vice-President

For the Employer:

John S. Ferrer, Esq.  
(Morgan Lewis LLP)  
Sue Harrison, Vice-President, Labor Policy and Planning, YRC North  
American Transportation  
Lamar Beinhower, Vice-President, Labor, Southern Region, YRC North  
American Transportation  
David Emery, Service Center Manager, Tampa

## **BACKGROUND**

The Transportation Communications International Union (“TCU” or “Union”) and Yellow Transportation, Inc. (“Yellow”) entered into a collective bargaining agreement whose term runs from May 1, 2008 through April 30, 2013 (“Agreement”). During 2009, Yellow Roadway Corporation (“YRC” or “Company”) became the successor to Yellow under the Agreement.

Prior to October 16, 2009, Roadway Corporation operated a terminal in Miami that was separate geographically and operationally from the terminal operated by Yellow in Hialeah. The clerical employees at the Yellow facility in Hialeah were represented by the TCU for many years and were covered by the Agreement. The clerical employees at the Roadway facility in Miami for many years have been unrepresented and were not covered by any collective bargaining agreement.

Effective Monday, October 18, 2009, the Roadway Miami clerical employees were directed to report to work at the Company's Hialeah facility coincident with the consolidation of the Miami and Hialeah operations which had taken place effective October 16, 2009. Over the objection of the Union, YRC credited the transferring Roadway employees with their full service based upon their dates of hire with Roadway and dovetailed them into the existing Hialeah seniority list for the bargaining unit. The Union asserted that the language of the Agreement required that those individuals be endtailed since they had not previously worked for the Company at the facility and were not previously covered by the Agreement.

The question presented in this arbitration is whether the Company violated the Agreement by the grant of seniority to the transferring Roadway employees for the period of their employment with Roadway prior to the consolidation of the two operations in October 2009, and if so, to determine the appropriate remedy.

An arbitration hearing in this matter was held on May 3, 2010. The Parties filed post-hearing briefs, which were received on June 11, 2010, and waived the time limits for the issuance of this Opinion and Award.

Most of the material facts of this case are not in dispute.

Relevant Provisions of the Agreement

Rule 5 – Seniority, of the Agreement, provides in its entirety as follows:

Seniority rights for all covered employees shall prevail. At the end of the sixty (60) working day probationary period, the employee's seniority date shall be the day he/she began the probationary period.

Where two or more employees begin their probationary period on the same day their names shall be shown on the seniority roster in the order in which they were hired. Seniority shall be broken by discharge, voluntary quit (no show, no call for 72 consecutive hours), retirement, or more than one (1) year on layoff or non-work related sick leave. The seniority district hereby established shall be continued unless and until changed by mutual agreement between the parties hereto.

Rule 8 – Seniority Roster, of the Agreement, provides in its entirety as follows:

(a) A seniority roster of all employees entitled to seniority showing name, position occupied, rate of pay and seniority date will be posted in January every year in places accessible to all employees and will be revised when necessary.

(b) The January seniority rosters will be checked by Management and the local representatives of the Union prior to posting. After posting, the employees shall have an initial period of thirty (30) days in which to protest errors; however, no monetary claim based on an incorrect seniority date will be honored after the original thirty (30) day period. Upon presentation of proof of error by an employee or his duly accredited representative, such error shall immediately be corrected.

(c) The Union's designated representative and the Shop Steward will be furnished with a list of additions and deletions or a copy of a revised seniority roster every month.

Rule 9 – Consolidation or Transfer of Work, of the Agreement, provides in its entirety as follows:

When such consolidation or transfers of work are made, the Management will notify the Union's designated representative at least thirty (30) days prior to the contemplated transfer or consolidation, and a conference will be held for the purpose of negotiating an agreement.

Rule 17 – Reducing Forces, of the Agreement, provides in pertinent part, as follows:

(a) When reducing forces, seniority shall govern. . . .

(c) It is agreed that management will offer the Union's designated representative at least thirty (30) days prior to the contemplated abandonment or closing of a station in whole or in part and will afford the Union the opportunity to negotiate as to the effects upon the employees.

Rule 44 – Management Rights, of the Agreement provides in its entirety as follows:

Except to the extent previously abridged by a specific written provision of this Agreement, the Company reserves and retains, solely and exclusively, all of its inherent rights to manage the business as such rights existed prior to the execution of this Agreement with the Union.

Rule 45 – Invalidation Clause, of the Agreement provides in its entirety as follows:

If any of the terms and conditions of this Agreement are in violation of any city, state, or federal law or court decision or decree, then to the extent of the violation, that portion of this Agreement shall be null and void and subject to renegotiation. If any portion of this Agreement is declared illegal, the remaining provisions of the Agreement shall not in any way be affected.

#### The Corporate Status of the Employer

Limited, but unrebutted, record evidence was introduced regarding the relationship at various times of Yellow and Roadway and other related corporate entities.

In or about August 2003, Yellow Transportation purchased Roadway Express. The two companies were operated separately until the fall of 2008 when the corporations were merged by their common parent – YRC Worldwide, Inc. – to form Yellow Roadway Corporation. Even after YRC was formed, the operations remained separate until 2009. In March 2009, Yellow and Roadway began the process of consolidating their operations, including the closure of terminals in geographic areas where there were multiple terminals operated.

YRC also owns a number of other trucking companies. During 2009, YRC consolidated terminals around the country where there were duplicate terminals as a result of the consolidation of Yellow and Roadway operations. In the Miami area, Yellow had a terminal in Hialeah and Roadway had a terminal in Miami. The Roadway terminal was closed and operations for both companies were consolidated at the Hialeah

facility on or about October 16, 2009, with the first day of clerical work at Hialeah for the former Roadway clerical employees occurring on October 18, 2009. When the units were consolidated, four clerical employees were transferred from the Miami terminal to the Hialeah terminal where there were then eight clerical employees. After the consolidation, the TCU remained the exclusive representative of the consolidated Hialeah bargaining unit, which then totaled twelve clerical employees.

In or about February 2010, the decision was made to move the clerical work for the consolidated facility from Hialeah to the former Roadway Miami facility. There was no indication that this move from Hialeah back to Miami had any effect upon the continued application of the Agreement, the status of the Union as the exclusive representative, or the instant grievance.

#### The Calculation of Seniority at Yellow Prior to the Transfer of Roadway Employees

The clerical employee working force at Hialeah historically included both full-time and casual part-time employees. Only full-time employees were afforded seniority under the Agreement. When vacancies arose, if there were casual part-time employees, then the Company enjoyed the right to make employment offers to whomever it desired, without regard to length of hire of the casual part-time employees. Any hired individuals would have to serve a probationary period and, if they successfully completed that probationary period, would then have their seniority date set at the date that they began that probationary period, not the date on which the individual was first hired by the Company. The date on which the individual became a full-time employee covered by the Agreement governed the grant of seniority. The witnesses at the arbitration did not know if the Roadway seniority dates used by the Company to integrate those employees into

the Hialeah bargaining unit seniority list represented the date that those Roadway employees became full-time at Roadway or represented their initial dates of hire. Prior to the transfer of the Roadway employees upon closure of their facility, no employee in the bargaining unit received a seniority date that preceded the date on which that individual became a full-time bargaining unit employee at the facility.

#### The Creation of a Post-Consolidation Seniority List

Prior to the consolidation, the Parties met to discuss the seniority of the former Roadway Express employees. The Employer wanted to dovetail the employees with employees to be assigned seniority based on their dates of hire with either Yellow or Roadway. The TCU wanted to entail the employees from Roadway with their seniority determined from the date that they first became covered by the Agreement, a position that the Union insisted was required by the Agreement absent mutual agreement pursuant to Rule 9 to the contrary.

In February of 2009, Keith Lilly, then Labor Manager, and Joseph P. Condo, International Vice-President, TCU, met to discuss the possible movement of the work performed by the bargaining unit to another location and the rights of the bargaining unit employees to follow that work. In May of 2009, Mr. Condo sent Mr. Lilly a letter signifying his (Condo's) understanding of their February 12, 2009 meeting. The letter outlined the TCU's understanding as follows:

- Laid off employees shall be considered for hire at the old Miami Roadway if the work load necessitates the need for more employees.
- If work is transferred to the old Miami Roadway location or another area location TCU members will be allowed to follow that work based on their seniority.
- Any additional work brought to our Miami location will be performed by current TCU covered employees including those on lay off before other YRC employees are transferred or hired.

- If the TCU location is merged into another location, we will negotiate the order of seniority at that time based on majority status. If another YRC location is merged into the TCU location, all our laid off employees must be called back before any new employees can be added to the bottom of our seniority roster and, hence, covered by our Collective Bargaining Agreement.
- If our TCU work is moved/merged to another location, our employees will follow that work. The issue of representation will be decided by majority status or a request for representation by card check. This last item, while not discussed at the aforementioned meeting, is a fair and equitable way of deciding the matter of future representation. If the Union prevails our current CBA will continue in effect to the current expiration date.

In August of 2009, the TCU discovered that the Roadway operation in Miami would be merged into the Yellow facility in Hialeah. The TCU wrote to the Company demanding notice of the merger as required by the Agreement. In response, YRC sent the TCU a combined roster that dovetailed the seniority of employees at both facilities based upon the respective hire dates of the employees at Yellow and at Roadway.

In anticipation of the merger of the two facilities, the Company offered a buyout to employees at the Roadway facility, but not to the bargaining unit employees at the Yellow facility. When Mr. Condo inquired as to whether the buyout would be offered to the bargaining unit employees at Yellow, he was informed that the Company would only be making that offer to the Roadway clerical employees. The Roadway employees who took the buyout had seniority dates of July 31, 2006 and March 26, 2007 – which would have resulted in their being laid off even if they were dovetailed into the existing seniority list.

After the buyout, the Company determined that it would need to lay off two additional clerical employees. The result of the Company's dovetailing of seniority was that the two junior Yellow bargaining unit employees (Cassidy and Manning) were laid off and/or had their hours of work reduced.

### The Grievance

Mr. Condo testified that he had discussions with several Company officials during the period from February through October 2009 about the possible merger of operations of Yellow's Hialeah facility and Roadway's Miami facility.

The initial meeting was in February 2009 and was with Mr. Lilly. When Mr. Condo learned that Mr. Lilly was leaving that position, Mr. Condo sent his May 2009 letter to confirm the results of the February conversation; Mr. Condo acknowledged that the letter included discussion of one point that had not been the topic of prior discussion with Mr. Lilly – i.e., the recognition or non-recognition of the Union as the exclusive bargaining representative for the merged work force.

Mr. Condo indicated that it was not clear until mid-September whether the Miami or the Hialeah operation would be the surviving Miami area facility. During a conversation with Lamar Beinhower, Vice-President, Labor, Southern Region, YRC North American Transportation, in August or September 2009, Mr. Condo was assured that regardless of the physical location, the Union would be recognized as the bargaining agent for all of the clerical employees in the consolidated operation.

The Parties disputed whether Mr. Condo told the Company that he was taking the position that the Agreement required endtailing because of the unrepresented status of the Roadway employees. Mr. Condo denied having made such a statement or harboring any such intention. According to Mr. Condo, the issue was one of the plain language of the Agreement and the preference for purposes of competitive seniority for those who were in the bargaining unit and covered by the Agreement over those who were not, regardless of their union affiliation.



In October of 2009, Mr. Condo sent a letter to Mr. Beinhower indicating that the Agreement did not award seniority for periods not worked under the agreement. YRC responded that it would dovetail the employees because to apply an endtail method, as suggested by the TCU, would be unlawful because it would unlawfully discriminate against employees on the basis of union membership in violation of the National Labor Relations Act (“NLRA”). The TCU responded that the collective bargaining agreement required endtailing because the transferred employees were not previously covered by the Agreement; the Union denied that the Agreement or its position was linked to the question of union membership. Although the Company took the position that to endtail would constitute an illegal act of discrimination against the Roadway clerical employees on the basis of their failure to belong to the Union, the record revealed that, pursuant to the National Master Freight Agreement (“NMFA”) Multi-Region Change of Operations Committee Process, a number of unrepresented groups of driver and warehouse employees were endtailed in connection with consolidation of terminals and the Company accepted those rulings and did not assert before the National Labor Relations Board (“NLRB”) that those rulings constituted unlawful discriminatory agreements.

Despite the dispute over dovetailing/endtailing, there was agreement that for purposes of eligibility to contractual benefits, the Union would not oppose the Company’s desire to treat the incoming Roadway clerical employees as entitled to those benefits based upon a service date calculated based upon their initial Roadway dates of hire.

On or about October 18, 2009, the Company dovetailed the transferred Roadway Miami employees into the existing Yellow Hialeah bargaining unit seniority roster based

on the employees' dates of hire with Roadway. Because only ten employees were needed at the consolidated terminal, the two employees with the least seniority were laid off. Both of the employees who were laid off were Yellow employees who were at work and enjoyed seniority status prior to the consolidation.

