BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS, CHAUFFEURS AND HELPERS UNION NO. 43	Case 37 No. 49139 A-5063
and	
TAYLOR ENTERPRISES, INC.	

Appearances:
Mr. Charles Schwanke, President, Teamsters Local No. 43, appearing on behalf
Mr. Jack Taylor, Transit Manager, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1990-93 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested the Wisconsin Employment Relations Commission to appoint an arbitrator to resolve the discharge grievance of Donald Montey.

The undersigned was appointed and held a hearing on April 21, 1993, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, and neither party filed a brief.

ISSUES:

Did the Company violate the collective bargaining agreement when it discharged Donald Montey?

If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

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ARTICLE 9. Posted Rules

It is agreed between the parties hereto that any Employer posted rules that have been approved by the Union must be observed by the employees. All present employees shall be given a copy of such rules and new drivers shall be given a copy of such rules upon hiring.

The following rules and regulations as set forth and the penalties to be charged for the violations of these rules are placed into effect so that all employees may know what duties are required of them in the general conduct of the Employer's business. Discipline imposed under these rules and regulations must be imposed within ten (10) working days for minor violations and must be imposed immediately for major violations. Any grievance resulting from discipline of any of the violations must be filed with the Employer within five

(5) working days of the violation.

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6. ATTENDANCE

(a) Absent three (3) successive scheduled work days without notification to the Employer.

Voluntary quit

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ARTICLE 14. Management Rights

The Employer possesses the sole right to operate the mass transit system and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this agreement and the past practices in the departments covered by the terms of this agreement, unless such practices are modified by this agreement or by the Employer under rights conferred upon it by this agreement or the work rules established by the Employer. These rights which are normally exercised by the Employer include but are not limited to the following:

1. To direct all operations of the transit system.
2. To hire, promote, transfer, assign and retain employees in their position with the transit system and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

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In addition to the management rights listed above, the powers of authority which the Employer has not officially abridged, delegated or modified by this agreement are retained by the Employer. The Union recognizes the exclusive right of the Employer to establish reasonable work rules.

The Union and the employees agree that they will not attempt to abridge these management rights and the Employer agrees that he will not use these management rights to interfere with rights established under this agreement. Nothing in this agreement shall be construed as imposing an obligation upon the Employer to consult or negotiate with the Union concerning the above areas of discretion and policy.

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ARTICLE 25. ARBITRATION

In the event that the Employer and the Union cannot mutually agree to a settlement of any unresolved controversy which may arise concerning any matter or the interpretation of this Agreement, such unresolved controversy shall be reduced to writing and shall be referred to the Wisconsin Employment Relations

> Commission to have an arbitrator appointed for settlement.
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> The filing fee required by the Wisconsin Employment Relations Commission for arbitration shall be split equally between the Union and the Employer.
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> The Employer and the Union agree that the decision of the arbitration committee shall be final and binding upon both parties. The Employer and the Union agree that Union membership shall not be a matter subject to arbitration.

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FACTS:

Grievant Donald Montey, who had worked for the Company for ten years as a Racine city bus driver, went to the doctor on March 25, 1993 complaining of back injury because of hitting pot holes as he drove. The grievant had had a similar incident in 1991, had been placed on Workers' Compensation, had asked if he could do light work, and had been told the only work available was bus driving. In the present incident, the grievant came to the Company office on March 25 and turned in a doctor's slip. This, however, stated on its face that he was to return to work March 25, 1993, and made no reference to not driving a bus. Under "work restrictions", this form listed that lifting and carrying were both limited to ten pounds, stooping was limited and there was to be no repetitive bending. The grievant called in and said to Willie McDonald Jr., the dispatcher on duty, that he was to see the doctor in two weeks and might be back at that point. The same day, the grievant had talked to Taylor's secretary Carol Davis, who testified that he told her he would be off for two weeks on workers compensation. She told the grievant to come in to fill out a form, which he did later that day, and she found the form and the doctor's slip the following morning on her desk. Later, on March 25, dispatcher Lisa Blankman was on duty when the grievant came in with the doctor's slip. Blankman looked at it and pointed out that it said he should return to work on March 25. The grievant said he would call the doctor, and did so while Blankman went off to photocopy the form.

Davis testified that when she found the form the next day, she attempted to call Montey, but was unable to reach him, and called the doctor's office, at which point she was told by the person who answered the phone and by the doctor's nurse that he had been told to report back to work on March 25. Davis was subsequently unable to reach the grievant by phone, and testified that the Company's insurance company told her they were also unable to reach him by phone.

Jack Taylor testified that the grievant did not report to work March 26 through March 31, or call to see if there was work, and in his opinion was taking a vacation while on Workers' Compensation. Taylor testified that he did have light work available for the grievant on this instance, and that it was the grievant's responsibility to see whether such work was available. On April 1, Taylor testified, he concluded that the grievant had voluntarily quit because he had not reported for work for three days.

Subsequently, the Union's steward reached the grievant, and the grievant called the Company on April 5. On the same date, the grievant submitted to the Company a new doctor's slip from the same original doctor's appointment, but corrected by the physician to include under "other limitations" "no bus driving". The Company refused to reconsider its view that the grievant had

quit.

At the hearing the Union submitted copies of the grievant's medical records from the clinic involved, which shows under the date of March 25, 1993 that "the patient is to return to work with the following restrictions: No bus driving and also limit the lifting and carrying to ten pounds and no repetitive bending no stooping". The report also specifies that the grievant was instructed to follow up at the occupational medicine clinic in two weeks.

THE COMPANY'S POSITION:

The Company argues that the grievant has the obligation to see if there is work available, and failed to do so. The Company contends that the Agreement specifies that an employe who has not called in or reported for work for three days is a voluntary quit, and that when the grievant failed to do either until April 1, he had automatically quit his employment. The Company described it as arrogance by the grievant that he would expect Company to perform the correction of a doctor's error on his behalf. The Company requests that the discharge be sustained.

THE UNION'S POSITION:

The Union contends that this sequence of events represents not a quit by the grievant, but a series of miscommunications, and that there is no evidence that the grievant had intended to quit his employment.

The Union contends that in over 20 years representing the employes of this Company, this was the first instance in which Union representative Schwanke had heard the Company agree to the concept of light work, and that it was up to the Company to offer the work, not the employe. The Union requests that the grievant be reinstated and made whole for loss of pay and benefits following the two week period of his treatment, which ended April 8.

DISCUSSION:

I can find nothing in this record that justifies a conclusion that the grievant could fairly be treated as having quit his employment under Article 9, Rule 6. It is clear from the doctor's report admitted at the hearing that the grievant was told not to drive a bus for two weeks. This is the core and substance of his job. Therefore, although the grievant may have shown little inclination to pursue other forms of work that might be available, I find that the Company acted hastily by presuming that the grievant's unavailability should be construed as a voluntary quit. Furthermore, I note that the grievant did call in on both March 25 and March 26, and apparently made at least a modest effort to get the doctor's office to correct the paperwork at that time.

If the grievant did not quit, it follows that he was discharged. In this instance, the Company has the burden to demonstrate that the discharge was for just cause. I find that the Company has failed to meet this burden, because there is no evidence that the grievant was abusing the Workers' Compensation system, and there is likewise no evidence to indicate that the Company went to any effort to communicate to the grievant that there was light work available. The grievant had some reason based on his prior experience to presume that if he could not drive a bus, he was not able to work. Therefore, the grievant could understandably have reached the conclusion that he was not required to be easily available while he was under treatment for his back injury.

Had the Company made some greater effort to offer light work to the grievant, or had the grievant had some reason based on prior experience to

anticipate that such a thing existed at the Company, I might find that some degree of penalty was appropriate, because of his slowness in getting the doctor's slip corrected. But under the circumstances, the first obligation lay with the Company, and I find that the Company created a liability for back pay by failing to make clear that light work was available.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company violated the collective bargaining agreement by discharging Donald Montey.

2. That as remedy, the Company shall, forthwith upon receipt of a copy of this Award, offer Donald Montey reinstatement to his position or a substantially equivalent position with his full seniority, and shall make the grievant whole for any loss of wages and/or benefits by payment to the grievant of a sum of money equal to such losses since April 8, 1993, less interim earnings, if any; and shall correct its records accordingly.

Dated at Madison, Wisconsin this 26th day of May, 1993.

By _____
Christopher Honeyman, Arbitrator