BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between HRIBAR TRUCKING INC. and TEAMSTERS UNION LOCAL 43	Lampton and Amoroso Discipline Case 8 No. 53600 A-5440

Appearances:

Mr. Robert Baxter, Business Agent, Teamsters Union Local No. 43, 1624 Yout Street, Racine, Wisconsin 53404, appearing on behalf of the Union.

Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. James Clay, appearing on behalf of Hribar Trucking, Inc.

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 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 discipline imposed on drivers Christopher Lampton, Sr. and Joseph Amoroso. The cases were heard in order on March 29, 1996 in Milwaukee, 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. The parties submitted post-hearing briefs, and the record was closed on May 6, 1996.

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.

I. Issues

The parties stipulated that the following issues should be determined in this Award:

1. Whether the grievance of Christopher Lampton, Sr. was appealed to arbitration in a timely manner?

2. If not, what is the appropriate action?

3. Whether the one day suspension of Christopher Lampton, Sr. violated the collective bargaining agreement between the Company and the Union?

4. If yes, what is the appropriate remedy?

5. Whether the grievance of Joseph Amoroso was appealed to arbitration in a timely manner?

6. If not, what is the appropriate action?

7. Whether the one day suspension of Joseph Amoroso violated the collective bargaining agreement between the Company and the Union?

8. If yes, what is the appropriate remedy?

II. Relevant Contract Language

ARTICLE 5 - MANAGEMENT RIGHTS

5.1 - Except as otherwise specifically provided in this Agreement, the Employer has the sole and exclusive right to exercise all the rights or functions of management. It is understood and agreed that any of the rights, powers, and authority that the Employer had prior to signing this Agreement are retained by the Employer, except those rights which are specifically abridged, granted or delegated to others, or modified by this Agreement. The Employer is not subject to any duties not expressly assumed in this Agreement. This Agreement embodies all restrictions on the Employer's rights.

5.2 - The Union agrees that the Employer has the right to make such reasonable rules and regulations not in conflict with this Agreement as it may, from time to time, deem best for the purpose of maintaining order, safety and/or effective and efficient operations of the Employer's business.

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ARTICLE 7 - GRIEVANCE PROCEDURE

7.1 - A grievance is a controversy or claim raised with the Employer by an employee as to the meaning or application of a provision of this Agreement. A grievance must specify the contract

provision or provisions which it is claimed the Employer has violated, and shall also specify the particular action requested on behalf of the grievant. An earnest effort shall be made to settle such differences at the earliest possible time by the use of the following procedure:

> A. Within five (5) working days after the reason for such grievance has occurred, the aggrieved employee and/or the Union steward and the immediate supervisor shall discuss the situation. In the event any grievance is submitted directly by an employee or group of employees, a steward shall be notified and shall have the right to participate in all matters relating to the adjustment of such grievance.
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> B. Failing to reach a satisfactory adjustment as outlined in sub-section A, the matter may be taken up with the Employer by the Union representative within ten (10) working days of the filing of the grievance,
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> C. If no satisfactory agreement is made between the Employer and the Union representative within ten (10) working days after the meeting with the Employer and the Union representative, either party shall have the right to arbitration.

7.2 - If a grievance is submitted to arbitration in the event the parties are unable to agree upon a mutually acceptable arbitrator, the Employer and the Union shall jointly request the Wisconsin Employment Relations Commission to appoint a member of their staff to serve as arbitrator.

In the event that the Wisconsin Employment Relations Commission no longer provides members of the Commission's staff to serve as arbitrators, the parties shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) arbitrators. The party requesting arbitration shall strike the first name from the list and the other party shall then strike one (1) name, and thereafter the parties shall strike alternately. The person whose name remains shall be the arbitrator, provided that either party, before striking any names, shall have the right to reject one (1) panel of arbitrators. The arbitrator shall be notified of his selection by a joint letter from the Employer and the Union requesting that he set a time and place

for the hearing, subject to the availability of Employer and Union representatives. The letter shall specify the issue(s) to the arbitrator.

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. The arbitrator shall have no authority to impose liability upon the Employer retroactively beyond the date upon which the alleged cause for complaint occurred (provided that the grievance is filed pursuant to this grievance procedure) or arising out of facts occurring before the effective date or after the termination of this Agreement, but this shall not prevent arbitration, after the expiration of this Agreement, of grievances alleged to have occurred during the term of this Agreement. In the event an employee is awarded back pay, all moneys received by him, either through working elsewhere or through unemployment compensation shall be deducted by the arbitrator from the back pay award. The arbitrator may decide more than one grievance at a time, if mutually agreed upon by the Employer and the Union. Subject to the foregoing, the decision of the arbitrator shall be binding on all parties hereto, and on all members of the bargaining unit.