The following seniority list was prepared and applied by the Employer; the Roadway Miami employees are noted in bold and occupied slots 2 through 5 and the employees who were laid off occupied slots 11 and 12:

Name	Seniority Date
1. C. Curbelo	10/4/1977
<b>2. K. Killingsworth</b>	<b>3/29/1987</b>
<b>3. D. Glatz</b>	<b>4/23/1989</b>
<b>4. J. Martin</b>	<b>11/6/1990</b>
<b>5. Y. Turner</b>	<b>1/15/1995</b>
6. S. Pastor	8/5/1998
7. B. Shannon	8/12/2002
8. K. Jackson	10/31/2002
9. T. Spivey-Carter	12/6/2002
10. C. Ricardo	8/1/2005
11. A. Cassidy	8/22/2005
12. C. Manning	10/16/2006

The Parties agreed to waive the lower steps of the grievance procedure and to submit the matter directly to expedited arbitration. Subsequently, the Employer filed an unfair labor practice ("ULP") charge (Case 12-CB-6155) with the NLRB alleging that the TCU discriminated against employees on the basis of union membership by taking the position that the Agreement required that the seniority be determined based on an endtailing method. On May 27, 2010, the NLRB Regional Director dismissed the Charge. The Employer has appealed the dismissal to the General Counsel.

## **CONTENTIONS OF THE UNION**

The Company violated the Agreement by granting seniority to employees based on service at a former competitor which was only later purchased by the Company and which was operated separately for six years after the purchase and prior to the work being transferred to the facility covered by the Agreement. The actions of the Company resulted in the improper lay off of two bargaining unit employees who pursuant to the Agreement had greater seniority than the former Roadway clerical employees.

Rule 5 of the collective bargaining agreement provides that “seniority rights for all covered employees shall prevail.” While the Agreement does not explicitly identify whom “covered employees” are to prevail over, the reasonable interpretation of the language is that the covered employees prevail over those employees who have not been covered by the Agreement. Accordingly, the seniority of employees who formerly worked for Yellow in Hialeah (i.e., those covered by the Agreement) should prevail over those who worked at Roadway in Miami (and were not covered by the Agreement). Rules 5 and 9 allow for modification only if both Parties mutually agree and the TCU has not agreed to any modification here. Therefore, the Company was obligated to entail the former Roadway employees and grant them competitive seniority no earlier than October 18, 2009.

Rule 17 of the Agreement provides that when there is a RIF, “seniority shall govern.” The Company conducted a RIF after it hired the former Roadway employees and improperly laid off the more senior former Yellow clerical employees in violation of that contractual provision.

The Union's interpretation of the Agreement is consistent with published arbitration decisions. In Jones & Laughlin Steel Corporation, 20 LA 797, 799 (1953) (Sidney L. Cahn, Neutral Arbitrator), the board of arbitration denied a grievance that sought to require the employer to grant seniority credit for service in the plant with a prior employer; the board stated: that "seniority has no existence apart from contract"; that "in the ordinary course of events seniority extends only for the duration of employment with a particular employer"; and that any "departure from this norm should be based only upon the clearest evidence that such departure was actually intended by the parties." Here, the seniority rights of the Yellow Hialeah employees were provided under the Agreement, which remained in existence and in full force and effect after the consolidation of the Miami and Hialeah operations. Absent agreement to depart from the provisions of the Agreement – and there was none – endtailing should have been applied here.

This situation is also similar to the circumstances in Purity Baking Company, 95 LA 172 (1990) (Michael D. Gordon, Arbitrator). Arbitrator Gordon rejected a grievance that challenged the continuation of a system whereby seniority for purposes of entitlement to receive employee benefits included length of service with a prior employer who was purchased by a signatory employer, but where competitive seniority was limited to the date of hire by the signatory employer and employment at the facility that is covered by the collective bargaining agreement.

The claim by the Company that enforcing Rule 5, as written, and endtailing the seniority of the former Roadway clerical employees would violate the NLRA must be rejected. The record failed to prove animus on the part of the Union against the Roadway

employees due to their non-union status. The failure of those employees to have worked in the bargaining unit, not their status as a member of any union, is central. The NLRB, in Riser Foods, Inc., 309 NLRB 635, 636 (1992) recognized that: “a union may lawfully insist on the endtailing of a new bargaining unit employees’ seniority when it is based on unit rather than union considerations.” The Board’s reasoning in Riser, supra, was also cited favorably in McNamara-Blad v. Association of Professional Flight Attendants, 275 F.3d 1165, 1173 (9<sup>th</sup> Cir. 2002), a case in which the Court of Appeals found no breach of the duty of fair representation under the Railway Labor Act by a union’s decision to endtail the flight attendants of a carrier being acquired by a much larger airline.

The NLRB Regional Director’s determination not to issue a complaint should also be given deference. While the Company has appealed that determination, the reported statistics showed that only 1% or so of all such appeals are granted.

For all of these reasons, the grievance should be sustained. The Arbitrator should direct that the seniority of employees be recalculated consistent with Rule 5 to reflect their date of hire in the seniority district (i.e., at Hialeah for Yellow or YRC) and all employees who were adversely affected by layoff or reduced work opportunities should be made whole by an appropriate award of back pay and benefits, including contributions to the appropriate benefit funds.

### **CONTENTIONS OF THE COMPANY**

The Union has failed to shoulder its burden to prove that the Company violated the Agreement. Rule 5 of the Agreement does not require the Employer to endtail the Roadway employees into the YRC Hialeah seniority roster. Rather, the Agreement is

silent regarding the computation of seniority after facilities are consolidated. Given that silence, the Management Rights provisions of the Agreement, Rule 44, allowed the Company to act as it did. Rule 5 merely establishes seniority rights for new hires who are required to serve a 60-day probationary period. The Roadway Miami based and Yellow Hialeah based employees each were existing employees of the Company (YRC) at the time of the consolidation. It is patently arbitrary and unfair to enttail the Roadway employees at the bottom of the seniority list when they are long service employees of the Company and when the work that they previously performed constitutes a substantial portion of the overall work at Hialeah after the consolidation.

The provision that “seniority rights for all covered employees shall prevail” does not mean what the TCU asserts it means. Furthermore, such an interpretation of the language does not evidence the intent of the Parties when the Agreement was made. In fact, the Union has failed to act consistently in its position that enttailing should apply. It has not contended that the Roadway employees were required to complete a 60-day probationary period or that the Roadway employees should be compensated at the new hire wage rates. Nowhere in the Agreement does it state that existing Company employees transferred into the Hialeah bargaining unit must establish seniority according to Rule 5.

The provisions of Rule 9 further support the actions of the Company in this case. Rule 9 is the only provision of the Agreement that expressly deals with consolidation or transfers of work. That provision requires notice and meeting with the Union, but does not address the issue of seniority. The TCU has failed to provide any evidence of or

establish any past practice that would have precluded the dovetailing approach adopted by the Company in this case.

Furthermore, it is well established that arbitrators should not amend or modify the collective bargaining agreement. The Union has failed to establish that the Agreement required the Company to enttail the former Roadway employees.

The TCU's position that endtailing should be applied is based on the Roadway employees' non-union status, and therefore, is violative of the NLRA. The testimony of Company witnesses made clear that Mr. Condo's stated opposition to granting seniority to the former Roadway employees on a dovetailed basis was the result of their being non-union. The NLRB has held that it is unlawful for a union or an employer to discriminate against employees with respect to seniority due to union considerations. In Teamsters Local 17 (Colorado Transfer & Storage, Inc.), 198 NLRB 252, 253 (1972), the Board found that a union discriminated unlawfully by seeking endtailing of employees who were employed by an acquired company that was on strike and was no longer signatory and was being operated non-union. The collective bargaining agreement in that case included provisions that would have dovetailed seniority whenever there is a merger of two companies signatory to the agreement, but the union opposed dovetailing on the basis of its position that the struck concern was no longer a signatory employer. While the collective bargaining agreement was found not to be unlawful on its face, the refusal to credit the transferring employees with seniority because of their lack of membership in the union was found violative of Sections 8(b)(2) and (1)(A) of the NLRA. The Board further noted that: "The Board has held that a provision conditioning seniority benefits on an employment history with a signatory employer is not unlawful,

insofar as it merely protects the transferability of seniority within a single multiemployer bargaining unit.”

Similarly, in Teamsters Freight Local No. 480 (Hilton D. Wall), 167 NLRB 920, 923 (1967), aff'd, 409 F.2d 610 (6<sup>th</sup> Cir. 1969), the collective bargaining agreement had a provision that in the event of the consolidation of two operations, if both are solvent, then the seniority lists will be dovetailed, but if one is insolvent, then the seniority lists will be endtailed with the insolvent employer’s employees placed at the bottom, and if there is merely a purchase of permits or rights without more, then the employees would be offered employment and given competitive seniority based upon the dates that they were hired, but given seniority credit for fringe benefits based upon original dates of hire. The decision of the Administrative Law Judge (“ALJ”), which was upheld by the Board, found factually that the non-union status of the acquired concern was critical in the decision to place the lone additional employee at the bottom of the terminal seniority roster. The ALJ relied upon counsel’s statements as further proof of the union’s improper motivation and distinguished prior NLRB cases. The ALJ rejected the assertion that the nonexistence of formal seniority rights for the unrepresented charging party was not the basis on which the union acted to endtail him; rather that action was found factually to be the result of the lack of prior union representation. In reaching that determination, the ALJ relied upon the decision of the NLRB in Whiting Milk Corporation (Milk Wagon Drivers, Local 830), 145 NLRB 1035 (1964), enforcement denied, 342 F.2d 8 (1st Cir. 1965).

For all of these reasons, the grievance in this matter should be denied in its entirety.



## **DISCUSSION AND OPINION**

After careful consideration of the entire record, I am persuaded that the Company's decision to grant the Roadway employees competitive seniority credit under the Agreement based upon their initial dates of hire with Roadway violated the Agreement. Accordingly, the grievance in this matter must be sustained. A summary of the principal reasons for this holding follows.

Seniority is a creation of the collective bargaining process. In a number of trucking industry collective bargaining agreements, there are provisions that specify how to address consolidations involving two or more employers, including when seniority will be endtailed, when it will be dovetailed, and when employees being transferred into the bargaining unit will be treated as new hires. In fact, the integration of the various driver and warehouse employee groups associated with the operational integration of the Yellow and Roadway operations were resolved through a joint Union-Management committee process. In this case, however, the Parties simply stated in Rule 9 that a conference would be held for the purpose of negotiating an agreement; but the Agreement is silent as to what would occur if no such agreement was reached. Moreover, the Agreement in this case is a single employer, single location agreement. Neither Party to this arbitration asserted that, if no agreement was reached in the Rule 9 conference, then the resulting substantive impasse would be determined in arbitration – in essence, through an interest arbitration-like process. Rather, the dispute in this case was presented and litigated as a traditional grievance arbitration case and is dependent upon whether or not the Company's actions violated the Agreement in the absence of some mutual agreement pursuant to Rule 9 having been reached.

The provisions of Rule 5, 8, and 9, read together make clear that: 1) seniority under the Agreement begins as of the date on which one becomes a permanent, full-time bargaining unit employee, dating back to the beginning of the probationary period, but excluding periods of part-time casual employment; 2) seniority rights are for “covered employees”; periods of service outside the bargaining unit for the employer are simply not credited; and 3) seniority rights are earned and are for use within the “seniority district,” which is not defined but which appears to be co-extensive with the bargaining unit.

Absent an agreement made pursuant to Rule 9 or otherwise, seniority is credited only for service covered by the Agreement. The Parties in their discussions reached a partial agreement regarding seniority for the transferring Roadway employees – they would receive credit for purposes of the Agreement for their prior Roadway service for receipt of benefits under the Agreement. No agreement was reached, however, to grant seniority for periods of service that the former Roadway employees: a) were not part of the seniority district; b) were not covered by the Agreement; and c) had no existing seniority rights at Roadway; as employees in an unrepresented state, they were all employees at will without any pre-existing seniority rights or protections. Prior to 2003, Roadway and Yellow were competitors. Even after 2003 and prior to 2008, when they were separately owned parts of a parent corporation and were separately managed, there was no claim that the Roadway employees had accrued seniority under the Agreement based upon their employment. In short, common ownership was recognized as an insufficient basis to entitle the Roadway employees to seniority and coverage under

Rule 5 prior to October 2009, even though they worked in the Miami area for a company that shared common ownership with the Company. Even after the decision was made to merge the two operations and to consolidate terminals in those geographic areas where there were multiple facilities, prior to the actual combination of the two workforces in a single terminal, there were no cross-bidding rights to employment opportunities at the other employer's terminal and no attempt to treat the Roadway employees as covered by the Agreement. The Company recognized that the two groups of employees were separate for all purposes prior to the actual combination into a single unit at Hialeah; as noted, buyouts were available to the former Roadway employees as part of the planned reduction in the overall workforce, but were not offered to the Yellow employees.

