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 Computation of Remedy

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 at the hearing, and Harvey, Pennington, Hertig & Rennaisen, LTD., Eleven Penn Center, 29th Floor, 1835 Market Street, Philadelphia, PA 19103, by Mr. Christopher J. Murphy, Attorney at Law, appearing on behalf of Lloyd Transportation.

SUPPLEMENTAL 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. The Award was issued on November 19, 1996. In the Award, the undersigned concluded that the Company had not been justified in refusing to reinstate the grievant to employment as of the date on which he presented a medical certification in October of 1995. The parties were directed to meet and confer on the amount of back pay due to the grievant, and the undersigned retained jurisdiction for thirty days to resolve any disputes over the remedy.

The parties contacted the arbitrator in December and asked him to retain jurisdiction for as long as was necessary to resolve the remedy question. In January of 1997, the parties requested a hearing on the remedy question. The hearing was held on February 14th, and the last of the post-hearing submissions was received by the arbitrator on March 8, 1997, whereupon 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 Supplemental Award.

I. Issue

The issue is the proper measure of damages owed to the grievant by reason of the Company's failure to reinstate him to employment.

II. 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 a driver in the Company's employ. The grievant had open heart surgery and a valve replacement in April of 1995. Part of his on-going course of therapy is the use of the anti-coagulant drug Coumadin. When he attempted to return to work for the Company, the Company's physician, Dr. James Foster, would not accept the medical clearance issued by his treating physician, Dr. Jeffrey Gindorf. The basis of the refusal was a concern that Coumadin could cause hemorrhage or spontaneous collapse. The collective bargaining agreement contains a provision for having a third doctor resolve disputes over medical fitness. Drs. Gindorf and Foster selected Dr. Rocque Pifare of Loyola University Medical Center as the third physician.

On September 13, 1995, Dr. Pifare released the grievant to return to work without restrictions. However, Pifare's release did not meet the technical definition of a medical certification under DOT rules. On October 6th, Gindorf issued a DOT Medical Examiner's Certificate, certifying that he had examined the grievant and found him qualified under the regulations. Dr. Foster remained unwilling to recommend that the Company allow him to return to work. Meanwhile, the Company and the Union sought guidance from the Department of Transportation's Office of Motor Carrier Law. However, that office did not provide any definitive answer. A pending grievance was pursued, and in an effort to settle the matter, the Company and the Union agreed to again select a third physician. Drs. Gindorf and Foster once again selected Pifare. Company President Jack Lloyd wrote Pifare, explaining the nature of the parties' dispute and the purpose of the examination. He enclosed all of the relevant information, including the various opinion letters on the use of Coumadin that caused Dr. Foster to recommend against re-employment.

At the end of January, 1996, Pifare submitted a note stating that he had examined the grievant released him for work in September of 1995. The Company rejected this opinion as not adequate, and possibly biased.

On February 13, 1996, the grievant took a job with Transitall Services, Inc. The dispute with Lloyd Transportation was submitted to arbitration.

On June 17th, the Union and the Company reached an agreement that the grievant could be reinstated so long as he passed a physical conducted by an agreed upon cardiologist, and subjected

himself to annual physical exams and monthly blood tests. The grievant indicated to the Union that the settlement was acceptable, but did not contact the Company. On August 12th, Company President Jack Lloyd sent him a certified letter, summarizing the agreement and advising him that he had 72 hours to respond or be considered a voluntary quit. The grievant did not respond.

At the hearing on September 26th, the grievant indicated that he was waiving reinstatement in favor of staying with Transitall. In November of 1996, I issued my Award finding that the Company had violated the collective bargaining agreement:

> 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.
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> 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.

Additional facts, as necessary, will be set forth below.

III. Arguments of the Parties

The grievant seeks approximately $18,000, his estimate of the difference between his earnings with Transitall and what he would have earned with Lloyd for the period from October 6th when he received his medical certification and September 26, 1996 when he waived reinstatement. The grievant argues that he satisfied his duty to mitigate his damages, since he did seek work but was unable to secure many of the driver's jobs he sought because of the Coumadin issue. Moreover, he did not seek some driver's jobs because the Company had assured him periodically that he would be coming back to work within a few weeks and he could not represent to a potential employer that he would be a long term employee.

The Company argues that the backpay period cannot commence before Dr. Pifare's release was received on January 29, 1996. While the arbitrator's interim award suggested that the period should commence in October of 1995 when Gindorf signed a certification, that conclusion is

erroneous and inconsistent with prior interpretations of medical disputes language. Thus the arbitrator should revisit this issue and correctly conclude that January 29th is the earliest possible date for backpay. The latest possible date for calculating backpay is August 19, 1996, when the grievant abandoned his job. The Company notes that it agreed with the Union in June of 1996 that the grievant should return to work. The grievant failed to contact the Company, even after he was notified via an August 12 certified letter that he had 72 hours to inform the Company of his plans or be considered a voluntary quit.

The Company notes that the grievant made no effort to mitigate his damages between October of 1995 and February of 1996 when he went to work for Transitall. Even though the Company demonstrated that there were numerous driving jobs available in the area, he did not seek work until his unemployment compensation benefits were about to run out. No matter what the merits of his claim against the Company, he was required to make reasonable attempts to find work instead of sitting back and attempting to maximize his damages. His failure to mitigate should bar any back pay prior to February of 1996.

Given that the relevant dates are February 12, 1996 through August 19, 1996, the Company asserts that the maximum amount of backpay owed is a gross amount of $1,125.88. This represents his average earnings of $755.36 per week (measured in the six months before his disability), less his average earnings of $715.15 with Transitall.

IV. Discussion

A. The Date for Commencing Backpay

The Company asserts that the portion of the Award setting October 6th as the date on which the Company's backpay liability begins is wrong when read in light of the outcome in a similar medical disqualification case. In Local Union No. 175 and Chemical Leaman Tank Lines, Inc. (Case No. 1885, 2/75) the Eastern Area Tank Haul Committee denied a grievance claiming backpay for the period between January 9, 1975, the date of a disputed medical disqualification and January 27, 1995, the date of the third doctor's opinion reinstating the grievant. While there is certainly a difference in the results between this case and Case 1885, I note that there is no rationale stated for the Joint Committee's decision in that case, and thus it is impossible to know what the reason for the difference might be. 1/ Even if a full and persuasive rationale

1/ In contrast, see the discussion of Shahmoon Industries, AAA Case No. 19-8 (Hogan, 1960) in Fairweather, Practice and Procedure in Labor Arbitration (BNA, 1983) at page 516, wherein the arbitrator found that liability in medical disqualification cases would run from the point at which the employee's doctor rendered a medical opinion contrary to that of the Company's doctor.

accompanied that decision, however, the date of commencement for backpay in this case has already been decided based upon the evidence and the arguments presented at the initial hearing.

I cannot agree with the Company's argument that the November 1996 Award was an interim award on the issue of when backpay liability commenced, subject to reconsideration and revision. On the contrary, the period on which backpay should commence was specifically addressed and answered in the Award. The issues before the arbitrator were twofold: first the substantive question of whether there was a contract violation and, if so, what would be the appropriate remedy. The Award concluded that there was a violation, and specified the periods encompassing the backpay liability:

> 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*. [Emphasis added]

While jurisdiction was retained, it was retained solely for the purpose of clarifying the remedy or resolving disputes over the remedy:

> 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.

There is nothing unclear about this portion of the remedial order. The Company simply wants the arbitrator to change his mind about when the contract violation took place. The arbitrator's retention of jurisdiction was for very limited purposes, and reconsidering the date on which liability attached is not within the scope of that retained jurisdiction. Thus, under the doctrine of functus officio, I conclude that I am without authority to modify the substance of the November Award.

B. The Date for Terminating Backpay

The grievant waived reinstatement at the September 26th hearing because he elected to stay

with his new employer, Transitall. The November Award directed that the period of backpay liability should therefore run through September 26th. The Company asserts that its liability should terminate as of August 19th because the grievant failed to respond to an offer of reinstatement which set a deadline expiring on that date. Unlike the argument for a later beginning date for backpay liability, this issue is within the retained jurisdiction of the arbitrator. While the argument over the commencement of backpay goes to the Company's liability for the contract violation, which was fully addressed in the November Award, the August letter presents a factual question as to whether an action of the grievant reduces or eliminates the backpay obligation for a portion of that period. 2/ In the same sense that a failure to mitigate damages otherwise owing is fairly included in the scope of the retained jurisdiction to "resolve disputes over the remedy", the question of whether the grievant voluntarily resigned his employment before the September hearing is properly a dispute over the computation of the remedy ordered, rather than an attempt to relitigate the basis for the liability.

2/ The August letter was included in the exhibits placed before the arbitrator at the September 26th hearing, but no testimony was presented about the issue at that time, and no arguments were made about its relevance.

I conclude that the grievant did voluntarily resign in August. At the hearing on the remedy, the grievant was not able to explain his failure to reply to Lloyd's letter, other than to express frustration with having to take yet another physical examination. His frustration is understandable, but the fact remains that he knew he would pass the physical and be reinstated to work. The conditions set in the letter were not unreasonable under all of the circumstances, and the grievant's refusal to even respond to Lloyd when he knew of the terms of the offer for two months, had at least tentatively indicated agreement, and had been clearly warned that a failure to contact the Company would constitute a voluntary quit all persuade the arbitrator that there can be no award of backpay for the period from August 19th through September 26th. 3/

C. Duty to Mitigate Between October 6th and February 13th

An award of backpay is generally understood to carry with it a duty to mitigate economic loss. A person who is discharged is not entitled to simply sit back and let damages accumulate without taking reasonable steps to find and keep suitable alternate employment. In this case, the grievant was unemployed until he started with Transitall on February 13th. The Company contends that there were plenty of driver jobs available in the area and that the grievant waited until his unemployment benefits were nearly exhausted to seek work. The grievant asserts that he was repeatedly told by Company officials that his reinstatement was only a couple of weeks away, so he could not honestly present himself as a candidate for a permanent position with another company. He also testified that he applied for a number of driving jobs and a job at McDonalds, but that these potential employers were put off when he explained that he had been medically disqualified from his previous job.

The Company bears the burden of proving that there were substantially equivalent jobs available for which the grievant was qualified, and that he failed to make reasonably diligent efforts to find employment. As to the first portion of this test, the Company has demonstrated that there were driving jobs available in the area during the months of October through February. It is difficult, however, to flatly state that the grievant could be considered qualified for most of these jobs. It is somewhat disingenuous for the Company on the one hand to vigorously assert during the initial phase of this proceeding that the grievant was not medically fit to be a driver, and then on the other hand express surprise in the remedial phase that he did not find work as a driver with someone else. The coumadin issue was anything but clear-cut, and the Award against the Company was not premised on any finding of bad faith. There was a legitimate question as to the grievant's fitness to drive and although I have concluded that the Company erred in not reinstating him, the very fact of his medical disqualification would have materially diminished his prospects for interim employment with another trucking firm. This does not completely relieve him of his obligation to seek equivalent work, but it does serve to substantially narrow the set of likely

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3/ Even if the failure to respond by August 19th did not constitute a voluntary quit, it would clearly constitute a failure to reasonably mitigate the damages after that date.

employers and make more understandable the four month lapse of time between receiving his medical certification and finding another driving job. It also makes more credible his claim that he did seek driving jobs, but was rejected because of uncertainty about his medical qualifications.

The grievant testified that Company officials assured him on several occasions that the dispute would be resolved and he would be returned to work within a few weeks. The Company's counsel dismisses this as an increasingly unrealistic belief as time passed and the Company's refusal to reinstate him continued. However, counsel was not present for the hearing, and no one from the Company denied the statements attributed to them by the grievant. The Company cannot plausibly argue that its liability should be reduced on the grounds that the grievant was a fool for believing the statements of Company officials. Moreover, the grievant could reasonably have believed that some resolution of this dispute was imminent throughout the period from October through the end of January. The evidence shows that the Company and the Union were engaged in efforts to resolve this case on a continuing basis throughout that time, ending when Pifare issued his January 29th opinion that the grievant was medically fit to drive, and the Company rejected his finding. In that time the parties first jointly wrote to the DOT for guidance in late October, and received an unhelpful reply in mid-December. They then promptly agreed on the use of Pifare, and forwarded information to him to inform his judgment on the coumadin issue. It was not until the Company rejected Pifare's opinion at the end of January that it became clear there would be no voluntary resolution of the case. At each step, the hoped-for response took longer than anticipated and did not resolve the issue, but that was not the grievant's doing. 4/ Thus, it is not so unlikely as the Company now claims that the grievant could have believed he would shortly be returned to work.

Whether an individual has made a reasonably diligent effort to mitigate his damages is an issue of fact, and it turns on the circumstances of each individual case. In this case, I find the grievant's claim that he did not vigorously pursue other permanent employment because of the Company's representation that he would return to work in the near future to be plausible, at least through the end of January. I also find that the pool of available jobs was much smaller than the Company suggests, owing to the understandable reluctance of other companies to take on a driver who had been judged an unacceptable liability risk by his previous employer. I therefore conclude that, while the grievant's testimony was vague as to the applications he submitted, the Company has not established that his failure to find other employment from October 6th until February 13th was due to a lack of due diligence on his part.

D. The Proper Measure of Damages

4/ Nor, clearly, was it the fault of the Company or the Union. As noted in the November Award, this case was marked by good faith efforts by all parties to get some clear answer on the coumadin issue, continuing at least until the end of January.

The grievant claims that the proper measure of damages is the average earned by the driver above him on the seniority list and the driver below him on the list for the period he was off work, less unemployment compensation and interim earnings. He estimates the average earnings to have been approximately $45,000 over an eleven month period, or $895 per week. The Company correctly argues that the better measure of lost gross earnings is the amount he earned on a weekly basis in the six months preceding his surgery, an average of $755.36 per week. This figure is more reliable than the grievant's estimate because the Company did not replace him, and thus the earnings of other drivers were inflated in comparison to what would have been paid if they had been fully staffed.

The grievant's unemployment compensation amounted to $266.00 per week. The grievant's average weekly earnings at Transitall from February 12th through September 30th were $715.15 per week, or $40.21 less than he was making at Lloyd. The appropriate calculation of damages is therefore:

October 6 - February 12:	$755.36 x 18 =	$ 13,596.48
February 12 - August 19:	$ 40.21 x 27 =	$ 1,085.67
		$ 14,682.15
Less Unemployment		
Compensation - 10/6 - 2/12:	$266.00 x 18 =	$ 4,788.00
Total Due		$ 9,894.15

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

SUPPLEMENTAL AWARD

The Company is ordered to immediately pay to the grievant the amount of $9,894.15, subject to normal tax withholding, as back pay.

Dated at Racine, Wisconsin this 9th day of June, 1997.

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