BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

R.W. MILLER & SONS

and

TEAMSTERS LOCAL UNION NO. 43

Case 3
No. 60951
A-5999

Appearances:

For R. W. Miller & Sons, Inc., **Attorney Daniel D. Barker,** Melli, Walker, Pease & Ruhly, S.C., 10 East Doty Street, Suite 900, P.O. Box 1664, Madison, Wisconsin 53701-1664.

For Teamsters Local 43, **Attorney John J. Brennan,** Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212.

ARBITRATION AWARD

R. W. Miller & Sons, Inc., hereinafter referred to as "Employer" or "Company," and Teamsters Local 43, hereinafter referred to as "Union," are parties to a collective bargaining agreement covering an initial period from June 1, 1999 through May 31, 2003. That agreement provides for binding arbitration of grievances as therein defined that may arise between the parties. On March 1, 2002 the Union filed a request with the Wisconsin Employment Relations Commission for a 5-person panel of WERC commissioners/staff arbitrators from which the parties could select a person to hear and decide the grievance that had arisen between the parties. Commissioner A. Henry Hempe was selected by the parties from the panel provided and was subsequently appointed by said Commission to hear and decide said dispute. A hearing was held on May 23, 2002 and a transcript prepared of the testimony provided. The Employer filed an initial brief received on July 2, 2002 and a reply brief received on July 15, 2002; the Union filed an initial brief received on July 8, 2002 and filed no reply brief.

The grievance herein is companion to another grievance (Case 4, No. 60977, A-6002) filed by the Union on behalf of the same grievant. By agreement of the parties, the grievances were consolidated for hearing purposes. However, the respective awards for each case are made and discussed in separate decisions by the arbitrator that conducted the hearing.

STATEMENT OF THE ISSUE

The Union proposed the following Statement of the issue:

> Did the Company violate the labor agreement by not allowing the grievant to work plowing snow on the 17th of January 2002? If so, what is the appropriate remedy?

The Company proposed the following Statement of the issue:

> Did the Company violate Article 4 of the labor agreement when it denied the grievant the opportunity to perform snow-hauling work when he did not timely respond to the Company's phone messages? If so, what is the appropriate remedy?

I adopt the following Statement of the issue:

> Did the Company deny the grievant a reasonable opportunity to perform snow-hauling work on January 17, 2002 in violation of the parties' labor agreement? If so, what is the appropriate remedy?

FACTS OF THE CASE

The Employer, R. W. Miller & Sons, Inc., is a road contractor engaged in road construction that includes excavation, grading and asphalting. In winter months, the Company's business activities have included hauling snow for the City of Lake Geneva.

The grievant, John Laskowski, has been employed by the Company for almost six years. Mr. Laskowski is a crusher operator, but also does welding (including welding on trucks). In addition, Mr. Laskowski works on the blacktop plant and the wash plant, and does whatever else is required to be done. He is sixth in seniority among Company employees. In the month of January 2002 Mr. Laskowski was on layoff for the entire month.

In mid-afternoon on January 16, 2002, the City of Lake Geneva unexpectedly engaged the Company for snow-hauling activities to commence in the very early morning hours of the day following. Company President Jeff Miller determined that he needed three persons to operate three snow-hauling trucks. Shortly after 2:45 p.m. Mr. Miller began efforts to assemble a crew of three drivers. The men were to commence work at 3:30 a.m. the following morning.

President Miller initially called three persons, including Grievant Laskowski. In each case he was able to connect only to an answering machine at the respective homes of the workers he called. Mr. Miller waited for about half an hour for the workers he called to call back before he "... started trying to contact the next people and seeing if they were available should I not be – get a call back from the other people."

By 4:10 p.m., Mr. Miller says he had gotten an alternate crew of drivers entirely lined up. Each member of the alternate crew had less seniority with the Company than did Mr. Laskowski. After obtaining his crew, Mr. Miller reports that he then called Mr. Laskowski (and the other two persons he had initially tried to contact) back and left messages that their snow-hauling services would not be needed the next morning.

According to Mr. Laskowski, he had been absent from his house for less than an hour on the afternoon of January 16. The grievant reports that he had left his house on that afternoon at approximately 3:15 p.m. to pick up one of his sons when school ended and take the boy to the doctor's office. He returned to his house at 4:10 p.m. and was advised by his wife that Mr. Miller had left two messages on the answering machine, the first of which had offered a snow-hauling work opportunity early the next morning. The second cancelled the opportunity.

Mrs. Laskowski had not been home when either call came in, but had logged them in writing. Mr. Laskowski is sure of the time he had left and returned to the house because his son's doctor's appointment was for 3:30 p.m. and he checked the times with his wife.

The grievant had originally purchased the answering machine at the request of the Company so it could call him if a snow-hauling job were to arise. Mr. Laskowski had previously requested that in the event the Company was unable to speak with him personally, it simply to leave a message as to what time it wanted him to report in and he would comply.

Upon learning of his CEO's messages, Mr. Laskowski immediately telephoned Mr. Miller to confirm his availability for work the following morning. Laskowski estimates that the latest he would have reached Mr. Miller at Company was between 4:15 and 4:20. (He had first tried to reach CEO Miller at his home). Mr. Miller thinks Mr. Laskowski's call reached him at 4:20 or 4:25. But when Mr. Laskowski indicated his willingness to haul snow the next morning Mr. Miller reiterated the second message he had just left on Laskowski's answering machine: the snow-hauling job slots for the next morning had been filled and there was no longer any work available for Mr. Laskowski. Consequently, Mr. Laskowski did not report in for the snow-hauling work the next morning.