The Company enjoyed the right to bring the Roadway employees into the bargaining unit and, with the agreement of the Union, to grant them credit for their service with Roadway for purposes of entitlement to pay and benefits. Absent mutual agreement, however, the entering Roadway employees were newly covered employees and the Agreement required that their date of competitive seniority be October 18, 2009 – the date on which they first became permanent, bargaining unit employees. Their relative positions vis-à-vis one another should be based upon their Roadway service dates since Rule 5 of the Agreement states that, if two or more employees become non-probationary employees on the same date, then their order of hire should establish their relative seniority. While this may well reference their hire by the Company, the order of hire by the Company may be presumed, in this case and in the absence of contrary evidence, to have been made in order of their Roadway seniority.

The Company's reliance upon the fact that the former Roadway employees were also employees of YRC is misplaced. Under the language of Rules 5 and 8 and 9 of the Agreement, even an employee who transferred to the bargaining unit from another Yellow facility outside the seniority district would be treated under the Agreement as a new employee and endtailed. There is no contractual language that, absent agreement in the Rule 9 process, provides for a crediting of seniority earned in employment that was outside of the seniority district and was not covered employment.

Even if the Arbitrator's role were more akin to that of interest arbitration with respect to seniority integration, following the failure to reach agreement in the Rule 9 conference, the ruling on the grievance would not have been different. Arbitrators hearing seniority disputes in the interest arbitration type of case have often focused upon a number of factors in determining the most appropriate way to integrate newly acquired employees into existing seniority units or to integrate groups that are combining into a completely new seniority unit. Arbitrators often apply one of five basic approaches to competitive seniority disputes. Competitive seniority usually affects shift and vacation selections, overtime, layoffs, recalls, bidding, and other similar situations. Non-competitive seniority usually affects entitlement to benefits or accrual of benefits such as the amount of vacation time or the length of time required to vest in a retirement plan or the particular step in a progressive pay system. These five common approaches are as follows:

- 1) the surviving group principle, or endtailing, applies when one employer purchases or acquires another; the employees of the purchasing or acquiring employer receive seniority benefits over the employees of the acquired employer and the "newcomers" are placed in line after the incumbent employees but in their former seniority order at their old employer;

- 2) the length of service principle, or dovetailing, applies when the employees involved in a merger or consolidation are placed on a new merged seniority list in the

order of their total length of service with their respective employers as if they had always been employed by the same employer;

3) the follow the work principle applies when one employer is merged with another, or there is consolidation of plants or departments within an employer, whereby the employees are given the opportunity to follow the work, which they were doing, with their seniority rights intact; this has been applied in situations where the work of the two employee groups can be readily distinguished, as in the case of airline operations not yet fully integrated and involving different categories of equipment being operated;

4) the absolute-rank principle, in which employees are placed on the merged seniority list on the basis of the seniority rank they held with the prior employer or department; this form of dovetailing would take place not on the basis of date of hire, but on the basis of relative standing in the seniority list as a whole; for example, the first employee of the list in each employer would become the first two employees in the merged employer regardless of their relative length of service or the number of employees in the two employers and one would then proceed down the separate lists, dovetailing into the newly merged list on the basis of a one for one integration, regardless of the size of the two employee groups; and

5) the ratio-rank principle, which would merge from the separate groups as in the case of the absolute-rank principle, but instead of doing so on an equal alternating basis would integrate based upon the ratio of the size of the groups being merged; thus, if group A has 8 employees and group B has 4 employees, the new combined list would consist of two A employees, followed by one B employee, followed by two more A employees, and one B employee, etc., until the list was completed.

See Kennedy, Merging Seniority Lists, Labor Arbitration and Industrial Change,

Proceedings of the 16<sup>th</sup> Annual Meeting of the National Academy of Arbitrators (1963);

Elkouri & Elkouri, How Arbitration Works (BNA 6<sup>th</sup> Ed., 2003), at 868-70; and National

Academy of Arbitrators, The Common Law of the Workplace, the Views of Arbitrators

(BNA 2<sup>nd</sup> Ed., 2005) at 148. The approaches are sometimes mixed to fit the facts of a particular situation.