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7.5 - The failure to exhaust the remedies under the grievance procedure or to abide by the time limits unless expressly waived in writing shall be deemed to be a conclusive waiver of (sic) abandonment of the grievance. Time is of the essence. A grievance settlement at any stage of the grievance procedure shall be final and binding on all parties.

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ARTICLE 14 - EXAMINATION OF RECORDS

14.1 - The Union business agent shall have the right to examine records pertaining to the computation of compensation of any individual or individuals whose pay is in dispute, upon written request.

ARTICLE 15 - DISCHARGE AND DISCIPLINE

15.1 - No employee shall be discharged without just cause. Included in the right to discharge is the right to discipline short of

> discharge including, but not limited to, warning letters and disciplinary layoffs.
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> 15.2 - The Employer reserves the right to apply different degrees of discipline to employees engaged in unlawful or prohibited conduct according to the degree of their leadership or instigation of such conduct.
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> 15.3 - All disciplinary actions and discharges shall be subject to the Grievance and Arbitration procedures in this Agreement to determine whether or not for just cause.
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> 15.4 - After a written warning has been in effect for a period of twelve (12) months without intervening disciplinary action, it shall be removed from an employee's personnel record.

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ARTICLE 23 - WORK RULES

> 23.1 - The Employer may, from time to time, adopt reasonable Work Rules not in conflict with this Agreement.

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III. Background - Arbitrability

The Company is in the construction trucking business, and the Union is the exclusive bargaining representative for the Company's drivers. The grievants, Christopher Lampton, Sr. and Joseph Amoroso, are drivers for the Company. Both of them were given one day suspensions for refusing to change their time sheets in the Fall of 1995. The Company demanded the changes because it believed the time sheets were inaccurate. The grievants both took the position that the time sheets were accurate and that they would not change them. Amoroso was given a discipline notice on September 28th, and filed a grievance challenging the discipline on October 12th. Lampton received a notice of discipline on October 11th and filed a grievance on October 31st.

Union President Merlin Hanson attempted to contact Company President Lee Hribar to set up a grievance meeting about these and other grievances. On November 8th, he sent Hribar a letter:

> I have on numerous occasions attempted to meet with you to discuss the following grievances from your employees. These grievances are: Chris Lampton - 10/31/95, Joe Amoroso - 10/10/95 & 9/21/95, Terry Biarnesen - 9/21/95 and Bob Brickner - 9/21/95.

> You have avoided to (sic) meet with me and you leave me no choice but to proceed to arbitration or file charges with the National Labor Relations Board. I have set these times to meet with you Monday, Nov. 14, Wednesday, Nov. 15 & Thursday, Nov. 16 either at 4:30 p.m. or 5:00 p.m. to process these grievances with an intention of settling if possible. If you refuse to meet with me, I shall consider your position as deadlocked and proceed to arbitration. I will be awaiting your reply.

A grievance meeting was held on November 14th at which time Hanson and Hribar discussed the grievances, but they were unable to reach a settlement. On December 7th, Hanson sent another letter to Hribar, asking him to forward Amoroso's pit tickets for September 28th:

> In order to further investigate the circumstance surrounding the incident which led to Joe Amoroso filing a grievance dated 10/12/95, I am requesting his Vulcan and Thelen pit ticket slips for 9/28/95.
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> I have in my possession the first pit ticket slip for 9/28/95, however, I need the pit ticket slips for second, third, fourth and fifth loads.
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> Based on my investigation thus far, Mr. Amoroso's second load was pulled from Vulcan (Racine), his third load from Thelen, his fourth load from Vulcan (Racine) and his fifth load from Thelen.
>
> Please send this information promptly, so that I may further process this grievance.
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> Thank you in advance for your anticipated cooperation.

Hribar faxed the requested information as soon as he received Hanson's letter.

On December 26th, a request for arbitration of the two grievances was received in the Madison offices of the Wisconsin Employment Relations Commission. The undersigned was designated as the arbitrator on January 12, 1996, and the file was mailed to the Commission's Racine office. On January 23rd, a letter was sent to Hanson and Hribar, advising them of possible hearing dates.

At the March 29th arbitration hearing, in addition to the facts cited above, the following testimony was taken on the issue of arbitrability:

Company President Lee Hribar

Lee Hribar testified that he received Hanson's letter demanding a meeting on these grievances, and called Hanson to arrange a November 14th meeting. On that day, he, Hanson, Union Business Representative Bob Baxter, Laurie Hribar, Amoroso and Lampton met at the

Company offices. The Company provided the Union with all relevant documents, and the group reviewed the facts surrounding the grievances. The Union did not give him any indication that it was proceeding to arbitration during the November 14th session. He was surprised when he received Hanson's December 7th letter, because the information had already been provided. He assumed that Hanson had simply lost the slips, so he faxed him additional copies.

Hribar testified that Hanson never advised him that these two cases were being appealed to arbitration. There was a grievance meeting on January 17, 1995 regarding other cases, including unrelated grievances by Amoroso and Lampton, and the Union made no mention of having appealed these cases. The first time Hribar was aware that the cases had been sent to the WERC was when he received the arbitrator's scheduling letter in late January.

Union President Merlin Hanson

Merlin Hanson testified that he repeatedly tried to reach Hribar before November 8th to schedule a meeting, but that Hribar's daughter kept saying he was out of town. He got an immediate response to his November 8th letter threatening to go to arbitration or to the NLRB. Hanson was not sure that he actually received all of the pit ticket slips for Amoroso at the November 14th meeting, but thought that he might have said the cases were going to arbitration during this meeting. When he, Baxter and the grievants held a meeting about these cases on December 4th, they decided that they needed more information. This led to his December 7th letter to Hribar.

Hanson testified that there were approximately seven grievances pending with the Company at this time, and he had several telephone conversations with Hribar about all seven between November 14th and December 7th. Hanson was not sure when he told Hribar that these two cases were going to arbitration, but he was sure that he had mentioned it during a telephone call. He believed that he might have told Hribar during a telephone conversation four days after the November meeting that, the way things were going, the cases would probably go to arbitration. Hribar was very upset during this conversation, and Hanson speculated that he might not have heard what Hanson was telling him about these two cases.

Hanson agreed that the early December request for additional information on the Amoroso case indicated that a firm decision had not been reached to arbitrate the case. He said he was sure that he told Hribar by phone that the cases were going to arbitration after he received the

additional information. He did not have his telephone logs with him at the hearing, and could not be sure of the date of his December call. The cases were sent to the WERC on December 22nd.

IV. The Positions of the Parties - Arbitrability

A. The Position of the Company on Arbitrability

The Company takes the position that the grievances are untimely, in that the Union failed to appeal them to arbitration in a timely fashion. The discipline against Amoroso was issued on September 28th and grieved on October 12th. Lampton's notice of discipline was dated

October 11th and the grievance was filed on October 31st. A grievance meeting was held on both matters on November 14th, with no indication that the Union intended to file for arbitration. The contract sets a ten day timeline for appealing to arbitration after the grievance meeting, yet the first notice the Company had of the appeal of these matters was in late January when the arbitrator wrote offering dates for a hearing. Clearly the Union failed to take these matters to arbitration within ten days after the grievance meeting, and they are accordingly untimely. Thus, the arbitrator has no jurisdiction, and the grievances should be dismissed.

B. The Position of the Union on Arbitrability

The Union takes the position that the cases were appealed in a timely fashion, and are properly before the arbitrator. Union President Merlin Hanson testified that he made numerous attempts to contact Lee Hribar after the November 14th meeting, and at some point before December 7th succeeded in verbally advising him that the cases were going to arbitration. The Union acted in good faith and with due diligence. Nothing in the contract requires written notice of intent to arbitrate, and Hanson's telephone conversation with Hribar clearly satisfies the contract's timelines. Thus the arbitrator should proceed to the merits of the disputes.

V. Discussion - Arbitrability

The grievance procedure is set forth in Article VII. Section 7.1(C) addresses an appeal to arbitration after the grievance meeting, and Section 7.2 specifies the method for appealing to arbitration:

> C. If no satisfactory agreement is made between the Employer and the Union representative within ten (10) working days after the meeting with the Employer and the Union representative, either party shall have the right to arbitration.
>
> 7.2 - If a grievance is submitted to arbitration in the event the parties are unable to agree upon a mutually acceptable arbitrator, the Employer and the Union shall jointly request the Wisconsin

Employment Relations Commission to appoint a member of their staff to serve as arbitrator.

In the event that the Wisconsin Employment Relations Commission no longer provides members of the Commission's staff to serve as arbitrators, the parties shall request the Federal Mediation and Conciliation Service to submit a list of seven (7) arbitrators.

. . .

Section 7.5 specifies that "time is of the essence" in the grievance procedure, and sets forth the consequences for failing to meet the timelines for grievance processing:

> 7.5 - The failure to exhaust the remedies under the grievance procedure or to abide by the time limits unless expressly waived in writing shall be deemed to be a conclusive waiver of (sic) abandonment of the grievance. Time is of the essence. A grievance settlement at any stage of the grievance procedure shall be final and binding on all parties.

Section 7.1(C) is awkwardly punctuated, in that it can be read as either providing a ten day period after the grievance meeting for settlement, with the right to arbitrate arising after the ten days and remaining open, or as requiring submission to arbitration within ten days after the meeting. However, both parties have approached the clause as having the latter meaning, and the overall structure of the grievance procedure would be inconsistent with the idea of an open-ended right to proceed to arbitration. In particular, a reading of Section 7.1(C) that places no deadline on a demand for arbitration would be completely at odds with the requirement of written waivers of deadlines and the statement that time is of the essence in Section 7.5. Reading the Article as a whole, I conclude that a party seeking arbitration has ten work days after the meeting of the Company and Union representatives at step 2 to make that intention known. 1/

The Step 2 meeting took place on November 14, 1995. Excluding weekends and the Thanksgiving holiday, ten working days after November 14th would have been November 29th. In order for a timely appeal to arbitration, the Union must have communicated its decision in some fashion by November 29th. Hribar denies that the Union ever told him these cases were going to arbitration. Hanson testified that he gave Hribar verbal notification over the phone at some point, although he didn't know when. He testified that it might have been at the November 14th meeting, or during a phone call four days afterwards, or at some other point before December 7th. He testified that he was sure he had also communicated this after receiving Hribar's fax of the pit ticket slips in response to the December 7th letter.

The Union is correct in its argument that the contract does not require any written notice of intent to arbitrate. Verbal notice will suffice. However, giving notice of something verbally, without a confirming letter or some other means of verifying the conversation, leaves open the possibility of this type of dispute. The Company denies that notice was given, and obviously it cannot prove the negative -- i.e. that a conversation about going to arbitration did not take place between November 14th and November 29th. The fact that the Union was still meeting with the grievants and investigating the grievances in early December, five days after the time for

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1/ Clearly the party seeking arbitration does not have to actually file for an arbitrator with the WERC within the ten days. The grievance procedure calls for an attempt at mutual agreement on an arbitrator, and this indicates that actual processing of an arbitration request with the State will take place at some point after the decision to arbitrate is made known to the other party.

demanding arbitration had expired, suggests that a decision to go to arbitration had not been made at that point. 2/ Hanson did not characterize this meeting as a preparation for arbitration, and he agreed that the December 7th letter indicated that there was not a firm decision to arbitrate as of that date. His inability to recall exactly when the decision to arbitrate was made and when he told the Company the cases would be arbitrated makes it virtually impossible to conclude that the demand was made within the ten working day window period. The Union does not bear the burden of proof on the Company's arbitrability claim, but it does bear the burden of refuting the Company's evidence on the issue. The preponderance of the evidence in the record supports the Company's position that the demand for arbitration was not communicated within ten working days after the November 14th meeting.

The arbitrator only has such jurisdiction as the contract bestows on him, and is specifically prohibited from adding to, subtracting from or modifying the collective bargaining agreement in any way. While a decision on the merits is always the preferred result in arbitration, the contract is absolutely clear on the result of a failure to process a grievance in accordance with the time limits. The evidence establishes that the Union failed to advance these grievances to arbitration within ten working days after the meeting between Hribar and Hanson. Accordingly, I find that the grievances are not arbitrable, and must be dismissed.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The grievance of Christopher Lampton, Sr. was not appealed to arbitration in a timely manner.

2. The grievance of Joseph Amoroso was not appealed to arbitration in a

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2/ I cannot treat the Company's response to the December 7th letter as a waiver of the timelines on the Amoroso grievance. Putting aside the Company's claim that the information had already been provided on November 14th, I note that November 29th had already passed at the point at which the request for information was made. The Company was not still actively negotiating with the Union on these grievances, and there was no written waiver of timelines. While the Company did not object to providing the requested information, it is legally obligated to provide such information on demand to the exclusive bargaining representative.

timely manner.

3. The grievances are denied.

Dated at Racine, Wisconsin this 27th day of June, 1996

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator