BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

TEAMSTERS, LOCAL NO. 75

and

THE VILLAGE OF ALLOUEZ

Case 37
No. 52884
MA-9137

Appearances:

Mr. David J. Condon, Attorney at Law, 801 East Walnut Street, P.O. Box 1656, Green Bay, Wisconsin 54305-1656, appeared on behalf of the Village.

Mr. Scott D. Soldon, and Ms. Suzanne J. Weslow, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

SUPPLEMENTAL ARBITRATION AWARD

On July 18, 1996, the undersigned issued a grievance arbitration award involving the captioned parties, which sustained a grievance protesting the discharge of employe B.K. The issue stipulated in that proceeding was as follows:

ISSUE

> Was there just cause for the unpaid suspension beginning July 11, and subsequent discharge? If not, what is the appropriate remedy?

The Award sustained the grievance and directed the following remedy:

> This discharge is reduced to a 30-calendar day unpaid suspension. The Employer is directed to reinstate the grievant and, with the exception of the 30-day suspension, to make him whole for losses incurred due to the discharge. Such make-whole relief includes compensation for regularly-scheduled straight time wages lost, benefits, and seniority. The Employer is directed to change the grievant's work record to reflect a 30-day suspension. The Employer is entitled to offset its liability by any interim earnings or unemployment compensation monies, if any, received by the grievant.

> I will retain jurisdiction over this matter for a period of 30 calendar days to resolve any disputes as to the remedy.

PROCEDURAL BACKGROUND

On August 15, 1996, counsel for the Union requested, in writing, that I extend my jurisdiction. On August 19, 1996, I sent both parties the following letter:

> This is to acknowledge receipt of your August 15, 1996 fax requesting that I retain jurisdiction over this matter, and to confirm that I will retain jurisdiction for purposes of resolving disputes as to remedy. I am available for hearing on October 16 or 24, and November 12. Please confirm a date, if a hearing is necessary.

On October 22, 1996, I sent the parties the following letter:

> This is to advise you that I am not holding dates for hearing on this matter. I will continue to retain jurisdiction until you advise me to the contrary.

On January 14, 1997, counsel for the Employer submitted the following letter:

> You may recall that you arbitrated the dispute referenced above and rendered your decision July 18, 1996. In your letter of October 22, 1996, you indicated that you would retain jurisdiction over this matter until you are advised to the contrary by Local No. 75 or the Village. You have not been notified by either of us, and therefore I am assuming you still claim jurisdiction.
>
> A problem has arisen because your stated remedy is that the Employer is directed to make the employe whole for losses incurred due to the discharge. The employe is now claiming that under your decision he is entitled to the following:
>
> [text deleted]
>
> . . .
>
> As you know, arbitration is purely a matter of contract, and you are entitled to decide only those matters which the parties have agreed to arbitrate. There is no agreement between the parties that any of the above matters be arbitrated. In addition, the last item,

Overtime, is a matter which was not presented during the arbitration and is too speculative to be the basis of an award.

I believe this matter can be appropriately and quickly resolved by your clarifying the language in the Remedy section of your decision. I would appreciate it if you could give this your immediate attention.

Very truly yours,

David J. Condon /s/
David J. Condon

On January 21, 1997, counsel for the Union forwarded the following letter:

Dear Mr. Houlihan:

You arbitrated the above-referenced dispute and issued your decision on July 18, 1996, ordering that "the Employer is directed to. . .make him whole for losses incurred due to the discharge." Later, at our request, you confirmed that you would retain jurisdiction for purposes of resolving disputes as to remedy.

The parties have been unable to agree upon the appropriate remedy with regard to certain matters.

More specifically, Mr. K. incurred the following losses as a result of the discharge:

[text deleted]

. . .

We believe that this dispute can be resolved by the receipt of submissions from both parties, rather than through hearing. Attorney Condon agreed to such a procedure in November, 1996. Therefore, we request the opportunity to document and explain each loss and suggest that you set a schedule for transmittal of submissions in the near future, perhaps followed by oral argument via conference call.

Thank you for your prompt attention to this matter.

Scott D. Soldon /s/
Suzanne J. Weslow /s/

Scott D. Soldon
Suzanne J. Weslow

I responded to the letters from counsel by letter dated January 23, 1997, which provided as follows:

> Dear Mr. Soldon and Mr. Condon:
>
> It is my understanding, from your separate letters, that each of you seek to have me indicate whether or not the remedy directed in this matter includes the various items listed in both letters. If my understanding is in error, please so indicate.
>
> If you have agreed to a specific procedure, outline it to me and I will accommodate your schedule. If there is no agreed upon procedure, I would suggest that the union submit the documents and argument it believes support its backpay claim to me and to the Employer, postmarked by February 17, 1997. I would suggest an Employer response postmarked by March 10 or 14 calendar days following receipt of the union's submission, whichever is earlier. Any Union reply should be postmarked no more than 5 days following receipt of the Employer submission. If you regard further argument to be appropriate, indicate your view at the appropriate time.
>
> Sincerely,
>
> William C. Houlihan /s/
> William C. Houlihan
> Arbitrator

On January 31, 1997, Mr. Condon replied as follows:

> Dear Mr. Houlihan:
>
> Your letter of January 23, 1997 has been received. The Village and the Union have not agreed on any specific procedure, and therefore your suggestion as to procedure is acceptable.

> However, there is also the issue of your jurisdiction to arbitrate a claim for items which are not wages and hours. Please see my letter to you of January 14, 1997. The Village of Allouez is not waiving any of its rights by requesting clarification of your earlier decision, and is not agreeing that any of the claims now being submitted by the Union for K. are properly the subject of arbitration under the collective bargaining agreement. We have merely asked for your clarification of the remedy that you have proposed in your decision.
>
> Because of this, I am presuming that Mr. Soldon will also wish to address this issue as part of the argument he submits.
>
> Very truly yours,
>
> David J. Condon /s/
> David J. Condon

The parties declined an evidentiary hearing, and opted to submit evidence and argument by written submission. The Union filed a brief, with accompanying attachments, which was received on February 14, 1997. The Employer submitted a letter brief received on March 10, 1997. The Union submitted a responsive letter, received March 18, 1997.

POSITIONS OF THE PARTIES

In its initial brief, the Union claimed that the Village owed the grievant $555 in health insurance monies. The claim was subsequently withdrawn.

The Union contends that the grievant is owed $3,417.47 in lost overtime/premium pay earnings. In essence, the Union's claim is predicated upon the earnings of an employe junior to the grievant. The Union contends that but for the grievant's discharge, those overtime opportunities would have been available to the grievant, and he would have availed himself of them. Additionally, the Union contends that the grievant was scheduled, for the first time, to receive his own snowplow route. The Union contends that the grievant is owed $564 as penalty for his early withdrawal from the Wisconsin Retirement Fund, $1,433.57 as State taxes paid on his early withdrawal from the WRF, and $3,416 as Federal taxes on his early withdrawal from the WRF. The Union contends that the grievant withdrew monies from his retirement account in order to meet the ongoing financial needs of his family.

Finally, the Union contends that the grievant is owed $446.56 interest incurred on late car

loan payments. The Union contends that the grievant had historically made his automobile payments timely, and that it was only as a result of his termination that his financial circumstance was such that he missed payments.

The Union contends that my jurisdiction arises from the contract and has been specifically renewed by the parties for purposes of deciding remedy issues. The Union goes on to cite arbitral authority that make whole relief involves placing a grievant in exactly the same position financially he would have been had the discharge not occurred.

It is the position of the Village that there exists no agreement between the parties that any of the claims now being made were to be submitted to arbitration, with the exception of overtime. However, that claim is too speculative to be the basis of an award. The Village contends that arbitration is purely a matter of contract; and that my jurisdiction is limited to those matters which the parties have agreed to arbitrate. The Village specifically reserves its right to seek judicial determination as to whether or not my remedy exceeds the jurisdiction conferred. The Employer cites the Agreement provision in the parties' contract, and contends that the purpose of the Agreement is to adjust workplace grievances between the Employer and the Union, and not private claims of an employe against the employer. Similarly, the Employer points to the purpose of the Agreement as addressing wages, hours and working conditions, and not to address other issues for which an employe may have a pretended claim. Similarly, the Employer notes that the grievance procedure is limited to an interpretation of the terms and conditions of the Agreement. The Employer cites Joint School District No. 10, City of Jefferson Education Association, 78 Wis. 2d. 94, 101, 253 N.W. 2d 536 (1977) for the propositions that arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that party has not agreed to submit, and for the further premise that an arbitrator cannot be the judge of the scope of his authority under the contract.

With respect to the substantive disputes, the Employer makes arguments relative to the health insurance premium claims. They are not set forth in this Award, given the subsequent withdrawal of those claims by the Union.

With respect to overtime pay, the Employer contends that the less senior employe was not the grievant's replacement, and that the grievant's work history does not warrant overtime pay as claimed. The Employer contends that the junior employe's overtime has been consistent over the last three years whether or not the grievant was on the payroll.

With respect to the Wisconsin Retirement Fund claims, the Employer contends that the grievant voluntarily withdrew his retirement monies from the fund. The Employer argues that it is unreasonable that it be expected to pay taxes and penalties incurred solely because of the acts of an employe.

With respect to the late car loan payments, the Employer contends that the grievant had

interim wage earnings and that his spouse was employed. The Employer contends that it is not responsible for late charges and penalties relating to his automobile payments.

Finally, the Village contends that it has never agreed to arbitrate matters beyond the scope of the labor agreement, or to ask the Arbitrator to decide matters which were not properly submitted at the arbitration hearing, or which are so speculative that an arbitrator cannot decide them on the basis of facts submitted, or which have not been properly presented as evidence with opportunity for an opposing party to cross-examine a witness or contest the nature and amount.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

AGREEMENT

This Agreement has been made and entered into between the Village of Allouez, hereinafter referred to as the Employer and Drivers, Warehouse, Dairy Employees Union, Local No. 75, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, for the purpose of maintaining harmonious labor relations and to maintain a uniform minimum scale of wages, hours and working conditions among the employes of the Village of Allouez Departments of Public Works, and Park Maintenance, and to facilitate a peaceful adjustment of all grievances and disputes which may arise between the Employer and the Union.

Article 2. Management Rights.

This Article to be effective January 1, 1995. Except as otherwise provided in this Agreement or as may affect the wages and hours and working conditions of employes, the Union recognizes that the management of the Village is vested exclusively in the Employer. All power, rights, authority and responsibilities customarily executed solely by management are hereby retained. Such rights include, but are not limited to the following:

. . .

D. To discipline or discharge employes for just cause . . .

Article 16. Grievance Procedure

16.1 Definition: Any dispute which may arise from an employe or Union complaint with respect to the interpretation of the terms and conditions of this Agreement shall be subject to the following grievance procedure, unless expressly excluded from such procedure by the terms of this Agreement. Time limits may be extended by mutual agreement between the parties. The Union shall have the right to be present at all steps of the grievance procedure.

. . .

16.2 Procedure:

. . .

Step 3: If a satisfactory settlement is not reached in Step 2, the Union may serve written notice upon the Village within ten (10) days of receipt of decision in Step 2 that the grievance shall be arbitrated. Within seven (7) days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within ten (10) days following said notice of arbitration, the Union shall request the Wisconsin Employment Relations Commission to assign a single arbitrator from among the following staff members:

William Houlihan
Lionel Crowley
David Shaw
Richard McLaughlin
Amedeo Greco

The decision of the arbitrator shall be final and binding upon the parties.

. . .

Article 17. Discharge

17.1 The Employer, through the appropriate supervisor (department head or other non-unit supervisor) shall not discharge or suspend any employe without just cause. The Employer shall give at least one warning notice to an employe in writing, with a copy to the Union. No such warning need be provided before an employe is discharged due to dishonesty, being under the influence of intoxicating beverages while on duty, illegal use of controlled substances or other flagrant violations. The warning notice provided herein shall not remain in effect for a period of more than nine months from the date of said warning. Discharge or suspension shall be in writing, with a copy to the Union and to the employe affected.

. . .

17.3 The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Failure to agree shall be cause for the issue be submitted to arbitration as provided for in Article 16 of this Agreement.

. . .

17.4 Should it be found that the Employe has been unjustly discharged or suspended, he/she shall be reinstated and compensated for all time lost, except as otherwise determined by agreement between the Employer and the Union or by discretion of the impartial arbitrator.

. . .

DISCUSSION

The threshold issue in this proceeding is the scope of jurisdiction I possess to fashion a remedy. My jurisdiction was originally conferred by these parties in this collective bargaining agreement. That jurisdiction has not been relinquished. Article 16 of the parties' collective bargaining agreement submits any dispute with respect to the interpretation of the terms and conditions of the agreement to the grievance procedure, unless that matter is expressly excluded from such procedure. The parties used expansive terms in defining that which was subject to the grievance procedure, subject to precise and narrow exclusions.

To be subject to the grievance procedure, a matter must draw its essence from some provision of the Agreement. Under Article 17, an employe is entitled to keep his or her job absent just cause for termination. In this proceeding, it was determined that the Employer lacked cause, and that the employe was entitled to a restoration of his job. Article 17.04 directs that a reinstated employe be "compensated for all time lost" unless otherwise determined by the parties, or by "discretion of the impartial arbitrator". The question posed by the Employer's jurisdictional defense is whether or not the claims submitted by the Union constitute compensation within the meaning of Article 17.04.

In this dispute, it was my judgment that the employe was properly reinstated. I exercised discretion conferred within Article 17.04 to award less than full backpay. This grievant was subjected to a 30-day suspension, and his backpay was limited to "regularly-scheduled straight time wages lost, benefits, and seniority." Neither party takes issue with this exercise of jurisdiction. The parties' stipulation of the original issue, set forth above, which frames a portion

of my jurisdiction, is open-ended. It is also made in the context of the parties' labor agreement, which speaks in expansive terms with respect to the scope of the grievance procedure.

I do not believe there exists a jurisdictional limitation to my deciding the matters presented in this proceeding. The Employer cites the Joint School District No. 10, City of Jefferson case as limiting the jurisdiction in this proceeding. Jefferson does contain certain jurisdictional limitations, however, none are applicable in this proceeding. The parties to this Agreement have created a grievance procedure to handle disputes over the terms of the Agreement. Disputes, other than those expressly excluded, are subject to the grievance procedure and to arbitration. The parties have agreed that the arbitrators shall be drawn from a narrow list of Wisconsin Employment Relations Commission members, of whom I am one. The parties have explicitly agreed that there is a "just cause" standard applicable to discharge cases and have, in Article 17.03, explicitly agreed that disputes as to the existence of cause are arbitrable. In Article 17.04, these parties have explicitly agreed a reinstated employe is eligible for compensation for all time lost, and have explicitly conferred upon their selected arbitrator a level of discretion. It is in that context that the parties posted the open-ended question for my consideration: ". . .What is the appropriate remedy?"

What is in dispute in this proceeding is the meaning of the parties' collective bargaining agreement. Specifically, whether or not the scope of remedial authority in the contract, or the stipulations of the parties, confers upon me the discretion to award certain remedies. That is to say, whether or not the health insurance, overtime pay, Wisconsin Retirement Fund penalty and taxes, and the interest on a car loan taken, fall within the meaning of the terms of the contract, or the stipulation. That dispute hardly rises to the level of a jurisdictional claim. Rather, it constitutes no more or less than a garden variety dispute as to the meaning of the words of the Agreement.

In its post-hearing brief, the Village implies that there are alternative forums in which to litigate these claims. The Jefferson court, noting the strong Wisconsin legislative policy favoring arbitration, adopted the federal presumption of arbitrability found in the Steelworkers' Trilogy. That presumption, coupled with the presumption of exclusivity of the grievance procedure (See, Mahnke v. Wisconsin Employment Relations Commission, 66 Wis. 2d. 524, 1975) urge that these discharge-related claims be addressed in this proceeding.

In its post-hearing brief, the Employer objects to an arbitral decision relative to matters which have "not been properly presented as evidence with opportunity for an opposing party to cross-examine a witness or contest the nature and amount." The parties were well aware of the scope of this dispute as they contemplated the format in which this case would be decided. Initially, dates were requested, and provided, for a hearing. These parties stipulated that a hearing was not necessary and that this dispute would be decided upon written submissions. They thereafter proceeded in that fashion. The Village is not now free to contend that the procedure to which it agreed pre-empts consideration of the Union's entire case.

I do not believe the grievant is entitled to further relief. The initial item in dispute was health insurance premium costs. By its March 17 post-hearing brief, the Union withdrew its claim in this area. In light of the withdrawal of the issue, there is nothing for me to decide. The second issue in dispute relates to lost overtime pay and earnings. The remedy portion of the original award is limited to "regularly-scheduled straight time wages lost . . ." This reflected a conscious decision to limit the remedy to straight-time wages, and to exclude potential overtime earnings. The grievant was reinstated. However, he was not without fault. The grievant's behavior appropriately subjected him to some level of discipline. The award acknowledges that. I believe that the overtime pay dispute between these parties has already been addressed by the remedy portion of the original Award. I would not modify that provision.

I believe that the penalty and taxes attendant to an early withdrawal from the Wisconsin Retirement Fund are too remote from the provisions of the collective bargaining agreement to be considered automatic components of make-whole relief. The Employer is right when it argues that the act of withdrawing funds from the retirement account was a discretionary act. The Employer is also right when it argues that there is no factual record which supports the inevitability, and necessity of such a withdrawal.

I am asked to find that the emptying of a retirement account is the inevitable consequence of the discharge. I am unwilling to so find. The grievant was under an obligation to mitigate his losses. The record is silent on this matter, and I am not prepared to create hard and fast rules without a factual underpinning.

Similarly, the fact that the grievant missed car loan payments, and incurred interest, is too removed from the components of his contractual compensation package to be automatically included as a portion of the remedy in this proceeding.

I do not believe there is a basis in this record to order further relief.

Dated at Madison, Wisconsin, this 12th day of August, 1997.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator