AMERICAN ARBITRATION ASSOCIATION
CASE NO. 01-14-0000-3192

In the Matter of the Arbitration

-between-

IBT LOCAL UNION NO. 177

-and-

UNITED PARCEL SERVICES, INC.

OPINION
AND
AWARD

Re: Grievance N-13-31

BEFORE: JACK D. TILLEM, Arbitrator

APPEARANCES:

For the Union:
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, Attorneys
By: ROBERT A. FAGELLA, Of counsel

For the Employer:
FROST BROWN TODD LLC
By: TONY C. COLEMAN, Of counsel
with CARRIE B. POND, Of counsel (on the brief)

Pursuant to the procedure for arbitration contained in the agreement between IBT LOCAL UNION NO. 177 and UNITED PARCEL SERVICES, INC., the undersigned was appointed to hear and decide the grievance involved herein. Hearings were held at the Ramada Inn, 160 Frontage Road, Newark, New Jersey on November 12, 2014 and June 30, 2015. After hearing the witnesses, submission of exhibits and arguments of the parties, decision was reserved. Post hearing briefs were submitted.

ISSUE: Did the Company violate Article 32 **SUBCONTRACTING** of the National Master Agreement, by allowing outside vendors to move empty UPS air containers from Newark Airport to Louisville and/or various locations within the UPS system. If so, what shall be the remedy?

United Parcel Services, Inc. is a common carrier operating throughout the United States and the world. Its primary business is the transportation of small packages. It has varying levels of service guarantees which are generally labeled as either air or ground packages. With an extensive transportation network devoted to the movement of its ground packages, UPS has thousands of vehicles, facilities and over 220,000 hourly employees involved in the pick-up and delivery of small packages within the U.S. The majority of the hourly employees are represented by the International Brotherhood of Teamsters and its affiliated local unions. Teamsters Local 177 is one of the affiliated locals. It represents UPS hourly production employees in New Jersey.

Because of service commitments a substantial number of UPS' packages must be flown by aircraft in order for them to be delivered within time commitments. Its primary air hub based in Louisville, Kentucky, UPS aircraft fly from gateways around the domestic U.S. into Louisville and back to the gateway with air packages to be delivered the next day. UPS has a number of different containers, dependent on the aircraft, into which the packages are loaded. The unit load devices ("ULDs" or "air containers") are loaded onto the aircraft for the purpose of transporting packages to the

various gateways throughout the U.S. Newark Airport (EWR) is one of the gateways into and out of which the Company operates on a daily basis. It currently receives nine flights each day – five in the morning and four at night – originating in Louisville, Kentucky; Dallas, Texas; and Cologne, Germany.

For more than a decade there has been an imbalance of air containers coming into EWR versus the number which depart by aircraft. In the 1990s virtually all empty ULDs were moved within the UPS system via aircraft. At that time canvas containers were used which, when collapsed, could allow up to seven containers to be moved in one aircraft. In the late 1990s, the FAA began requiring cargo carriers to use new hard and plastic containers for fire suppressant purposes.

The imbalance of air containers in Newark became even more acute in 2001 when a flight involving a Boeing 767 began operating from Louisville to Newark and then to Anchorage, Alaska. The volume from Louisville to EWR was typically air packages which were placed in air containers in Louisville to be transported and off-loaded in EWR. The flight from EWR to Anchorage was primarily freight, which is not containerized, and instead is placed on a skid and secured by plastic wrap or netting. As a result of this flight, UPS began receiving on a daily basis twenty to twenty-four more containers into Newark than were being used on the outbound aircraft.

Beginning in 2001, UPS began using a third party trucking company to assist in returning the empty air containers to Louisville where they would then

be reintroduced into the air system. The number of loads of empty air containers returning to Louisville has ranged from as low as one to over forty in some weeks. The air containers are not used just for transportation of air packages delivered by UPS. They are also used to transport U.S. Postal Service mail, some types of freight, and even aircraft parts or equipment needed by aircraft mechanics in the different gateways. The hub of the airline in Louisville, its primary parts warehouse is also located there. When aircraft mechanics in a gateway such as EWR need supplies or parts, they are often placed in an air container and flown to the gateway.

One of the reasons for the fluctuation in the number of loads moved by third party vendors is that the empty air containers are moved in a variety of ways. The first choice for the movement of empties is by UPS aircraft that have empty positions. The second choice is by utilizing what would otherwise be empty lanes on UPS sleeper or feeder routes. These runs are already scheduled to move empty one way because of the need to move small package volume with no scheduled return volume. There is no cost to the Company to move empty air containers on prescheduled lanes on which no packages are being moved. Movements also occur on other air carriers, DHL, for example. Finally, if empty trailers are being moved by rail, the Company will take advantage of the opportunity and move empty air containers in the trailers on a rail car. UPS has used vendors on about 8,100 runs to move empty air containers in the period from April 2, 2012 to October 13,

2014. Over 37,300 empty air containers have been moved. Over eighteen outside carriers were used for these one-way moves throughout the system.

Local 177 has jurisdiction over all bargaining unit work at Newark Airport. In May 2012, Business Agent Bill Heady discovered the empty UPS air containers were being loaded by Local 177 members into trucks owned by Mr. P Trucking, an outside vendor, which then transported the containers to Louisville using non-union employees. Mr. P Trucking, as it happens, had been doing this work for a decade or longer – making a direct run from an Amazon facility in Louisville dropping off packages in New Jersey, then picking up the empty containers at EWR and returning them to Louisville.

This grievance ensued. The Union contends that Mr. P Trucking is doing bargaining unit work for which the CBA does not provide an exception. The National Panel Grievance Committee having deadlocked, the matter was forwarded to arbitration.

The relevant contractual provisions:

ARTICLE 1. PARTIES TO THE AGREEMENT

> The Employer and the Union adopt this Article and enter into this Agreement with a mutual intent of preserving and protecting work and job opportunities for the employees covered by this Agreement. No bargaining unit work will be subcontracted, transferred, leased, assigned or conveyed except as provided in this Agreement.

ARTICLE 32. SUBCONTRACTING

> For the purpose of preserving work and job opportunities for the employees covered by this Agreement, the Employer agrees that no work or services of

the kind, nature or type, and including new operations or buildings, covered by, presently performed, or hereafter assigned to the collective bargaining unit will be subcontracted, transferred, leased, assigned or conveyed in whole or in part to any other plant, person or non-unit employees, unless otherwise provided in this Agreement. The Employer may not subcontract work in any classification for the purpose of avoiding overtime. The Employer may not subcontract work in any classification if any employee who normally performs such work is on layoff.

ARTICLE 26. COMPETITION

The Union recognizes that the Employer is in direct competition with the United States Postal Service and other firms engaging in the distribution of express letter, parcel express, parcel delivery, and freight, both air and surface. In order to meet that competition and thereby protect and, if possible, increase the number of bargaining unit jobs, it is agreed that any provisions in this Agreement to the contrary notwithstanding the Employer:

(a) may use substitute means of transportation (Such as airplane, helicopter, ship or T.O.F.C.) In its operations, provided, however, that no feeder driver with more than three (3) years of seniority in the feeder driver classification will be laid off or displaced from a feeder classification as a result of a run being placed on the rail. However, the Employer shall not be required to remove loads from the rail to provide work for employees whose ground loads were eliminated or temporarily discontinued. Any claimed abuse of this Section by any of the Local Unions shall be subject to immediate review by the National Grievance Committee. . . .

ARTICLE 43. PREMIUM SERVICES

From time to time, the Employer must offer special new premium services to its customers in order to protect existing jobs and further the mutual goal of increasing the number of bargaining unit jobs. The Employer shall utilize bargaining unit employees to perform the feeder movement work of such new premiums service, which work shall be considered to be bargaining unit work....

In implementing such new premium services, the Employer shall utilize the following options to complete the ground movement of the customers' packages in the following order:

(1) If the Employer's existing feeder network can meet the Employer's time and service needs, that network will be used first.

(2) When the existing feeder network will not adequately meet the Employer's time and service needs, the Employer agrees to establish a new driver classification, which shall be called a premium service driver. This driver will be typically used to move loads to and from ground and air hubs that are mor than two hundred fifty (250) miles apart....

(3) If the Employer cannot accommodate his time and service needs under (1) and (2) above, the Employer shall have the right to propose the use of bargaining unit sleeper teams to the Local Unions and the Joint Premium Service Review Committee as set forth in Section 4 below. The wages and other economic terms of employment for such sleeper teams shall be as set forth below.

Section 2. Sleeper Team Operations

The Employer may use subcontractors for new custom contracts for reasonable start-up periods. In no event shall such start-up period exceed thirty (30) days....

* * *

UPS, as the Union sees it, has been diverting the traditional bargaining unit work to an outside trucker for no other reason than convenience or expediency. The practice is not incidental or sporadic, the Union says; it's a significant and routine performance of bargaining unit work which never previously came to the Union's attention. The Union submits that subcontracting is not a complicated topic in the CBA: bargaining unit work shall not be performed by outside contractors unless it falls within a specified contractual exclusion.

A review of the material facts in this case makes clear, the Union says, that application of this general proposition is all that is needed to resolve the dispute. Noting that the Company doesn't deny that Local 177 feeder drivers are transporting empty air containers – albeit not to Louisville – the Union says the Company thus acknowledges this is core bargaining work. And if that's so, the Union reasons, the only remaining question is whether there is a contractual exception which authorizes an outside contractor to perform this work from Newark Airport to Louisville.

The Union's answer: There isn't.

The Union's reading of Article 26 **COMPETITION** together with Article 32 **SUBCONTRACTING** does not permit an outside contractor to perform bargaining unit work on a routine basis – and that, it says, is precisely what is happening here. Allowing that Article 26 permits the Company, in the name of competition, to use a substitute means of transportation, the Union underscores its limitations: plane, ship, helicopter and T. O.F.C.* No problem, the Union says, it has no beef with the Company if it transports empty air containers by air, ship or rail – just not over the road.

Nor, the Union continues, can the Company avail itself of a past practice defense. To be sure, the Company may have been using Mr. P Trucking for well

*T.O.F.C. – trailer on flat car, i.e., rail

over a decade. Two daunting hurdles, however, preclude the Company from invoking the doctrine in this case, the Union argues. First, the alleged practice must be known and acquiesced in for a substantial period of time. Here, the Union says, it filed its grievance promptly after discovering what Mr. P trucking was doing in Newark Airport. And second, it says, the clear contractual language of Article 32 read in conjunction with Article 26 trumps any purported past practice involving outside truckers encroaching on routine bargaining unit feeder work.

The Company's defense, in the Union's view, borders on the brazen: traditional bargaining unit work, as the Company would have it, is fair game for subcontracting if it's performed by an outside contractor for an extended period. The Union assails the defense as an unprecedented misuse of Article 26 and the doctrine of past practice in an attempt to severely weaken Article 32's protection of bargaining unit work.

The Union relies on several arbitral precedents to support the proposition that bargaining unit work is to be done by bargaining unit members unless a specific exclusion applies. In a case involving Local 705 (FMCS 09-03867, January 2011), Arbitrator Jacobs held that driving UPS trailers to an outside repair facility is bargaining unit work to be done by feeder drivers. In a case involving the Teamsters UPS National Negotiating Committee (AAA 13-00542 96), the Company and Union were negotiating pursuant to Article 43 for permission to have an outside contractor drive certain routes involving bargaining unit work. Under Article 43, the Union can agree to authorize otherwise

impermissible subcontracting. However, no agreement having been reached, Arbitrator Jonas Aarons held that in the absence of specific consent by the Union, only UPS long distance feeder team operations could perform this bargaining unit work. In essence, Arbitrator Aarons held that subcontracting to outside ground truckers was an Article 32 violation, regardless of why consent was not granted.

The Union submits that most of the cases which have authorized alternate means of transportation have done so on the basis that the work was being transported by rail, which, as noted, is permissible under Article 26. For example, the Union points to AAA 51 300 01254 06 (IBT Local 90) in which a scheduled sleeper team transfer was instead transported by rail. The Union objected and the arbitrator upheld the Company's determination that during Thanksgiving weekend, rail service was a permitted "substitute means." Usage of rail was also the method at issue in AAA 39 000 00054 94 (Local 667, Arbitrator Baroni 1991).

The Union says that the limited circumstances in which an outside trucking company is permitted as "substitute means" almost always involves situations where an emergency arises and no other alternative is available. For example, in AAA 72 300 0109 04 (Local 63), Arbitrator Askins permitted a single day shipment that was normally performed by rail to be transported by ground as an Article 26 "substitute means".

In AAA 18 3000 01635 05 (Local 30) Arbitrator Wittenberg permitted utilization of an outside trucker to perform bargaining unit work on a single day,

but only because there were no feeder drivers available to perform the work, or if available, would not have been able to perform the work in time to allow UPS to meet its service commitments. So too, in the decision of Arbitrator Vaughn involving Teamsters Local 30 (AAA Case No. 18 300 01634 05), feeder drivers needed to perform the work were unavailable, no layoffs were triggered or overtime lost as a result of a subcontracting, and no reasonable alternative existed to insure timely delivery.

The grievance, the Union concludes, should be sustained. The Company should be ordered to cease and desist giving this work to an outside contractor and damages awarded for the bargaining unit's loss of this work dating back to the filing of the grievance.

* * *

It is the Company's position that it has not violated Article 32 by using third party trucking companies to move empty air containers from Newark to Louisville. It relies on some twenty arbitral precedents interpreting Article 32; the common thread weaving through all of them is that Article 32 is not a tool to be used by the Union to claim new work and expand the bargaining unit. Rather, the Company says, the provision is a work preservation clause prohibiting UPS from hiring third party vendors to perform work that has previously been performed by the bargaining unit.

By its own terms, the Company asserts, Article 32 is a work preservation provision: "for the purpose of *preserving* work and job opportunities for the

employees covered by this agreement. . .". For example, Arbitrator Gary Axon held in a decision involving IBT Local 63, "Article 32 is a work preservation clause, not a mechanism to be utilized for capturing additional work for the bargaining unit." (AAA Case No. 72 300 01079 09). Arbitrator Howard Edelman similarly held:

> As the Company correctly noted, Article 32 is a work preservation provision. . . Thus the key element in Article 32 is whether the work has been "presently performed" by bargaining unit members (Local 671 AAA Case No. 18 300 8513 04).

The Company cites other awards to show that Arbitrators Axon and Edelman are not alone in declining to allow work expansion through Article 32. See, for example, AAA Case No. 72 300 0084 01 in which Arbitrator Thomas Roberts stated Article 32's intent is "to preserve the work and job opportunities of bargaining unit employees". In a case involving Local 135 (AAA Case No. 52 300 00280 95), Arbitrator William Heekin stated: "Clearly, Article 32 does not call for bargaining unit work expansion."

As the Company sees it, it is insufficient for the Union to claim that an operation is one that bargaining unit employees once performed (although it is now done by contractors or management personnel) or that it involves the use of a procedure or equipment (e.g., trucks, driving, telephone, scanner, etc.) which the bargaining unit uses in other operations. The Company asserts that the focus, as the cited awards attest, is on whether the work is an operation presently performed by the bargaining unit; it's not similar work that they have not actually done.

What's more, the Company continues, in a 2005 case, Arbitrator Charles Askin upheld the company's use of subcontractors to transport packages to locations bargaining unit employees have never made deliveries. (Local 483, AAA Case No. 77 300 00042 04). If subcontracting actual package delivery routes does not violate Article 32, the Company reasons the use of vendors for the long haul movement of empty air containers is certainly proper.

Indeed, the Company points to numerous arbitration awards which have held that even identical work can be performed by the bargaining unit and outside vendors – a concept of "shared responsibility" recognizing that the same functions performed for the same purposes may be done by bargaining unit and non-union employees if historically they happen to be developed and carried out in that fashion. For example, in denying a claim under Article 32 by the Union, Arbitrator Roberts concluded that the packaging, weighing, labeling and insuring functions were not exclusively the work of represented customer clerks but were functions also performed by UPS bulk shippers. (AAA Case No. 72 300 0084-01). Even though the work was identical, in still another case Arbitrator Askin held that the company's assignment of certain duties to non-union personnel based on the history of shared responsibility with bargaining unit employees is not a violation. (Local 856, September 2002).

If the above cited precedents are applied to the facts in this case, the Company submits, Local 177's grievance must be denied. The Union would have it that

if a Local 177 feeder driver has transported an empty air container, then all air container movements originating within Local 177's jurisdiction must be performed by a Local 177 feeder driver – an interpretation of the provision which the Company insists finds no support in the language of Article 32 nor arbitral precedent.

The Company contends that the evidence is undisputed: Local 177 feeder drivers have never moved empty ULDs to Louisville on a two way empty run. That Local 177 is attempting to use Article 32 to expand its bargaining unit rather than preserve work is easily answered, the Company says, by the undisputed testimony that UPS would be required to hire twenty more feeder drivers and buy equipment in order to schedule and move empty air containers to Louisville. A network would have to be created to relay the empty containers to Louisville using two meet points: Local 177 drivers would move a trailer with the empties to a location in Pennsylvania and return back to New Jersey. A second feeder driver would then relay the empty trailer and air containers to a second meet point where they would ultimately get picked up and driven to Louisville. Multiple sleeper team routes of vehicles would be another option. In any event, as the Union concedes, UPS would have to hire more drivers and buy more equipment. This, the Company insists, cannot be "work preservation" as envisioned by Article 32.

The evidence in this case establishes a clear shared responsibility in the movement of empty air containers, the Company asserts, a shared responsibility based on the difference in purpose and function of the work performed by Local 177 versus Mr. P

Trucking as it pertains to empty air containers: Local 177 drivers move air containers locally in order to make the containers available for Local 177 represented employees to load and unload air packages in them. On the other hand, the long haul movement of the containers by Mr. P Trucking to Louisville is for the purpose of the airline introducing them back into the system at the air hub – work, the Company underscores, which Local 177 members have never performed.

Yet even if Article 32 is read to prohibit the Company's use of an outside trucking company for long haul movement of air containers, the Company contends that Article 26 recognizes its right to subcontract bargaining unit work to meet the competition. By its title "COMPETITION", Article 26 recognizes there are various instances where the use of third party vendors is appropriate and necessary. The Company cites multiple cases in which arbitrators have ruled that Article 26 gives UPS wide latitude in using substitute means of transportation to meet its competition, not only by using the rails, but also by using trucking contractors. For example, Arbitrator Wittenberg, noting that as early as 1989, arbitrators have interpreted Article 26 to allow UPS to use other truck drivers, stated:

> The language in Article 26 establishes a balance between protecting the jobs of bargaining unit employees while allowing the Company flexibility to meet its service requirements. Therefore, when, as in the circumstances here, the Company does not have available drivers at the originating location and the distance between the two locations is such that it is impractical to use a driver from the destination location to make

> the round trip and meet service commitments, the Company is within its contractual right to subcontract those loads (AAA Case No. 18 300 01635 05).

Based on the use of an outside vendor for more than a decade to truck empty air containers to Louisville and using Local 177 employees to load the containers into the vendor's trailers, the Company asserts that the evidence is sufficient to establish that the use of vendors is a past practice. Nevertheless, it has not and does not take the position that its use of Mr. P Trucking is only permissible because it is a binding past practice. The Company need not and has not done so, it says, based on its foregoing analysis of Articles 32 and 26 together with the arbitral awards upon which it relies. However, it notes the Union's failure to file any grievances or raise any objections over the course of three different rounds of collective bargaining should weigh heavily in favor of UPS's right to use Mr. P Trucking to move empty air containers to Louisville.

It is also noteworthy, the Company says, that UPS's practice of using vendors to move empty air containers to balance air system equipment is nationwide; the evidence shows that the number of moves in other parts of the country are as prevalent as they are in Newark. UPS submits there is a reason it has not been challenged by other locals in other parts of the country. It is the same reason that Local 177 predecessor officers did not challenge Mr. P Trucking or the other vendors prior to 2009. The one way movement of empty air containers is not, the Company insists, bargaining unit work.

In sum, the Company maintains this is not a violation of the National Master Agreement between UPS and the Teamsters. The Company underscores that the Union has the burden of proving that the contract was violated. Local 177, it says, did not meet that burden in this case. Accordingly, UPS urges that the grievance should be denied in its entirety.

* * *

The parties have submitted a plethora of arbitration awards in support of their respective positions. Like a Scrabble board, the cases have grown over the years in several directions – no decision erased, but qualified, distinguished or adhered to. Rather than attempting to engage in broken field running through them, it might be more helpful at the outset to put them aside and take a quick refresher on what Article 32 and Article 26 actually say: Article 32 is a lapel grabbing *no subcontracting* provision – unless otherwise provided in the agreement. And that refers to Article 26 – also straightforward and crystal clear in limiting the exception to "substitute means of transportation (such as airplane, helicopter, ship or T.O.P.F.C.)".

It's perhaps obvious but nonetheless worth emphasizing that this is not a contract devoid of a *no subcontracting* provision, a contract which would permit the luxury of balancing the employer's interest in efficient operation and the union's interest in protecting job security. That is not my job in this case. Here the parties have set the

parameters: The two provisions have a limited range of meaning and no interpretation which goes beyond that range is permitted.

So the first question: In Article 32, what does the word *preserving* in the phrase "for the purpose of preserving work and job opportunities" mean? The Employer places heavy reliance on arbitration awards which hold that the word does not permit the Union to caption new work on behalf of the bargaining unit. Rather, it only permits the preservation of work they are already performing. As one award put it: *Article 32 is a work preservation clause, not a mechanism to be utilized for capturing additional work for the bargaining unit.* (AAA Case No. 72 300 01079 09).

This definition, to my mind, is problematic. It means the bargaining unit can keep what its got. New work? Well, that's up for grabs. To be sure, *preserving* comports with a definition of immutability: as in preserving a jar of turnips or cryonics. Here, however, the context connotes something else: dynamism involving change and growth: as in preserving a beach by replenishment; preserving the population by having babies; preserving a forest by replanting saplings; and most on point, preserving UPS by replacing customers who fade away with new ones and adding still more. In this context, using a definition which fixes the bargaining unit in place like a snapshot, Article 32 will produce precisely the opposite result: non-preservation. Over time, unable to capture additional or new work on which outside vendors will most assuredly feast, the bargaining unit will shrink and eventually disappear.

There is a canon of contractual interpretation, *noscitur a sociis*, which means, literally, "it is known by its companions." It stands for the proposition that a word is given meaning by those around it. Consider the phrase "and job opportunities" in tandem to "preserving work" in Article 32. Surely the parties weren't limiting job opportunities to bumping rights, replacing resignations and retirees. They had to be thinking growth and expansion of the Company – and the bargaining unit with it. In the same vein, the first paragraph of Article 26 says ". . . increase the number of bargaining unit jobs;" the third paragraph, "in order to expand the work opportunities for members of the bargaining unit. . ." – two provisions reflecting the parties' optimism about growth. There was no thought about retaining the status quo by handing off new or additional business to non-union vendors.

But this is not new work, the Company answers; nor is it packages we're dealing with. It's equipment transferred from one company location to another; work that's been done by an outside vendor for years without anyone laid off as a result. All true. Yet if similar trips of air containers from EWR to Louisville were to be initiated tomorrow, could the Company subcontract this work to a non-union trucker? On what basis? This is ground transportation – quintessential bargaining unit work – for which there is no exception in Article 26.

Article 26 provides for four exceptions to Article 32's subcontracting prohibition: *substitute means of transportation (such as airplane, helicopter,*

ship or T.O. F.C.). Period. Yet It does say "such as". Still, for two reasons it cannot be seriously contended that *such as* encompasses truckers: its inclusion would wipe out Article 32; and trucking is the *same* means, not a "substitute means" of transportation. Nonetheless, the Company says, Mr. P Trucking has been doing it for a very long time – and the Union had to know, its own employees at EWR were loading Mr. P's trucks.

Whether clothed as a past practice or a form of estoppel, the argument is less than compelling. The practice wasn't discovered until shortly before the grievance was filed when a business agent happened upon it in 2012 during an investigation at the airport for an unrelated safety complaint. Nor could the airport workers be clear about its nature, the evidence showing that UPS contracts with other organizations such as the U.S. Postal Service and DHL for use of its airplanes. So there are all sorts of businesses going on and different trucks coming and going at the airport.

Yet apart from a lack of consent or acquiescence, the fatal shortcoming to this defense is that the clarity of a provision is to past practice as a cross is to Dracula and Article 32 does not atrophy over time for lack of use. It's worth underscoring at this juncture that we are not dealing with a grievance concerning, say, an employee's claim to overtime or some arcane benefit to which the doctrine of past practice might attach. Article 32 is of a different magnitude – a bedrock covenant at the heart of the parties' relationship; it brooks no fiddling or erosions or Talmudic-like nuances.

For that reason alone, this case must be distinguished from those relied on by the Company – or, for that matter, by the Union. Some deal with one of a kind emergencies or unusual occurrences requiring the use of an outside contractor when there is no other feasible way to get the job done. Still others involve the question of when a trailer becomes UPS work or whether a bargaining unit member is required to operate the truck on premises. Not to put too fine a point on it, all these cases are like dandruff compared to a tumor.

Here the Company seeks to provide an exception for routine ground transportation on a regular basis. Think about it for the future. Anticipating the Company will grow and expand – the air segment with it – that's good news for Mr. P Trucking. It doesn't bode so well, however, for a bargaining unit restricted to preserving what it has. Extending the logic of the Company's position to the limits of its absurdity, if FedEx or DHL ceased doing business tomorrow in New Jersey it would mean the Company would be free to hand off this work or share it with non-union truckers.

Yet even if we accept the proposition that the bargaining unit is limited to work it already has – prohibited from capturing new work – this is a belt and suspenders case for the Union. The bargaining unit *has* been doing this work. Local 177 feeder drivers regularly transport empty air containers locally and another local – Local 804 in New York – does it routinely to Louisville.

Company witness Eric Bringe testified:

Q. And you're aware of those situations in which that work, not necessarily going to Louisville, but the movement of these containers, [is] in fact done by Local 177 IBT local members routinely?

A. Locally, yes, and also the 804 [runs] which I talked about in my testimony that goes to Louisville.

Q. So the work itself, the movement of this, is done by bargaining unit employees on a local basis, you're saying, right?

A. Yes.

Q. When you say "local," that means they're moving it from the airport to where?

A. Other containers within the jurisdiction of New Jersey, maybe New York and possibly Philadelphia.

Q. And to that extent you agree it is part of the union work?

A. Yes.

Q. And you agree Mr. P. Should not be moving it locally?

A. Yes. (T.9-10)

Mr. Bringe offered his definition of bargaining unit work.