On several occasions in the past the grievant had received messages on his answering machine from the Company offering snow-hauling work. The grievant had responded to those messages by telephoning back, and was allowed to do the work. Under cross-examination, the grievant further indicated that in some instances he had phoned his acceptances of the snow-hauling call-in requests Company officers had left on his answering machine directly to either Company president Jeff Miller or his brother Peter (also an officer of the Company) at their respective homes later than five o'clock but not later than seven o'clock p.m. In each case, Mr. Laskowski said he had been permitted to do the work.

In the winter months the Company shop normally closes at 4:00 p.m., although Jeff and Peter Miller often stay later. Jeff Miller testified that he had established what he called "an artificial time limit" as to the time employees should call back to indicate availability for snow-hauling work. That time limit is simply ". . . before we go home from work." CEO Miller explained that this was done by the Company ". . . because this thing has lasted into six, seven o'clock at night and we don't know who's going and who's what and we're calling people and they're making plans to be somewhere." Sometimes, Mr. Miller said, there were instances where persons for whom messages were left didn't show up at all, ". . . so we had to establish a procedure to make sure that we had the forces in – available and in force on the job when they needed to be there."

The company president stated that he had come up with the "artificial time limit" the year before. However, he acknowledged that the new policy had never been put in writing, had never been negotiated with the Union, had never been disseminated to the workforce, and that he had never advised the Union of the creation of the new policy, either in writing or otherwise.

Mr. Miller also acknowledged that at the time Mr. Laskowski called him he (Miller) had the phone numbers where he could have reached each of the three more junior employees to whom he had given the snow hauling assignments for January 17. One of the three had left the plant at 4:10 p.m., was presumably in his car on his way home, and could have been reached at his cell phone number.

Mr. Laskowski remained on layoff for the entire month of January 2002. In February 2002, Laskowski's minor daughter received medical services for which Laskowski was billed in the amount of $1,137.30.

There is no dispute that Mr. Laskowski's layoff during the entire month of January 2002 and his failure to elect COBRA coverage resulted in his health insurance coverage being interrupted for the month of February 2002. The grievant thus became personally liable for payment of the entire amount. The Company paid Mr. Laskowski no wages during his layoff period nor did the Company make any contribution on Laskowski's behalf to the pension fund identified in the Agreement between the parties.

RELEVANT CONTRACT PROVISIONS

ARTICLE 4. SENIORITY

Section 1. Seniority, with ability and qualifications, shall govern in advancement to higher rated jobs. For other than seasonal work, employees will be called back to work by seniority in their classifications.

Section 2. The term "master seniority" means length of service with the Employer while the employee is performing the work in the collective bargaining unit covered by this Agreement. The term "yard" (which shall mean – yard, plant or terminal) seniority means – length of service with the Employer while the employee is performing work in the collective bargaining unit covered by this Agreement at the particular yard.

. . .

Section 6. The right to work overtime, the right to work on premium pay jobs, and on Saturdays, Sundays and holidays shall be in accordance with the yard seniority of employees.

. . .

ARTICLE 21. HEALTH AND WELFARE BENEFITS

Section 1. Effective June 1, 1999, the Employer agrees to provide health and welfare insurance benefits as provided and offered as settlement of this Agreement. The Employer agrees to cover the cost of coverage up to a maximum monthly premium of $447.65 per aggregate employee. During the 2nd, 3rd, and 4th years of this agreement the maximum monthly premium amount will increase to $516.85, $586.05 and $655.25 respectively. . . .

(A) . . .

(B) When an employee is laid off due to lack of work, he shall receive benefits for the calendar month following his layoff. The Company will notify the insurance carriers upon termination of employment or layoff so that such employee may be billed directly.

(C) Regular employees returning from layoff will be eligible for coverage the first of the month following return to work.

ARTICLE 22. PENSIONS

Section 1. Effective June 1, 1999, the Employer shall continue to contribute to the Central States, Southeast and Southwest Areas Pension Fund the sum of eighty-five dollars ($85.00) per week for each employee covered by this Agreement, who has been on the payroll thirty (30) calendar days or more.

. . .

Section 5. Contributions to the Pension Fund must be made for each week on each regular or extra employee, even though such employee may work only part-time under the provisions of this contract, including weeks where work is performed for the Employer but not under the provisions of this contract, and although contributions may be made for those weeks into some other pension fund or health and welfare fund. Employees who work either temporarily or in cases of emergency under the terms of this contract shall not be covered by the provisions of this Section.

. . .

ARTICLE 31. GRIEVANCE PROCEDURE

Section 1. . . .

Section 2. . . .

Section 3. . . . In the event that the Employer's representatives and the Union's representatives are unable to reach a decision resolving the dispute, either party may, within five (5) days inform the co-chairman of the Joint Grievance Committee in writing requesting arbitration in accordance with this Article.

Section 4. The parties agree an arbitrator shall be selected on application to the Wisconsin Employment Relations Commission. If the Commission finds it necessary to appoint an arbitrator not a member of the Commission, the losing party shall bear the full cost of the arbitrator. No employee shall have the right to require arbitration, that right being reserved to the Union or Employer exclusively.

Section 5. . . . The decision of the impartial arbitrator on any matter submitted to it shall be final and binding on all parties. . . .