The record evidence in this case, however, fails to reflect sufficient information to support a finding that dovetailing based upon date of hire was the most appropriate equitable solution in this case even assuming arguendo that the Arbitrator had the authority to determine the most equitable or appropriate solution to the issue of seniority, rather than the more limited determination of whether the Company's unilateral imposition of dovetailing violated the Agreement. For example, there was no evidence as

to the relative state of the pre-consolidation business of Yellow and Roadway in Miami or generally, no evidence of the any general practice systemwide relative to the integration of seniority, no evidence of any industry practice regarding the consolidation of two operations which once were competitors and then were commonly owned, no evidence as to the proportion of the post-combination clerical work that was associated with former Yellow work on the one hand and former Roadway work on the other, and no evidence as to whether the post-combination work would be readily differentiated on an ongoing basis based upon whether it was former Yellow or former Roadway clerical work. What is clear is that by granting the former Roadway employees full date of hire seniority (which may even have included service as a casual or part-time employee) and then dovetailing, the former Roadway employees have obtained greater job security than they brought into the consolidated terminal in several ways, including the following:

1) although there were six Roadway employees (prior to the buyouts) and eight Yellow employees, suggesting that Roadway contributed a minority to the overall combined work needed to be performed, all four of the Roadway employees who were transferring were retained and granted four of the top five seniority positions whereas two of the eight Yellow employees were laid off; there was no evidence that, absent the consolidation, any of the eight Yellow employees who were working and had already earned seniority in the seniority district would have been laid off; 2) prior to the consolidation, the Roadway and Yellow employees were treated as working for separate companies under separate labor relations control and management; wages and working conditions were different, management was different, and despite the language of the Agreement, there was never any assertion that the Roadway employees (who were employees at will) enjoyed any

seniority under the Agreement; nor did they enjoy any seniority rights under any other collective bargaining agreement; and 3) the differences in the treatment of the Roadway employees and Yellow employees, despite the common ownership of the two companies, was underscored by the offers of buyouts to the Roadway employees, but not to the Yellow employees. These facts would militate against dovetailing based upon date of hire of the two employee groups in this case.

The final area of dispute related to the Company's argument that application of endtailing in this case would be violative of the NLRA. While the jurisdiction of the Arbitrator is limited to determining whether the Agreement was breached by the Company's grant of seniority to the incoming Roadway clerical employees based upon their dates of hire at Roadway, the NLRA issue is nonetheless relevant to the disposition of the grievance. It may be presumed that the Parties, when they agreed to the Agreement, intended that it be lawful on its face and also that it be applied in a lawful manner. This canon of contractual interpretation is particularly appropriate given the language of Rule 45.

After careful consideration of the facts of this case and the applicable case law, however, I am unable to conclude that the endtailing of the Roadway employees in this case called for by the Agreement would be prohibited by the NLRA. With respect to the legality of the Agreement, on its face, I am unpersuaded that agreement by the collective bargaining parties to enttail employees who may be added to the bargaining unit as a result of a purchase, merger, or consolidation is per se violative of the NLRA. It is well recognized that unions enjoy significant latitude with respect to negotiating seniority. The Board cases that find endtailing to constitute unlawful discrimination in violation of

the NLRA all involved situations in which unrepresented employees were denied dovetailed seniority that was granted to other represented groups of employees who were merged into the existing bargaining unit. In this case, however, there was no proof of such disparate treatment. The Agreement provides for no dovetailing for any other employee groups, whether represented or not, absent joint agreement between the Union and the Company to do so in the Rule 9 process. There was no showing of any discriminatory treatment of the Roadway employees based upon their unrepresented status. The testimony of the Company witnesses that Mr. Condo had expressed this motivation was credibly denied by Mr. Condo. There is simply no basis to conclude that the Union's position would have been different relative to the endtailing/dovetailing issue if the clerical employees who previously worked for Roadway were represented. The decision of the NLRB General Counsel to dismiss the Charge and decline to issue a Complaint further reinforces these findings in this case.

For all of these reasons, I find that the Company's unilateral action in granting seniority to the Roadway employees based upon their Roadway dates of hire violated the Agreement. Those employees began work in covered employment in the seniority district on October 18, 2009, and their competitive seniority should be credited as of that date. Accordingly, the grievance must be sustained, a corrected seniority list issued forthwith, and all bargaining unit employees who were adversely affected as a result of the incorrect attribution of seniority to the former Roadway employees must be made appropriately whole. Jurisdiction will be retained to resolve any remedial issues that the Parties are unable to resolve on remand.



**AWARD**

The Company violated the Agreement by the grant of seniority to the transferring Roadway employees for the period of their employment with Roadway prior to their beginning work on October 18, 2009, following the consolidation of the Miami and Hialeah operations.

The Company is directed to publish a corrected seniority list forthwith and to make all bargaining unit employees who were adversely affected by the improper grant of seniority appropriately whole.

Jurisdiction will be retained to resolve any remedial issues that the Parties are unable to resolve on remand.

The grievance is sustained.

July 20, 2010



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Ira F. Jaffe, Esq.  
Impartial Arbitrator