BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between	:	
IRON WORKERS LOCAL UNION NO. 813 of the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL & ORNAMENTAL IRON WORKERS	:	Case 2 No. 47370 A-4916
and	:	
SWANSON HEAVY MOVING COMPANY	:	

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Appearances:
Mr. Samuel Wilcox, Business Manager, 1602 South Park Street, Madison, Wisconsin 53715, on behalf of the Union.
Bosshard & Associates, Attorneys at Law, P.O. Box 966, LaCrosse, Wisconsin, 54602-0966, by Atty. James W. McNeilley, Jr., on behalf of the Company.

SUPPLEMENTAL AWARD

On July 3, 1992, the undersigned issued an Arbitration Award in which he sustained a grievance, directed remedial relief, and retained jurisdiction for "no less than 90 days, to monitor the implementation and effectiveness" of the remedy. In early December, 1992, the undersigned was informed that a dispute remained concerning the implementation of the remedy. On December 30, 1992, the undersigned conducted a conference call with the parties, after which he concluded that said dispute did remain. The parties were offered a hearing, but, there appearing to be no additional controversy over material matters of fact, the undersigned suggested, and the parties agreed, that the matter be handled through written argument. The union and employer submitted supplemental briefs on January 27, 1993 and February 1, 1993, respectively. The union submitted a reply brief on February 17, 1993; the employer declined to file a reply brief.

ISSUE

The undersigned states the issue as follows:

Is further remedy warranted, as remedy for the Company's violation of the collective bargaining agreement, committed when the Company challenged the unemployment compensation claim by the grievant, Jack Moser?

If so, what shall the remedy be?

BACKGROUND

The facts and arguments surrounding the merits of the grievance are noted and discussed in the initial Award of July 3, 1992. In that Award, I directed the Company to "notify the Labor and Industry Review Commission within ten (10) working days that it does not challenge the grievant's claim to unemployment compensation." I also retained jurisdiction "for no less than 90 days, to monitor the implementation and effectiveness of the remedy."

On December 3, 1992, Labor and Industry Review Commission (LIRC) Legal Secretary Connie Elding wrote to Union business representative Sam Wilcox as follows:

This is in response to your telephone inquiry of December 2,

> 1992. I have gone through the entire file in the referenced case and do not find any letter from Swansons Heavy Moving or any representative for such employer stating that they no longer challenged Mr. Moser's claim for benefits. You had stated you expected a letter to that effect to have been sent on or shortly after July 3, 1992.

On December 7, 1992, forwarding the Elding letter, Wilcox wrote to WERC Staff Director Thomas L. Yaeger, as follows:

> I am requesting that the Wisconsin Employment Relations Committee (sic) check into the award that was made by Arbitrator Stuart Levitan. Swanson Heavy Moving Company did not notify the Labor and Industry Review Commission within ten (10) working days that it would not challenge Jack Moser's claim to unemployment (see enclosures).
>
> Swanson Heavy Moving Company has had ample time to meet the criteria of this award. We are requesting that the Arbitrator settle this award.

On December 8, 1992, the Company's Secretary, Daniel Melding, wrote to Elding as follows:

> Please be advised that a letter stating that Swanson's Heavy Moving Co., Inc., no longer challenged Mr. Moser's claim for benefits was forwarded to the Commission on July 14, 1992. At that time, copies of the letter were also sent to Mr. Wilcox, Mr. Moser and to Stuart Levitan, the arbitrator in this case.
>
> A copy of that letter is enclosed for your review. If you have any further questions, please feel free to call at any time.

Enclosed in the December 8 letter was the following letter, addressed to "Unemployment Compensation Office, Labor and Industry Review Commission, 508 Fifth Avenue South, LaCrosse, Wisconsin," dated July 14, 1992:

Dear sirs:

> Swanson's Heavy Moving, Inc. did contest the unemployment compensation benefits for the above referenced employee. In an Initial Determination and Appeal Tribunal Decision, the State of Wisconsin held that the employee had failed, without good cause, to accept an offer of suitable work, and suspended his benefits.
>
> Subsequently, the Company and the Union that represents the employee were involved in arbitration in this case. The Arbitrator was Mr. Stuart Levitan of the State of Wisconsin, Wisconsin Employment Relations Commission. The arbitrator has since held that the Company violated the Collective Bargaining Agreement between the Union and the Company by contesting this employee's unemployment compensation benefits.
>
> It was the Arbitrator's decision that the Company "shall notify the Labor and Industry Review Commission with ten (10) working days that it does not challenge the grievant's claim to unemployment compensation."
>
> While the Company does not necessarily agree with the findings of the Arbitrator, we did agree with the Union to be bound by his decision. The Company, therefore, does hereby rescind its challenge of this employee's unemployment compensation benefits.

Respectfully,

Daniel Melde /s/
Daniel Melde,
Secretary

Due to the manner in which this letter was addressed, the letter was not received in the Madison office of the Labor and Industry Review Commission as of December, 1992.

On December 28, 1992, James L. Pflasterer, General Counsel for the Labor and Industry Review Commission, sent the following letter to Daniel Melde, corporate secretary for the employer:

> This is in reply to your letter of December 8, 1992, to Connie Elding of our office, confirming your mailing on July 14, 1992, a letter stating that Swanson's Heavy Moving Company, Inc. no longer challenged Mr. Moser's claim for benefits. I note from the copy of the letter appended to your letter of December 8 that, although it included the Commission's name on the second line of the address, the letter was mailed to the La Crosse Local Unemployment Compensation Office. That may be the reason the Commission has not received it. It may have been filed in Mr. Moser's legal file in the La Crosse Office without having been forwarded to the Commission.
>
> Even if we had received the letter prior to deciding the case, however, the employer's retraction of its

> challenge to the claim is not likely to have made much difference in the outcome. The Commission has long held, and a line of court cases has agreed, that private agreements between parties may not control the result of an unemployment compensation eligibility issue. As a practical matter, an employer may effectively back away from contesting a claim before a hearing is held by simply not appearing at the hearing. In general, decisions are in favor of the party who appears when only one side appears at a hearing on a contested matter between employer and employe. Once a hearing is held, though, the Commission is bound to base its decision on the facts brought forth in the testimony and exhibits.
>
> I regret that your July letter was not delivered to the Commission. Having now become aware of the letter, the Commission cannot conclude that it affords any basis for further action on the decision.
>
> Sincerely,
>
> James L. Pflasterer /s/
> James L. Pflasterer
> General Counsel

On December 30, 1992, I conducted a conference call with Melding and Wilcox, after which I sent them the following letter:

> This is to confirm our conference call of this date.
>
> As to the issue of whether the employer had notified the Labor and Industry Review Commission that it did not challenge Mr. Moser's claim to unemployment compensation, I concluded that the evidence supported a finding that the employer sent such notification to the LaCrosse Unemployment Compensation office in a timely manner, in a good faith belief that such notice complied with that aspect of my Award.
>
> There remains the issue of whether further remedy is warranted. I have asked you to submit written argument on the question of whether the employer should be required to make Mr. Moser whole for unemployment benefits he was denied. We have agreed to a briefing schedule of Monday, February 1, 1993 for initial statements, exchanged through me, with a right to reply by Friday, February 12, 1993.

By correspondence dated February 2, 1993, the parties were given until February 17, 1993 to submit reply briefs.

POSITIONS OF THE PARTIES

In support of its position that further relief is warranted, the union asserts and avers as follows:

> The facts of this case are no longer up for argument. The arbitration award has already been made. It has been determined that the employer violated the collective

bargaining agreement, and, therefore, the employer must assume responsibility for the damages done to the grievant.

The attempted remedy to make the grievant whole has not been effective. The only remedy that can accomplish what is necessary in making the grievant whole is for the employer to pay the grievant $2,394.00, for the loss of unemployment compensation.

This request is appropriate and reasonable, and is based on the grievant's actual hours worked and unemployment compensation lost in the weeks February 15, 1992 - May 16, 1992.

The employer must be held accountable for its actions because its actions caused the grievant significant harm. A remedy requiring the employer to assume direct responsibility for the damages incurred by its violation of the collective bargaining agreement is the only effective remedy remaining.

The grievant has documented his losses at $2,394.00. If the employer had not violated the agreement, this amount would have been paid to the grievant. The employer should now be ordered to pay that amount, and make the grievant whole.

In support of its position that no further relief is warranted, the employer asserts and avers as follows:

If the arbitrator had correctly interpreted the collective bargaining agreement, the arbitrator would not now be considering the question of whether or not the employer should be forced to "make Mr. Moser whole for unemployment benefits he was denied."

There are further reasons why no further relief should be ordered. In his original decision, the arbitrator only retained jurisdiction for 90 days. That period has long since passed, and the arbitrator has no jurisdiction to make any further awards.

Further, the original award only required the employer to withdraw its challenge to the grievant's unemployment compensation claim. The employer did so in a timely manner. It is not the employer's fault that unemployment compensation benefits were denied.

Finally, as noted in the correspondence of General Counsel James Pflasterer, the provisions of the collective bargaining agreement would not have controlled the outcome in any event. Agreements between parties do not control unemployment compensation eligibility; if the Department of Labor, Industry and Human Relations had looked into this matter regardless of the employer's objections, the department would have concluded that the grievant was not eligible for unemployment compensation benefits.

Accordingly, no further award is warranted.

In its reply brief, the union posits further as follows:

It is well settled that arbitrators can retain jurisdiction such as for the purpose in the instant case. The employer's feeble attempt to present an issue involving the timeliness of fashioning a final and effective remedy is totally bogus.

The employer's other argument, that it believes the grievant was not eligible for unemployment compensation and therefore its contract violation was of no regard, requires the arbitrator to accept as fact speculation and supposition. This argument is also absurd. The employer's challenge caused the grievant to be denied benefits; if there had been no challenge, there would not have been any damages.

The union does not rely on such supposition, but rather on specific calculations to support a remedy which makes the grievant whole. It is reasonable to expect the employer to make the grievant whole for the damages he has suffered.

The employer waived its right to file a reply brief.

DISCUSSION

The company raises two preliminary objections to consideration of whether further remedy is warranted. I find neither persuasive.

The company states that I "only retained jurisdiction for 90 days," and that, ninety days having long since passed, I no longer have "any jurisdiction to make any further awards." It is true that, in the discussion of whether the remedy being ordered would prove adequate, I retained jurisdiction "for 90 days," to determine whether the remedy being ordered was adequate. However, in the formal Award section, I explicitly retained jurisdiction "for no less than 90 days, to monitor the implementation and effectiveness" of the remedy (emphasis added). Given the implicit reasoning of the discussion section, and the explicit terms of the Award, it is evident that I have not surrendered, and do still retain jurisdiction for the purposes of this Supplemental Award.

The company also states that my Award "only stated that Swanson's should withdraw its challenge," that it did so in a timely manner, and that it was through "no fault of its own" that benefits were still denied. Again, it is true that the Company complied with the terms of one element of the Award, namely that it notify the LIRC that it did not challenge the grievant's claim to unemployment compensation. However, the Award, both in discussion and order, clearly put the company on notice that further remedy might be forthcoming, in the event that simply notifying LIRC proved inadequate. In the discussion section, I stated that "the appropriate remedy, at this time, is for the employer to notify the LIRC" that it rescinded its challenge, but that I was retaining jurisdiction "to determine whether such remedy is adequate." (emphasis added). Again, in the Award section, I explained the purpose of retaining jurisdiction was "to monitor the implementation and effectiveness of such remedy." Clearly, I would not have needed to retain jurisdiction if there were no potential for additional remedy; given the employer's legal burden of compliance with a lawful award, if the only remedy contemplated was for the employer to notify the LIRC, there would have been no issues of implementation and effectiveness to monitor.

Having rejected the company's threshold arguments, I turn now to the merits of whether additional remedy is warranted. I find that it is.

The company, citing correspondence from LIRC General Counsel James L. Pflasterer, notes that private agreements between parties are not dispositive on the issue of eligibility for unemployment compensation. Thus, the company suggests, regardless of whether the company did or did not lodge a challenge, "if the Department had looked into this matter ... the Department would have concluded that Mr. Moser was not eligible for unemployment compensation benefits."

The critical word in the company's contention is "if."

As I noted previously, I am neither schooled nor skilled in the administration of the unemployment compensation system. I rely, therefore, on the representations made by the LIRC General Counsel. In his correspondence, General Counsel Pflasterer makes several points. One of them does, indeed, support the company's contention -- that eligibility for unemployment compensation is subject to statutory criteria, and is not determined by private agreements such as collective bargaining agreements.

But General Counsel Pflasterer makes a further, equally vital point -- that "as a practical matter, an employer may effectively back away from contesting a claim before a hearing is held by simply not appearing at the hearing." In general, the General Counsel states, "decisions are in favor of the party who appears when only one side appears at a hearing on a contested matter between employer and employe."

Once the hearing is held, however, such flexibility vanishes and "the Commission is bound to base its decision on the facts brought fourth in the

testimony and exhibits."

That is, the remedy initially ordered -- notice to the LIRC -- would apparently have been adequate, if only it had been effectuated in a timely manner, namely prior to the hearing being held. But such was not the case.

I conclude from the statement of the LIRC General Counsel that, in the absence of affirmative opposition by the company at hearing, the grievant would likely, but not inevitably, have received unemployment compensation benefits. We shall, of course, never know, due to the company's affirmative opposition. I have previously concluded that the company violated the collective bargaining agreement when it affirmatively challenged the grievant's claim to unemployment compensation benefits. Perhaps it is a slight elaboration to state that the comapny's violation of the contract caused the denial of benefits. But the following facts are clear on the record: the grievant applied for unemployment comepnsation benefits; the company, in violation of the collective bargaining agreement, affirmatively challenged his application; the grievant's bid for benefits was denied.

Accordingly, the company must make the grievant whole.

The union has presented a fiscal analysis of the amount it believes the grievant is due for lost benefits. The company, while vigorously challenging the grievant's claim to any further remedy, did not take issue with or challenge the union's fiscal analysis. Having no basis for a differing analysis, I adopt the union's.

Accordingly, on the basis of the collective bargaining agreement, the record evidence, and the arguments of the parties, it is my

SUPPLEMENTAL AWARD

That the company shall pay to the grievant, Jack Moser, $2,394.00, payment due no later than May 1, 1993.

Dated at Madison, Wisconsin this 17th day of March, 1993.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator