BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS LOCAL 43 and LLOYD TRANSPORTATION	Case 2 No. 54286 A-9611 Thomas Pancyrz Medical Restrictions

Appearances:

Mr. Merlin Hanson, President, Teamsters Union Local No. 43, 1624 Yout Street, Racine, Wisconsin 53404, appearing on behalf of the Union.

Mr. Jack Lloyd, Post Office Box 129, Pleasant Prairie, Wisconsin 54158, appearing on behalf of Lloyd Transportation.

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 Lloyd Transportation, 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 the eligibility of Thomas Pancyrz to return from disability leave. A hearing was held on September 26, 1996 at the Company's offices. Additional information requested by the arbitrator was received on October 8, 1996. The parties waived closing arguments, and the record was closed.

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. Issue

The issue in this case is:

> Did the Company violate the collective bargaining agreement by refusing to reinstate the grievant to his job as a driver based upon his need to take the prescription anti-coagulant Coumadin during his recovery from open heart surgery and, if so, what is the appropriate remedy? 1/

1/ The grievant indicated at hearing that he was not seeking reinstatement to Lloyd Transportation, as he had taken another job as of February 12, 1996. Thus the remedy question is limited to backpay and credit for service.

II. Relevant Contract Language

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ARTICLE 13 EXAMINATIONS AND IDENTIFICATION FEES

Section 13.1

Physical, mental or other examinations required by a government body or the Employer shall be promptly complied with by all employees, provided, however, the Employer shall pay for all such examinations. The Employer shall not pay for any time spent in the case of applicants for jobs and shall be responsible to other employees only for time spent at the place of examination or examinations, where the time spent by the employee exceeds two (2) hours, and in that case, only for those hours in excess of said two (2). Examinations are to be taken at the employees's (sic) home terminal and are not to exceed one (1) in any one (1) year unless the employee has suffered serious injury or illness during the year. Employees will not be requires (sic) to take examinations during their working hours.

In the case of new hires, the applicant will be responsible for the cost of the initial examinations. Once the applicant has been put to work, he will be reimbursed for the cost of the examination within sixty (60) days. Should the applicant voluntarily terminate his employment within sixty (60) days, he shall pay the cost of his physical examinations.

The Employer reserves the right to select its own medical examiner or physician, and the employee may, if he believes an injustice has been done him, be re-examined at his own expense and by the physician of his choice.

In the event of disagreement between the doctor selected by the Company and the doctor selected by the employee, the Company and the employee doctors shall together select a third doctor within seven (7) days, whose opinion shall be final and binding on the Company, the Union and the employee. The Company, nor the Union, nor the employee will attempt to circumvent the decision. The expense of the third doctor shall be equally divided between the

> Company and the Union. Disputes concerning back pay shall be subject to the grievance procedure.
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> The Employer shall make the necessary appointment with the Medical examiner and shall notify the employee in sufficient time prior to the renewal of the D.O.T. physical. Upon request, the employee shall be allowed a ten (10) hour rest period.
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> If the Employer of (sic) Government Agency requests a regular employee to qualify on equipment requiring a classified or special license, or in the event an employee is required to qualify (recognizing seniority) on such equipment in order to obtain a better job opportunity with his Employer, the Employer shall allow such regular employee the use of the equipment so required in order to take the examination on the employee's own time.
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> Cost of such license required by a Government Agency will be paid for by the employee.

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III. Background

The Company is an affiliate of Quality Carriers, Inc. and Montgomery Tank Lines, Inc. It operates a trucking business in southeastern Wisconsin, hauling liquid freight. The Union is the exclusive bargaining representative for the Company's drivers. The grievant, Thomas Pancyrz, was at all relevant times a driver in the Company's employ. On April 6, 1995, the grievant had open heart surgery at Loyola University Medical Center for an aortic valve replacement. As part of his therapy following the surgery, he is permanently required to take Coumadin, a brand name for warfarin sodium, a prescription anti-coagulant drug. This grievance concerns his fitness to drive while taking coumadin.

Under Department of Transportation rules, drivers must have medical certifications, which must, from time to time, be renewed. In addition, a driver with a current medical certification who suffers an illness or injury which impairs his ability to perform his duties must be recertified before he can begin driving again. The Company's policy on re-certification is that all drivers returning from an injury or an extended illness must be recertified.

On July 11th, the grievant received a return to work authorization from one of his physicians, Dr. Raju:

> NAME: Thomas Pancyrz DATE: 7/11/95

> This is to certify that the above named patient has been under my care for thoracic aneurysm and was totally disabled from 3/31/95 to 7/9/95 and may return to work on 7/10/95 with the following restrictions: NONE.
>
> /s/ N.V.R. Raju, M.D.

The Company would not accept the slip from Dr. Raju, since it did not constitute a re-certification. The Company's physician, Dr. James Foster, examined the grievant for fitness. Somewhat before this examination, Dr. Foster had attended a conference on medical re-certification, during which the effects of anticoagulant drugs were discussed. He learned that there was at least some possibility of hemorrhage and spontaneous collapse for persons using anticoagulants, and that the Department of Transportation discouraged the certification of drivers who were taking these drugs. While his examination did not disclose any problems related to the heart surgery itself, Dr. Foster refused to re-certify the grievant based on his need to take coumadin.

After Foster refused to certify him to drive, the grievant consulted another one of his doctors, Jeffrey Gindorf. Gindorf examined him and, like Raju, wrote a return to work slip:

> TO WHOM IT MAY CONCERN:
> Re: Thomas Pancyrz is able to return to work full duty on 7-9-95.
>
> /s/ Jeffrey Gindorf, M.D. 8-14-95

Dr. Foster and Dr. Gindorf discussed the grievant's case, but were not able to agree on his ability to drive safely. Under the contract, a dispute between an employee's doctor and the Company's doctor is submitted to a third doctor selected by them, and that doctor's conclusion is binding on all parties. Gindorf suggested to Foster that the matter be referred to Dr. Roque Pifare, chairman of Loyola University Medical Center's department of cardiac thoracic surgery. Gindorf had the impression that Foster had agreed to use Pifare, and sent the grievant to see him. Pifare did an out-patient examination of the grievant, reviewed his medical records and issued a return to work slip without restrictions on September 13th.

Dr. Foster was not under the impression that there was a firm agreement with Gindorf to use Pifare as a third doctor, and since Pifare's slip was not technically a medical re-certification, Foster remained unwilling to certify the grievant. His reservations were buttressed by a memo issued by Quality Carriers' director of safety:

> To: ALL AFFILIATES & TERMINAL MANAGERS
> From: Richard W. Carr, ASP, CDC, VP SQE
> Date: September 14, 1995
> Re: Regulatory Criteria for Evaluation Under Section 391.41(b)(4)

> The U.S. Department of Transportation, Office of Motor Carrier Safety has very definite guidelines concerning physical requirements for those individuals who operate commercial motor vehicles in interstate and foreign commerce. One specific area of concern which has recently come to light is the use of anticoagulants by individuals with cardiac problems.
>
> Specifically, the Office of Motor Carrier Safety has referenced a 1986 Cardiac Conference Report (see attached), and through an interpretation of this, finds that individuals taking anticoagulants for cardiac problems cannot be qualified under U.S. Department of Transportation, Office of Motor Carrier Safety regulations. Based upon this information, we cannot and will not accept any driver who is taking anticoagulants.

. . .

In October, the grievant was given a D.O.T. physical by Gindorf, who issued a re-certification of his ability to drive:

> MEDICAL EXAMINER'S CERTIFICATE
>
> I certify that I have examined Thomas Pancyrz in accordance with the Federal Motor Carrier Safety Regulations (49 CFR 391.41 through 391.49) and with knowledge of his/her duties, I find him/her qualified under the regulations including:
>
> _X_ Qualified only when wearing corrective lenses.
>
> A completed examination form for this person is on file in my office.
> /s/ J. Gindorf Expiration date: 7/31/96

Notwithstanding Dr. Gindorf's issuance of the Medical Examiner's Certificate, Dr. Foster remained unwilling to re-certify the grievant or to recommend to the Company that he be allowed to drive.

In an effort to break the deadlock, Company President Jack Lloyd and Union President Merlin Hanson jointly wrote to the Office of Motor Carrier Law in late October seeking some authoritative guidance. They received a reply in mid-December, in the form of a 1991 opinion

letter on another company's driver. That letter stated that the Federal Highway Administration's 1987 Conference on Cardiac Disorders and Commercial Drivers had concluded that the taking of Coumadin created a risk for hemorrhage secondary to trauma and spontaneous bleeding, and should therefore be disqualified. The letter went on to note that: "While that conclusion is not a regulatory prohibition on the use of warfarin sodium, we strongly urge examining physicians to consider and accept the task force's recommendation." At about the same time this letter was received, Montgomery Tank Lines received a letter from its insurance company, advising them that the insurer felt strongly that drivers on Coumadin must not be allowed to drive. This letter was passed along to affiliates, including Lloyd Transportation.

Ultimately, the Union demanded that a third doctor be selected to resolve the dispute, as provided in Article 13 of the contract. Dr. Foster and Dr. Gindorf finally reached agreement on the use of Dr. Pifare as the third physician. Jack Lloyd phoned Pifare and told him that the Company and the Union wanted him to examine the grievant and determine whether he should be re-certified for driving. Lloyd wrote to Pifare on December 20th specifying what was needed:

> Reference to our phone conversation of December 14, 1995, I am forwarding the following documents for your review prior to your scheduling Mr. Thomas Pancyrz for examination for re-certification as an Interstate Truck Driver, handling hazardous and non-hazardous materials.
>
> As mentioned, Mr. Pancyrz has been examined by two (2) other physicians for the same purpose - One which denied Mr. Pancyrz's re-certification due to Cardiac criteria for the use of anti-coagulants, specifically coumadin.
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> The second doctor has re-certified Mr. Pancyrz for re-certification, therefore, due to contractual commitments, a third doctor's opinion is now required in order to determine if Mr. Pancyrz can be re-certified under guidelines and criteria of the U.S. Department of Transportation.
>
> Enclosed, please find copies of the following:
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> 1) Standard D.O.T. Regulations and Protocol to be followed by all physicians performing Certification/Re-certification exams.
> 2) Job Description for Mr. Pancyrz
> 3) Drivers Medical File

4) The FHWA's January 25, 1991 memo addressing coumadin.
5) FHWA's Letter to Diana Gaines, addressing coumadin.
6) 1987 Conference on Cardiac Disorders and Commercial Drivers.
7) 1991 Conference on Pulmonary/Respiratory Disorder and Commercial Drivers

. . .

Pifare did not actually examine the grievant in December, proceeding instead on the basis of the September examination and the medical records. At the end of January, he rendered an opinion, finding that the grievant was medically qualified to resume driving:

> I examined Mr. Tom Pancyrz on August 13, 1995 (sic) in the outpatient clinic. He was released to return to work on August 14, 1995 (sic). 2/

The Company, however, rejected this finding because there was no contemporaneous examination and because it believed that Dr. Pifare might not be unbiased, as one of his associates had been the surgeon in the grievant's heart operation. The Company also noted that Pifare's note was not actually a re-certification under the regulations. Pifare did not respond to efforts by both the Union and the Company to obtain clarification of his opinion, other than an observation by one of his assistants to the effect that the certification form was not provided because Dr. Pifare's practice did not usually extend to doing employment physicals.

A grievance had been filed on the dispute in September, demanding reinstatement and back pay. It had been held in abeyance during the Fall, pending efforts to reach a settlement or get binding guidance from the government. The grievance was heard by the Joint Committee on February 6, 1996. The Committee deadlocked, and the matter was referred to arbitration.

In the summer of 1996, prior to the arbitration hearing, the D.O.T. relaxed its reservations on the use of coumadin, causing Dr. Foster to conclude that the grievant could be recertified if he submitted to and otherwise passed a physical examination and submitted to monthly blood tests. Additional facts, as necessary, will be set forth below.

IV. Discussion

A. The Merits of the Grievance

2/ The dates in Dr. Pifare's note are in error. The grievant's examination and release for work were in September, not August.

The underlying cause of this dispute is the government's refusal to take a clear position on the eligibility of drivers on coumadin for medical certification. Prior to the summer of 1996, the Federal Highway Administration basically refused to say that it would disqualify such drivers, while simultaneously "strongly urging" physicians to accept the task force recommendation that such drivers be disqualified. Given the potential liability flowing from any highway accident, the safety and risk management officials of trucking companies understandably read this as effectively disqualifying a driver. However, the regulations leave the decision to re-certify to individual doctors, and doctors differ on their assessment of the risk posed by coumadin. There is theoretically a method for resolving medical qualification disputes through the Department of Transportation's Office of Motor Carrier Safety, but the correspondence in the record suggests that it is not a meaningful option. These parties requested help in October of 1995, and as of the arbitration hearing in September 1996 had not received any authoritative response.

Absent any binding ruling by the government, the parties are left to the provisions of their collective bargaining agreement. The subject of medical examinations is addressed in Article 13, which states in part:

> ....Examinations are to be taken at the employees's (sic) home terminal and are not to exceed one (1) in any one (1) year unless the employee has suffered serious injury or illness during the year. Employees will not be requires (sic) to take examinations during their working hours.
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> . . .
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> The Employer reserves the right to select its own medical examiner or physician, and the employee may, if he believes an injustice has been done him, be re-examined at his own expense and by the physician of his choice.
>
> In the event of disagreement between the doctor selected by the Company and the doctor selected by the employee, the Company and the employee doctors shall together select a third doctor within seven (7) days, whose opinion shall be final and binding on the Company, the Union and the employee. The Company, nor the Union, nor the employee will attempt to circumvent the decision. The expense of the third doctor shall be equally divided between the Company and the Union. Disputes concerning back pay shall be subject to the grievance procedure.

Here the dispute between Doctors Gindorf and Foster was submitted to Dr. Pifare, who agreed with Gindorf that the grievant could be returned to work. The Company's grounds for

rejecting this opinion were threefold: first, that Pifare relied on the September exam rather than conducting a fresh physical; second, that one of Pifare's colleagues at Loyola was the grievant's heart surgeon and this might compromise his impartiality; and third, that Pifare failed to actually re-certify the grievant.

The Company's complaint that Pifare might have some sort of conflict is not sustainable. There is no logical connection between the initial surgery and the dispute over the grievant's eligibility to be recertified. No one was contending that the surgeon did anything improper or that the surgery was anything but a success. The issue was whether the standard post-operative regimen of anticoagulants affected the grievant's ability to drive safely. Moreover, Dr. Foster knew of the original surgeon's connection to Loyola from the grievant's medical records, and he knew of Dr. Pifare's position with Loyola when he agreed to use him as the third doctor. If he had reservations about Pifare's objectivity he should not have agreed to use him. Thus there does not appear to be a likelihood of any conflict of interest in this case, and even if there had been, the employer waived it by agreeing to use Dr. Pifare with full knowledge of the connection between him and the heart surgeon.

The objection that Pifare did not conduct a second physical exam is, on its face, somewhat more of a problem. On closer review, however, I do not agree with the Company that this invalidates his opinion. The Company is quite correct in asserting that the contract assumes a physical examination by the third doctor before he renders an opinion. Pifare did examine the grievant, albeit in September. That is roughly the same time that Foster and Gindorf conducted their physicals. It does not appear that there was any real disagreement between the results of their examinations, and the issue for Pifare was not so much the actual physical condition of the grievant in December or January as it was the on-going risk posed by the coumadin therapy. 3/ A second examination by Pifare would not have had any particular bearing on his resolution of that issue.

The final objection to Pifare's opinion is that it was not accompanied by a form re-certifying the grievant. Pifare was told that he was to certify the grievant as fit to drive. He

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3/ Dr. Foster's summary of his medical opinion in a letter to the Company on January 29, 1996 focused not on his examination of the grievant, but on the input he had received from various government sources on the effects of coumadin. After reviewing the task force recommendation against certifying persons using the drug, he related conversations he had had with D.O.T. officials, who were "adamant" in opposing certification, and told him that if he certified the grievant, he did so at his own risk: "In view of this, I was uncomfortable releasing Mr. Pancyrz to duty in direct violation of D.O.T. recommendations. Therefore, to date, I have been unable to personally okay his receiving D.O.T. medical clearance."

was briefed on what was required for certification and was provided all of the relevant information on coumadin. From the record, it appears that Pifare is an eminent doctor, acknowledged by both Dr. Foster and Dr. Gindorf as an expert in the field. I cannot simply assume that he failed to review the information he was provided or did not consider all of the criteria before rendering his written opinion that the grievant could return to work. Certainly his failure to submit the requested form complicated matters, but the fact remains that the grievant already had a Medical Examiner's Certificate from Gindorf, and the Pifare's only role under the contract was to resolve the dispute between the other two doctors. His opinion was stated clearly in the January 29th letter, and according to Article 13, that opinion is final and binding on all parties, and may not be circumvented.

I have no doubt that the Company has proceeded in good faith, but the clear language of the contract leaves the ultimate decision on the grievant's return to work to the third physician selected to resolve the dispute. Dr. Pifare rendered an opinion in the grievant's favor, and even though he could have been more responsive to the Company's wishes in terms of the format of that opinion, there is nothing unclear about his report. Thus I conclude that the Company violated the contract by refusing to reinstate the grievant.

B. The Appropriate Remedy

The grievant has waived reinstatement, and the sole questions on remedy are the periods covered by back pay and credit for service. In disputes over medical fitness, Article 13 leaves back pay questions to the grievance procedure. The Company contends that it should not be liable for any back pay, as the refusal to reinstate was based on government action rather than Company discretion. The grievant contends that he is entitled to back pay to July of 1995, when he first sought reinstatement. Neither position is completely correct.

The Company is correct in asserting that it would have no liability if the refusal to reinstate was based on a government edict. The contract cannot be interpreted and applied to force the employer to take an action which would be illegal. However, the Company's claim that it was compelled by the government to deny reinstatement is factually incorrect. While the Company's decision was heavily influenced by the D.O.T.'s pessimistic but non-definitive stance on certifying drivers who were taking coumadin, it cannot be said that it was compelled by the government. The regulations do not prohibit such certification, and Dr. Foster acknowledged that the ultimate decision to certify or not was left to the physician. In the end, the dispute was not between Dr. Gindorf and the government. It was a disagreement between physicians as to the proper interpretation of government guidelines as applied to the grievant's medical condition. I therefore conclude that the Company is not insulated from back pay by government action.

As for the grievant's claim that back pay should extend to July, the Company's refusal to reinstate was based on Dr. Foster's belief that he was not eligible for a medical certificate. Notwithstanding the July opinions of Dr. Raju and Dr. Gindorf that he could return to work, there was nothing to refute Dr. Foster's analysis until Dr. Gindorf issued a Medical Examiner's Certificate on October 6th. Obviously there was a disagreement among the doctors before then, but until one of them was willing to actually sign the required certificate the Company had no basis on which to return to the grievant to the job. Since the grievant could not have been reinstated until the certificate was issued, there can be no back pay liability prior to the point at which the grievant presented the October 6th Medical Examiner's Certificate to the Company.

The remaining question is whether there is any basis for using some later date for the calculation of back pay. The only plausible later date would be the end of January, when Dr. Pifare issued his opinion breaking the deadlock between Dr. Foster and Dr. Gindorf. An argument could be made that this was the point where the Company's liability became clear-cut. This argument is not persuasive, both because of the nature of back pay and because of the language in Article 13. Back pay is compensatory in nature. It results from a violation of the contract, whether intentional or unintentional. It is not a form of punitive damages, and the fact that the Company was acting in good faith does not change the fact that its refusal to reinstate the grievant was mistaken. Moreover, the contract itself does not limit back pay in cases of medical disagreements to the point at which the third doctor renders his opinion. Instead, Article 13 requires the Company to immediately reinstate if the neutral doctor rules against it, and leaves the back pay question to the grievance procedure. Thus there is an assumption in the contract that there is at least some back pay liability prior to issuance of the third doctor's opinion.

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

AWARD

The Company violated the collective bargaining agreement by refusing to reinstate the grievant to his job as a driver based upon his need to take the prescription anti-coagulant Coumadin during his recovery from open heart surgery. The appropriate remedy is to make the grievant whole for his losses by crediting him for service and paying him back pay in the amount of wages lost, less interim earnings, for the period of time starting with his presentation of Dr. Gindorf's Medical Examiner's Certificate authorizing his return to work on or after October 6, 1995, and the date of the hearing in this matter on September 26, 1996.

The arbitrator will retain jurisdiction over this case for a period thirty days from the date of this Award for the sole purpose of clarifying and/or resolving any disputes over the remedy ordered herein, if requested by both parties.

Dated at Racine, Wisconsin this 19th day of November, 1996.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator

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