

**In the Matter of Arbitration Between:**

**INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, LOCAL 804,**

**Union,**

**and**

**UNITED PARCEL SERVICE, INC.**

**Compny.**

**AAA Case No. 01-20-0005-00968**

**Issue: Personal Vehicle Drivers**

**Arbitrator: Elliot H. Shaller, Esq.**

**Date of Decision: September 15, 2021**

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APPEARANCES:

For the International Brotherhood of Teamsters, Local 804

Nathaniel K. Charny, Esq., Charny & Wheeler, P.C.

Thomas J. Lamadrid, Eisner Dictor & Lamadrid, P.C.

For United Parcel Service, Inc.

Tony C. Coleman, Esq., Dinsmore & Shohl, L.L.P.

**DECISION AND AWARD**

This arbitration arises from a grievance filed by Local 804 of the International Brotherhood of Teamsters (“Local 804” or “Union”) against United Parcel Service, Inc. (“UPS” or “Company”) challenging its decision to hire “Personal Vehicle Drivers” (“PVDs”) for Peak Season in 2019 without negotiating with or obtaining the Union’s agreement. Arbitration hearings were held over seven days on: October 13, 2020; October 26, 2020; February 9, 2021; February 10, 2021; February 11, 2021; March 18, 2021 and March 19, 2021. The first two days of hearing were held in person in New York City. The balance of the hearing was conducted virtually over the Zoom platform with the assistance of the American Arbitration Association (“AAA”) Administrator assigned to this case. A transcript of the hearing was not taken. The

parties were represented by counsel throughout the proceedings and afforded a full and fair opportunity to present opening statements, call witnesses, conduct direct and cross-examination and present documentary evidence. Each party submitted a Post-Hearing Brief on June 19, 2021 and a Reply Brief on July 27, 2021, at which time the record was closed.

The parties disagreed on how the issue or issues should be framed. The Union asserted in its opening statement that the issue is whether the Company violated Article 26 or 32 of the National Master United Parcel Service Agreement (“NMA”) or Articles 2, 13, 25, or 36 of the Local 804 and UPS Supplemental Agreement (“Local 804 Supplement”) when it hired drivers who used their personal vehicles to deliver packages during peak season 2019 and continuing. In its post-hearing brief the Union expressed the issue as whether the Company violated the Collective Bargaining Agreement (“Agreement”)<sup>1</sup> when it used PVDs in Local 804's jurisdiction in 2019 and continuing. In the Company's opening statement and post-hearing brief the Company framed the issue as whether it violated Articles 26 or 32 of the NMA or Articles 2, 13, 25 or 26<sup>2</sup> Local 804 Supplemental Agreement when it hired and used drivers using their personal vehicles to deliver packages during the 2019 peak season.

The parties authorized me to determine the issue. Based on the record and for the reasons detailed below, I find that the issue is whether the Company violated Articles 26 or 32

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<sup>1</sup> In this decision the “CBA” or “Agreement” refers to the NMA and the Local 804 Supplement as a combined integrated agreement. *See Local 804, IBT and UPS*, Case No. 13 300 00987 00 (Maurice C. Benewitz, Arb. (March 31, 2004) (“...[T]he Master Contract and the local supplement are a single integrated agreement.”)

<sup>2</sup> It appears from the record that in its statement of the issue the Company may have intended to refer to Article 36 of the Local 804 Supplement, not Article 26 of the Supplement. In their post-hearing briefs, neither presented evidence or argument on any alleged breach of Article 26 of the Supplement. However, the Company argued that there was no violation of Article 36 of the

of the NMA or Articles 2, 13, 17, 25 or 36 of the Local 804 Supplement when it employed PVDs in Local 804's jurisdiction to deliver packages during the 2019 peak season.

The parties agreed that if there is a finding that the Company violated the Agreement, the matter will be remanded to them to address the remedies with the Arbitrator retaining jurisdiction to resolve any dispute over remedies.

## **BACKGROUND**

### **The Parties and the Collective Bargaining Agreement**

UPS is a common carrier that delivers packages to customers around the world. Local 804 represents the UPS employees employed in its small package operations in the New York City metropolitan area. The Union and the Company are parties to the NMA and the Local 804 Supplemental Agreement. The following are the provisions of the NMA relevant to this case.

#### **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.

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#### **ARTICLE 2. SCOPE OF THE AGREEMENT**

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##### **Section 2. Riders**

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Any lesser conditions contained in any Supplement ... shall be superseded by the conditions contained in this Master Agreement. However, except where specifically stated otherwise in the Master Agreement, nothing in this Master

Agreement shall deprive any employee of any superior benefit contained in their Supplement, Rider or Addendum.

**ARTICLE 3. RECOGNITION, UNION SHOP AND CHECKOFF**

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(b) \*\*\*

Business agents and/or a steward shall be permitted to attend new employee orientations to talk about the benefits of Union membership. The Employer agrees to provide the Local Union at least one week's notice of the date, time, and location of such orientation. Upon request, the Union representative will be given a list of the names of the employees attending orientation no later than at the meeting. The sole purpose of the business agent's or steward's attendance shall be to encourage new employees to join the Union. \*\*\*

**ARTICLE 18**

**SAFETY AND HEALTH EQUIPMENT, ACCIDENTS AND REPORTS**

**Preamble**

The Employer and the Union agree that the safety of the employees and the general public is of utmost importance.

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**Section 1. Employees' Rights - Equipment, Vehicles and Conditions**

The Employer shall not require employees to take out on the streets or highways any vehicle, or use any type of equipment, that is not in a safe operating condition or equipped with the safety appliances prescribed by law. \*\*\*

**ARTICLE 20. EXAMINATION AND IDENTIFICATION FEES**

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**Section 4. Disqualified Driver - Alternative Work**

Except as provided for in Article 16, a driver who is judged medically unqualified to drive, but is considered physically fit and qualified to perform other inside jobs, will be afforded the opportunity to displace the least senior full-time or part-time inside employee at such work until he/she can return to his/her driving job unless otherwise provided for in the Supplements, Riders or Addenda. \*\*\*

**ARTICLE 26. COMPETITION**

**Section 1.**

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, ... :

(a) \*\*\*

During peak season, the Employer will make every reasonable effort, in accordance with the appropriate Supplement, Rider or Addendum, to use current UPS employees and hire a sufficient number of employees to handle peak volume. After doing so, the Employer may use alternate means of transporting packages during peak season and will utilize union carriers whenever possible. Plans to utilize outside carriers will be reviewed and agreed with the Local Union. Such agreement will not be unreasonably withheld.

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UPS shall provide its plan to the affected Local Union by October 15<sup>th</sup> of each year.  
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No package car driver shall be forced to use his or her personal vehicle to deliver packages.

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**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 ... 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. \*\*\*

**ARTICLE 38. CHANGE OF OPERATIONS**

**Section 1.**

(a) The Employer agrees that prior to any change in its operation that will result in a change of domicile and/or possible layoff of seniority employees, it shall notify the affected Local Union(s) in writing with the specific details and

information then available and then meet jointly with them to inform them of the proposed changes and to resolve questions raised in connection with the proposed change. The information will be provided at least seven (7) days prior to the meeting. During this joint meeting the Employer and the Union shall reduce to writing all agreed upon issues and both parties shall sign the written document in acknowledgement of such agreement. The parties shall also reduce to writing all unresolved issues, if any, and they shall be referred directly to the appropriate Regional Change of Operations Committee. This meeting shall be completed where practical at least forty-five (45) days prior to the proposed change. The change may not be implemented until the forty-five (45) days' notice is provided and the meeting is completed unless the operational change is dictated by emergency conditions. The Union shall not unreasonably delay the scheduling or completion of the requested meeting. \*\*\*

#### **ARTICLE 40. AIR OPERATION**

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(4) \*\*\*

(i) Personal Vehicles

Air Exception drivers will use the Employer's vehicles whenever possible. Air Exception drivers who would happen to use their personal automobiles shall be reimbursed at the IRS limit applicable per mile for all miles driven to perform air driving work in addition to their air driver wages. \*\*\*

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#### **ARTICLE 41. FULL-TIME EMPLOYEES**

##### **Section 2. Full-time Wage Progression**

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(c) The progression for employees entering a package car driving ... or other full-time job ... after August 1, 2018 shall be as follows:

Start 21.00

The following are the provisions of the Local 804 Supplement relevant to this case.

**ARTICLE 2. WAGES**

**Section 1 – Full-Time Wage Progression**

[wage charts from NMA]

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**Section 6 – Seasonal Employees**

Employees hired between January 16 and October 14 will be paid in accordance with Section 2 of this Article except for peak season package helpers.

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**ARTICLE 3  
HOURS OF WORK, OVERTIME, SUPERVISORS WORKING**

**Section 1 - Work Week and Overtime Pay**

- (a) The basic workweek for all regular full-time employees should be forty (40) hours per week consisting of eight (8) hours per day, five (5) days per week.

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**ARTICLE 4  
STARTING TIMES**

**Section 1 - Fixed Start Times**

The Company shall fix the starting time for employees, which shall remain constant during any particular week, but may be changed from week to week.

**ARTICLE 6  
PART-TIME EMPLOYEES**

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**Section 3 - Part Time Work Restrictions**

Part-time employees will not be permitted to do delivery driving ....

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**ARTICLE 13  
SENIORITY**

**Section 1 – Acquisition of Seniority**

(a) After forty days of work within a seventy consecutive work day period, (excluding orientation) a new employee will acquire seniority and the employee shall be given a seniority date as of his/her first day of employment (orientation) worked within such 70 consecutive work day period. If, however, the employee does not complete the 40 days within these 70 days his/her seniority date will be the first day of the 40 worked within any subsequent seventy (70) workday period.

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(b) There shall be a free period, beginning October 15 and ending January 15 the following year, during which no employee can qualify for seniority.

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**Section 2- Package Center Seniority**

(a) Center Seniority. There shall be separate seniority lists for the inside employees of each package center and separate seniority lists for the outside employees of each package center. \*\*\*

(b) Job Assignment of work shall be made on the basis of seniority lists described in (a) above.

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**ARTICLE 17  
GENERAL MANAGEMENT PROVISION**

The management of the Company and the direction of the working forces, including the right to plan, direct and control the Company operations and to maintain and establish rules of operation and working practices, not inconsistent with the provisions of this Agreement shall be vested exclusively in the Company. It is agreed that the Company will give the Union thirty (30) working days notice of any anticipated major change in the Company's methods of operation. (See Footnote 3)

If any major change by the Company in methods of operation results in a substantial change in job content of any job classification provided in this Agreement or in the creation of a new classification or in substantial hardship to employees, the parties shall attempt to agree on a new wage rate for such job or jobs, or hardship corrections, and on failure to agree, an applicable wage rate or



hardship correction shall be determined by arbitration in accordance with the provisions of Article 18 herein.

Footnote 3: see also National Agreement, Article 38, Section I

**ARTICLE 25  
MAINTENANCE OF STANDARDS**

The Employer agrees that all conditions of employment relating to wages, hours or work, overtime differential, and general working conditions, as negotiated or agreed upon, shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement except as specifically provided in this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvements are made elsewhere in this Agreement.

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**ARTICLE 36  
COMPLETE AGREEMENT**

The Parties agree that this contract is the sole and complete agreement between them and that any other previous understandings or agreements, oral or written, inconsistent with the provisions of this Agreement are superseded and are of no effect during the terms of this Agreement.

The Parties hereto expressly agree that during the lifetime of this Agreement there shall be no demands for collective bargaining negotiations as to any matter or issue not covered by the provisions of this Agreement, or for the negotiation of any of the provisions of this Agreement, except as elsewhere provided in this Agreement.

**The Company's Decision to Employ PVDs**

UPS packages are delivered to customers by employees occupying the job classification of package car drivers, a bargaining unit position. Package car drivers operate the Company's brown package cars and, on occasion, when there is not a sufficient supply of them, similar vehicles or vans that the Company rents.

During peak season, which runs from October 15 of the current year to January 15 of the succeeding year, in addition to seniority package car drivers already on the payroll (hereafter referred to as "regular package car drivers" or "RPCDs"), the Company employs seasonal

package car drivers. These employees also operate the Company's brown package cars or rental vehicles. They are considered to be in the bargaining unit, although, under Article 13, Section 1(b) of the Local 804 Supplement, they do not accrue seniority.

UPS introduced evidence reflecting that in recent years, due largely to the growth of e-commerce, its volume of peak season deliveries has substantially increased. As a result of this growth, UPS began encountering difficulty securing enough package cars to handle the peak season volume. Because its competitors have also sought to rent similar vehicles during peak season, UPS also had difficulty renting enough vehicles to meet its needs. Moreover, during peak season the Company's package distribution centers have often not had enough open car positions at which to load the vehicles. The record reflects that in 2019, in each of the eighteen facilities within Local 804's geographic area, maximum car capacity was exceeded on five or more days during peak season.

These factors led UPS, starting in the 2015 peak season, to hire package car drivers in some locations (not including in Local 804's jurisdiction) who used their own vehicles to deliver packages. These employees were referred to as PVDs and they were included in the bargaining unit. The Company supplied the names of the PVDs on the monthly new hire report it provided the Union. However, like the other seasonal package car drivers and pursuant to Article 13, Section 1(b) of the Local 804 Supplement, they did not accrue seniority.

The Company hired a substantially increasing number of PVDs in each subsequent year. For example, whereas in 2017 it hired 2,771 PVDs, in 2019 it hired 27,551. According to the record evidence the use of PVDs has not reduced the RPCDs workload. From 2017 to 2019,

both nationally and within Local 804's jurisdiction, there has been an increase, albeit a relatively modest one, in the number of RPCDs UPS has employed.

**Bargaining History Regarding PVDs and Employee Use of Personal Vehicles**

Al Gudim, former UPS Vice President of Labor Relations (now retired), testified that before the Company employed PVDs for the peak seasons in 2015, 2016 and 2017, it reviewed with the International Brotherhood of Teamsters ("IBT") its plans for using PVDs in each of those years. There is no evidence that the IBT objected to the use of PVDs in 2015 or 2016. However, it did object in 2017. On September 1, 2017, then Teamster Small Package Director, Sean O'Brien, wrote the following in a letter to Mr. Gudim:

Article 40, Section 1(i) is the only contractual provision that permits a current classification of employees to utilize their personal vehicles to deliver packages in extraordinary circumstances, i.e., where no other means of delivery is possible. As you know, that exception is limited to air packages. There is nothing in the contract that permits the use of non-company vehicles to deliver or pick up ground packages. \*\*\* [I]n my view, the proposal undercuts the standards established for the workers who currently provide these delivery services and would constitute a threat to the bargaining unit on a par with any other means of subcontracting, etc. prohibited by Article 1.

In short, we have no intention of permitting the company to utilize seasonal employees to transport ground packages in their own vehicles. We would consider any attempt by the company to initiate such a program to be a violation of the current contract and will invoke all of our rights to prohibit such implementation. And I highlight, if such is necessary, the significant financial penalties the company will face if it is found to have violated its pledge in Article 1, Section 4 that it will not establish a parallel work force to which it can divert bargaining unit work.

Mr. Gudim responded to the IBT in a letter dated September 1, 2017 addressed to Dennis Taylor, who had replaced Mr. O'Brien as the IBT Small Package Director. In pertinent part, Mr. Gudim's letter stated as follows:

This is in response to your letter dated September 1, 2017, in which you reject an alleged proposal by UPS to create a new job classification called "Full-time

Seasonal Personal Vehicle Driver." Your letter is factually and contractually without merit.

The Company did not present any proposal to the Teamsters for review or approval concerning seasonal personal vehicle drivers. Further, UPS is not proposing the creation of a new job classification, as your letter indicates. Rather UPS simply indicated that it was planning to request some seasonal employees to use their personal vehicles to deliver packages. This is a practice which the Company has used in many different locations throughout the United States in past years.

Finally, your letter makes reference to alleged violations of Article 1, Section 4 and the preamble to Article 1 of the ... NMA. The preamble states that work will be preserved for "employees covered by this Agreement." Neither of these two sections are in any way relevant to the Company's planned use of seasonal employees. Seasonal employees are, by definition, "employees covered" by the NMA. \*\*\* UPS cannot violate Article 1, Section 4 or the preamble to Article 1 by using bargaining unit employees to perform bargaining unit work.

Mr. Taylor responded to Mr. Gudim in a letter dated October 2, 2017. Mr. Taylor reiterated the IBT's objection to "the Company's unilateral proclamation of its intent to implement" the PVD program. He asserted that "[e]stablishing a new classification ... is a mandatory subject of bargaining...." Mr. Taylor included in the letter a request that UPS provide various information about the PVD program.

In a letter dated October 11, 2017, Mr. Gudim responded as follows:

This is in response to your letter dated October 2, 2017. In that letter you stated, "[t]he Teamsters UPS National Negotiating Committee objects to the Company's unilateral proclamation of its intent to implement a new 'Seasonal Personal Vehicle Driver program. \*\*\*

Before responding to your specific inquiries, it will be beneficial to correct some misconceptions. The future employees we are discussing are seasonal package car drivers - the same classification of employee whom UPS has hired for decades. They are not independent contractors, owner-operators, or subcontractors. It is not a new job classification. They will be UPS employees. They will pay initiation fees and dues in accordance with local practices for seasonal hires. There has been much misinformation disseminated about these jobs. In reality, the job itself is not really anything more than a seasonal driver.

Regarding your paragraph 1, the locations and schedules for hiring of these drivers is attached as Exhibit A. As you can see, the use of these drivers is generally limited to

those centers which have residential deliveries on rural and super-rural routes. The total number of planned positions will be approximately 4300, with many of those working for a short period during peak weeks.

\*\*\* UPS must pursue this operating plan to make service on the continuously increasing volume of packages handled each "Peak." Last year, more than ever, we found that rental trucks and vans are oftentimes completely unavailable at peak. Parking capacity within many of our buildings is non-existent. A seasonal driver with his or her own vehicle solves these and other peak problems.

With regard to paragraph 3 of your letter, the location of these seasonal drivers in 2016 is set forth in Exhibit B. There were approximately 120 drivers in these various locations. UPS also had a structured test of this concept in 2015 in Roswell with approximately six drivers. No agreements were obtained from any local union, as UPS views this as something allowed by Article 26 of the NMA, as well as past practice. For many years, UPS has also requested employees to deliver packages in their personal vehicles on an ad hoc basis. Exhibit C is a document developed based on mileage reimbursements for bargaining unit employees. As you can see, there were approximately 5500 hundred employees in 2016 who used their personal vehicles in connection with their work. The number in 2017 is approximately 3460 year-to-date.

Nothing new is being introduced in 2017 except the number of necessary seasonal drivers increases as peak volume continues to increase every year. Employees who have transported packages with their own vehicles have all been compensated the same as other package car drivers. They have received the same benefits. It has always been our practice to reimburse drivers at the IRS rates when their personal cars are used.

With regard to paragraph 4 of your letter, the data provided above in response to your paragraph 3 establishes that this is not a matter of "new types of equipment and/or operations." It is a continuation of a practice that has occurred for years on an informal and formal basis. The fact that Article 6, Section 3 is not implicated supports UPS' position that this is contractual.

With regards to paragraph 5 of your letter, as noted above the cost of the rental vehicles is not even the primary issue compared to the scarcity of rental equipment and car park positions. As you can imagine the loss of production due to the seasonal drivers having to return multiple times to retrieve delivery packages is very costly.

The fact that these employees will be classified as seasonal employees answers the questions you pose in paragraphs 8 and 9. The seasonal drivers are employees. 401k coverage and health & welfare contributions will be handled the same as any other seasonal package car driver. With regard to the question posed in your paragraph 9, UPS does not expect these employees to impact the work of permanent full-time package car drivers any differently than seasonal package car drivers do every year. Thus, this should not be an issue.

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In paragraph 10, you ask whether these drivers would violate Article 22, Section 1 of the NMA. There is no issue with this Section of the contract as the seasonal employees will be full-time.

Your letter further inquires in paragraphs 11 and 12 about the Company's compliance with Article 3, Section 1 as it relates to Local Unions' opportunity to provide applicants and attend new employee orientations. It is my understanding that we do allow locals to attend new hire orientation per the contract. If there is any area in which this is not occurring, please let me know. \*\*\*

Finally, UPS has always had the right to establish the qualifications of those employees it hires. Article 26 clearly gives UPS the right to hire seasonal drivers and use "substitute means of transportation ... in its operations...." Just as UPS has experimented with deliveries on bicycles and golf carts, UPS has the right to request seasonal employees to use their personal vehicles. Article 26 exists to allow UPS to meet its competition. I have not seen a more compelling case for its application.

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It is the Company's intent to deal with this issue on a national basis rather than on a local level. If you to discuss this further or have other questions please contact me.

There is no evidence that the IBT responded to the Company's October 11, 2017 letter. However, in January 2018, during the negotiations for a new NMA, the parties bargained over whether employees may be required to use their personal vehicles to deliver packages to UPS customers. UPS made the following written proposal:

Article 11

[Clarification Purposes to Capture Past Practice]

The Employer shall be allowed to require employees to use their personal vehicles, which must meet standards established by the Employer, to deliver packages. Employees shall be reimbursed at the applicable IRS rate for all miles driven to perform deliveries and provided UPS insurance coverage while working. These employees will be paid in accordance with Article 41, Section 5. [Economic Proposals Forthcoming]. The use of personal vehicles shall be voluntary for full-time employees on the payroll on the date of ratification.

Mr. Gudim testified that UPS labeled the proposal as a “clarification” because the Company believed there was an established past practice pursuant to which employees used their personal vehicles, based on the prior employment of PVDs and employee use of their own vehicles on an ad hoc basis. UPS provided the IBT with a spreadsheet showing that in 2016 and 2017 there were several thousand occasions on which employees used their personal vehicles for Company business.

The IBT objected to the Company’s proposal. Mr. Gudim testified that Mr. Taylor did not like how the proposal was worded, as he was concerned that it might allow the Company to compel permanent drivers (presumably referring to RPCDs) to use their own vehicles. (Mr. Taylor did not testify) The parties ultimately agreed to add the following sentence to Article 26, 1.(a): “No package driver shall be forced to use his or her personal vehicle to deliver packages.”

**The Use of PVDs Within Local 804’s Jurisdiction**

Prior to 2019, the Company did not use PVDs in Local 804’s jurisdiction. But on September 4, 2019, the Company notified the Union that it intended to use PVDs in 2019 in the Union’s jurisdiction. The parties discussed the issue at peak season meetings held in September and October 2019. In a letter dated October 14, 2019, Vincent Perrone, President of Local 804, notified the Company that the “union position is this position is barred by the CBA” and “the Company position is that PVDs are Seasonal Peak Drivers.” In his letter Mr. Perrone asked the Company to “please provide dates on which these outstanding issues may be resolved.” There is no evidence in the record reflecting that the issue was subsequently negotiated or further discussed.

The Company proceeded to solicit applicants for PVD jobs within Local 804's jurisdiction for the 2019 peak season. A flyer UPS posted about the job described it as follows:

**PVD JOB CONDITIONS**

\$21.00 PER HOUR

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Candidate Requirements:

- Drive your own car
  - Weekly work schedule
  - Mileage reimbursement
- \*\*\*

Vehicle Requirements:

- Minivans and Suv's acceptable
  - Sedans and Hatchbacks with 4 Doors
- \*\*\*

The Company reported the PVDs it employed as new hires covered by the Agreement. Pursuant to Article 41, Section 2(c) of the NMA it paid them \$21.00 per hour and reimbursed them at the IRS mileage rate for the miles they drove their personal vehicles to deliver packages for the Company.

Local 804 filed a grievance on September 9, 2019 alleging that “[m]anagement gave notice that it will be hiring PVDs without negotiating such hires with the Union and without agreement from the Union.” The grievance alleged that the Company violated Articles 26 and 32 of the NMA and Articles 2, 13, 26 and 36 of the Local 804 Supplement. The grievance requested the following as a settlement:



Do not create this job. If the job is created, time and ½ for all hours worked by 'PVDs' to top seniority Regular Package Driver in the center where PVD worked."<sup>3</sup>

On November 4, 2019 the Company began using PVDs for the first time within Local 804's jurisdiction.

On November 20, 2019, the Local Panel deadlocked over the Union's grievance. The grievance was filed with the National Panel on December 2, 2019 as it required an interpretation of the NMA. (See Article 8, Section 3 of the NMA). The joint submission to the National Panel stated that the Union alleges "the Company violated Articles 26 and 32 of the NMA, claiming management gave notice that it will be hiring PVDs without negotiating such hires with the Union and without agreement from the Union." In the accompanying "Pre-Hearing Information Sheet" the Union indicated that its claim was based on Articles 26 and 32 of the NMA and Articles 2, 13, 25, and 36 of the Local 804 Supplement. In its March 2020 submission to the National Panel Grievance Committee, the Union referred to these articles of the NMA and the Local 804 Supplement, and also alleged that the Company violated Article 17 of the Supplement by failing to negotiate with the Union a new wage rate for the job. The Union framed the issue before the National Panel as whether "UPS violated the CBA when it hired and used PVDs in Local 804's jurisdiction during the 2019 Peak Season."

The Company in its submission to the National Panel asserted that there was no violation of Articles 26 and 32 of the NMA or of Articles 2, 13, 25, and 36 of the Local 804

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<sup>3</sup> At a Local Panel hearing held regarding the grievance on October 31, 2019, the Company raised a procedural point of order, asserting that the grievance was premature because it had not as yet used PVDs within Local 804's jurisdiction. When the Company did start using PVDs within Local 804's jurisdiction on November 4, 2019, its point of order was mooted.

Supplement. The Company submitted Article 17 of the Local 804 Supplement as an exhibit and asserted that “Articles 26 of the NMA in conjunction with Article 17 ... gives [it] the ability to utilize PVDs during the free period as there is no language in the CBA that bars [the Company”] from doing so.”

The matter deadlocked at the National Panel. The grievance was then referred to the AAA to assign an arbitrator to hear and resolve the dispute. On April 30, 2020 the AAA appointed me to serve as arbitrator in the case.

**Comparison of the Job Conditions Applicable to the PVDs and to Other Package Car Drivers**

The parties introduced considerable evidence on how the PVD job compared to other package car driver jobs. The following is a summary of this evidence.

Orientations

The Company generally conducts new employee orientations for RPCDs. Under Article 3, Section 1(b) of the NMA the Company is required to notify the Union of when the orientations will be held to afford union representatives an opportunity to attend and encourage new employees to join the Union. According to the record evidence, the Company held orientations for at least some of the newly hired PVDs in Local 804's jurisdiction during the 2019 peak season, and did not notify the Union in advance when the orientations would be held.

Use of Personal Vehicles

RPCDs and seasonal package drivers other than PVDs operate the Company's package cars or trucks or vans that the Company rents. These drivers are not responsible for insuring,

maintaining or washing the vehicles they operate. However, PVDs are required to use their personal vehicles to deliver packages and bear the responsibility for insuring, maintaining and washing them.

### Training

The Company provides RPCDs with extensive training, most of which concerns the operation of the package car. The training includes a week of classroom instruction followed by several days of on-the-road instruction that includes driving a training vehicle with an instructor, typically followed by on-the-road riding with a supervisor or a more senior driver. The training includes instruction on handling hazmat packages. Package car drivers who will be operating a Company package car are required to pass a road test and to be certified.

The extent of the training given to seasonal package car drivers other than the PVDs is somewhat unclear from the record. It generally appears that they receive roughly similar but somewhat less training than the RPCDs.

Because the PVDs do not drive package cars, they receive substantially less training than other package car drivers and are not required to pass a road test or to be certified. Most of the training for the PVDs is online and addresses keeping safe distances, how to sort packages for delivery when loading them into the vehicles, how to lift packages safely, and how to use the Company-supplied Mobile Delivery Assistant (“MDA”) device. There was evidence that some PVDs also received a few hours of on-the-road training. The Company did not train PVDs on handling hazmat because they did not deliver packages containing hazmat.

### Uniforms

UPS provides RPCDs with uniforms consisting of long and short pants, a shirt and a coat. According to the record evidence some but not all PVDs received these uniforms.

Warren Pandiscia, UPS Division Manager of Labor Relations, testified that in 2019 UPS planned to provide full uniforms to all the PVDs and uniforms were given to most of them. He explained that the uniform manufacturer was unable to keep up with the demand and, as a result, the Company supplied some of the PVDs with reflective vests with the UPS logo on the back instead of the regular uniform. One Union witness testified that he observed a PVD deliver packages while wearing street clothes.

### Equipment

RPCDs are provided with Delivery Information Acquisition Devices (“DIADs”), computers that perform various functions including the ability to send to and receive texts from the distribution centers, GPS, a flashlight and timekeeping. The Company did not provide the PVDs with these DIADs but supplied them with MDAs. The PVDs who testified at the hearing described the MDA as a type of cell phone designed for delivering packages, but which lacked the full functionality of the DIADs, including the ability to send and receive texts from the distribution center and GPS. However, there was evidence that the MDAs now used by PVDs are the next version DIADs that will be assigned to all drivers.

The Company supplied RPCDs, but not the PVDs, with hand trucks to facilitate package delivery. Mr. Pandiscia testified that hand trucks were in short supply during peak season but that the Company would have given one to any PVD who asked for this equipment.

RPCDs were provided lockers but the PVDs were not.

Schedules and Hours

Article 4, Section 1 of the Local 804 Supplement requires employees to have fixed starting times. According to the record evidence the schedules for the RPCDs are posted on Thursday or Friday or Saturday night for the ensuing work week and provide for fixed starting times during that week. However, the PVDs who appeared as witnesses testified that they were notified of their schedules by text message the night before each workday and that their starting times were not necessarily fixed.

Eight Hour Guarantee

RPCDs are guaranteed eight hours of work per day. In the Company's payroll system the default pay code for RPCDs is "06," signifying that they are entitled to this guarantee. However, there are instances in which RPCDs are coded as 05, signifying "pay actual," i.e., that they are to be paid only for the time worked. The 05 pay code is used for RPCDs when they arrive late to work or ask and are granted permission to leave early.

The default pay code for the PVDs was 05. However, the Company asserted that the PVDs were entitled to the eight-hour guarantee. In support of this assertion it introduced into evidence waivers signed by 70 of the PVDs employed in Local 804's jurisdiction during the 2019 peak season. In these waivers the PVDs acknowledged that they were guaranteed eight hours of work but that on dates listed in the waivers they agreed to be paid only for the actual time worked. The text of these waivers stated as follows:

Full-time employees who report to work as scheduled will be afforded the opportunity to earn 8 hours of pay per day. Recognizing that employees leave early for various reasons, the Company will allow employees to leave early, volume permitting. Employees who leave early will be paid for hours worked only.

On [list of dates worked fewer than 8 hours] I was afforded the opportunity to be released from responsibilities, and agree that I will not be paid my 8 hour guarantee for that/those day(s), and will only be paid for the time that I actually worked.

The waivers that the Company introduced into evidence were signed and dated on various dates in late December 2019 or early January 2020 and referred to the dates on which the PVD worked fewer than eight hours. Mr. Pandiscia testified that the 70 waivers the Company introduced into evidence did not necessarily represent all of the waivers the Company had secured, although he did not indicate that a signed waiver was secured from every PVD who for one or more days did not receive the eight-hour guarantee.

#### Preloading

Preloading work at the distribution centers is done predominantly by inside employees in the loader classification. However, before beginning their delivery runs, package car drivers routinely perform some amount of preloading work. The PVDs are responsible for loading packages onto their personal vehicles. Other package car drivers regularly do miscellaneous preloading work before beginning their runs, which may include unloading trucks, sorting, moving packages from one belt to another, and loading packages on to package trucks. The record lacks evidence on how much time the package car drivers spend doing this preload work, and on whether PVDs generally spend more or less time than other package car drivers in preloading. However, it is clear from the evidence that the time PVDs and other package car drivers spent preloading was relatively minor compared to the time they spent completing their runs and delivering packages.

Wages

Package car drivers are paid the hourly rates specified in Article 41, Section 2(c), which progress based on length of service. The starting hourly rate is \$21, which was the rate paid to the PVDs the Company employed for the 2019 peak season in Local 804's jurisdiction.

Because they used their own vehicles, the PVDs, unlike the other package car drivers, also received mileage reimbursement based on the Internal Revenue Service's mileage rates. The Union introduced evidence reflecting a considerable disparity in the amount of mileage reimbursement the PVDs received. In this regard, it gave the example of "Mini-Cooper Mike," who "made a killing," because he could only carry a limited number of packages in his vehicle and would have to return multiple times during the course of his shift to the distribution center to reload. As a result, he drove a relatively high number of miles and was reimbursed accordingly. By contrast, a PVD who drove a large SUV could load his vehicle with far more packages and would not need to return to the center. As a result, this PVD would drive his or her personal vehicle far fewer miles than Mini-Cooper Mike and, consequently, receive significantly less mileage reimbursement.

**CONTENTIONS**

**Local 804's Contentions**

The following is a summary of Local 804's contentions in the matter: Although under Article 17 management has discretion in directing operations, such discretion is limited to changes that are "not inconsistent with the provisions of this Agreement." The use of PVDs within Local 804's jurisdiction represents the exercise of management discretion that is almost

entirely inconsistent with the provisions of the Agreement, including, among other things, that PVDs: are forced to use their personal vehicles in violation of Article 26, Section 1(a) of the NMA; are forced to wash their cars in violation of Section 13(2)-(3) of the Local 804 Supplement; are assigned to load their own vehicles in violation of Article 32 of the NMA and Article 6 of the Local 804 Supplement; have no fixed starting times, in violation of Article 4, Section 1 of the Local 804 Supplement; are not coded for the eight-hour guarantee, in violation of Article 6, Section 3 of the Local 804 Supplement; are denied bargained-for safety measures in violation of Article 18 of the 804 Supplement; have their wages unilaterally set by the Company; receive very limited training; and are denied full uniforms and equipment. Further, the Union is denied access to PVD orientation sessions in violation of Article 1(b) of the NMA.

UPS use of PVDs in Local 804's jurisdiction is a blatant violation of Article 26, Section 1 of the NMA, stating that "[n]o package car driver shall be forced to use his or her personal vehicle to deliver packages." It is undisputed that PVDs are package car drivers and are forced to use their own vehicles. The flyer soliciting PVDs in Local 804's jurisdiction is explicit in listing as a requirement for the position that the applicant "[d]rive your own car." Further, Mr. Gudim and Mr. Pandiscia testified that PVDs are forced to use their own vehicles if they want to work as package car drivers.

The bargaining history supports the Union's interpretation of the Article 26, Section 1 language. In the Fall of 2017 the parties on the national level exchanged letters in which the Union strongly objected to the PVD program. During the January 2018 national negotiations, the Company made a proposal that would allow it "to require employees to use their personal vehicles ... to deliver packages" and state that "[t]he use of personal vehicles shall be voluntary



for full-time employees on the payroll on the date of ratification.” The Union rejected the proposal. The parties ultimately agreed on the language incorporated in Article 26, Section 1, i.e., that “[n]o package driver shall be forced to use his or her personal vehicle to deliver packages.” This language applies to *all* package car drivers, including PVDs, thereby clearly prohibiting the Company from requiring them to use their own vehicles.

By using PVDs the Company violated Article 32 of NMA. Although the title of Article 32 is “Subcontracting,” its prohibitions are far broader than those contained in a traditional subcontracting clause. The article prohibits work from being “transferred ..., or assigned ... in whole or in part to any other ... person...” Because PVDs are performing bargaining unit work across classifications, the Article 32 prohibition against this transfer or reassignment of work applies.

In *Local 804, IBT v. UPS*, AAA Case No. 13 300 02878 03 (Shriftman, Arb.) (April 21, 2008), Arbitrator Elliott Shriftman relied in part on Article 32 of the NMA to find that the Company violated the Local 804 Supplement by transferring bargaining unit work performed by one classification to a newly created classification. Contrary to the Company’s contention, the Shriftman Award did not deal with a transfer of bargaining unit work to non-bargaining unit employees, but rather, how the Company distributed work among different bargaining unit titles.

The Company’s use of PVDs in Local 804's jurisdiction violates the strong job title and job classification protections in the Local 804 Supplement. In his decision Arbitrator Shriftman described these protections as follows:

As readily as one tastes a pickle and discerns that it is salty, the Arbitrator must acknowledge that of the hundreds of collective bargaining agreements he has perused over his some thirty-three years in the field of labor relations, the one at bar contains the or one of the strongest statements about job title integrity and work preservation.

Further, Arbitrator Morris Glushien's decision in *Local 804, IBT v. UPS*, AAA Case No. 1330-0294-83 (Glushien, Arb.) (September 12, 1983) ("*Glushien Award*") is directly on point and dispositive. In that case the Company canceled the preload shift because of an incoming snowstorm. When the facility reopened after the storm, instead of calling in the preloaders, the Company instructed the package car drivers to load their own vehicles. Arbitrator Glushien sustained the grievance, noting Local 804's strong job classification protection. He relied in part on Article 13 of the Local 804 Supplement mandating separate seniority lists for each classification. He stated that the "clear import of this provision is that outside employees ... may not take over the work and duties of inside employees [and] ... vice versa."

The Company defends its use of PVDs by relying on the needs of the operation. However, the Company's evidence about these alleged needs was all based on national data. It submitted no local analysis. For example, there is no evidence that the Company made any effort to rent additional vehicles for the 2019 peak season within Local 804's jurisdiction which would have obviated any need to use PVDs. The Company thereby violated the Article 26 requirement that it exhaust alternative courses of action before subcontracting. Although the Company did not subcontract delivery work to outside carriers, it has created a bargaining unit job title that crosses classifications and violates nearly every clause in the Agreement.

In the past, the parties have bargained over creating new classifications that combined the work of two or more job classifications and other new classifications. For example:

During the 1997 national negotiations, the parties agreed in Article 22.3 of the NMA to combine the package car driver classification with inside work to create a full-time job, with the delivery limited to packages from the Air Operation as set forth in Article 40 of the NMA.

During the 2018 national negotiations, the parties agreed in Article 22.4(b) of the NMA to create another new job that combined inside and outside work. Article 22.4(b) stands for the proposition that in Local 804's jurisdiction the Company needs permission to create a position where package car drivers are permitted to do a combination of inside and outside work.

