BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
IRON WORKERS LOCAL UNION NO. 383 of the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS	Case 2 No. 47370 A-4916
and	
SWANSON HEAVY MOVING COMPANY	

Appearances:
Mr. Samuel Wilcox, Business Manager, 1602 South Park Street, Madison, Wisconsin 53715, on behalf of the Union.
Mr. Daniel Melding, Office Manager, 2850 Hemstock Drive, LaCrosse, Wisconsin 54

ARBITRATION AWARD

Iron Workers Local Union No. 383, of the International Association of Bridge, Structural & Ornamental Iron Workers, AFL-CIO, ("the Union") and Swanson Heavy Moving Company ("the Company") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. 1/ The Union made a request, in which the Company concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a dispute over the application and interpretation of the terms of the agreement relating to subsistence allowance and unemployment compensation. The Commission designated Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held at the Company's offices on June 18, 1992; it was not transcribed. The parties made oral presentations at hearing, and mutually waived their rights to submit written arguments.

ISSUE:

Did the employer violate Section 16, paragraph two, by challenging the unemployment compensation claim by an employe (Jack Moser) who had refused to travel 93 miles from his principle residence to a job site? If so, what is the remedy?

RELEVANT CONTRACTUAL PROVISIONS

SUBSISTENCE ALLOWANCE

Section 16. Subsistence shall not be mandatory under the terms of this Agreement, however, it shall not be in violation of this Agreement for an employe to negotiate subsistence with an employer.

1/ Technically, the collective bargaining agreement is between the Union and Madison Employers Council, Inc. and Others; as one of the "others," Swanson Heavy Moving has assumed the terms and provisions of the agreement.

> No employer will challenge the unemployment compensation claim of an employe who refuses to travel more than fifty (50) miles from his principle residence to a jobsite within Local 383 jurisdiction.

BACKGROUND

On Monday, February 10, 1992, Tom Kiesling, the Company's job coordinator, called Jack Moser to offer a work assignment on February 12, on a project in Cassville, Wisconsin. 2/ The job in question would have lasted approximately eight days, at $16.49 per hour for workers in Moser's journeyman iron-worker classification. Moser, whose LaCrosse residence is approximately 93 miles from Cassville, initially indicated tentative acceptance of the assignment; subsequently, however, Moser rejected the assignment.

The company's practice is to have the job foremen determine whether the workers commute on a multi-day project, or stay over. The foreman on the Cassville project was John Ross. There is some dispute over the exact nature and degree of communication among Ross, Moser and Kiesling. Moser testified that Kiesling told him that the company would not pay full expenses on the job, but rather only a $15 per diem. Kiesling testified that the stay/return decision was Ross's; that Moser told him (Kiesling) that Ross had said that the workers would be returning each night rather than staying over; and that Ross told him (Kiesling) that he had never spoken to Moser on this matter. In any event, Moser on February 11 rescinded his prior acceptance, on the stated grounds that he did not believe the company was offering adequate expenses for the job. At this time, Moser was collecting unemployment benefits chargeable to an employer based in Black River Falls, Wisconsin.

From approximately 1970 to 1984, the collective bargaining agreement between the parties included a provision for a set $15.00 per diem plus a mileage allowance ($10.00 if over 30 miles, $15.00 if over 50 miles). In the 1984-1987 and 1987-1990 agreements, the specific figures were deleted, and the following provision included:

2/ At hearing, the union asserted that such direct contact was contrary to the referral clause in the agreement. The employer responded by stating that it had previously acted in such a manner without problems, or grievances. As this issue does not affect the grievance before me, it is noted, but not further addressed.

SUBSISTENCE ALLOWANCE

> Subsistence shall not be mandatory under the terms of this Agreement, however it shall not be in violation of this Agreement for an employee to negotiate subsistence with an employer.

In the negotiations for the 1990-1993 agreement, the parties agreed to include the new second paragraph as cited above, which provides that no employer "will challenge the unemployment compensation claim" of an employe who "refuses to travel more than fifty (50) miles from his principle residence" to a jobsite within Local 383's jurisdiction.

Subsequently, the company challenged Moser's right to unemployment compensation. In an initial determination and appeal tribunal decision, the State of Wisconsin Unemployment Compensation Division held that Moser had failed, without good cause, to accept an offer of suitable work, and suspended his benefits. At the time of hearing, appeal in this matter was pending before the Labor and Industry Review Commission.

POSITIONS OF THE PARTIES

The Union asserts and avers that that language of the collective bargaining agreement is clear and unambiguous: employes have the right to refuse to travel more than fifty miles to a jobsite, free from an employer's challenge to their unemployment compensation. The employe exercised that right, but was wrongfully denied benefits due to the employer's improper challenge to his unemployment benefits, contrary to the contract.

The company asserts and avers that the language in question must be read in context of the whole section on subsistence allowance, and that the "freedom to refuse" clause only applies when the employer refuses to pay all subsistence/expenses entirely. Here, the employer agreed to pay all expenses on the job, and the employe -- who was on unemployment compensation at the time -- accepted the job. The employer should not now have to pay benefits for someone who turned down a good-paying job.

DISCUSSION

Section 16 of the collective bargaining agreement between the parties contains three concepts. The first two pertain only, and directly, to subsistence payments: there is neither a mandatory subsistence payment, nor a prohibition on employes and employers negotiating such payments. The third concept provides that, when a jobsite is more than fifty miles from an employe's principle residence, and the employe and employer fail to negotiate a mutually agreeable subsistence allowance, the employe may refuse the job without fear that the employer will challenge a claim for unemployment compensation.

The bargaining history, coupled with practical considerations, supports the union's interpretation of this section. Initially, the contract contained specific amounts for per diems and mileage. Then, the employer representatives were successful in changing that to the "open for negotiation" concept. Given the extent of Local 383's jurisdiction -- from Grant to LaCrosse to Florence to Jefferson counties -- this was seen by the union as inadequate; that is, workers could be offered jobs hundreds of miles from home, without any guarantee of mileage, per diems, or other subsistence payments. Unsuccessful in obtaining a return to a set schedule of subsistence payments, the union did secure the current language, which at least removes the fear of an employer

challenge to unemployment compensation in the event the parties cannot agree on subsistence terms.

The question of what the grievant knew about the details of the Cassville job, and when, and from whom, he knew it are not directly relevant to the issue before me. Nor is it my job to determine what subsistence the company should have offered, or did pay, nor to determine whether Jack Moser should have taken the assignment. My job is not to determine whether Jack Moser or Tom Kiesling is a more credible witness. My job is not to determine whether Jack Moser was legally, or morally, entitled to continued unemployment compensation. My only job is to determine whether the employer violated the collective bargaining agreement, and, if so, to fashion a remedy.

For whatever reason, based on whatever information he had, Jack Moser did not believe that the company had assured him of a subsistence allowance that he felt adequate. Under the collective bargaining agreement, Moser had the right to refuse the job, without the employer challenging his unemployment compensation claim.

By challenging the unemployment compensation claim of an employe who refused to travel more than fifty (50) miles from his principle residence to a jobsite without Local 383's jurisdiction, the company violated Section 16 of the collective bargaining agreement. Accordingly, the grievance is sustained.

The matter of the proper remedy is more difficult to determine. The union has sought to have Moser made whole for benefits he was denied, through an employer's payment of no less than $2,394 and up to $5,311. Such a remedy, however, presupposes that Moser would have received a certain level of benefits, but for the employer's challenge. Unschooled and unskilled in the administration of the unemployment compensation system, I am unable to evaluate such a contention on the record at hand.

The grievant's appeal of the suspension of his benefits is currently pending before the Labor and Industry Review Commission. While it may be impossible to return this matter to a clean slate, I have concluded that the appropriate remedy, at this time, is for the employer to notify the LIRC that it does not challenge the grievant's claim for unemployment compensation. I will, however, retain jurisdiction for 90 days, to determine whether such remedy is adequate under the contract.

Based on the collective bargaining agreement, the evidence at hearing, and the arguments of the parties, I issue the following

AWARD

1. The grievance is sustained.

2. The employer shall notify the Labor and Industry Review Commission within ten (10) working days that it does not challenge the grievant's claim to unemployment compensation.

3. I shall retain jurisdiction for no less than 90 days, to monitor the implementation and effectiveness of such remedy.

Dated at Madison, Wisconsin this 3rd day of July, 1992.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator

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