BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between HRIBAR BROTHERS TRUCKING INC. and TEAMSTERS UNION LOCAL 43	Case 2 No. 47182 A-4894 (Biarnesen)

Appearances:

Mr. Charles Schwanke, President, Teamsters Union Local No. 43, 1624 Yout Street, Racine, WI 53404 appearing on behalf of the Union.

Mr. Lee Hribar, 1571 Waukesha Road, Caledonia, WI 53108 appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Union Local No. 43 (hereinafter referred to as the Union) and Hribar Brothers Trucking, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the assignment of work on February 13, 1992. A hearing was held on August 13, 1992 in Racine, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. No transcript was made of the hearing, and the parties closed the record on oral arguments.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

THE BACKGROUND OF THE GRIEVANCE

The Company is in the construction trucking business, and the Union is the exclusive bargaining representative for the Company's drivers. The grievant, Terry Biarnesen, is a driver and Union steward, and is 9th on the seniority list.

Due to the seasonal nature of construction, the Company lays off three quarters of its personnel between January and March. Senior drivers frequently take voluntary layoffs during this period, in part because the available work is intermittent, and many of them make more from unemployment insurance than they could earn by working. Another factor is that weather conditions make the work difficult and unpleasant during the winter months. Employees on voluntary layoff in February of 1992 were:

Employee - (Seniority Rank)
Griesmer - (2)
Dabbs - (4)
Barrons - (5)
Ryddner - (6)
Lampton - (7)
Biarnesen - (9)
Amoroso - (10)
Mirr - (13)
Brusen - (15)
Cieslak - (17)
Greenwood - (21)
Caldwell - (22)

Driver Mark Goessl, 12th on the seniority list, was not on voluntary layoff, but was absent from work due to a medical disability. He returned from disability on February 13th.

On the morning of February 10th, Lee Hribar received a call from a customer asking to have loads hauled from Illinois to Wisconsin beginning on the 12th. Hribar began calling through the seniority list to offer the work to laid-off workers. Griesmer refused the work. The next driver on the list, Dabbs, was not in and Hribar left a message on his answering machine saying that work was available and asking him to call in. He continued through the list, with the next three senior drivers -- Barrons, Ryddner and Lampton -- all refusing the work. He reached the grievant, who said he would accept the work.

On the next day, the customer called back and said the loads would be hauled beginning on the 13th rather than the 12th. Dabbs then returned Hribar's call and said he would accept the work. Hribar assigned the work to Dabbs. He did not call the grievant to tell him the work was no longer available. The grievant called Hribar on the 12th and asked what had happened to the work assignment, and Hribar told him no work was available.

On February 14th, driver Dick Berget called in sick at 6:00 a.m., and Hribar called part-time driver Ray Gordon to cover the work. Gordon was 20th on the seniority list. The grievance was filed on February 18, 1992. The complaint was detailed as follows:

On Monday, Feb. 10, 1992, at 11:00 A.M. I was called by Lee Hribar and offered work. I was told I was going to haul Varmicutite from Seneca, Ill. to Koos Company in Kenosha, Wi. This would be two loads per day for either 2/12/92, 2/13/92 and 2/14/92, or 2/13/92, 2/14/92 and 2/17/92. On Feb. 10, 1992, when Lee called me he told me he would either call me on the evening of 2/11/92 or 2/12/92 to let me know what time my dispatch to leave the yard would be. Lee Hribar did not call me to give me a dispatch time. So on 2/12/92 at 5:50 P.M. I called Lee Hribar to see what was going on and was told that there was nothing or no work. After talking to Lee Hribar I then called Eddie Rennpfred. He informed me that he was dispatched for 2/13/92. 2/14/92 and 2/17/92. I then called Lee Hribar back at appriximately 6:05 P.M. on 2/12/92 and asked him why he was using six (6) Junior Seniority Drivers to me who were Dick Berget, Mark Goessl, Bob Cunningham, Mike Ugan, Gary Bresette and Bob Brickner. All of whom had been laid off since the second week of January. On 2/14/92. Dick Berget did not show up for dispatch so instead of calling me to came to work Lee Hribar then called up another less Siniority employee Ray Gordon to work on 2/14/92. The following Articles were violated Article 1, Article 2.3, Article 6.1, 6.3, 6.4 and 6.7. As settlement of this grievance, I am requesting lost wages of $540.00 which would of been my wages had the contract not been violated.

Hribar agreed that the basic facts set forth in the grievance were accurate, but took the position that there was no violation of the contract. The parties met to discuss the grievance, although there were several other matters on the table, including a discharge case involving this grievant. The meeting was apparently focused on these matters, and this case was not discussed in detail. The grievance deadlocked and was referred to arbitration. Additional facts, as necessary, will be set forth below.

RELEVANT CONTRACT LANGUAGE

ARTICLE 6
SENIORITY

6.1) Seniority is the length of service with the Employer by an employee and it is also the right of preference with reference to layoff, recalling and rehiring after layoff and for such other purposes as are specifically set forth herein.
***

6.3) When as between two or more employees their qualifications are approximately equal (qualifications include but are not limited to work record (including a history of properly caring for equipment), safety record, and attendance record), seniority shall govern. Accordingly, if qualifications are approximately equal the ;last employee hired shall be the first employee laid off and the last employee laid off shall be the first recalled.

***

6.7) Before the recalled employee actually reports to work within such three (3) days, the Employer shall have the right to use another employee with less seniority without penalty.

***

ARTICLE 7
GRIEVANCE PROCEDURE

***

7.3) The sole function of the arbitrator shall be to determine whether or not the rights of the employee, as set forth in the grievance, have been violated by the Employer. The arbitrator shall have no authority to add to, subtract from or modify this Agreement in any way nor to substitute his discretion for the discretion of the Employer unless such discretion is manifestly unjust. *** In the event an employee is awarded back pay, all moneys (sic) received by him, either through working elsewhere or through unemployment compensation, shall be deducted by the arbitrator from the back pay award….

***

DISCUSSION

This grievance raises three issues:

1) Did the Company violate the Agreement by assigning the order scheduled for February 13, 14 and 17, 1992 to Dabbs rather than the grievant;

2) Did the Company violate the Agreement by having six less senior drivers -- Dick Berget, Mark Goessl, Bob Cunningham, Mike Ugan, Gary Bresette and Bob Brickner -- working in February of 1992 while the grievant was on layoff; and

3) Did the Company violate the Agreement by having Ray Gordon fill in for Berget on February 14th, rather than offering the work to the grievant?

On the first of these issues, the undersigned finds that there was no contract violation, because the Company was obligated under Article 6.1 and 6.3 of the contract to give the work to the senior qualified employee on layoff. Dabbs was clearly senior to the grievant, and exercised his right to claim the work. This grievance apparently flowed from Hribar's failure to call Biarnesen back after Dabbs took the job, leaving him with the impression that junior employees

had displaced him. The grievant's disappointment and irritation, while understandable, do not give rise to a remedy under the contract.

The second issue is whether it is a violation for junior employees to work while the grievant was on layoff. Article 6 gives employees the right to preference on layoff and recall by seniority. According to the uncontradicted evidence offered by Hribar, 1/ the grievant was among the senior employees who elected to be placed on layoff status during the winter of 1991-92. The six junior employees cited in the grievance had not elected to take a layoff, and with the exception of Goessl had all been working prior to February. Goessl had been off because of a medical condition, and was cleared to return to work on February 13th. Nothing in the record suggests that the grievant gave the Company any notice that he wished to revoke his decision to remain on layoff status. 2/ His request to take the load on February 12th cannot be reasonably interpreted as such a notice, inasmuch as that related to a temporary recall, rather than permanently displacing any other employee who was not in layoff status. On the state of this record, the undersigned concludes that the situation in February of 1992, with the grievant on layoff and the junior employees working, was the result of the grievant's own exercise of his seniority right to take a layoff during the winter months.

The third issue is whether the grievant should have been called to fill-in for Dick Berget when Berget called in sick on February 14th. The driver used by the Company, Ray Gordon, was unquestionably junior to the grievant, and was on involuntary layoff until called on the 14th. Gordon had told the Company that he would work during the winter months, but no work had been available. The question is why the work on the 14th, which was not offered to the senior employees on layoff, was treated differently from the load of Varmicutite hauled on the 13th, 14th and 17th, which was assigned by calling the seniority list.

The Company explained at the hearing that it customarily used Gordon for covering for sick drivers because he was part-time and had told them that he would work at any time and on

---

1/ The grievant was, for personal reasons, not present at the hearing. Lee Hribar appeared for the Company both as a witness and an advocate, and Charles Schwanke appeared in the same capacities for the Union. The absence of any Union witness with direct knowledge of the facts leads to some confusion in this record on important points such as whether the junior employees had been working in February as the result of a recall notice in that month or had been regularly, albeit intermittently, performing available work during the winter months. The general applicability of the conclusions drawn in this case is limited by the uncertain state of the factual record.

2/ The record is devoid of any evidence concerning an employee's right to change his mind about remaining on layoff status during the winter months and the undersigned expresses no opinion on this point.

very little notice. The Company took the position that regular full-time drivers on layoff would be unlikely to respond positively to a call in at 6:00 in the morning, both because of the short notice and because they would probably lose more in unemployment compensation than they would earn for one day's work on commission. Since Gordon was not eligible for unemployment compensation, he would accept this work.

Granting that the Company's reasons for using Gordon are rational, the undersigned can find nothing in the collective bargaining agreement that treats the recall of part-time employees differently than fulltime employees, nor any provision suspending seniority rights in cases of short notice. The work available on the 14th constituted a temporary recall in the same way that the load of Varmicutite on the 13th, 14th and 17th constituted a recall. Absent any evidence that the Union had agreed to the use of Gordon as an automatic fill-in for sick drivers, and in light of the contract's admonition that the "arbitrator shall have no authority to add to, subtract from or modify this Agreement in any way", the undersigned concludes that the Company did violate the contract by failing to call the seniority list to seek a substitute for Dick Berget on February 14th. 3/ The remedy is to compensate the grievant by paying him a sum of money equal to the amount which he would have earned had he been called in on the 14th, less any sums received for other employment or unemployment compensation. 4/

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

---

3/ The undersigned is mindful of the practical concerns expressed by the Company over quickly securing a willing substitute for a sick driver. If, as indicated at the hearing, the current system works well for everyone concerned, the parties are free to expressly agree to continue that system. Otherwise, the Company can require senior employees who have elected a layoff during the winter months to indicate whether they wish to be called for short notice, short duration sick leave substitutions.

4/ There are five employees senior to the grievant who had a superior claim on this work. The lack of a grievance by any of the five is interpreted herein as a refusal of the work, and the monetary remedy is therefore directed to the grievant as the most senior employee expressing a desire for the work.

AWARD

1) The Company did not violate the Agreement by assigning the order scheduled for February 13, 14 and 17, 1992 to Dabbs rather than the grievant.

2) The Company did not violate the Agreement by having six less senior drivers -- Dick Berget, Mark Goessl, Bob Cunningham, Mike Ugan, Gary Bresette and Bob Brickner -- working in February of 1992 while the grievant was on layoff.

3) The Company violated the Agreement by having Ray Gordon fill in for Dick Berget on February 14th, rather than offering the work to more senior laid-off employees. The appropriate remedy is to immediately pay to the grievant the amount which he would have earned had he been called in on the 14th, less any sums earned by other employment which he would not have earned had he worked in place of Gordon, and less any sums received for unemployment compensation which he would not have been entitled to had he worked in place of Gordon.

The undersigned will retain jurisdiction over this grievance for a period thirty days, solely for the purpose of clarifying the remedy ordered herein, should there be a dispute between the parties.

Signed and dated this 14th day of August, 1992 at Racine, Wisconsin:

Daniel Nielsen /s/

Daniel Nielsen, Arbitrator
Post Office Box 1375
Racine, WI 53401