The parties bargained over the creation of the positions of air drivers and air walkers. Specifically, Article 40, Section 1 of the NMA was negotiated to allow the Company to hire air drivers and allow them to use their personal vehicles and be paid the bargained-for mileage reimbursement rate. The parties negotiated the provisions of Article 40, Section 2, to allow the Company to use air walkers, subject to the detailed work rules set forth in the section.

The parties negotiated the terms of Article 2, Section 13 of the Local 804 Supplement, permitting the Company to "create a new full-time combination helper classification [that] consist[s] of any combination of part-time preload, part-time hub or part-time local sort work and driver helper." The work rules negotiated regarding this position are detailed and specific and designed specifically to protect the job classification protection required in Local 804's jurisdiction.

Thus, in Local 804's jurisdiction, the Company must negotiate with the Union and obtain its agreement in order to create a position where package car drivers are required to perform inside work.

Under Article 6, Section 3 of the NMA the Company is required to negotiate with the Union before introducing any new equipment. The article broadly defines "new equipment" to include "all new types of equipment....." The Company violated Article 6, Section 3 by unilaterally implementing the PVD program, which included the requirement that the PVDs operate their own vehicles to deliver packages for the Company

The Company violated various work rules contained in the Local 804 Supplement by how it implemented the PVD program in the Local's jurisdiction. Such violations include the following:

Article 4, Section 1 states that "the Company shall fix the starting time for employees, which shall remain constant during any particular week," and that "[s]tarting times shall be posted by Thursday of the preceding week." It is undisputed that PVDs have no fixed schedule or any assigned schedule posted that far in advance. Rather, the Company only gives them a one-day notice of their schedule.

Article 3, Section 1 of the 804 Supplement states that "[a]ny employee who is assigned to full-time work shall be afforded an opportunity to earn not less than eight (8) hours of pay per day." The PVDs do not receive this eight-hour guarantee. On the Company's payroll records they are coded as 05, signifying pay only for time worked, rather than as 06, which mandates the eight-hour guarantee. That there are some instances in which RPCDs are also coded as 05 is not significant as those cases are due to situations in which they forfeited the guarantee by being late or asking to leave work early.

The waivers the Company relied on do not excuse its violation of Article 3, Section 1. The Company did not introduce into evidence waivers from all of the PVDs and, those that it

did, were secured after the fact when the PVDs' employment was about to end. The waivers are irrelevant in any event because, by default, the Company was not providing the PVDs with the eight-hour guarantee. As Arbitrator Dennis Nolan stated in *UPS and Teamsters Local 509*, FMCS Case No. 02-09572 (Nolan, Arb.) (August 21, 2003):

[E]mployees and their supervisors may waive the minimum hours guarantee by agreeing to pay only for hours worked. While both parties must agree, any derogation from a contractual right is a narrow exception that must stem from the employee's unfettered preference. Any direct or indirect pressure from the employer to gain such a waiver would undercut the contractual provisions.

Article 3, Section 1 of the NMA provides that "[b]usiness agents and/or a steward shall be permitted to attend new employee orientations to talk about the benefits of Union membership." It requires the Company to give the Local advance notice of the orientation's date, time, and location and, upon the Local's request, a list of the employees who will be attending. The Company has not complied with these requirements. Scott Damone, Local 804 Business Agent, testified that the Company never advised it of orientations in 2019 for newly hired PVDs, denying Local 804 representatives of the right to attend them.

Although the Company viewed PVDs as package car drivers, it did not provide them the extensive training it gives to other package car drivers, regardless of whether they are hired during peak season. Nor did the Company provide the PVDs proper uniforms and equipment, including hand trucks that it provides to other package car drivers.

Article 18, Section 1 of the NMA states that the Company "shall not require employees to take out on the streets or highways any vehicle, or use any type of equipment, that is not in a safe operating condition or equipped with the safety appliances prescribed by law . . ."

Because PVDs are forced to use their own vehicles, they are not provided these bargained for safety measures and equipment.

Article 40 of the NMA reflects that mileage reimbursement for certain bargaining unit employees is a subject the parties have negotiated. But in this case the Company unilaterally implemented the \$21 per hour plus mileage reimbursement compensation structure for the PVDs. Further, this compensation scheme resulted in disparities in pay among the PVDs. A PVD who operated a small vehicle that lacked sufficient space to carry many packages and with high miles per gallon capacity would have to return often to the distribution center to reload, and thereby maximize his or her mileage reimbursement. By contrast, a PVD who operated a large vehicle and with a lower miles per gallon capacity, would not have to return to the distribution center as often and would receive less mileage reimbursement. Such disparities violate a Local 804 foundational precept that bargaining unit members performing the same work should be paid the same.

The Company violated Article 17 of the 804 Supplement, providing that when the Company makes a change in operations that results in a “substantial change in job content of any job classification ... or the creation of a new classification,” it must at least bargain the wage rate with the Union to impasse and then proceed to arbitration. The introduction of PVDs constituted such a substantial change in job content and creation of a new job classification considering that, unlike other package car drivers, PVDs: were required to use their own vehicles; performed a combination of outside and inside work, including loading their own vehicles; received only nominal training; had no set schedule; had no eight-hour guarantee; had no set uniform; and received an inconsistent and fluctuating wage rate. There is

no merit to the Company's argument that because it could have just as easily rented vehicles for RPCDs to use, there was no substantial change in operations.

There is no merit to the Company's argument that the footnote reference in Article 17 to Article 38 of the NMA, entitled "Change of Operations," limits the meaning of "major change" in the second paragraph of Article 17 to those that result in domicile changes and possible layoffs. The footnote is placed after the last sentence of the prior paragraph addressing the unrelated issue of anticipated major changes in methods of operations.

The decision by Arbitrator James Darby in *Teamsters Local 764 and UPS*, AAA No. 01-18-0004-2899 (Darby, Arb.) (August 30, 2019) "*Darby Award*" is inapposite. The local union in that case, unlike Local 804, had lax protections in its Local Supplement for RPCDs. Further, the Union did not challenge the roll out of PVDs. Local 764 waived and accepted it, essentially ceding the right to object to part-time drivers and the cross classification of job titles. Arbitrator Darby held only that in Local 764's jurisdiction there need not be bidding for PVD work among other part-time employees such as TCDs.

Based on the entire record the Union submits that the Arbitrator should find that the use of PVDs in Local 804's jurisdiction beginning in 2019 violates the Agreement and remand this matter to the parties to attempt to formulate a mutually-agreed-upon remedy.

### **UPS Contentions**

The Union has failed to meet its burden of proving that the Company violated the Agreement by employing PVDs within its jurisdiction during the 2019 peak season.

The Union cannot show that the Company violated Article 26 of the NMA. Section 1(a) of the article states that "any provisions in this Agreement to the contrary notwithstanding, the

Employer . . . [d]uring peak season... will make every reasonable effort to use current employees . . . and hire a sufficient number of employees to handle peak volume.” UPS demonstrated that based on the unavailability of traditional package cars or rental vehicles, the only means it had to employ a sufficient number of employees to handle peak volume was to hire drivers using their own vehicles

The Union’s argument that the provision of Article 26 obligating UPS to make “every reasonable effort to use current employees” requires it to assign delivery work to RPCDs exclusively was rejected in the *Darby Award*. Arbitrator Darby interpreted the language of Article 26 as follows:

I cannot conclude that [this] language ... clearly and unambiguously requires the Company to give a preference to current UPS employees over hiring ‘a sufficient number of employees to handle peak volume.’ It merely requires the Company to make every reasonable effort to use current employees ‘and’ to hire other employees, without expressing any priority or preference of one over the other.

There is no merit to the Union's contentions that by having PVDs use their own vehicles to deliver packages, UPS violated the provision of Article 26 stating that “no package driver shall be forced to use his or her own personal vehicle to deliver packages.” The parties added this sentence to Article 26 of the 2018-2023 NMA. The record reflects that when the parties began negotiations on the new NMA in January 2018, UPS proposed that it could require employees to use their personal vehicles and, if they did, it would reimburse them at the IRS mileage rate. UPS indicated that the proposal was a clarification as it believed it had an established past practice of requiring employees to use their personal vehicles, not only based on its prior use of PVDs, but also based on employees having used their own vehicles on an ad hoc basis for years. As a concession, it added to its proposal a provision to the effect that



employees on the payroll as of the date the NMA was ratified would only use their own vehicles voluntarily. The sentence reading that “no package driver shall be forced to use his or her personal vehicle to deliver packages” was only included to address the Union’s concern that existing drivers would be forced to use their own vehicles.

Significantly, this new sentence was added to the NMA in Article 26, Section 1(a), following the preamble of that article referring to UPS’ need to remain competitive with other firms engaged in package delivery, and immediately following the provisions regarding Peak staffing. Mr. Gudim testified that it was placed in that location because it was intended to deal with drivers during peak. Considering the other potential locations at which this language could have been inserted, its placement at that location makes it obvious that this provision relates only to UPS’ use of PVDs.

The language of Article 26, Section 1(a) clearly provides that individuals can use their personal vehicles to deliver packages if they agree to do so. An applicant for a PVD position, as opposed to some other UPS job, is choosing to volunteer to use his or her own vehicle. The Union failed to present any evidence that any PVD was forced to use his or her own car. The PVDs who testified indicated that they applied for the PVD job because they preferred it over other positions they may have sought.

It is undisputed that even a seniority package car driver may volunteer to use his personal vehicle rather than a UPS-provided vehicle. It is absurd and nonsensical to suggest that a seasonal package car driver cannot volunteer to perform the same job using his own vehicle while a seniority driver could agree to do so. *See Elkouri & Elkouri, How Arbitration*

*Works*, 6<sup>th</sup> Ed. P. 470. (“The arbitrator should avoid an interpretation that would lead to “harsh, absurd, or nonsensical results....”)

The notion that UPS cannot hire seasonal drivers to handle the influx of package volume at peak is also undermined by the provisions of the Local 804 Supplement. Article 2, Section 6, specifically contemplates that UPS will hire seasonal employees and Article 13, Section 1(a) and (b) provides that October 15 of each year through January 15 of the following year is a “free period” where “. . . no employee can qualify for seniority.”

The Union cannot establish that the Company violated Article 32 of the NMA because that article, whose purpose is to preserve bargaining unit work, only concerns subcontracting. *See Teamsters Local Union No. 63 and UPS*, AAA Case No. 72-300-01079-09 (Gary L. Axon, Arb.) (September 26, 2011), p. 15 (“*Axon Award*”) (“The stated purpose of [the subcontracting article] is to preserve and protect work and job opportunities for employees.”). PVDs are not subcontractors; rather, they are bargaining unit members. UPS provides the names of the PVDs on the contractually required new hire report it gives the Union each month. UPS cannot be found to violate Article 32 by using bargaining unit employees to do bargaining unit work. There is nothing to suggest that Article 32 is a vehicle to differentiate between different groups of bargaining unit employees. The *Shiftman Award* that the Union relies on is irrelevant because it dealt with the transfer of alleged bargaining unit work to non-bargaining unit employees. Such a transfer of work did not occur in this case.

Article 32 cannot be read to prohibit the use of seasonal package car drivers when Article 26 of the NMA authorizes UPS to hire them. As discussed above, Article 26, empowers UPS to “hire a sufficient number of employees to handle peak volume” (emphasis

added) The “sufficient number of employees” for package delivery purposes means “seasonal drivers.”

The decision to ask seasonal drivers to use their personal vehicles is one that falls within the scope of UPS' management right under Article 17 of the Local 804 Supplement to change methods of operations. While Article 17 requires the Company to give the Union 30 working days' notice of any “anticipated major change in the Company's methods of operations,” and to meet with the Union and follow certain other procedures, the inclusion in the article of footnote 3, citing Article 38 of the NMA, limits this requirement. Specifically, and as Mr. Pandiscia testified, Article 38 requires UPS to give the Union notice and to meet to discuss contractual issues only when a change of operations will result in the layoff or change of domicile of bargaining unit employees. There was no layoff or change of domicile in this case.

The interest arbitration provisions of the second paragraph of Article 17 are inapplicable as they only apply if the change in methods of operation results in a “substantial change in job content of any job classification ... or in the creation of a new classification.” In this case there has not been a substantial change in job content of any classification because Article 26 allows drivers to volunteer to use their personal vehicles. Nor has a new job classification been created as PVDs are seasonal package car drivers, an already established job classification.

Any differences between the PVD job and the other Package Driver jobs were merely due to the fact that PVDs use their personal vehicles, or were otherwise inconsequential, and can not be the basis for finding that the PVD is a new job classification. Local 804's

examples of differences rely on comparisons with RPCDs. The correct comparison is between PVDs and other seasonal package car drivers UPS hires each peak season.

Regarding job qualifications, except for certain factors related to the use of personal vehicles, the job requirements for PVDs and RPCDs are identical.

Regarding training, the additional training that RPCDs receive covers the operation of package cars, which would be irrelevant for the PVDs, who use their own vehicles.

Because PVDs use their personal vehicles and not the Company's package cars, unlike the RPCDs, they wash and maintain their cars.

Unlike RPCDs, the PVDs receive mileage reimbursement. Because the parties agreed in Article 26 that employees could volunteer to use their own vehicles and UPS informed the IBT that its practice was to reimburse for mileage at the IRS, the Union's assertion that the parties did not negotiate the rate is untrue. The IBT also accepted UPS' past practice of using the IRS mileage reimbursement rate.

PVDs used a different MDA than the RPCDs, but the record shows that it performed most of the functions that the current version of the DIAD given to the RPCDs performs. Moreover, some RPCDs used the MDAs that the PVDs used when DIADs were unavailable, and, the MDAs the PVDs now use are the next version of the DIAD that will be given to RPCDs.

UPS' failure to give the same full brown uniform it gives to RPCDs to all of the PVDs was due to a uniform shortage it experienced in 2019 that impacted other classifications as well. In any event, UPS acknowledges that PVDs have a right to receive a full uniform.

Although the Union contended that, unlike RPCDs, PVDs were not given hand trucks to use to deliver packages, the record reflects that PVDs could have requested hand trucks and there was no evidence that any such request was denied.

Regarding the Union's contention that PVDs differ from RPCDs in that PVDs load their own vehicles, the record reflects that RPCDs routinely do preload work.

There is no merit to the Union's contention that, unlike RPCDs, PVDs are not guaranteed to be paid eight hours a day. No Company witness claimed or argued that PVDs were not entitled to the eight-hour guarantee. As documented by the waivers the Company introduced into evidence, to the extent PVDs worked fewer than eight hours in a day, that was by their choice. As Arbitrator Carol Wittenberg ruled, employees may with employer approval decide to work fewer than eight (8) hours and effectively break the guarantee. *See Local 804, IBT and UPS, Case No. 18 300 667 12 (Wittenberg, Arb.) (December 19, 2014).*

In sum, PVDs are seasonal package car drivers hired to deliver packages at Peak; they serve the same function and are paid the same. The only meaningful difference is that they are using their own vehicle. UPS negotiated with the IBT to allow them to do so voluntarily. Further, it is undisputed that UPS may rent vehicles, including minivans, and require RPCDs and seasonal package drivers to use them to deliver packages, and UPS has done so. It is absurd to suggest that whereas there is no contract violation or change in job content when the Company requires a package driver to operate a rented minivan to deliver package, but there is a contract violation and the creation of a "new job" when a package car driver operates the same type of minivan that he or she owns to deliver packages.

Further, the Company can not be found to have violated the Agreement based on its request that the PVDs use their personal vehicles because the Union waived its right to bargain. In 2015, 2016 and 2017 UPS met with the IBT and reviewed its plans regarding the use of PVDs in the upcoming peak seasons in those years. The Company's October 11, 2017 response to Dennis Taylor's October 2 letter set forth the Company's position that UPS had historically requested Teamster-represented drivers to use their own vehicles and detailed how these employees would be treated as seasonal package car drivers with the same rate of pay, pension and health benefits and full-time status. Mr. Gudim concluded his letter by stating that it was "the Company's intent to deal with this issue on a national basis rather than on a local level. If you [want] to discuss this further or have other questions please contact me."

The IBT did not object to the Company's planned use of PVDs, file a grievance, or ask to bargain despite being provided timely notice and an opportunity to do so. The Union thereby waived its right to bargain. *See Ciba-Geigy Pharmaceuticals Division*, 264 NLRB 1013 (1982) ("The Board has long recognized that where a union receives timely notice that the employer intends to change a condition of employment, it must promptly request that the employer bargain over the matter."). Based on the IBT's failure to object or request bargaining, UPS substantially expanded its use of PVDs in Peak 2017.

The Union falsely states that the Company did not negotiate the PVD wage rate with it. PVDs were paid \$21 an hour, the starting wage rate specified in Article 41, Section 2 for new package car drivers. Further, payment for mileage is not compensation. It is the standard IRS reimbursement rate to cover operating costs, including for gas and maintenance.

The Union also attempts to avoid UPS' reliance on past practice by claiming that the practice is irrelevant "since PVDs have never been used in Local 804's jurisdiction and Local 804 timely grieved" when they were. Significantly, Local 804 does not dispute that there is a past practice regarding the use of PVDs, it just claims it does not apply within its jurisdiction. As Article 2, Section 2 of the NMA makes clear, Local 804 does not exist as a separate bargaining unit but rather is a part of one nationwide bargaining unit. Local 804 does not have the luxury of claiming that past practices outside of its jurisdiction are irrelevant especially when NMA language is in dispute.

UPS's decision to employ PVDs did not violate the "Maintenance of Standards" clause in Article 25 of the Local 804 Supplement. Numerous arbitrators have recognized that employer decisions on to how to manage operations are not the type of "working conditions" protected by such clauses. *See How Arbitration Works, supra*, pp. 663-664 ("...[U]nless restricted by the agreement, management has the right to determine what work shall be done, to determine what kinds of services and business activity to engage in, and to determine the techniques, tools, and equipment by which work on its behalf shall be performed.")

Further, Article 25 only protects those "conditions of employment ... as negotiated or agreed upon." Because a prohibition against the use of personal vehicles was not "negotiated or agreed upon," the change in the method of operations to have drivers use their own vehicles is not a subject protected by this provision.

For example, in *Local 177, IBT and UPS*, Case No. 18 300 00721 96 (Nicolau, Arb.) (December 8, 1997), the Union contended that the Company violated the Maintenance of

Standards clause by changing the air drivers' start time in response to higher than anticipated volume. Arbitrator George Nicolau rejected the claim. He stated:

[There] are ... practices that, over time, become binding because they are grounded in mutuality. But there are other practices, also initiated unilaterally, that are 'merely present ways, not prescribed ways, of doing things,' choices made in management's discretion that can, in management's discretion, but modified. \*\*\*

In my opinion, the start time of Shuttle Drivers, though normal and usual, is of this discretionary character and therefore not inviolate. Here, circumstances were such that, in the opinion of the Company, all the package cars would not be needed on the nights in question and that the needs of the business would be better served by using tractor-trailers. Given the language of the agreements at issue and the fact that the Contracts do not explicitly require what the Union seeks, the Company was entitled to make that judgment and to vary assignments as needed."

*See also UPS and Local 384, Teamsters, Case No 29 (Milton Rubin, Arb.) (June 17, 1978 ("As negotiated or agreed upon" requires evidence that a protected condition is one that is "mutually identified and accepted by the two parties.")).* The operational changes at issue in this case are not covered by the Maintenance of Standards Article.

There is no merit to the Union's argument that the Company violated Local 804 Supplement because PVDs performed preload work in conjunction with their delivery work. The Union's reliance on the *Glushien Award* to support this argument is misplaced. In the case before Arbitrator Glushien, on the day after a snowstorm the Company assigned package car drivers to perform all of the work normally handled by the inside employees and were found to have displaced them from a full day's work. In the case at bar, there is no evidence that any PVD spent hours loading their personal vehicles or performing any of the other inside worker's jobs of unloading, feeding and sorting packages nor is there evidence that the amount of time PVDs spent loading their vehicles was more than the time spent by other package car drivers loading or assisting in loading package cars. Despite the Union's repeated insistence that there



is "classification" protection, package car drivers routinely perform inside preload work, including the loading of package cars.

For these reasons, the alleged differences between the PVD and other package car driver jobs do not constitute a substantial change or new job description.

### **FINDINGS, DISCUSSION AND DECISION**

As a threshold matter, the specific issue to be decided in this arbitration must be determined. As discussed above, the parties differed on how the issue should be framed and authorized me to frame it based on the record.

Considering the different statements of the issue the parties proffered at the outset of the hearing and in their post-hearing briefs, it is apparent that their disagreement on the issue centers on two points. First, the Company maintains that the issue should be limited to the Company's use of PVDs in Local 804's jurisdiction during the 2019 peak season, whereas the Union maintains that the issue should encompass the use of PVDs that year "and continuing" in subsequent years. Second, while there is agreement that the issue properly encompasses the Company's alleged breach of Articles 26 and 32 of the NMA and Articles 2, 13, 25, and 36 of the Local 804 Supplement, the parties disagree on whether it should also encompass the alleged breach of Article 17 of the Local 804 Supplement and any other article that may apply.

The issue to be addressed in arbitration should be limited to that which was considered in the grievance proceedings before the Local and National Panels. *See UPS and Teamsters Local 63*, AAA Case N. 01-19-0001-2891 (Timothy D. Williams, Arb.) (July 13, 2021), p. 10 (The Arbitrator's "authority derives from the issue on which the Grievance Committee

deadlocked.”) The Union framed the issue before the National Panel as whether “UPS violated the CBA when it hired and used PVDs in Local 804’s jurisdiction *during the 2019 Peak Season.*” (Emphasis added) Further, in their submissions to the Panel (made after the 2019 peak season but before the 2020 peak season), the parties only addressed the circumstances surrounding the use of PVDs in 2019. Moreover, in the arbitration virtually all of the evidence related to what occurred during the 2019 peak season. Accordingly, I find that the issue should be limited to the alleged breaches of the Agreement in 2019.

In determining whether the issue should encompass the alleged breach of Article 17 of the Local 804 Supplement, and/or any other article that may apply, I am again guided by how the issues were framed and litigated during the earlier steps of the grievance procedure. The Union did not cite Article 17 or “any other article that may apply” in the “Pre-Hearing Information Sheet” it submitted to the National Panel. In that document the Union indicated that its claim was based on Articles 26 and 32 of the NMA and Articles 2, 13, 25, and 36<sup>4</sup> of the Local 804 Supplement. However, in its March 2020 submission to the National Panel, the Union also alleged that the Company violated Article 17 by failing to negotiate a new wage rate for the PVD job. It did not however refer to “any other articles that may apply.” The Company, its submission to the National Panel, asserted that there was no violation of Articles 26 and 32 of the NMA or of Articles 2, 13, 25, and 36 of the Local 804 Supplement. But it also submitted

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<sup>4</sup> The initial grievance cited Article 26 of the Local 804 Supplement, entitled “Union Cooperation.” But neither party cited this article in any subsequent submission to the Local or National Panel. Further, evidence was not introduced at the arbitration hearing relating to any alleged breach of Article 26 of the Local 804 Supplement and neither party made any argument concerning this article in its post-hearing briefs. I therefore find that the issue in this case does not encompass any claimed breach of Article 26 of the Local 804 Supplement. *See also* footnote 2 above.

Article 17 of the Local 804 Supplement as an exhibit and asserted in its submission that “Articles 26 of the NMA in conjunction with Article 17 ... gives [it] the ability to utilize PVDs during the free period as there is no language in the CBA that bars [the Company]” from doing so.” Thus, in the proceedings before the National Panel both parties raised Article 17 as an issue to be addressed; neither party alluded to “any other articles that may apply.”

Accordingly, based on the matters raised in the earlier grievance proceedings, I find that the issue in this arbitration is “whether the Company violated Articles 26 or 32 of the NMA or Articles 2, 13, 17, 25 or 36 of the Local 804 Supplemental Agreement when it employed PVDs to deliver packages during Peak Season 2019.”

**Article 26, Section (a) of the NMA: Prohibition on Forcing Package Car Drivers to Use their Personal Vehicles**

Under Article 26, Section 1(a) of the NMA, during peak season, the Company is required to “make every reasonable effort, in accordance with the appropriate Supplement ... to use current UPS employees and hire a sufficient number of employees to handle peak volume.” It is undisputed that pursuant to this provision, the Company had the right to hire seasonal package drivers during the 2019 peak season to handle the volume of deliveries it anticipated that season. The Company also met its obligation under Article 26, Section 1(a) to “provide its plan to the affected Local Union by October 15th of the year.” According to the record evidence, the Company met with the Union in September and October of 2019 and advised it of its plan to employ PVDs within Local 804’s jurisdiction for the peak season that year.

What is disputed is whether the Company breached the terms of the last paragraph of Article 26, Section 1(a), stating that “[n]o package car driver shall be forced to use his or her

personal vehicle to deliver packages.” In interpreting this provision, the proper focus is on the plain meaning of the terms. If the terms are ambiguous, it is then appropriate to also consider bargaining history. *See Axon Award, supra*, p. 15 (“In issues of contract interpretation, arbitrators are controlled in the first instance by the contract language. Past practice and bargaining history may be important in ascertaining the meaning of a contract in dispute where the language is ambiguous or unclear.”)

By its terms, the prohibition on forcing employees to use personal vehicles applies to “package car drivers.” It is undisputed that PVDs are package car drivers. Further, it is apparent that to work as a PVD during the 2019 peak season in Local 804’s jurisdiction, one had to use his or her personal vehicle to deliver packages. This requirement is clear from the flyer the Company posted seeking applicants for PVD positions. The first bullet listed under “Candidate Requirements” states: “Drive your own car.” Further, according to the record evidence, employees hired as PVDs all drove their own cars; there is no evidence that in 2019 any PVD in Local 804’s jurisdiction drove a Company package car or rental vehicle to deliver packages or had the option to do so. I therefore find that the PVDs, who were indisputably regarded as package car drivers, were forced to use their own vehicles in violation of the contractual prohibition.

I am not persuaded by the Company’s argument that because some PVD applicants may have preferred to drive their own vehicles, and/or opted to apply for a PVD job rather than for some other seasonal package car driver job, they were not required, but volunteered, to drive their own cars. Significantly, in this case the Company did not hire seasonal package car drivers and then solicit volunteers from those it hired to work as PVDs or give them the option

to use their personal vehicles. Had it done so, the Company would not have run afoul of the prohibition against forcing package car drivers to use their personal vehicles; under those circumstances, the employee's choice to use his or her personal vehicle would have been voluntary. Instead, as reflected by the flyers it posted about the position, the Company solicited applicants for PVD positions, and advised potential applicants that they would have to "drive their own car." That there were individuals who chose to apply for the PVD job in lieu of some other seasonal or other package car driver job (and there was no evidence indicating that they would have necessarily been hired for one of these other jobs had they applied for them), does not alter the fact that driving one's own car was a condition of employment for those package car drivers hired as PVDs. I therefore conclude that the PVDs were forced to drive their own vehicles in violation of Article 26, Section 1(a)

Regarding bargaining history, Mr. Gudim testified that during the negotiations over the provision, Mr. Taylor only expressed concern over the possibility that under the Company's initial proposal RPCDs might be required to drive their own vehicles. Notably, Mr. Taylor did not testify and Mr. Gudim's testimony was not disputed. However, no explanation was provided as to why, if the parties intended for the provision to only bar the Company from forcing RPCDs from using their own vehicles, they did not include language to that effect, or incorporate an express exception to the prohibition for seasonal package car drivers. Instead, the parties agreed to a blanket prohibition stating that "[n]o package driver" may be forced to use his or her personal vehicle." It is apparent that this language does not suggest that there is an exception to the prohibition for any subset of package car drivers, including any new or seasonal package car drivers.

The bargaining history evidence does not suffice to override what I find to be the straightforward language of Article 26, Section 1(a), broadly prohibiting the Company from forcing *any* package car drivers to use their personal vehicle to deliver packages. Accordingly, I find that the Union demonstrated by a preponderance of the evidence that by requiring PVDs, during the 2019 peak season and within Local 804's jurisdiction to use their personal vehicles, the Company violated Article 26, Section 1(a).

**Article 32 of the NMA: Subcontracting**

Article 32 of the NMA prohibits the Company from subcontracting, or transferring to any entity or individual outside of the unit work assigned to the collective bargaining unit. It is apparent that the purpose of Article 32 is to preserve bargaining unit work. In this case it can not be said that by employing PVDs the Company subcontracted or transferred bargaining unit work outside the unit, because PVDs are themselves members of the bargaining unit.

The Union maintains that the *Shriftman Award* supports its position that Article 32 extends beyond subcontracting or otherwise transferring work outside of the bargaining unit. But I find that a careful reading of the decision does not support this contention. In that case the Company assigned some of the work of the Return Clerks, a full-time bargaining unit position, to other bargaining unit employees it employed on a part-time basis in three new job classifications it created. While Arbitrator Shriftman referred to Article 32's strong work preservation provisions, he did not rule that the Company violated that article by transferring work from one bargaining unit position to other bargaining unit positions. Rather, he concluded that the Company violated Article 6, Section 3 of the Local 804 Supplement, setting forth restrictions on the work that part-time employees may perform.

For these reasons I find that the Union did not prove by preponderant evidence that the Company violated Article 32 of the NMA by employing PVDs in Local 804's jurisdiction during peak season in 2019.

**Article 2 of the Local 804 Supplement: Wages**

Article 2 of the Local 804 Supplement contains the wage schedules. Section 6 of the article states that “[e]mployees hired between January 16 and October 14 will be paid in accordance with Section 2 of this Article....” The Union has not articulated in either of its post-hearing briefs, nor in its opening statement or submission to the National Panel, how the Company violated Article 2. Moreover, the \$21 per hour wages paid to the PVDs employed in Local 804's jurisdiction during the 2019 peak season is consistent with the starting wage rate specified in Article 41 of the NMA.

To the extent the Union maintains that the Company violated Article 2 by providing the PVDs mileage reimbursement, I do not find merit to that contention. Mileage reimbursement does not constitute wages, the subject of Article 2, but represents compensation for costs the PVDs incurred in using their personal vehicles.

I therefore find that the Union has not met its burden of proving by a preponderance of the evidence that the Company violated Article 2 by employing PVDs within Local 804's jurisdiction during the 2019 peak season.

**Article 13 of the Local 804 Supplement: Seniority**

Article 13 of the Local 804 Supplement requires the Company to maintain separate seniority lists for the inside and outside employees at each package center and to assign work based on such lists. The Union maintains that because the PVDs had to load their own vehicles,

they did inside work in violation of this article. In support of its position the Union cites the *Glushien Award*. I find, however, that the *Glushien Award* is distinguishable. In that case the Company required package drivers to spend an entire shift unloading trailers, and doing the feeding, sorting and loading of package trucks, all of which was work normally done by inside employees. Arbitrator Glushien noted that the “package drivers ... usually spend a small amount of time (averaging about 20 minutes) helping the inside men load their package trucks before the package drivers start out on their routes,” but this fact did not justify what occurred in this case. He explained:

First, this Monday morning the package drivers were not merely ancillary helpers to the inside men ... -- here, the package drivers were the whole show. Second, the package drivers did not merely help load the trucks; they did all the other tasks of the insiders, unloading the trailers and doing the feeding and sorting, too. And finally, the package drivers did not spend a mere 20 minutes or so before taking out their trucks; they devoted between two and three hours in doing the insider work.

In the case at bar the PVDs did not displace the inside employees as the package drivers did for an entire shift in the case before Arbitrator Glushien. They rather spent a relatively brief amount of time loading their vehicles, and did not do the other type of preloading work that the inside employees perform.

For these reasons, I find that the Union has not demonstrated by a preponderance of the evidence that by its employment of PVDs during the 2019 Peak Season in Local 804's jurisdiction, the Company violated Article 13 of the Local 804 Supplement.

**Article 17 of the Local 804 Supplement: Requirement to Negotiate When Certain Major Changes in Operational Methods are Made**

Article 17 of the Local 804 Supplement states that when the Company makes a “major change ... in methods of operation [that] results in a substantial change in job content of any job



classification ... or in the creation of a new classification, or in substantial hardship to employees,” it must attempt to agree with the Union on a new wage rate or hardship correction for the position and, failing agreement, the parties must arbitrate the issue. The Union contends that the Company’s employment of PVDs constituted such a major change; therefore, by failing to bargain with the Union over the change, the Company violated Article 17.

For the reasons that follow, I do not find that by implementing the PVD program in Local 804’s jurisdiction during the 2019 peak season the Company made a major change in operations resulting in a “substantial change in job content of any job classification ... or in the creation of a new classification, or in substantial hardship to employees.”<sup>5</sup>

The record reflects that during the 2019 peak season, within Local 804’s jurisdiction, some of the conditions of the PVD job differed from those applicable to other package car driver jobs. The differences in conditions included the following: PVDs were required to use their personal vehicles to deliver packages whereas other package car drivers operated the Company’s package cars or rental vehicles; PVDs were required to insure, maintain and wash the vehicles they used to deliver packages whereas other package car drivers were not; although the PVDs were paid the same hourly rate as other package car drivers, unlike the other drivers, they also received mileage reimbursement; PVDs received less training than other package car drivers; whereas other package car drivers are notified of their schedules for the week at least a few days before the week commences and are assigned to fixed routes and hours, PVDs were

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<sup>5</sup> In view of the finding that there was not a major change in operations resulting in a substantial change in job content, creation of a new classification, or substantial hardship to employees, triggering any bargaining obligation under Article 17, it is not necessary decide whether, as the Company maintains, the footnote reference in Article 17 to Article 38 of the NMA limits the meaning of “major change” in the second paragraph of Article 17 to domicile changes and possible layoffs.

only notified the evening before of their assignment for the following days and there was some evidence that their hours and routes were subject to fluctuation; PVDs were supplied with MDAs that lacked all of the functions that the DIADs given to other package car drivers had; at least by default, PVDs were coded in UPS's payroll as 05, representing "pay actual," whereas, by default, other package car drivers were coded as 06, reflecting entitlement to an eight hour daily guarantee; whereas other package car drivers received the full UPS uniform, not all of the PVDs did; PVDs loaded their own vehicles whereas other package car drivers did not (although, as discussed above, they did certain other preloading work).

It is apparent from the above listing that there were some not insignificant differences in some of the employment conditions applied to PVDs compared to other package car drivers. But I find that the function and content of the PVD job were fundamentally the same as the function and content of the other package car driver jobs. The duties of all package car drivers, including the PVDs, primarily entailed completing assigned runs to deliver packages for the Company. In addition, package car drivers, including PVDs, spent a relatively minor amount of time doing preloading work.

While I have found the requirement that PVDs use their own vehicles to violate Article 26, Section 1(a) of the NMA, I do not find that it equates to a substantial change in job content or creation of a new job classification, or that it created a substantial hardship in violation of Article 17 of the Local 804 Supplement. Moreover, the significance of PVDs use of their own vehicles for purposes of comparing job content is diminished to some extent by the fact that the rental vehicles some of the other package car drivers operated (such as minivans) were similar to some of the PVDs' personal vehicles. The other differences in the conditions of employment

reflected in the record related not to job content, but to matters such as what uniforms the PVDs were provided, and how they were trained, scheduled and compensated (i.e., how they were coded in the UPS payroll system for purposes of determining whether, at least by default, they were entitled to the eight-hour guarantee).<sup>6</sup>

Nor has the Union shown that the Company made a change in operations that resulted in a “substantial hardship to employees.” There was no evidence that the RPCDs or other seasonal package car drivers lost any employment opportunities or were otherwise adversely affected by the use of PVDs in Local 804’s jurisdiction during the 2019 peak season, or that the conditions that were applied to the PVD created a substantial hardship for them.

For these reasons, I find that the Union has failed to demonstrate by preponderant evidence that the by using PVDs in Local 804’s jurisdiction during the 2019 peak season the Company violated Article 17 of the Local 804 Supplement.

**Article 25 of the Local 804 Supplement: Maintenance of Standards**

The Union alleges that the Company violated the “Maintenance of Standards” provision set forth in Article 25 of the Local 804 Supplement. Because the Union has not articulated how the Company violated the maintenance of standards provision, I find that it has failed to demonstrate by preponderant evidence that by using PVDs in Local 804’s jurisdiction during the 2019 peak season the Company violated Article 25.

**Article 36 of the Local 804 Supplement: Complete Agreement**

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<sup>6</sup> Whether the Company might have violated various provisions of the Agreement the Union has cited – other than Articles 26 and 32 of the NMA and Articles 2, 13, 25, and 36 of the Local 804 Supplement) – by virtue of the conditions of employment it applied to the PVD job, or by its alleged failure to provide the Union advance notice of orientations for newly hired PVDs, is beyond the scope of the issues presented in this arbitration.

Article 36 of the Local 804 Supplement is a standard "zipper" clause. Among other things it provides that during the term of the Agreement "there shall be no demands for ... negotiations as to any matter or issue not covered by the ... Agreement, or for the negotiation of any of the provisions of this Agreement, except as elsewhere provided in this Agreement."

In this case the Union presented evidence and argument on how the Company breached certain bargaining obligations it allegedly had under Article 17 of the Local 804 Supplement. The issue of whether the Company violated Article 17 is addressed above. However, the Union has not presented evidence on or articulated how the Company may have breached any bargaining or other obligation it had under Article 36 of the Local 804 Supplement. Accordingly, I find that it has failed to prove by preponderant evidence that the Company violated Article 36

**AWARD**

For the foregoing reasons, I find that the Union proved by a preponderance of the evidence that the Company violated Article 26, Section 1(a) of the NMA by requiring the PVDs it employed in Local 804's jurisdiction during the 2019 peak season to use their personal vehicles to deliver packages. I further find that the Union has not proved by preponderant evidence that the Company violated Article 32 of the NMA or Articles 2, 13, 25, and 36 of the Local 804 Supplement. Accordingly, the grievance is granted in part and denied in part.

Pursuant to the parties joint request, this decision does not address the issue of remedy. Rather, the matter is remanded to the parties to negotiate a resolution. Jurisdiction is retained for a reasonable period of time to address the issue of remedy should the parties fail to reach a resolution.

September 15, 2021

*Elliot H. Shaller*

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Elliot H. Shaller, Esq.  
Arbitrator