BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between VAN DER VAART, INC. and DRIVERS, WAREHOUSE & DAIRY EMPLOYEES UNION, LOCAL NO. 75	Case 25 No. 52603 A-5368

Appearances:

Mr. Jack D. Walker, Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Martin Luther King Jr. Boulevard, P. O. Box 1664, Madison, WI 53701-1664, on behalf of the Employer. 1/

Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

SUPPLEMENTAL AWARD

The Award in the captioned case (attached hereto as Attachment A) was issued by the Undersigned on October 10, 1995. The Undersigned retained jurisdiction "regarding the appropriate remedy" herein if the parties could not "mutually agree upon a remedy within thirty (30) days after the issuance" of the Award. By letter dated November 8, 1995, the Union advised that the Employer had not complied with the October 10th Award. The Union also requested that the Undersigned exercise her jurisdiction "to establish briefing or other argument on the remedy issue". Attorney Walker appeared for the Employer by his letter dated November 16, 1995. The Undersigned set a briefing schedule and an amended briefing schedule regarding the remedy herein. All briefs and reply briefs were received by January 17, 1996, and the record herein was thereupon closed.

1/ Prior to the hearing, at the hearing, and thereafter, the Employer was represented by its Vice President, James A. Jacquart. On November 17, 1995, the Undersigned received a letter from Attorney Walker which indicated that Mr. Walker would be representing the Employer thereafter.

Positions of the Parties: 2/

Union's Position:

The Union (in its December 8, 1995 brief) noted that while the collective bargaining agreement between the parties has expired (January 1, 1995), the Side Letter (dated July 17, 1989) has no expiration date: It has been in effect from 1989 to date. In addition, the Side Letter was in effect and was acknowledged as such by the Employer (through its agent Jacquart) during the period in which the Employer hired additional employes into its non-union division. Furthermore, the Union observed that the facts giving rise to the grievance arose during the period that the labor agreement containing the grievance arbitration clause was in full effect. Thus, the Union urged that the Supreme Court's ruling in Nolde Brothers, 430 U.S. 243, 97 S.Ct. 1067 (1977), should apply to this case to assure that this grievance was properly arbitrable.

The Union pointed out that the Award herein, in favor of the Union, does not require that "any particular individual must become a member of the Union", but that it does require "that an appropriate number of individuals be placed in the unit currently represented. In addition, the Union requests that Clint Witt (seniority date 4/25/88), John Owens (seniority date 5/3/93), Matt Batt (seniority date 7/13/93), Scott Sonnemann (seniority date 3/15/93) and Mike McDonnough (seniority date 5/30/95) be immediately placed in the bargaining unit represented by the Union. The Union also stated, in the alternative, that if some other method to effectuate the remedy herein were chosen, it "has no objection to (a different) method by which five employees are placed in its unit, or who those employees are".

The Union contended that the Employer has consistently refused to comply with the Award herein and that the Employer's only option is to move to vacate the Award in Federal Court if it wishes to belatedly raise procedural arbitrability questions. However, the Union argued that the Employer's failure to raise any jurisdictional or timeliness objections at the initial hearing herein, means that the Employer has waived same and that, in any event, it has no grounds for a Federal Court to set aside the Award herein.

Employer's Position:

In Attorney Walker's letter dated November 16, 1995, he asserted that the Undersigned "does not have, and has never had, jurisdiction, because there is no agreement in effect requiring

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2/ The positions of the parties have been gleaned from all letters sent to the Undersigned by the parties regarding the remedy herein and received from November 8, 1995 through January 17, 1996.

arbitration, there is no agreement in effect at all, and there is no agreement for ad hoc arbitration. Further, the employer reserves the view that the time bar on grievance filing is jurisdictional, as well". In addition, Attorney Walker argued that the Award stated no remedy and that "since no remedy has been determined, the Employer could not comply with the remedy".

By his letter dated November 30, 1995, Mr. Walker argued that even if there was a mutually agreed-upon hearing in the instant case, that should "not constitute consent to jurisdiction, and that the employer did state that the agreement was no longer in effect. . . ." Nonetheless, Mr. Walker asserted that no remedy is appropriate other than a declaration that the Employer's past conduct violated the expired contract. On this point, Walker submitted two documents not submitted in the hearing herein: a contract termination notice sent by the Teamsters dated October 3, 1994 and a subsequent letter dated March 30, 1995 regarding the remedy herein. 3/

The Employer further argued that to force Sheboygan Concrete employes to become members of the Union is "illegal on its face," and that with no union contract in effect containing a union security clause, it would be ". . . illegal to force an employe to become a "member" of the Union. 4/

By letter dated December 19, 1995, Mr. Walker asserted that, in any event, any remedy "should be prospective", in the form of an order to hire future employes into the Van Der Vaart unit. Any retroactive remedy would affect the rights of persons not parties to the proceeding (employes of Sheboygan Concrete) who have a reliance interest in their present employment.

3/ As these documents go to the merits of this case and because they were not proffered during the hearing herein (affording the Union an opportunity to review them, or offer evidence or argue regarding them), the documents cannot be and have not been considered in reaching the decision herein.

4/ No legal citations were contained in Mr. Walker's letters dated November 16, November 30, or December 19, 1995. The Employer, by Mr. Walker, cited only one case in its January 4, 1996 letter brief, City of Fond du Lac, Dec. No. 11830 (WERC, 1973).

By letter dated January 4, 1996, Attorney Walker responded to the Union's December 8, 1995 brief regarding the remedy. Therein, while reserving the Employer's objections thereto, Mr. Walker stated "that the question of enforcement of the award or the remedy is not before the arbitrator and we do not argue the jurisdictional matters". Mr. Walker noted that both parties appeared to agree that the remedy herein "should be prospective". However, Walker urged that the Union's requested remedy -- to immediately place five named persons employed by the Employer in the Local 75 bargaining unit -- is inappropriate. Mr. Walker observed, contrary to the Union's arguments, that even if the Side Letter is clear and unambiguous, this fact should not bear upon the remedy which, the Employer urged, should be accomplished reasonably, and with an acknowledgement that the Union's rights are not the only rights involved herein -- that Sheboygan Concrete employes' rights must also be considered.

In this regard, Mr. Walker contended that to require the Employer to transfer existing employes to different employment "affects the rights of those employes . . ." who "are not parties to this case" and who have not been represented by the Union; that any employe who might be transferred into the bargaining unit would immediately lose his or her right to deal directly with the Employer, and would become bound by whatever the Teamsters may negotiate, without ever having had any opportunity for input into that representative status. In addition, Walker asserted, the Union's proposed remedy and the conditions of employment of affected employes would necessitate "future litigation and disagreement", and that the Union's arguments imply an unwarranted assumption that any employes placed in the bargaining unit "would owe union dues beginning on the date they became unit employees".

Mr. Walker made a general statement in his brief that the terms of employment for the Employer's non-unit employes "are not identical" to those at Van Der Vaart, Inc., so that benefit plan rights may be affected. In the Employer's view, whether to dovetail or not to dovetail transferred non-unit employes, also presents a problem. Therefore, the Employer urged that "(t)he problem of adversely affecting existing Sheboygan Concrete employees' terms of employment could be ameliorated, admittedly, by stating that their terms of employment could remain unchanged until there is a successor agreement between the parties". The Employer asserted that such a result would be reasonable because this is the same type of result the WERC would reach in a unit clarification case, citing City of Fond du Lac, Dec. No. 11830 (WERC, 1973). Thus, Mr. Walker, on behalf of the Employer sought a Supplemental Order "limiting the remedy to a declaration that the Side Letter was violated", or in the alternative an Order that "future hires be unit hires until parity is reached".

Discussion:

After the issuance of the initial Award herein, the Employer hired counsel, Mr. Walker, to argue for the first time that because the 1992-95 labor contract had expired at the time of the hearing in this case, the Arbitrator lacked jurisdiction to issue an Award herein. In addition, the

Employer's counsel argued that the fact that Company representative Jacquart agreed to the hearing herein and represented the Company, such action would not constitute a waiver of the Company's right to object to the Arbitrator's jurisdiction, given the fact that Jacquart argued that the 1989 Side Letter was invalid.

It is significant that Mr. Jacquart, on behalf of the Company failed at any time prior to the hearing, during the hearing, or after the hearing to raise the argument that the Undersigned lacked jurisdiction to decide the instant grievance because the 1992-95 labor contract had expired. In this regard, I note that Mr. Jacquart waived the contractual timelines contained in Article 7 of the 1992-95 labor agreement on behalf of the Employer at the hearing. In addition, I note that the record in this case contains Joint Exhibits 2A and 2B. Joint Exhibit 2A is the grievance initiated by the Union and Joint Exhibit 2B is also a grievance initiated by the Company in response to the Union's grievance, Joint 2A. 5/ Furthermore, Company Vice President Jacquart was the Employer's sole representative before, during, and after the instant hearing. Jacquart agreed to the hearing date, time, and that the hearing be held at the Employer's facility, and Jacquart represented the Company at the hearing. Jacquart stipulated to the issue to be decided in the case, made an opening statement on behalf of the Employer, had an opportunity to cross-examine each Union witness, and Jacquart acted as the Company's only witness at the hearing at which time he offered an exhibit on behalf of the Employer. Jacquart wrote and submitted the Company's post-hearing brief. Thus, all of the circumstances surrounding the filing of the grievance, its processing up to and through arbitration as well as Company representative Jacquart's actions as the sole representative of the Company were consistent with a conclusion that no jurisdictional issues were timely raised in this case.

In the initial Award, the Undersigned held that the Company had violated the 1989 Side Letter and ordered the Company to "immediately comply with the terms of the 1989 Side Letter". Attorney Walker has raised several issues regarding the merits of this case, that could have and should have been raised by the Company at the hearing. As the Company failed to raise these issues/arguments at the hearing, they have been waived. In addition, as the Undersigned made clear in her initial Award, I have retained and can now assert jurisdiction only as to how to implement compliance with the remedy ordered in that initial Award. By issuing the initial Award herein, I released jurisdiction over the merits of the case.

According to the terms of the 1989 Side Letter (and the settlement agreement supporting it), the Company is bound to hire and employ the same number of Union Van der Vaart, Inc., readimix drivers as it has non-union Sheboygan Concrete Corp. readimix drivers. This means that the number of actively employed Van der Vaart, Inc. readimix drivers must be the same as the

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5/ Article 7 -- Settlement of Disputes contained in the 1992-95 labor agreement, defines a grievance as ". . . a complaint by an employe, the employer, or the union as to the interpretation or application of this agreement . . ." (emphasis supplied).

number of actively employed Sheboygan Concrete Corp., readimix drivers. Company counsel has argued that it would be illegal to force employes of the non-Union Sheboygan Concrete Corp. to become members of the Union as part of the remedy in this case. The record and Award in the initial case clearly indicate that Company representatives knowingly violated the 1989 Side Letter. The Company, therefore, has a responsibility to place the Union in the position it would have been in had the Company abided by the Side Letter as it was bound to do -- the number of non-union Sheboygan Concrete employes must equal the number of Van der Vaart, Inc. employes. However, the remedy ordered herein is intended to require that employes transferred from Sheboygan Concrete be placed in the Union's bargaining unit, not that they be forced hereby to join the Union. It is up to the Union to advise these transferred employes that they must pay their fair share of the cost of representation.

On December 11, 1995 the Union requested that the following employes be placed in the bargaining unit as an appropriate remedy herein:

1. Clint Witt (seniority date 4-25-88).

2. Scott Sonnemann (seniority date 3-15-93).

3. John Owens (seniority date 5-3-93).

4. Mike Batt (seniority date 7-13-93).

5. Mike McDonnough (seniority date 5/30/95). 6/

The Employer's counsel argued that the remedy in this case must be prospective only, that the Award herein should state that Van der Vaart, Inc. should hire Union employes in the future until these Union employes equal the number of non-Union employes of Sheboygan Concrete Corp. As noted above, such a prospective order would not fully and appropriately remedy the violation in this case. The fact that "future litigation and disagreement" may be promoted by the issuance of a Supplemental Award in favor of the Union can have no bearing on this case. In addition, I note that the Employer's argument that the Undersigned should require that the terms and conditions of employment of affected employes should remain unchanged until a successor collective bargaining agreement is reached between the parties would exceed the Arbitrator's authority under Article 7 of the expired collective bargaining agreement and exceed the limits of the grievance before the Arbitrator in the initial case.

Also, the Employer's citation of a unit clarification case, City of Fond du Lac, Decision No. 11830 (WERC, 1973) has no applicability to this case. In this regard, I note that the instant case involves the arbitration of a grievance regarding the rights of employes and the Union under both the 1989 Side Letter and the last collective bargaining agreement between the parties. 7/ In my view, there is no similarity between a fact-finding proceeding, like a unit clarification, and a

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6/ The Union did not explain why, in its brief, it listed these five individuals not according to their seniority dates, but out of order: Witt, Owens, Batt, Sonnemann, McDonnough. I have listed them according to their seniority dates. There may have been changes in the non-union employe compliment since December 11, 1995. If so, this Award must be read to hire, employ and maintain the same number of Union Van der Vaart, Inc., employes as it has non-union Sheboygan Concrete Corp., employes, no matter their identity or seniority dates.

7/ The Union cited a United States Supreme Court case, Nolde Bros., Inc., 430 U.S. 243, 97 S.Ct. 1067 (1977). That case, held that even if a labor contract has expired, a dispute which clearly arises under the substantive terms of the expired contract and which, on its face, is governed by the agreement, is nonetheless arbitrable.

grievance arbitration hearing. In addition, the rights of the parties as well as the evidence, arguments and procedures of unit clarification cases are entirely different from those involved and a grievance arbitration hearing. In addition, the rights of the parties as well as the evidence, arguments and procedures of unit clarification cases are entirely different from those involved in grievance arbitration cases. In this case, it was the Company's violation of the 1989 Side Letter, with full awareness that the Company was nonetheless bound to that Side Letter, that caused the number of Union drivers to decline as compared to the number of non-union drivers. To essentially freeze the employment conditions of the employes involved in this case, as the Commission would do in a unit clarification case, would not properly remedy the violation in this case. Therefore, based upon the entire record in this matter as well as all briefs and arguments in this case, I issue the following

SUPPLEMENTAL AWARD

The Company, Van der Vaart, Inc., shall immediately place the following employes in the Union's bargaining unit:

1. Clint Witt (seniority date 4-25-88).

2. Scott Sonnemann (seniority date 3-15-93).

3. John Owens (seniority date 5-3-93).

4. Mike Batt (seniority date 7-13-93).

5. Mike McDonnough (seniority date 5/30/95).

If the above-named employes are no longer employed by Sheboygan Concrete Corp., the Employer shall immediately transfer the same number of employes as listed above from Sheboygan Concrete Corp. to Van der Vaart, Inc. and place them in the Union's bargaining unit so that the number of non-union Sheboygan Concrete Corp. drivers is equal to the number of bargaining unit Van der Vaart, Inc. drivers.

Dated at Oshkosh, Wisconsin this ___ day of March, 1996.

By _____
Sharon A. Gallagher, Arbitrator