A. Well, if certain work is work they continued doing all the time I would say it is bargaining unit work, but if they do it on isolated basis like the 804 drivers do, I don't consider it bargaining unit work.

Q. Well, even the 804 drivers are doing it routinely, it's just that it's not a lot of it, isn't it?

A. One day a week, two days a week.

Q. One day a week, two days. If you do that every single week, you'd agree that's routinely, isn't it, it's routinely once a week?

A. Once a week, right. (T. 12)

The Company thus acknowledges that moving empty air containers and equipment balancing is traditional bargaining unit work for Local 177 feeder drivers. It falls back, however, on the argument that the destination or distance of the trip drives the determination. However, nothing in Article 26 or any provision of the CBA authorizes the sharing of work with outside truckers depending on the destination or distance of the trip – an exception to bargaining unit work carved out of whole cloth.

No one denies that Mr. P Trucking may drive to New Jersey to drop off Amazon packages from Louisville. But it may not transport empty containers or move empty trailers to balance equipment. Why? Because that equipment is in the UPS distribution system – and thus traditional bargaining work. As union official Al Betts, a former feeder driver, testified without contradiction, moving empty trailers to balance equipment whether done locally or long-distance through sleeper teams, is done routinely by feeder drivers. ("I would say half our job is moving empties every day. . .") (T. 23).

The Company has introduced into evidence a contract proposal made by the IBT in the 2007 negotiations seeking to eliminate any "outside ground transportation" as an alternate means of transportation; the proposal was withdrawn. The Company thus reasons that it serves as an acknowledgment by the Union that the Company's

interpretation of Article 26 as permitting outside vendor ground transportation is correct. It is an argument that overreaches and under delivers.

Lots of reasons exist for introducing proposals during negotiations, not the least of which is to eliminate the possibility – real or imagined – about a future challenge to an apparently otherwise unambiguous provision – sort of like a pitcher with a 0-2 count throwing one away just to see if the batter swings. In any event, discerning the reason for such a proposal involves looking into the minds of the people at the table to figure out why they made it. Having no expertise in psychology and never having been at the bargaining table, I am handicapped in that endeavor.

First and foremost, however, a fair reading of Articles 32 and 26 makes clear their unmistakable purpose: Putting aside emergencies or one-off situations, all ground transportation must remain the exclusive domain of the bargaining unit except for the substitute means carved out in Article 26: airplane, helicopter, ship and rail. We may empathize with the Company's difficulties replacing outside vendors with bargaining unit employees at Newark Airport. But let us not pretend that Article 26 provides a license for non-union truckers to replace Union feeder drivers on regular, routine runs.

Accordingly, the answer to the issue posed is yes and the grievance sustained. The Company shall cease and desist using outside vendors to move empty air containers from Newark Airport to Louisville or other various locations within the U.S. system.

One last point. The Union's request for damages for the alleged loss of earnings its members suffered during the years an outside vendor did this work is denied for several reasons: First, it's too speculative. Second, it will in all likelihood result in a long festering dispute, something this proceeding is supposed to put to rest. Third, though the Union didn't condone or acquiesce in the use of an outside trucker – an activity obscured by the confusion resulting from all the different players at the airports – still, a bit more diligence on its part might have unearthed it sooner. And, finally, while it insists it relied on the Company informing them from time to time that the contract was not being violated – a sincere belief on the Company's part – perhaps the Union should have heeded President Reagan's advice: *Trust everyone but cut the deck.*

AWARD

The grievance is sustained. The Company shall cease and desist using outside vendors to move empty air containers from Newark Airport to Louisville or other various locations within the UPS system.

Dated: October 9, 2015

JACK D. TILLEM, Arbitrator

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

On the 9th day of October, 2015, before me personally came and appeared JACK D. TILLEM, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged to me that the same was executed by him.

DEANNA R PEARL
Notary Public, State of New York
No. 01PE4823999
Qualified in Nassau County
Commission Expires Nov 30 20[illegible]