POSITIONS OF THE PARTIES

Union

The Union asserts that the Employer cannot seriously be heard to argue that allowing the grievant to haul snow the morning of January 17 would have caused any disruption – even if ". . . a disruption would provide an exception to the clear contractual requirement of assignment by seniority." In support of this assertion, the Union points out that the starting time for the snow haulers was 3:30 a.m. the following morning and Jeff Miller had telephone numbers for all the employees he had just scheduled to work then.

The Union also argues that the past practice of the parties was inconsistent with Jeff Miller's refusal to let the grievant participate in the overtime snow-hauling work. In the past, the grievant has called either Pete or Jeff Miller at their respective homes to accept snow-hauling work after 5:00 p.m. and been permitted to perform the proffered work. But the practice was not followed in this instance because of what Jeff Miller described as an "artificial time limit."

However, the Union notes, the "artificial time limit" was never bargained with the Union, put into writing, nor disseminated to Local 43. The Union contends that if the Employer is going to deny work opportunities when an employee is not immediately available by phone, it has at least the obligation to tell its employees of the new policy.

The Union finds the Employer's refusal to let Mr. Laskowski work the snow-hauling hours on January 17 to be ridiculous. The Union suggests that the Employer was motivated primarily by its desire to avoid paying benefits to the grievant. According to the Union, the employee that had left the plant at 4:10 p.m. could have been easily reached at his cell phone number and told that an employee with greater seniority wanted the overtime. The Employer's conduct in denying the grievant the snow-hauling work was an abuse of discretion and an unreasonable denial of seniority rights.

The Union argues that as a consequence of not being able to work in January, the grievant lost his family health insurance, as well as three hours of overtime pay and the appropriate contribution to his pension. The grievant's minor daughter incurred almost $1,200 worth of unanticipated medical services costs for which the grievant became personally liable. The Union believes the grievant should be reimbursed for his medical expenses for which he would have avoided personal liability had he worked in January 2002, as well as made whole as to overtime wages, and the pension contribution that should have been made under the collective bargaining agreement.

Employer

The Employer contends that the grievance should be dismissed because it gave the grievant a reasonable opportunity to claim the work. The Employer believes it acted reasonably when it called the grievant to offer the work, left a message, then waited for what the Employer describes as "a reasonable time" for the grievant to return the call. When the grievant did not return the Employer's call within the time-frame the Employer describes as reasonable, the Employer made other arrangements to avoid being "left in the lurch." By the time the grievant called, the work that he had been offered earlier was no longer available.

The Employer argues that the Union's contention must fail because the Employer did in fact offer the grievant the snow-hauling work. Moreover, says the Employer, the grievant could have 1) carried a cell phone or 2) alerted his wife to claim the work on his behalf. Since the grievant did neither of these things, he did not make himself available to claim the work within a reasonable time.

Furthermore, the Employer postulates, if the Union's position is accepted, ". . . an employee who receives a message about snow-hauling work could delay claiming the work until the last possible minute and show up at the shop even though others had accepted it. If this were to happen then the employer would have to pay show-up pay to those who were bumped. Under this scenario, it is possible that the employer would have to pay show-up pay to an entire extra crew.

The Employer sees other dangers portending the Union's position.

> Moreover, it is possible that the employees who timely accept the work will rely on the assignment to their detriment, such as by making other alternate arrangements for child care. Thus if employees were permitted to bump their way back into the shift after the shop closed, the ramifications could be far-reaching. Such a result would not be fair to the lower seniority workers, who should not have to worry that that they might be bumped. Moreover, the result advanced by the Union would deter lower seniority workers from making arrangements to fit the work into their plans.

It is, says the Employer, for these reasons that the Employer decided to have a crew lined up by the time the shop closed. The Employer doesn't perceive this decision as arbitrary or in violation of the labor agreement.

According to the Employer, it ". . . should not be expected to have to work well into the evening making phone calls to straighten out who is going to be working a shift that starts in the middle of the night. And it should not have to risk having to incur show-up pay in the event that it is not able to get in touch with one of the employees that accepted the work."

The Employer also asserts that the Union makes too much of the Employer's failure to notify the Union that it wanted to have overtime assignments in place before the end of the working day. This, says the Employer, is a red herring because the Union presented no evidence of a past practice establishing that employees had the right to bump other employees that had accepted the work.

The Employer cites two arbitration awards in support of its contentions, one decided in 1948, the other in 1953.

According to the Employer, in CORN PRODUCT REFINING CO., 10 LA 414 (RADER, 1948), ". . . Arbitrator Rader held that the employer made a reasonable effort to offer overtime work to a senior employee by making two telephone calls within a 20 minute period."

The Employer also finds TRAILMOBILE INC., 20 LA 592 (MCCOY, LEMASTER, SWIGERT, 1953) supportive of its position in this matter. The Employer describes the TRAILMOBILE case as one in which ". . . an arbitration board held that a company gave a senior employee a proper opportunity to claim Saturday work when it placed several phone calls to the employee over a 45 minute period."

The Employer disputes the Union's contention that if Laskowski had performed any work in January the Employer would have been obligated to pay Laskowski's health insurance premium for February. The Employer argues that Article 21, Sec. 1 (c) ". . . requires work on a regular basis for such health benefits to be paid following a return from layoff." According to the Employer, a reasonable reading of that provision ". . . would not require health benefits to be paid when the employee does not return to work on a regular basis." "It is unlikely," the Employer postulates, "that the parties intended a contrary interpretation, since it refers to 'regular' employees." Since the grievant would not have returned as a regular employee, payment by the Employer of health benefits would represent an undeserved windfall to the employee that worked only a few hours.

Finally, the Employer urges that even if the arbitrator concludes that the grievant's health benefits for the month of February should have been paid, the award ought to be limited to the value of the health insurance premium payment since the grievant failed to mitigate his damages by not choosing COBRA insurance continuation coverage.

Employer's Reply to the Union's Brief

The Employer repeated its contention that it had acted reasonably when it did not allow the grievant to bump an employee that had claimed the work after the grievant did not respond to the message the Company had left on his answering machine within a half an hour. The Employer believes the cases cited in its initial brief establish that other arbitrators are in accord with the Company's position herein ". . . and have found that employers need only wait a reasonable period of time before making alternative arrangements to have the work done." The Employer notes that the Union cited no cases suggesting that the Employer acted in anything but a reasonable manner.

The Employer suggests that even if it had been able to call off one of the more junior employees it had secured for the snow-hauling work, in effect that employee would be penalized for staying in contact with the Employer while the grievant would be rewarded for being out-of-touch.

The Employer faults the Union for offering no proof that it was attempting to avoid paying benefits to the grievant: "For example, it (Union) offered no evidence that Miller doesn't pass on the cost of benefits to the customer when it performs snow-hauling work. What's more, in Miller's letter denying the grievances, he made no reference to economics with respect to the snow-hauling grievance."

The Employer contends that Mr. Laskowski "had every chance to claim the work within a reasonable period of time." The Employer continues in a similar vein:

> Given Laskowski's belief that the opportunity to do this work is extremely important to his family, one would expect him to make an extra effort to be available. That would mean making arrangements with his wife to either get a hold of him or to ask her to call the Company to confirm his availability if she could not reach him. These steps would be a reasonable precaution since it would be unreasonable to think that the Company would hold open the work indefinitely. Accordingly, because Laskowski did not respond within a reasonable period of time, he lost any right he may have had to do the work.

The Employer is critical of the grievant for presenting ". . . no concrete evidence that he was actually away from home taking his son to the doctor at the time Miller called to offer him the work. He did not present the note his wife purportedly wrote (logging the times of Miller's calls) nor did he offer any documentary evidence that he had taken his son to the doctor."

The Employer distinguishes between a past practice of accepting snow-hauling work in the evening and a past practice of allowing a senior employee to bump a more junior employee who had already accepted an overtime assignment. Thus, according to the Employer, "the time for acceptance of open work is not the issue."

Moreover, the Employer asserts that even the practice cited by the Union does not qualify as a "past practice." Citing the standard for establishing a "past practice" set forth in Elkouri & Elkouri How Arbitration Works, 5th ed. at 632 (1997)], the Employer claims that "a time or two" remembered by the grievant is not a past practice because it was neither 1) unequivocal, 2) clearly enunciated and acted upon, nor 3) readily ascertainable over a period of time as a fixed and established practice accepted by both parties. According to the Employer, the grievant's testimony that he remembers accepting a shift when no one else had claimed it is insufficient evidence, and offers only a small snapshot of the Employer's practice under different circumstances.

In summary, the Employer asserts that it should not have to risk angering customers when its employees don't show up nor have to make phone calls well into the evening to line up a crew. Since the Employer finds "good reasons" support its action, the action cannot be considered arbitrary and the grievance should be dismissed.

DISCUSSION

I have no doubt that prior to January 16, 2002, the Employer had allowed employees to respond even later than 5:00 p.m. to overtime work opportunities that had been offered on employee answering machines. In my opinion, the Employer's permissiveness in this regard was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a period of time as a fixed and established practice accepted by both parties.

The mutual acceptance of the practice was apparently tacit, at least in the sense that it had not been reduced to writing. That does not diminish its viability or enforceability as a past practice, for its mutual tacit acceptance constitutes, in my view, an " . . . implied mutual agreement – arising by inference from the circumstances." See Elkouri & Elkouri, How Arbitration Works, 5th ed. at 633 (1997). John Laskowski's testimony describes it. Jeffrey Miller's testimony confirms it.

I do not perceive the grievant's testimony, both direct and under cross-examination, as limiting the asserted practice to "a time or two," the Employer's argument notwithstanding. The grievant was not queried as to how many times he responded in late afternoons or early evenings to messages offering overtime left on his answering machine by his Employer.

Under cross-examination, the grievant further explained that "(t)here's been times I have called the company and everybody has gone and I've called Pete or Jeff at home . . . later in the evening . . . such as after five o'clock . . . (but not after seven o'clock)." Tr. 31-2. None of the grievant's testimony was refuted.

In effect, Jeffrey Miller corroborated it. For when the Company CEO explained his perception of the problems the Employer experienced, 1/ by implication, he necessarily acknowledged the existence of the earlier practice of leaving answering machine call-in messages that the grievant had described. 2/ Indeed, the Employer's apparent insistence that employees purchase answering machines appears to have contributed to the practice. With answering machines installed, employees were (presumably) free to leave their homes and respond to Employer messages when they returned.

1/ (". . . this thing lasted into six, seven o'clock at night and we don't know who's going and who's what and we're calling people and they're making plans to be somewhere." Tr. 43. "Before that (coming up with the artificial time limit) we had people not show up . . . Well, I can show you when we didn't have enough people show up . . ." Tr. 56-7.

2/ What the grievant had not described were the problems the Employer encountered when some employees failed to respond to the messages. All that may indicate, however, is that either the grievant was unaware of the problems or that he, himself, never failed to respond to the Employer's messages – in some cases by calling Company officers at their respective homes between 5 and 7 o'clock p.m. There is no evidence that the grievant was ever deprived of work prior to January 16, 2002.

As a result of the problems the Employer began to experience, he came up with what he described as "an artificial time limit" on lining up a snow-hauling crew. (Tr. 43) Under that artificial time limit, " . . . it's got to be settled before we go home for (sic) work." *Supra.*

The record is barren, however, of any evidence that there had ever been an occasion to implement the new, artificial time limit. Obviously, based on the facts of this case the practice of leaving messages on employees' answering machines was not abandoned. The grievant did testify that he had purchased his home answering machine at the Employer's request, but the record does not indicate the date of purchase. Neither is there any evidence that the grievant believed he was under any time limits as to returning Jeffrey Miller's calls on January 16 before Mr. Miller left the work site to go home. In fact, the grievant was able to reach Mr. Miller before he had left Company offices, 3/ but he first had attempted to reach Mr. Miller at Miller's home.

3/ According to Mr. Miller's testimony, the artificial time limit required closure on organizing a snow-hauling crew "before we go home." Inasmuch as the grievant's phone call to Mr. Miller reached Miller before Miller had left for home, arguably the grievant had complied with the "artificial time limit," albeit unknowingly. The Union does not press this point, however, nor shall I.

Thus, if Jeffrey Miller had indeed come up with the artificial time limit the year before, the record does not indicate that he ever told anyone about it. In fact, Mr. Miller conceded that he had not ever put his new artificial time limit in writing or communicated it in any way to the Union. Given this conceded fact, it is unreasonable, *per se,* to expect employees to comply with it. 4/

4/ Whether the artificial time limit is a condition of employment or a work rule is beyond the scope of this award. In either case, however, its dissemination to the employees likely to be affected by it seems fundamental to its enforceability.

The question thus becomes whether the Employer allowed the grievant a reasonable amount of time to respond to the proffered snow-hauling opportunity.

Jeffery Miller believes he relayed the work opportunity to Mr. Laskowski's answering machine "right after break time." (Tr. 39) Break time runs from 2:30 to 2:45. *Supra*. Mr. Miller called two more persons to complete the crew. He states he then waited about a half an hour to hear from them before contacting the next persons in the seniority line. *Supra*. He further says he completed assembling a different crew by 4:10 p.m., then called the Laskowski residence and left a new message advising Laskowski that his snow-hauling services were no longer needed. (Tr. 41-2)

According to Mr. Laskowski, he had left his house at 3:15 to pick up his son at school and take him to a doctor's appointment. 5/ Mr. Laskowski is certain he had received no calls from the Company president prior to leaving at 3:15. (Tr. 29) Given Mr. Laskowski's obvious desire to work, it seems unlikely he would be mistaken on this point.

5/ The Employer is critical of the grievant for presenting no "concrete evidence" that he had left his home to take his son to the doctor. But this tack is as unpersuasive as it is immaterial. Laskowski's "evidence," consisting of his direct testimony to the point, is concrete enough, particularly since it was unchallenged during an otherwise extensive cross-examination. Moreover, Laskowski's whereabouts during his absence from his home is immaterial. The question is whether Miller provided Laskowski a reasonable amount of time to respond to his message, not Laskowski's whereabouts during his absence from his house.

Mr. Laskowski further testified that his wife had returned to the Laskowski residence by 3:30 p.m. (She had left to pick up another Laskowski school child from a school located three blocks away). (Tr. 16-17) Both of Jeff Miller's messages had already been left on the answering machine. Mrs. Laskowski heard the messages; she wrote them down, 6/ and relayed them to her husband upon his return at 4:10 p.m. (Tr. 16) Mr. Laskowski reached Mr. Miller at the Company offices by telephone only a few minutes later.

6/ The Employer is also critical of the grievant for not bringing his wife's note to the hearing. While production of the note would have assisted the establishment of a time-sequence for Mr. Miller's calls to Mr. Laskowski, since I have no reason to question the grievant's testimonial credibility I do not regard the note as an essential element of proof. I find neither unreasonable nor unusual that the grievant failed to preserve what he may well have regarded as simply a routine household telephone memo of no particular evidentiary value.

If Mr. Miller's testimony is fully credited, he initially left a message on the Laskowski answering machine a short time after 2:45. When he had received no response from the grievant (or the other two employees he had called) within approximately a half an hour (3:15 p.m.) he began assembling a different crew. According to Mr. Miller, that task was completed at about 4:10 p.m., at which time he then left the second message on the Laskowski answering machine.

If Mr. Laskowski's testimony is fully credited, he had received no calls from Mr. Miller by 3:15 p.m. When he returned to his house at 4:10 p.m., his wife advised him of the two messages from Mr. Miller on the answering machine. The grievant reached his Company president between 4:15 or 4:20 p.m. to accept the work.

Obviously, there are some time discrepancies between the two versions. But resolving them is unnecessary. Given the existence of the past practice described by the grievant and acknowledged by Mr. Miller, coupled to Mr. Miller's admission that neither the workforce nor the Union had ever been advised of Miller's new "artificial time-limit" for assembling an overtime snow hauling crew, I am not persuaded that under the time-table described by either the grievant or the Mr. Miller, the grievant was provided with a reasonable opportunity to accept the overtime work the Employer offered. 7/

7/ The arbitration awards cited by the Employer offer dubious support at best for the Employer's position. In CORN PRODUCTS REFINING CO., 10 LA 414 (1948), the labor contract required the employer to call employees for extra work in the order of seniority and requiring the employer to compensate employees not so called "unless it is shown that the usual means of notifying them have

> ***been utilized." Upon a sufficient showing by the employer that notifying the grievant required a long-distance telephone call, that two attempts to call the grievant through the long-distance operator were made approximately 20 minutes apart, and that the grievant failed to answer the phone on either occasion, the arbitrator found that the employer had utilized the usual means of notifying this employee and had thus met the obligation of the contract.***
>
> ***But CORN PRODUCTS is clearly distinguishable from this case. In the instant matter, the usual method of notifying eligible employees as to extra work opportunities was through an answering machine procedure, a procedure apparently initiated by and countenanced by the Employer to the extent that a past practice was established. Unlike CORN PRODUCTS, in this case the Employer's message reached the employee. The issue herein is not whether the Employer used the usual means of contacting the employee, but whether the Employer allowed the employee a reasonable period of time in which to respond.***
>
> ***In TRAILMOBILE, INC., 20 LA 592 (1953) an arbitration board found the employer had not violated the contract requiring the offer of weekend premium work to senior qualified employees by offering Saturday work to a junior employee, where the senior employee had already left work on Friday when the need for the Saturday work arose and several telephone calls to the senior employee's house during late Friday afternoon office hours failed to reach him. The arbitration board also found (employer-appointed arbitrator dissenting) that the employer had violated the same contractual provision by offering Sunday and Labor Day premium work to a junior employee where the employer's failure to reach the senior employees was due to the failure of the personnel department to dispatch a telegram or to give the senior employee's telephone number to the supervisor in charge during the holiday weekend.***
>
> ***Unlike TRAILMOBILE (in which several calls to the senior employee were made during a 45 minute span) in the instant matter only one call to offer the work was made to the grievant. Moreover, unlike TRAILMOBILE, the grievant in the instant case did claim the work before the Employer's office closed, but his claim was denied. TRAILMOBILE may be instructive, however, as to the lengths a majority of the arbitration board concluded the employer should have gone (telegram) to advise the senior employee of the Sunday and Labor Day overtime opportunities.***

The Employer suggests that the grievant could have protected himself by either carrying a cell phone or requesting and authorizing his wife to accept work opportunities on the grievant's behalf. Under the Employer's suggested first option, the employee would, in effect, be placed on an unpaid "on call" status; the second would, in effect, place the grievant's wife (who is not employed by the Company) on an unpaid, on-call status and preclude or restrict her performance of other important household tasks, including employment outside the home. But since the answering machine system that was in place had been apparently initiated at the Employer's request or direction and the Employer had failed to express any complaints to the Union about that system, there was little reason for the grievant to think that he needed further protection. Certainly, he was not required to adopt unilaterally either of the more heroic measures now suggested by the Employer.

It is undisputed that each member of the crew assembled by Mr. Miller to work on

January 17 had less seniority than the grievant. Based on the Employer's failure to provide the

grievant with a reasonable opportunity to accept the Employer's initial offer of work left on the grievant's answering machine, such failure constitutes, in my view, a violation of Article 4, Section 6 of the parties' labor agreement.

I am neither unmindful of nor unsympathetic to Jeffrey Miller's desire for closure by the end of his workday regarding crew selection for overtime work. But desirable as that goal may be from CEO Miller's standpoint, it is trumped in this instance by the unequivocal provisions of Article 4, Section 6. Given the existence of the past practice that I conclude was in existence when this grievance arose, unilateral, unwritten, and unpublicized establishment of an "artificial time limit" is not sufficient to overcome the practice. If the practice is to be modified, the Employer must seek some other alternative.

REMEDY

The Union asks that the grievant be made whole in the event the Employer is found to have violated the Labor Agreement. The Union believes that a "make-whole" remedy includes reimbursement to the grievant for any out-of-pocket medical expense or liability he incurred for services that would have been otherwise covered by the grievant's contractual health insurance benefits, plus three hours of overtime pay and the appropriate contribution to the contractually identified pension fund in which the grievant participated.

The Employer argues that no health benefits should be included in any "make-whole" remedy because the Employer is not contractually obligated to pay such benefits when the employee does not return to work on a regular basis. The Employer finds support for this argument in Article 21, Section 1 (C).

Article 21, Section 1(C) provides as follows:

(C) Regular employees returning from layoff will be eligible for coverage the first of the month following return to work.

Contending it is unlikely that the parties intended a meaning contrary to the interpretation urged by the Employer since the provision refers to "regular" employees, the Employer notes that even if the grievant had been called back to haul snow on the morning of January 17, his return would have been only on a casual basis.

Though strained, the Employer's interpretation is not entirely unreasonable. But an arbitrator cannot "ignore clear-cut contractual language." 8/ "The fact that disputed language is subject to more than one interpretation does not mean that said language is, therefore, unclear." 9/

8/ Clean Coverall Supply Company, 47 LA 272, 277 (Witney, 1966), cited in Elkouri & Elkouri, 5th ed. at 483 (1997).

9/ Sonoma-Marin Publishing Company, 83 LA 512, 516, (Griffin, 1984), cited in Elkouri & Elkouri, 5th ed. at 482.

In the provision under examination, the adjective "regular" is used as a modifier for the plural noun "employees." It is not used as a modifier for the noun "work." As such, the words of the provision are clear on their face and require no further interpretive efforts. If the parties had intended the interpretation now advanced by the Employer, they could have done so easily enough by twice using "regular" as an adjective, once to modify "employees" (as they did) and once again to modify "work" (as they did not). Their failure to do so seems a clear enough indication that they had no intent of doing so. 10/

10/ Jt. Exhibit 4 supports this conclusion. That Exhibit consists of Company President Jeffrey Miller's response to two Laskowski grievances - the instant one involving the snow-hauling work and one other involving welding repair work to which the grievant claimed entitlement. The two grievances had been consolidated for hearing purposes. Mr. Miller's response (to the grievance involving welding repair work is explicit in its acknowledgment that providing the grievant only 3 hours of welding work in January 2002 would have cost the Employer in excess of $1,100 in benefits alone. I find CEO Miller's response instructive and entirely consistent with the conclusion I reach above.

Applying the words of Article 21, Section 1(C) to the facts herein, indisputably the grievant is a regular employee. Whether the work he should have been allowed to perform on January 17 was regular or not is immaterial, because Section 1(C) makes no requirement in that regard. In my view, therefore, if the grievant been permitted to work the estimated three hours of snow hauling on January 17, 2002, the Employer had an obligation arising under the labor agreement for payment of the grievant's group health insurance policy premium.

Finally, the Employer urges that even if I reach this conclusion, I should limit my award to the value of the health insurance premium that the Employer would have paid had the grievant been allowed to work on January 17. The Employer argues that Mr. ". . . Laskowski failed to mitigate his damages by not choosing COBRA insurance continuation coverage."

The only record evidence as to COBRA issue consists of only two questions by counsel for the Employer as he cross-examined Mr. Laskowski and Mr. Laskowski's response to each question:

> Q You were offered – or are you familiar with what's known as COBRA coverage?
> A Yes, I am.
> Q Did you take COBRA coverage when you were laid off?
> A No, I didn't. 11/

11/ Tr. 30.

"COBRA coverage" offers employees that are laid off or terminated from their employment the opportunity to continue coverage under whatever existing group health insurance plan they had participated while employed for a period up to 18 months following loss of employment, as a matter of law. However, if the employee elects that option, the employee becomes responsible for payment of the entire health insurance premium.

In labor arbitrations the concept that an injured party has some duty to mitigate the losses or damages that he has suffered is usually discussed in the context of a discipline or discharge case. 12/ This case is neither, and the Employer has cited no authority that supports the extension of the duty to the case herein. But neither does the Union argue the converse – i.e., that the doctrine of mitigation should be restricted to cases involving discipline or discharge.

12/ E.g., <u>Remedies in Arbitration</u>, 2d, Hill, Jr., Marvin H., and Sinicropi, Anthony V., BNA, 1981, 1991, in which the authors' discussion on the duty to mitigate damages was included as a subsection under II, Remedies in Discharge and Disciplinary Cases, specifically as a factor to consider as a basis for reducing back pay. While noting that most (but not all) arbitrators prefer the approach of the employer's liability for the grievant's failure to mitigate damages, the authors also note the contrary view of Arbitrator David Feller who argues there is no duty to mitigate damages because the arbitrator does not award damages. Feller seems to suggest that in discharge cases the duty to mitigate damages flow from the agreements providing for such a duty.

Logic alone does not appear to offer any immediately compelling reasons as to why the facts of this matter should not be measured against the conditions under which an obligation of mitigating damages has been placed on injured parties. For in this case, as in cases involving discipline or discharge, the Employer's violation of the labor agreement has created some liability for the losses incurred by the grievant, but the Employer suggests that the grievant's failure to limit some of his losses should act as a correlative limitation on the Employer's liability for those losses. Under this circumstance I am inclined to examine the Employer's contention.

The conditions under which a plaintiff may be obligated (or not) to mitigate damages are described in *Restatement of Contracts*, Sec. 336 (1932):

> Section 336. Avoidable Harm; Losses Incurred in Efforts to Avoid Harm. 1) Damages are not recoverable for harm that plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation. . . . 13/

13/ Reported with apparent approval in REMEDIES IN ARBITRATION, 2D, at 214, note 128, SUPRA.

There appears to be no dispute that Mr. Laskowski had participated in a group family health insurance plan prior to his layoff in January. The Employer argues the grievant's duty to mitigate damages required him to exercise his COBRA option when he was laid off. However, it should be noted that had he elected to do so – or even to obtain only February coverage for himself and his family as protection against remaining on layoff during the entire month of January - he would have had to provide the cost of the monthly premium from his own pocket.

On direct examination by the Union's attorney, Mr. Laskowski explained the circumstances that led to his liability for more than $1,100 in medical expenses in February 2002:

> Q Mr. Laskowski, I'm showing you what's been marked as Union Exhibit 1. Just referring to the first page alone, what does that reflect as payments you had to make directly to health care providers?

A $167.76.
Q And the patient is listed at (sic) Katie Laskowski. Who is that?

A That's my daughter.
Q How old is she?
A Thirteen.
Q I have a Katie that's thirteen as well. What happened to Katie that she needed to go see the doctor?
A She was having stomach problems and such and they took her in, they did CAT scans and some other stuff, and they found out one of her kidneys had been slid back in here towards the back. They're thinking hopefully it was just from birth and it's still going to stay right where it's at, but they don't know.
Q And did that doctor's appointment occur on February 4th?
A Yes.
Q Okay. Now referring to the second page, there's some charges from St. Joseph's Hospital on February 4. Did you – in addition to the Mankato Clinic, did you have to go to the hospital?
A It's – yeah, it's the same thing pretty much.
Q Okay.
A Just different doctors billing you different times.
Q And did these charges of $956.50 have to come out of your pocket?
A Yes.
Q Were these charges that would otherwise be covered by your health insurance had you been covered?
A Yes. It says right here.
Q Okay. You're referring to expenses incurred after coverage terminated?
A Yep.
Q And then the last page appears to be a single charge related to a doctor or health care provider of some sort. Is that accurate, $13.04?
A Yes.
Q And was that paid by you?
A Yes. 14/

14/ Tr. 19–21.

Based on this testimony as well as the RESTATEMENT OF CONTRACTS explanation of the circumstances under which an injured party may be excused from an obligation to mitigate damages, I do not believe Mr. Laskowski had any obligation to mitigate his losses by exercising his COBRA option following his layoff in January 2002. As is readily inferable from his testimony recited above, the medical services required by his daughter in February appear to have been of an emergency nature and were not *foreseeable* damages. Moreover, for the grievant to continue his family health insurance coverage under his COBRA option would have required him to pay the monthly premium out of his own pocket 15/ – a cost that appears to me as probably falling in the category of *undue expense* for even one month.

15/ Unlike the responsibility to mitigate damages of a wrongfully discharged employee that may include, e.g., qualifying for Unemployment Compensation with only minimal out-of-pocket expense to the employee, the mitigation of damages that this Employer seeks to lay on the grievant would have involved a significant investment of funds by that employee – who had just been laid off from his employment. In the first example, the harm by not qualifying for Unemployment Compensation is foreseeable (loss of income) and requires no undue risk, expense or humiliation. In the instant matter, however, the harm caused by a temporary interruption of health insurance coverage was not foreseeable and the purchase of family health insurance under the COBRA option to cover a one-month layoff period appears to constitute an undue expense.

By declining to exercise his COBRA option, the grievant gambled either that he would not be laid off the entire month of January or that he and his family would remain healthy in the month following a layoff lasting the entire month of January, or both. Clearly, the most prudent action for the grievant would have been to elect the COBRA option, if he could reasonably afford to do so. (The record contains no information as to this). From the grievant's standpoint, however, absent other circumstances his failure to do so put at risk himself and his family only if he remained on layoff for the entire month of January.

For in my opinion, under these facts any mitigation of loss responsibilities on the grievant does not include, in effect, providing insurance coverage at the grievant's personal and undue expense – insurance that serves not only to protect the grievant and his family, *but the Employer as well,* by reducing the Employer's potential losses in the event the Employer violates the labor agreement. The latter is a risk the Employer must necessarily bear, for it was the Employer that took the initial gamble that withdrawing the grievant's work opportunity was not a violation of the labor agreement. And if, as here, the Employer violates the contract and as a consequence of the violation the grievant loses health insurance coverage to which he would have been otherwise entitled, making the grievant whole can hardly be said to constitute a windfall to him, for he receives no greater benefit than he would have received had there been no contract violation. He is merely put back in the position he would have occupied had the breach not occurred.

Accordingly, I find the Employer responsible for reimbursing the grievant for the medical bills incurred by the grievant in February 2002 that would have been otherwise covered by the Employer's group health insurance plan.

Under all of the circumstances and the record herein, this award shall direct that Mr. Laskowski be made whole from any losses he incurred as a result of the contractual violation by the Employer, including overtime pay for three hours of work, an appropriate contribution to the pension fund identified in the parties' labor agreement, and reimbursement to the grievant for any personal financial liability the grievant incurred as a result of any medical services provided the grievant or members of his immediate family in the month of February 2002 that would have been covered by the Employer's group health insurance plan then in effect, if the grievant been permitted to perform the snow hauling work on January 17, 2002 that had been originally offered, then withdrawn, by the Employer.

AWARD

The Employer failed to provide the grievant with a reasonable opportunity to haul snow on January 17, 2002, in violation of Article 4, Section 6 of the labor agreement.

As and for a remedy, the Employer shall make whole the grievant for any damages he incurred as a result of said violation, including 1) three hours of premium pay at the rate applicable to the grievant for January 17, 2002, 2) any required contractual contribution to the Central States, Southeast and Southwest Areas Pension Fund as set forth in Article 22 of the parties' labor agreement, and 3) reimbursement to the grievant for any personal financial liability the grievant incurred as a result of any medical services provided the grievant or members of his immediate family in the month of February 2002 that would have been covered by the Employer's group health insurance plan then in effect if the grievant been permitted to perform the snow hauling work on January 17, 2002 that had been originally offered, then withdrawn, by the Employer.

I will retain jurisdiction over this matter for a period of 45 days in the event either party has a question as to remedy.

Dated at Madison, Wisconsin, this 25th day of September, 2002.

A. Henry Hempe /s/

A. Henry Hempe, Arbitrator

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