BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION, LOCAL 662	Case 20 No. 48481 A-5014
and	
LAND O'LAKES, INC.	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law
Ms. Mary K. Mills, Counsel, Law Department, appearing on behalf of the Employ

ARBITRATION AWARD

General Teamsters Union, Local 662, hereinafter referred to as the Union, and Land O'Lakes, Inc., hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Employer, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. The parties stipulated that the Board of Arbitration and the time limits for the issuance of the award provided in the parties' agreement was waived. Hearing was held in Clear Lake, Wisconsin on April 6, 1993. The hearing was not transcribed. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged on June 1, 1993.

BACKGROUND

The grievant was hired by the Employer on November 5, 1979. 1/ The grievant allegedly injured his back on October 18, 1991 when he carried a 75-85 pound circle chart down a flight of stairs. 2/ The grievant continued to work until November 8, 1991 when the pain became so great that he could not continue working. 3/ The grievant had back surgery on November 21, 1991 and was off work for some time to recover from the surgery. 4/ The grievant was released to return to work on March 30, 1992 by his treating physician, subject to certain restrictions that would apply for six months. 5/ The restrictions were set forth in a Functional Capacity Evaluation 6/ which contained the following:

> SIGNIFICANT DEFICITS
>
> Mr. Danielson is unable to tolerate sustained static trunk posturing due to decreased trunk stabilization.

1/ Ex. 22

2/ Ex. 5 and 6.

3/ Id.

4/ Ex. 6.

5/ Ex. 4.

6/ Ex. 6.

He also had difficulty performing activities requiring continuous trunk rotation. He was unable to tolerate standing for more than fifteen minutes in one position, and tolerated up to thirty minutes of sitting. At work he should be allowed self-paced position changes between sitting, standing and walking. He demonstrated difficulty with repetitive firm gripping bilaterally; he has a history of nerve compression in the bilateral upper extremities.

ASSESSMENT

Results of the Functional Capacity Evaluation indicate that Mr. Danielson can function at the heavy physical demand level of work.

RECOMMENDATIONS

1. Mr. Danielson should avoid all forward bending activities at work. The ideal working surface is at his waist level; because Mr. Danielson is 6'4", this is higher than the average work surface. Any surface lower than this will encourage forward bending and result in decreased work tolerance.

2. Mr. Danielson is aware of when he needs to make position changes with regard to work position. He should be allowed to self-pace position changes between sitting, standing and walking. He is encouraged to perform muscle stretching and relaxation techniques on his breaks.

3. Mr. Danielson should continue to perform a home exercise and flexibility program on a regular basis, with a focus on walking.

4. I believe Mr. Danielson has the physical capacities to return to full time work within the restrictions as outlined on the FCE form. Mr. Danielson should not exceed his lifting capacities for frequent and continuous category, i.e., he should not be placed on a job where he lifts more than 25 lbs. on a continuous basis.

5. Mr. Danielson should continue to utilize the posture and body mechanics he demonstrated throughout the Functional Capacity Evaluation.

The grievant gave his release to Shirley Johnson, the Employer's Personnel Specialist, 7/ who informed the grievant that there was no work available for the grievant and he would be called when work was available.

The grievant filed a worker's compensation claim which was disputed by the Employer on a number of grounds. A compromise agreement was reached on the worker's compensation claim which was signed by the grievant and his attorney

7/ Although the parties dispute whether Johnson was the Personnel Director or Personnel Coordinator, her exact title is not relevant to the dispute as she was an agent of the Employer. The title Personnel Specialist appears on Ex. 4.

on October 12, 1992 and the Employer's attorney on October 19, 1992 and provided, in part, as follows:

> That, therefore, there exists a dispute between the parties hereto as to whether or not the applicant sustained an injury in the course of his employment and also as to the nature and extent of the injury and disability.
>
> That as and for a full and complete compromise settlement of all of the claims of the applicant for benefits arising under the Worker's Compensation Act, including claims for temporary total disability, temporary partial disability, permanent partial disability, vocational retraining benefits, loss of earning capacity and past, present or future medical expense, together with any claims for penalty or bad faith or willful refusal to rehire and including, but not limited to, any and all liability under secs. 102.18(b), 102.22, 102.35(3), 102.42, 102.44(6), 102.46, 102.47, 102.48, 102.49, 102.57, 102.58, 102.60 and 102.61, Stats., the respondents herein agree to pay the sum of Twenty Six Thousand Dollars ($26,000.00) to the applicant, the same to be paid without interest credit. 8/

On November 16, 1992, the grievant again requested that he be returned to work. 9/ The Employer's representative, Paul Shafer, told him that there was no job for him and that the grievant had given up his right to reemployment by signing the settlement agreement. The grievant then gave Shafer a grievance over the refusal of the Employer to return the grievant to work. 10/ Shafer denied the grievance on November 20, 1992. 11/

The grievant submitted a Return to Work form from his treating physician dated January 22, 1993 indicating the grievant could return to work immediately with the same restrictions from the March, 1992 FCE report. The Employer reviewed the restrictions and concluded that the grievant with his restrictions was not able to perform any available jobs at the Employer's plant. Additionally, the Employer hired Karr Rehabilitation Services, Inc., who reviewed the FCE report and written Job Analyses and submitted a report 12/ which stated, in part, as follows:

> At the request of Mr. Philip Bowe, Production Supervisor with Land O'Lakes, Inc., I have reviewed Mr. Danielson's Functional Capacities Assessment and compared it with the Job Analysis of positions at Land O'Lakes that Mr. Danielson would be required to perform if he were to return to work there. This included a review of written Job Analyses for 6 job titles that Mr. Danielson would rotate; as well as visually

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8/ Ex. 7.

9/ Ex. 2.

10/ Id.

11/ Ex. 3.

12/ Ex. 13.

reviewing the same work sites at the Land O'Lakes Plant in Clear Lake, Wisconsin.

I toured the Clear Lake Plant and reviewed the job site areas with Mr. Bowe on February 15, 1993.

. . .

CONCLUSIONS:

Given Mr. Danielson's recommended work restrictions in the Functional Capacities Evaluation (FCE), it would not appear that the physical requirements of the line positions at Land O'Lakes discussed in this report, are within those restrictions. While it does appear that Mr. Danielson would be able to tolerate lifting requirements of the line positions, several other requirements do not meet the recommended work restrictions. Mr. Danielson is limited to 3-4 hours of standing in an 8 hour work day, where as the line positions would require a minimum of 5-6 hours standing, and often times more. It is also recommended in the FCE report that Mr. Danielson should avoid all forward bending activities at work. Various tasks on the line positions do require forward bending. It is also recommended that Mr. Danielson should be allowed to self-pace position changes between sitting, standing and walking. Four of the 6 line positions Mr. Danielson would rotate on, require standing for an entire hour on that rotation.

The FCE also states that Mr. Danielson is unable to tolerate standing for more than 15 minutes in one position and tolerates up to 30 minutes of sitting. It is also noted in the FCE report that Mr. Danielson is 6 feet 4 inches tall, making the working surface higher than average for him. There is also a considerable amount of reaching forward and twisting of the trunk in several of the line positions. Given the nature of Mr. Danielson's injury, this would most likely aggravate his low back symptoms. Thus, it is my conclusion that the line positions reviewed at Land O'Lakes are not entirely within Mr. Danielson's work restrictions, and his attempt at performing these positions would most likely aggravate or cause reinjury to his back.

The grievant was not returned to work and the grievance was appealed to arbitration.

ISSUES

The parties were unable to agree on a statement of the issues.

The Union stated the issue as follows:

> Was the grievant terminated for just cause? If not, what shall the remedy be?

The Employer stated the issue as follows:

> Did the grievant voluntarily terminate his employment?

The Employer also claimed that the grievance was not timely.

The undersigned frames the issues as follows:

1. Is the grievance timely? If so,

2. Did the Employer violate the collective bargaining agreement when it refused to return the grievant to a position at the plant based on his physical/medical limitations? If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 5

SENIORITY

Section 1. Seniority shall be defined as continuous service with the Employer at the plant covered by this Agreement from the employee's most recent date of hire (See Article 3 Probationary Period). Should two or more employees be employed the same day, their seniority shall be determined by lot. An employee's seniority is nullified when the employee:

(a) Is laid off, or is not recalled to work within two (2) years from the date of layoff.

. . .

(d) Is absent due to occupational or non-occupational sickness or illness for more than three (3) years.

(e) Is discharged for cause.

Seniority shall not be broken for time lost due to vacation, leave of absence, temporary layoff (not to exceed two (2) years,) military service as prescribed by law, illness or accident (not to exceed three (3) years).

. . .

Section 3. When layoffs are necessary, those employees with the least seniority shall be laid off first provided those employees retained are capable of carrying on the operations. When employees are called back to work, those employees having the greatest seniority shall be recalled first providing they, together with those on the job, are capable of carrying on the plant's usual operations.

Employees who have seniority to work will work their job bid if it is functioning.

When layoffs are necessary, and in order to adhere to the seniority provisions as provided herein, employees will be given an opportunity to qualify for jobs which

they did not bid for previously, excluding all Operators and Maintenance I and II, QSA, QSB, QASA, QASB and staging provided the employee notifies the Employer immediately of his/her interest in said job.

. . .

ARTICLE 9

DISCHARGE

Section 1. No employee who has completed his/her probationary period will be disciplined, discharged or suspended without just cause. The Employer agrees to notify the Union and steward in writing of the action taken.

. . .

Section 3. Discipline, discharge, and suspension must be by proper written notice to the employee with a copy to the Union. An employee may request an investigation as to his/her discipline, discharge or suspension. Should it be found that the employee has been unjustly disciplined, discharged or suspended, he/she shall be reinstated and compensated per the adjustment of the grievance.

. . .

ARTICLE 25

LEAVE OF ABSENCE

Section 1. Any employee who is off work due to occupational or non-occupational sickness or accident shall be considered on leave of absence and shall not be required to have same in writing unless such sickness or accident exceeds one (1) year duration. Any employee who expects to be off work due to such sickness or accident for more than one (1) year shall secure a written leave of absence from the Employer and the Union. The request for such leave must be in writing accompanied by a doctor's certificate certifying that said employee cannot return to work and is not reasonably expected to return within the one (1) year period. The request for such absence must be made sometime between the eighth and twelfth month of absence from work. Failure to comply with this provision shall result in the complete loss of seniority rights.

. . .

1993-1997 AGREEMENT

ARTICLE 5

SENIORITY

. . .

Section 5. If employees are involuntarily laid off for a period that exceeds six (6) calendar months in duration, they shall be afforded the opportunity to bump less senior employees working protected jobs anywhere in the plant, excluding maintenance. The Company shall provide the bumping employees sufficient training to perform the job which he/she has bumped into.

UNION'S POSITION

With respect to the Employer's timeliness objection, the Union contends that the failure to raise the timeliness defense prior to the arbitration hearing constitutes a waiver of the defense. The Union argues that the purpose of requiring that a timeliness objection be raised earlier is to allow the Union to evaluate its position and to determine whether or not it should bear the expense and burden of processing the grievance to arbitration.

The Union contends that the grievance is a continuing grievance which may be filed at any time. It notes that the grievant asked to return to work and was told that he would be called and when he was finally advised that he would not be returned to work, he filed a grievance in a timely manner.

The Union points out the at the Employer has changed the reason given for the grievant's discharge. The Union refers to the grievance answer and Mr. Shafer's statement that the reason for the grievant's termination was the worker's compensation compromise settlement. The Union insists that under this settlement, the grievant never waived his right to reemployment under the collective bargaining agreement and nothing in the settlement agreement indicates any agreement by the grievant to terminate his employment. The Union argues that the Employer cannot be allowed to change the reasons for the grievant's termination for the first time at the hearing.

The Union claims that not allowing the grievant to return to work constitutes a violation of the collective bargaining agreement. It submits that the grievant did not quit, was not on layoff for more than two years, was not absent due to occupational illness for more than three years and was not discharged for just cause, so the grievant's seniority was not nullified by the terms of the collective bargaining agreement. It asserts that the Employer nullified the grievant's seniority and that he was discharged without just cause. The Union alleges that the contract requires two things to complete a termination:

1. Discharge for just cause;

2. Proper written notice to the employe with a copy to the Union.

It maintains these requirements were not met as there was no written notice given, and the Employer cannot discharge an employe based on the findings in a worker's compensation proceeding. It takes the position that as

the above two requirements were not met, the grievant must be returned to work.

The Union contends that the grievant was released to return to work and the mere fact that he has received worker's compensation does not establish that he is unable to perform work. It insists that the Employer has the burden to prove that an employe is unfit for employment and the Employer has been unable to prove the grievant's unfitness to work. It argues that the Employer's use of the FCE and Karr's analysis is flawed because Karr ignored many classifications and observed only two of the four lines in operation. It claims that a review of the job descriptions and the restrictions on the FCE indicates that the grievant is capable of performing many jobs such as the following:

1. Inventory person
2. Forklift driver
3. Quality Specialist A, B and C
4. Quality Assurance Specialist B
5. Quality Specialist A
6. Quality Specialist B
7. Lead operator-packaging
8. Maintenance inventory
9. Inspector
10. Reconditioning
11. Bright stacker
12. Depalletizer
13. Over capper
14. Packaging worker
15. Cheese slurry operator
16. Drier mix and blend operator I
17. Canner operator

The Union admits that some of these jobs were protected under the old collective bargaining agreement, but the new collective bargaining agreement allows bumping into bid jobs after six months on layoff. It claims that the grievant's termination is very much like an involuntary layoff and he is grieving the Employer's refusal to put him back to work, and inasmuch as he has been off work for more than six months, he can bump a less senior employe in a protected position. It argues that the grievant should be returned to work because he never gave up his right to reemployment and is capable of performing work that is available. It asks that the grievance be sustained and the grievant be reinstated and made whole for the losses suffered as a result of his unjust termination.

EMPLOYER'S POSITION

The Employer contends that the grievance is untimely. It points out the

contract requires that grievances be processed immediately and the grievant knew as early as March 25, 1992, that there was no work available for him, so a grievance should have been filed then. It claims that there was no reason that prevented the grievant from filing a grievance on March 30, 1992. It submits that the November, 1992 grievance was not filed immediately for a violation that occurred seven months earlier and the grievance should therefore be denied.

The Employer asserts that the grievant's termination was part of the worker's compensation settlement agreement whereby a claim for rehire under Sec. 102.35. Stats., was waived. It submits this has no meaning if the grievant retained his employment after execution of the settlement agreement. It insists that an issue in the worker's compensation claim was one of causation and Paul Shafer would not have agreed to settle the claim if it didn't include the grievant's voluntary termination. It argues that the parties' understanding of the settlement was that the grievant would not continue after the settlement agreement and any ambiguity should be decided in favor of the Employer because the grievant's attorney drafted the agreement. The Employer asserts that nothing in the agreement forbids it from reaching a settlement agreement which severs the employment relationship.

The Employer contends that the grievant was not and is not physically able to return to work. It refers to the grievant's restrictions set forth in the functional capacity evaluation which had been prepared at his doctor's direction. It submits that the January 22, 1993 return to work release incorporates the same restrictions and the restrictions compared with the physical requirements of available positions establish that there are no jobs available to the grievant. The Employer points out that it sought an outside evaluator who confirmed the grievant is not physically able to perform the essential functions of available positions. The Employer admits that employes with restrictions were working but none were working outside the scope of the job analysis forms, i.e., they were working within their medical restrictions but this would not be true of the grievant and there are no jobs available within the grievant's medical restrictions.

The Employer alleges that it has not violated Article 5, Section 3 of the collective bargaining agreement. The Employer takes the position that Article 5, Section 3 deals with layoff and the grievant was not laid-off but was considered on a leave of absence under Article 25, Section 1, so layoff does not apply. The Employer submits that the issue in this arbitration as framed by the Union was just cause for termination but no section is cited and the termination is listed as October 29, 1992, the date implementing the worker's compensation settlement, so the grievant's claim for back pay is groundless on its face.

The Employer asserts that the record establishes that the grievant will do anything to maximize the cash in his pocket, including collecting short-term disability, unemployment compensation and worker's compensation. It submits that the grievant's termination is implicit in the worker's compensation settlement and he is not physically able to return to work at any position. It asks that the grievance be denied.

Union's Reply

The Union submits that the grievance is timely and an employe does not lose seniority by not bumping a junior employe. Additionally, it asserts that Shirley Johnson's informing the grievant that there was no available work establishes he was not required to "immediately" file a grievance. Furthermore, the Union points out that the grievant was never informed he had been terminated until his grievance was answered. The Union insists that there was nothing wrong with the grievant's collecting unemployment compensation and short-term disability payments.

