BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS "GENERAL" LOCAL UNION NO. 200

and

THE TEWS COMPANY

Case 25
No. 55399
A-5599

(Robert DeGroot Discharge Remedy)

Appearances:

Ms. Andrea Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

Mr. Ron Loesch, Director, Human Resources, Redland Genstar, Inc., a subsidiary of Lafarge Corporation, 300 East Joppa Road, Suite 200, Towson, Maryland 21286, appeared on behalf of the Company.

SUPPLEMENTAL ARBITRATION AWARD

On May 8, 1998, I issued an Arbitration Award resolving the Robert DeGroot discharge grievance between Teamsters "General" Local Union No. 200 and The Tews Company. I sustained the grievance. The "Award" section of the decision provided as follows:

> Grievant DeGroot was not terminated for just cause. For the reasons set forth above, his termination for failing to clock out for four follow-up doctor appointments is set aside and is reduced to a written warning. The Company is directed to reinstate DeGroot with no loss of seniority and to make him whole for lost wages and benefits less any interim earnings. The undersigned will retain jurisdiction for at least sixty (60) days from the date of this Award solely for the purpose of resolving any dispute with respect to the remedy herein.

On July 29, 1998, the Union notified me that the parties "were unable to agree on the calculation of backpay" for DeGroot and asked me to convene a hearing to take evidence on same. A hearing on this backpay dispute was held on September 18, 1998 in Milwaukee, Wisconsin. Afterwards, the parties filed briefs whereupon the record was closed on October 14, 1998. Based on the entire record, the undersigned issues the following Supplemental Arbitration Award.

ISSUE

The parties did not stipulate to the issue to be decided in this case. Having reviewed the record and arguments of the parties, the undersigned finds the following issue appropriate for purposes of deciding this dispute:

What is the amount of backpay owed to DeGroot by the Company?

FACTS

The Company's business is seasonal and employes' hours fluctuate. The available work is parsed out to employes based on their seniority.

Each December, bargaining unit employes have the opportunity to bid on their classification. There are four classifications, two of which are known as building materials and ready-mix. Employes do not have to change their classification each year but can do so if they wish. When DeGroot was fired on November 27, 1996, he was in the building materials classification. DeGroot asserts that had he not been fired in November of 1996, he would have bid into a different classification in December of 1996 (specifically, the ready mix classification). The basis for this assertion is as follows.

For background purposes, it is noted that in late November, 1996, the Company permanently closed its North Milwaukee yard. This yard closure resulted in a series of bumps as the employes at the closed yard moved to the Company's other yards. One employe from the closed yard bumped John Stroud who then worked at the West Allis yard. Stroud, in turn, exercised his master seniority and moved from the West Allis yard to the Oak Creek yard. Once at the Oak Creek yard, Stroud again exercised his seniority and moved from the ready-mix classification to the building materials classification. Stroud has a master seniority date of June 6, 1978 and DeGroot has a master seniority date of May 27, 1987. Since Stroud has more seniority than DeGroot, Stroud was placed higher than DeGroot on the Oak Creek yard building materials seniority list. Thus, Stroud's bump into the building materials classification at the Oak Creek yard had the practical effect of reducing DeGroot's relative seniority in that classification at that yard. Specifically, if DeGroot had stayed in the building materials

classification at the Oak Creek yard, he would have gone from being the third driver to the fourth driver because Stroud became the third driver. This drop, in turn, would have reduced both DeGroot's ability to secure work and his income because work is parsed out to employes based on their seniority. Thus, given Stroud's movement into the building materials classification in the Oak Creek yard, DeGroot would have suffered a loss of income had he stayed there (i.e. in the building materials classification at the Oak Creek yard). If DeGroot had bid into the ready-mix classification at the Oak Creek yard, he would have displaced ready-mix driver Gary Boldt. Boldt has a master seniority date of June 29, 1987. Since DeGroot's seniority date is May 27, 1987, DeGroot has more seniority than Boldt.

Following the arbitrator's award, the Company reinstated DeGroot on May 18, 1998. When the Company reinstated DeGroot, he was placed in the building materials classification (which, as previously noted, is the classification DeGroot was in when he was discharged). When DeGroot was reinstated, he bumped building materials driver Scott Metcalf.

The Company proposes that DeGroot's backpay be based on the wages and hours of Scott Metcalf (who, as just noted, worked as a building materials driver and was the employe bumped by DeGroot when DeGroot was reinstated). Metcalf has a seniority date of May 3, 1995.

At the hearing, the Company offered an exhibit (Company Exhibit 1) entitled "Scott Metcalf Hours Worked – Building Materials". This exhibit lists the hours worked by Metcalf on a weekly basis from December 1, 1996 through May 17, 1998 and states that the Company paid Metcalf $25,991.59 in wages during that period. This document contains a five-month gap because the entry for the week of December 29, 1996 is followed by the entry for the week of June 8, 1997. Company Vice-President David Ferron testified there were two possible theories for this five-month gap: either Metcalf was laid off during that period or he worked in another division in the Company. If the latter occurred, then Metcalf's total earnings from the Company for the time period between December 1, 1996 and May 17, 1998 are not listed on Company Exhibit 1.

In their post-hearing brief, the Company revised the exhibit referenced above. Their stated reason for doing so was as follows: "At the hearing, the Company recognized that this summary did not contain all of the hours worked by Mr. Metcalf during the period under examination, since it did not include the hours he worked in other job classifications outside of his primary classification of Building Materials." The revised Company Exhibit 1 purports to show Metcalf's total earnings from the Company for the time period between December 1, 1996 and May 17, 1998. This exhibit states that the Company paid Metcalf $31,434.97 in total wages during that period.

The Union proposes that DeGroot's backpay be based on the wages and hours of Gary Boldt. As previously noted, Boldt is a ready mix worker who has a master seniority date of June 29, 1987. Although the Company did not supply the exact figures to the Union, the Union believes Boldt was paid $1901 in wages between November 27 and December 31, 1996. The record indicates the Company paid Boldt $32,067.35 in wages in calendar year 1997. The record further indicates the Company paid Boldt $10,032.10 in wages from January 1 through May 31, 1998. After tabulating these figures from 1996, 1997 and 1998, the Union avers that Boldt was paid $44,000 in wages during the time period that DeGroot was off work (i.e. November 27, 1996 through May 17, 1998). The record also indicates that Boldt was laid off for a portion of the time period just referenced, and that he received unemployment compensation from the State of Wisconsin during that period which totaled $3,284.

The record indicates that in the 11 months prior to his termination on November 27, 1996, the Company paid DeGroot $24,752 in wages.

In the 18-month period between his discharge and his reinstatement, DeGroot had the following interim earnings. First, he received unemployment compensation from the State of Wisconsin in the years 1996 and 1997 which totaled $5,918.97. Second, he earned $4,213 from New Berlin Ready-Mix Company in 1997. When these two figures are tabulated, the total is $10,131.97. The Company's figure for DeGroot's interim earnings is close to the figure just identified, but not identical. The Company puts the figure at $10,132.41. It is unclear from the record why this discrepancy between these two figures exists.

At the hearing, the Company proposed that the figure of $25,991.59 (Metcalf's wages as shown on Company Exhibit 1) be offset by DeGroot's interim earnings (as previously noted, the Company uses the figure of $10,132.41). The difference between these two amounts is $15,859.18. The Company thus proposed at the hearing that DeGroot be paid $15,859.18 in backpay, less taxes.

In their post-hearing brief, the Company proposed that the figure of $31,434.97 (Metcalf's wages as shown on Revised Company Exhibit 1) be offset by DeGroot's interim earnings (as previously noted, the Company uses the figure of $10,132.41). The difference between these two amounts is $21,302.56. The Company now proposes that DeGroot be paid $21,302.56 in backpay, less taxes.

The Union proposes that the figure of $44,000 (Boldt's wages) be offset by the figure of $6848. The figure of $6848 comes from the following: first, it includes DeGroot's interim earnings of $4213 from New Berlin Ready-Mix Company and second, it includes a total of $2635 for unemployment compensation. The Union arrived at the latter figure (i.e. $2635) by taking the total amount of unemployment compensation which DeGroot was paid during the

applicable time period (i.e. $5918.97), and subtracting the amount of unemployment compensation which Boldt was paid (i.e. $3284) for the same period. The difference between $5918.97 and $3284 is $2635 after rounding. The Union's rationale for using the figure of $2635 rather than the figure of $5918 is that since Boldt was laid off and received unemployment compensation, DeGroot would have too. The difference between $44,000 and $6848 is $37,152. The Union thus proposes that DeGroot be paid $37,152 in backpay, less taxes.

At the time of the hearing herein, the Company had not paid DeGroot any backpay.

POSITIONS OF THE PARTIES

Union

The Union contends that the Company's determination of DeGroot's backpay is incorrect and should be changed by the arbitrator. In the Union's view, DeGroot is entitled to more backpay than what the Company is offering. It makes the following arguments to support this contention.

First, the Union asserts that the parties' labor agreement establishes a detailed system of seniority rights that makes it virtually impossible to accurately calculate a reinstated employes' wages without taking seniority into account. It notes in this regard that when the Company closed its North Milwaukee yard in November, 1996, the affected employes bumped into other positions in other yards. When this was done, an employe who was more senior than DeGroot (i.e. Stroud), bumped into DeGroot's existing classification (i.e. building materials), thus reducing DeGroot's relative seniority in that classification. According to the Union, this meant that if DeGroot stayed in the building materials classification at the Oak Creek yard, he would have received fewer work hours in 1997 than he did in 1996. The Union asserts that since Stroud's bump into building materials reduced DeGroot's ability to secure work, it is logical to assume that he would have bid into a more favorable relative position in a different classification effective January 1, 1997 had he not been fired on November 27, 1996. In the Union's view, there is nothing speculative about concluding that DeGroot would have exercised his seniority rights to save himself from a reduction in income.

Building on the premise that DeGroot would have bid into a different job in December, 1996 to preserve his income, the Union argues that "the obvious choice" for DeGroot would have been a ready-mix job at the Oak Creek yard. Thus, the Union avers that had he not been fired in November, 1996, DeGroot would have bumped into that job (i.e. a ready-mix job at the Oak Creek yard) effective January 1, 1997.

Next, the Union contends that DeGroot's backpay should not be based on Scott Metcalf's earnings (as the Company proposes) but rather on Gary Boldt's earnings. The basis for this assertion is as follows. The Union notes that Boldt was the employe in the ready-mix classification at the Oak Creek yard who was junior in seniority to DeGroot. The Union avers that had DeGroot not been fired on November 27, 1996, he would have displaced Boldt and worked the same number of hours as Boldt worked. The Union also calls attention to the fact that DeGroot has eight more years seniority than Metcalf. The Union therefore submits that the employe who should be used to determine DeGroot's backpay is Gary Boldt.

Finally, the Union asks the arbitrator to award interest on the backpay awarded.

Company

The Company contends its determination of DeGroot's backpay is correct and should not be altered by the arbitrator. In its view, any determination that gives DeGroot more money is arbitrary, capricious and punitive. It makes the following arguments to support this contention.

First, the Company avers that the employe who should be used to determine DeGroot's backpay is Scott Metcalf. The basis for this assertion is that when DeGroot was fired, he was classified as a building materials driver. The Company asserts that since he was in that classification when fired, it follows that he should be reinstated to that classification as well. The Company asserts that this premise has been accepted by numerous arbitrators in numerous cases involving reinstatement and backpay.

Building on this premise, the Company believes that Metcalf should be used as the comparison because he was the next lower seniority employe in the building materials classification when DeGroot was fired. The Company notes that when DeGroot was fired, Metcalf assumed DeGroot's relative seniority position at the Oak Creek yard. The Company therefore maintains that had DeGroot not been fired on November 27, 1996, he would have worked the same number of hours as was worked by Metcalf.

Second, the Company argues that it is pure speculation that if DeGroot had not been fired, he would have moved from his existing building materials job to a ready-mix driver's job on January 1, 1997. As the Company sees it, this is nothing more than a "self-serving fabrication" which is being used to "extract a monetary and punitive penalty from the Company." The Company therefore asks that Boldt not be used to determine DeGroot's backpay.

DISCUSSION

My original Award directed the Company to reinstate DeGroot and "to make him whole for lost wages and benefits less any interim earnings." DeGroot has been reinstated, but the parties could not agree on the backpay. This supplemental award resolves the backpay dispute.

It is uniformly recognized in labor relations that the purpose of a traditional "make-whole" remedy, such as the one ordered herein, is to indemnify the discharged employe by making him or her financially whole for lost earnings incurred by reason of the employer's contract violation (i.e. the improper termination). Typically, this is accomplished by awarding the employe what he/she would have earned if the discharge had not occurred. Said another way, lost earnings are generally measured by the wages the employe would have earned if he or she had continued at work and not been discharged. In some cases, it is relatively easy to determine the employe's lost earnings because employes work a fixed schedule. In others, it is more complex. This case involves the latter situation because employes do not work a fixed schedule and because the available work is parsed out to employes based on their seniority.

Since the parties dispute which classification DeGroot should be reinstated to, it follows that this is the threshold issue. The Company contends DeGroot should be reinstated to the building materials classification while the Union asserts it should be the ready-mix classification.

Typically, when a discharged employe is reinstated, they are reinstated to their former position or the classification they were in when fired. In this case, DeGroot was in the building materials classification when he was fired. That being so, the initial presumption of the undersigned is that DeGroot should be reinstated to that classification (i.e. building materials).

However, in this case, the Union has successfully rebutted that presumption. It did so by showing that under this labor agreement, DeGroot's seniority rights trump the presumption just noted. The following shows this. My analysis begins with a review of the following pertinent facts. After the Company closed its North Milwaukee yard in November, 1996, the affected employes bumped into other positions in other yards. When this bumping was completed, an employe who was more senior than DeGroot (i.e. Stroud) had bumped into DeGroot's classification at the Oak Creek yard. Stroud's bump had the practical effect of reducing DeGroot's relative seniority in the building materials classification at the Oak Creek yard. Had DeGroot stayed in the building materials classification at the Oak Creek yard after Stroud bumped into that classification, DeGroot would have gone from being the third driver to the fourth driver because Stroud became the third driver. Additionally, had DeGroot stayed in the building materials classification at the Oak Creek yard after Stroud bumped into that

classification, DeGroot would have received fewer work hours and had his income reduced because the available work is parsed out to employes based on their seniority. It is against this factual backdrop that the Union notes that employes have the contractual right to bid on different classifications every December 1. DeGroot asserts that had he not been fired on November 26, 1996, he would have bid into a different classification the next month (i.e. December, 1996). While this assertion is admittedly speculative, a factual basis supports it. As just noted, the factual basis is that Stroud's bump into building materials reduced DeGroot's ability to secure work hours. In my view, it is logical to assume that because he was faced with this situation, DeGroot would indeed have exercised his seniority rights and bid into a different classification to preserve his income. I therefore conclude that had DeGroot not been fired on November 26, 1996, he would have bid out of the building materials classification. The obvious question which follows from this finding is what job would he have bid into. DeGroot asserts he would have bid into a ready-mix job at the yard he was then working at (i.e. the Oak Creek yard). The undersigned has no reason to dispute this assertion, especially since it does not appear from the record that there were any other jobs available at the Oak Creek yard. Given the foregoing, I find that in this particular case, DeGroot is not to be reinstated to the classification he was in when fired (namely, building materials), but rather is to be reinstated to the classification he would have bid into had he not been fired (namely, ready-mix).

The next question is which employe should be used to determine DeGroot's backpay. Having just found that it is not appropriate in this case to reinstate DeGroot to the building materials classification, it logically follows from that decision that it is also not appropriate to use a building materials worker as the comparable employe. Thus, building materials driver Metcalf will not be used to determine DeGroot's backpay. Instead, I find that the employe who will be used for that purpose is ready-mix driver Boldt. The basis for this finding is that Boldt was the employe in the ready-mix classification at the Oak Creek yard who was junior in seniority to DeGroot, and thus the employe who DeGroot would have displaced had he not been fired. I further find that had he not been fired, DeGroot would have worked the same number of hours as was worked by Boldt and been paid the same amount.

Having so found, attention is now turned to the matter of determining Boldt's wages for the time period DeGroot was off work (i.e. November 27, 1996 through May 17, 1998). The amounts for 1997 and 1998 are undisputed. The Company paid Boldt $32,067 in wages in calendar 1997 and $10,032 in wages from January 1 through May 31, 1998. These two figures total $42,099. While the Company did not supply the figures that Boldt was paid for the time period of November 27 through December 31, 1996, the Union estimates it to be $1901. The undersigned has decided to accept that figure and utilize it here because it is comparable to the figure which the Company paid Metcalf for his work during that same time period. Additionally, that figure is not challenged as inaccurate by the Company. When these

figures from 1996, 1997 and 1998 are tabulated, they total $44,000. I have therefore decided to use $44,000 as the figure for Boldt's total wages for the time period that DeGroot was off work (November 27, 1996 through May 17, 1998). In addition to the wages just noted, the record indicates that Boldt was laid off for a portion of the time period just referenced, and that he received unemployment compensation from that State during that period which totaled $3,284.

The focus now turns to determining what amount will be offset against the figure of $44,000. The undersigned has decided that the amount to be offset is $6,848. The basis for this figure is as follows. First, it includes DeGroot's interim earnings of $4,213 from New Berlin Ready-Mix Company. Arbitrators typically offset interim earnings from backpay. The undersigned has done likewise. Second, it includes $2,635 for unemployment compensation. In so finding, it is initially noted that DeGroot received $5918.97 in unemployment compensation from the State during the applicable time period. Arbitrators typically offset unemployment compensation from backpay, so the initial presumption of the undersigned in this case was to do likewise and offset all of DeGroot's unemployment compensation from his backpay. However, I did not do so here for the following reason. The record indicates that Boldt also received unemployment compensation from the State during the applicable time period (i.e. between DeGroot's discharge and his subsequent reinstatement). Specifically, Boldt received $3,284 in unemployment compensation. While DeGroot received unemployment compensation because he had been discharged by the Company, Boldt received it for a different reason, namely that he had been laid off from his employment with the Company. Insofar as the record shows, Boldt did not have to return any of the unemployment compensation he was paid or offset any of it against his wages; instead, he got to keep it all. This is important in the context of this case because having previously decided to use Boldt as the employe for wage comparison purposes, it follows that he is to be used for unemployment compensation purposes as well. Since Boldt did not have to return his $3,284 in unemployment compensation or offset it against his wages, it follows that DeGroot would not have either if he had not been fired and had displaced Boldt. I have therefore concluded that DeGroot is entitled to keep that portion of his unemployment compensation that equals what he would have received, and had been able to keep, if he had been in Boldt's shoes. As previously noted, that amount is $3,284, so that amount of unemployment compensation will not be offset from DeGroot's backpay. I have therefore deducted $3,284 from $5,918.97, which is $2,635 after rounding. Thus, I am allowing $2,635 in unemployment compensation to be offset against DeGroot's backpay. When the two figures of $4,213 (i.e. DeGroot's interim earnings) and $2,635 (i.e. that portion of DeGroot's unemployment compensation which is being offset) are tabulated, they total $6,848. When this total offset figure of $6,848 is subtracted from $44,000, it leaves $37,152.

The final matter involves the Union's request for interest on the backpay. It is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing.

Thus, the awarding of interest by arbitrators on a traditional "make-whole" remedy has been the exception rather than the rule. When it has occurred, it has often been because the employer engaged in such dilatory action that the arbitrator concluded that some penalty in the form of interest was due. In this case, the undersigned is not persuaded by the record evidence that the Company's conduct or instant circumstances warrant the granting of interest. Consequently, the undersigned has not included interest on the backpay.

In sum then, it is concluded that DeGroot is to be paid $37,152 in backpay, less taxes.

Based on the foregoing and the record as a whole, the undersigned enters the following

SUPPLEMENTAL AWARD

That the amount of backpay owed to DeGroot by the Company is $37,152, less taxes.

Dated at Madison, Wisconsin this 8th day of December, 1998.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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