The Union insists that the only actual reason for denying the grievance was the worker's compensation settlement, specifically referring to in Section 103.35, Stats., but that only relates to penalties for a refusal to rehire and cannot be used in a different context. The Union asserts that the settlement cannot be used to establish an inability to return to work and a compromise cannot be later used as an admission and compensation awards do not establish per se an employe's inability to work so as to justify a refusal to use him. It states that arbitrators hold that an employe cannot be penalized for exercising the legal right to worker's compensation. The Union notes that the grievant and Attorney Erspamer testified that the grievant never gave up his right to employment with the Employer, and whoever drafted the agreement is irrelevant because the Employer's conclusion on the grievant's returning to work is not supported by the language in the document. The Union states that it has not asserted that the settlement agreement nullifies the provision of the contract and the settlement agreement does not nullify the grievant's employment rights with the Employer.

The Union contends that the grievant is able to return to work. It insists that the "inability to work" claim made by the Employer was an after-the-fact argument to support a position the Employer took in denying the grievance. It maintains that the Employer has violated the parties' agreement by not returning the grievant to work. It claims that the Employer's arguments as to timeliness, inability to work and unavailability of other jobs were first made at the hearing, whereas the reason for the termination was solely the worker's compensation settlement agreement. The Union argues that the Employer did not have just cause to terminate the grievant and the grievance must be sustained and the grievant made whole.

Employer's Reply

The Employer contends that several misstatements of facts appear in the Union's brief, including the fact that the grievant was injured at work, that Johnson is the "Personnel Director" and that the grievance was filed in October, 1992. The Employer asserts that the grievant received no notice of termination because he voluntarily terminated his employment by the settlement of the worker's compensation claim. It submits that Erspamer's testimony with respect to resignation is that the document did not expressly provide for termination and the Union's argument that it does not do so implicitly is self-serving and unsupported. The Employer admits that employes are working with some medical restrictions but these do not prevent them from performing the essential functions of their jobs.

The Employer insists the characterization of the grievant as "minimally restricted" is inaccurate and inconsistent with the functional capacity evaluation and the Karr report. It notes that the grievant's restrictions in January, 1993 are the same as March, 1992 and its determination then is valid now. The Employer admits that it does not dispute the grievant's own doctor's report but it does dispute that he is able to return to work. It insists that it has a record of returning employes to work who can do their regular duties but the grievant's situation reflects his medical restrictions.

The Employer, contrary to the Union, cites arbitral authorities which have held that timeliness may be raised anytime including for the first time at the arbitration hearing, so the issue of timeliness is a proper defense. It maintains that the grievance is not continuing as it involves a single act and not a "continuing violation". The Employer denies that it has changed its reason for the discharge because it does not agree that there was a discharge, in fact, the grievant waived his right to rehire, and whether the grievant is physically able to perform available jobs is not a separate issue because the basis for the settlement agreement was the grievant's inability to perform work. The Employer submits that physical inability to perform work provides

just cause for termination. However, according to the Employer, the grievant terminated his employment voluntarily, so the Employer did not have to follow the procedures related to termination.

The Employer denies that it selectively focused on parts of the functional capacity evaluation to support its position and points to the Karr report as supporting its position. The Employer denies that it relied on worker's compensation findings to support its conclusion that the grievant could not perform available jobs and insists it relied on the information supplied by the grievant's own physician, the Karr report and its own evaluation. It submits that the representative from Karr did not see all the lines but the two he observed were representative of all of the others. It denies that the grievant could bump employes in bid jobs because he was not laid off, and had no ability to bump less senior employes in bid protected positions. The Employer argues that the grievant's self-evaluation must be ignored and the jobs he identified that he could perform do not include "caser operator", an essential function of the packaging worker position and by this omission, the grievant has admitted he is not physically able to perform the work. The Employer insists that the grievant has not discredited Shafer's testimony that the grievant discontinued his employment by signing the compromise settlement agreement.

The Employer denies it violated any terms of the agreement. It submits the grievant's termination was an implicit condition of his worker's compensation settlement, and besides, he is not physically able to return to work to any position available to him by virtue of his seniority, a conclusion supported by his own physician and a third-party rehabilitation consultant. It asks that the grievance be denied.

DISCUSSION

Timeliness - The Employer has raised the issue of timeliness contending that the grievance should have been filed in March, 1992 and the November, 1992 filing violates Article 7, Section 1. The Union asserts that the grievance is timely because the grievant was not told he had been terminated until November, 1992. Additionally, the Union cites arbitral authorities for the proposition that waiting to raise the timeliness defense until the arbitration hearing constitutes a waiver of the defense and the Employer cites arbitral authorities supporting a conclusion that timeliness may be raised at any time including at the arbitration hearing. The parties also disagree over whether the grievance is continuing or not. The parties refer to the layoff clause and to the discharge clause in Article 9 requiring just cause for termination.

To determine the timeliness issue, it is necessary to determine what provision of the contract applies. Article 25, Section 1 of the parties' collective bargaining agreement provides that an employe who is off work due to occupational or non-occupational sickness or accident shall be considered on leave of absence. . . . Although the Employer raised an issue about whether the grievant's injury was job-related, Article 25 applies whether it is job-related or not. Article 5, Section 1 provides that an employe's seniority is nullified if he/she is absent due to occupational or non-occupational sickness or illness for more than three (3) years. It appears that the grievant was ill or injured and required surgery and that he was off work due to this injury. It follows that Article 25 applies and so does Article 5. The grievant brought in a return to work slip dated March 24, 1992 indicating he could return to work with restrictions which would apply for six months. According to the grievance, the grievant was told that the Employer had no work for him. This is consistent with the Employer's position that given the grievant's restrictions, he was unable to perform any job available to him on the basis of his seniority. Assuming that this is correct and accepted by the grievant, there would be no basis to file a grievance at that time because he was still on a leave of absence due to his illness and perhaps in six months the

restrictions would be less than those imposed in March, 1992. The Employer argues that it didn't violate any provision of the contract in March, 1992. It follows that no objection on timeliness is appropriate at that time because there was nothing to grieve. In November, 1992, the grievant was removed from the seniority list, 13/ and it was Paul Shafer's understanding that the grievant resigned and that he no longer worked there based on the worker's compensation compromise agreement. It was at this point that the Employer considered the grievant to no longer have seniority under Article 5 and terminated his leave of absence under Article 25 and, at this point, a grievable situation arose. Although the grievant's grievance was not as artfully drafted as it could be, it was in response to the Employer's informing him that he no longer worked there. The grievance was filed immediately over the Employer's actions and it must be concluded that the grievance is timely. Under these circumstances, it is unnecessary to determine whether the timeliness issue has been waived or whether the grievance is continuing, and it is concluded that the grievance is timely.

Merits

The Employer has contended that the grievant terminated his employment voluntarily by signing the compromise agreement for worker's compensation. Paul Shafer testified that he approved the compromise settlement with the understanding that the grievant would quit as a result of the settlement. Mr. Shafer's understanding is not expressed in the compromise agreement 14/ and Mr. Erspamer's testimony was that the grievant's resignation was not part of the settlement. No evidence was offered by the Employer's worker's compensation counsel to refute this testimony. Although Mr. Shafer expected a resignation to be included, for whatever reason, it was not. The grievant never tendered his resignation and it must be concluded that the settlement agreement did not expressly provide for the grievant's resignation.

In finding that the grievant did not expressly submit a voluntary resignation, it does not mean that he is entitled to reemployment. In County of LaCrosse v. WERC, 174 Wis. 2d 444 (Ct. of App., 1993), the Court held that because Sec. 102.35(3), Stats. specifically provides a remedy for an employe whom the employer refuses to rehire after the employe is injured in the course of employment, subjecting that circumstance to arbitration in collective bargaining must be done knowingly and explicitly. In the settlement agreement, the grievant waived his rights under Sec. 102.35(3), Stats., so the issue is whether the parties' have bargained in their collective bargaining agreement, knowingly and explicitly, a provision that an employe who is terminated because of a work-related disability is entitled to a remedy beyond that provided in Sec. 102.35(3), Stats. In LaCrosse, supra., the court examined the contract and concluded that the layoff clause did not apply to disability layoffs. It also rejected the argument that "just cause" applied and that disciplinary action had to be for an infraction or unacceptable behavior which was not involved in the case. 15/ In the present case, it would appear that no layoff occurred and that just cause for termination due to misconduct is also not involved. Thus, arguably, the Employer may be correct in its position that the grievant, by waiving his Sec. 102.35(3), Stats. rights, has implicitly waived his right to continued employment. However, the parties' collective bargaining agreement expressly provides that an employe who is off work due to a work-related injury will be considered on a leave of absence 16/ and can remain on

13/ Ex. 16.

14/ Ex. 7.

15/ County of LaCrosse v. WERC, 174 Wis. 2d 444, at 456.

16/ Ex. 1, Article 25.

the seniority list for three years. 17/ Therefore, under the instant contract, the parties have explicitly provided for additional benefits such that the rationale of LaCrosse, supra., does not apply in its entirety. Thus, the Employer's argument that the grievant gave up any right to rehire by the settlement agreement has arguable merit, but it is not persuasive in this case.

Although the grievant didn't explicitly or implicitly by law resign his employment, and the Employer relied on such resignation, the Union has argued that the Employer cannot rely on an inability to perform the work argument and the grievant must be returned to work. However, if an employe cannot perform work due to injury or illness, it would not make sense to put him to work but rather he/she would remain on a leave of absence. Article V, Section 3 provides that the grievant may remain on a leave of absence for up to three years, when he is absent due to illness. Being on a leave of absence due to illness or injury and retention of seniority for a period of three (3) years implies that an employe won't be terminated during that period unless the injuries are permanent and when the employe has sufficiently recovered, he will return to work. The question then becomes is the grievant still too ill or sick such that he is on the leave of absence or has he recovered sufficiently such that he is entitled to be returned to work. The facts establish that while the grievant was given a release to return to work, it was with a number of restrictions. An employe is not entitled to return to work where these restrictions or conditions prevent him from performing the job or where he cannot perform it without undue risk of injuring himself or others. The reality of the situation is that the grievant has had back surgery and has certain limitations which may or may not be permanent. It would be irresponsible to ignore the grievant's limitations, and while he may feel that he can perform any job, the opinion of his doctor must be taken into account in assessing the risk of more serious injury to the grievant as well as the financial liability associated with returning to work which does not fall within the doctor's restrictions.

Therefore, it is necessary to determine whether the grievant can return to work with his limitations. Mr. Bowe testified that, based on the functional capacity evaluation and the job analysis, the Employer did not have a job for the grievant and that no accommodation was possible. The Employer also hired Karr Rehabilitation Services, who analyzed a number of jobs and concluded that they were not within the grievant's restrictions and his attempt to perform these jobs would most likely aggravate or cause reinjury to his back. 18/ The Union argued that the grievant could perform a large number of jobs and asserted that the Karr report was flawed because it looked at only a few jobs and only two of the four lines. The Union asserted that the grievant could perform the jobs of packaging worker, overcapper, inspector, depalletizer, and bright stacker, which are five of the specific jobs Karr evaluated and Karr concluded the grievant could not perform these. 19/ The Union also asserted that the grievant could perform the job of forklift operator. The job of forklift operator requires a great deal of sitting, about six hours a day. 20/ The functional capacity evaluation states that the grievant can tolerate sitting up to 30 minutes and he has to make changes between sitting, standing and walking. It appears that forklift operation would be outside the grievant's limitations. It also appears that Karr supported his conclusion

17/ Id., at 5.

18/ Ex. 13.

19/ Id.

20/ Ex. 24.

with well-reasoned analysis and the Union's base assertions were self-serving. On the record presented, it is concluded that at the present time the grievant cannot perform any of the jobs asserted by him as within his physical limitations. Further, the record fails to demonstrate that the Employer's assertion that it cannot accommodate the grievant's limitations was false. The evidence established that the grievant's physical limitations prevent him from performing available work for the Employer at this time. Should the grievant's condition improve and his restrictions be reduced such that he can perform work, he shall be reinstated at that time.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. The grievance is timely filed.

2. The Employer did not violate the parties' collective bargaining agreement when it refused to return the grievant to a position at the plant based on his physical/medical limitations.

3. The Employer shall retain the grievant on the seniority list for the three years specified in Article 5, Section 1 (d) and should his health improve and the restrictions decrease such that he can safely perform available work, he shall then be reinstated to said work.

Dated at Madison, Wisconsin this 16th day of June, 1993.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator