

Beckman #3

VOLUNTARY ARBITRATION PROCEEDINGS

Termination Appeal Procedure

David L. Beckman, Arbitrator

In the Matter of Arbitration between:

EMPLOYER,

And

EMPLOYEE

OPINION AND AWARD

Date of Assignment: December 22, 1997

Date of Hearing: February 25, 1998

Receipt of Transcript: March 12, 1998

Receipt of Briefs: April 9, 1998

Date of Decision: May 3, 1998

ISSUES

- (1) Does the evidence establish just cause for the termination of the employment relationship between the Employer and Employee, on or about September 15, 1997?
- (2) Did the Employer unlawfully discriminate against Employee on the basis of his national origin (Chinese) in discharging him?

- (3) If just cause is lacking, or if there is a finding of unlawful discrimination, what is the remedy?

RELEVANT TERMINATION APPEAL PROVISIONS

Section L

Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate's termination from employment. The arbitrator shall have the authority to determine whether the termination was lawful under applicable federal, state and local law and to determine whether the Employer had just cause for termination.

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or which was raised at the arbitration hearing and which was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect.

Nor shall the arbitrator have authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business. If the arbitrator finds that the associate violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser action.

Section M

Relief

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the award[ed] the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment compensation payments, and any amount attributable to the associate's failure to mitigate the damages.

If the arbitrator orders reinstatement, the Employer shall have the option, within fourteen (14) days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

Section N

Arbitrator's Award

The arbitrator shall submit to the parties a written award signed by the arbitrator. The award shall specify the relief awarded, if any, and the elements and basis for any monetary award. The award shall be accompanied by a written opinion signed by the arbitrator which shall include findings of fact and, where appropriate, conclusions of law. The arbitrator's award shall be final and binding and a judgment may be entered on the award by any circuit court or other court of competent jurisdiction.

EMPLOYER POSITION

The evidence clearly shows the Employer had just cause to discharge Mr. Employee. In addition, he failed to show that his national origin played any unlawful role in the Employer's decision to terminate his employment.

Employer has a policy expressly prohibiting the use of overrides to eliminate overtime. The Employer made reasonable efforts to put Mr. Employee on notice of that policy. The policy provides that if an employee is found to be using an override for other than legitimate business reasons" the employment relationship will be terminated. We submit that the evidence shows that Mr. Employee clearly violated the aforesaid policy. The Employer conducted a fair and reasonable investigation into Mr. Employee's conduct before discharging him. Discharge was the appropriate decision, and the decision was consistent with the way the Employer has handled similar cases.

The Employer did not unlawfully discriminate against Mr. Employee on the basis of his national origin. Mr. Employee has failed to establish that he was treated differently than similarly situated persons outside of his protected classification.

We ask, therefore, that the arbitrator uphold the Employer's decision to terminate its employment relationship with Employee.

EMPLOYEE POSITION

It is the position of Mr. Employee, by counsel, that a reasonable person would not find a discharge justified under the facts and circumstances of this case. It is clear that Employer did not have an appropriate reason to discharge Mr. Employee. Mr. Employee is of Chinese origin, with limited English reading skills. It was impossible for him to read and have explained to him every piece of paper he signed, as he was hired. He stated that no one ever explained the particular piece of paper the Employer now relies on to support its discharge action. We submit that a custom was in effect which differed from the written policy, and that it is proper to hold that the custom modified the written policy.

Mr. Employee initially worked at an Employer's store where the delete key was not to be used at all by anyone. However, in the new store, he was given instruction on the use of the delete "function 13" key by Person 2. Such instruction was approved and supported by Person 1, Mr. Employee's immediate supervisor. Mr. Employee was rated "outstanding" on keeping overtime down. After he became responsible for about twenty employees, it was no longer practical to track down every employee who had neglected to record their lunch hour properly. Any employee who discovered that a mistake had been made in his time was free to point that out to Mr. Employee who was glad to work with them to correct it.

Mr. Employee had a legitimate business reason to believe that Person 3 had failed to properly record her time. She had a one-hour overlap with him on Friday afternoon, and failed to inform him that she had deviated from his approved schedule. Every employee was required to notify Mr. Employee, as the assistant manager, of any deviation from the schedule. Ms Person 3 claimed she had notified Miss Person 1. If this were true, then Ms. Person 1 was obligated to notify Mr. Employee, which she failed to do.

The evidence established that Employee is a hardworking, dedicated Employer employee who only used the override function to make a change for what he believed to be a "legitimate business reason". Accordingly, the Employer did not have just cause to fire Mr. Employee. He should be reinstated to his former position, and awarded back wages for the time he has missed.

INTRODUCTION

The Termination Appeal Procedure which Employer, Inc. (herein referred to as Employer or Employer) makes available to a managerial employee (herein referred to as Appellant or Employee) who has been discharged contains provisions which allow for final and binding arbitration Under the Termination Appeal Procedure, David L. Beckman was selected as Arbitrator to decide the issues set forth on page 2 hereof. The hearing was held at the Hotel A, City A, State A on the date set forth on the cover page hereof.

The proceedings were transcribed by Person 4 of Reporting Company. Full opportunity was given to each party to present evidence, to examine and cross examine

witnesses, to state positions and to make arguments with respect to the evidence.

Following the hearing, both parties filed written briefs of their respective positions

FINDINGS OF FACT

On September 15, 1997, Appellant, Employee, was discharged from Employer. The Employer alleged that he was guilty of "manipulation of the payroll reporting system" Employee, by counsel, appealed the termination decision, denying that the Employer had just cause for the termination, and alleging that the Employer discriminated against Mr. Employee by reason of his national origin. The matter was not resolved, and these arbitration proceedings were instituted.

Employee was hired in February 1995 at the City B, State A store. He was hired because he had expertise in the operation of a Chinese restaurant, and the Employer was interested in opening a Restaurant within its store in City B. He was interested in the benefits provided by the Employer. As part of the hiring process, he was asked to sign receipts indicating he had received Employer documents, such as the Team Handbook and a memorandum regarding "Overrides on the payroll reporting system and accurate recording of time worked." At the City B store, Mr. Employee had no occasion to ever have to use an override on the payroll system.

In April of 1996, Employee moved to the City C Store where he managed a Won Ton food operation with approximately five employees. The City C Store contained a hamburger restaurant which was called Grill A, managed by Person 2, who supervised approximately 25 employees. A number of the grill employees were mentally challenged, and they had difficulty using the time card system.

The time clock is activated by an employee swiping a plastic card through a slot, thereby recording the time of day, and the function involved, such as, punching in to begin the work day and punching out to begin a break. The employees had three scheduled breaks consisting of two paid rest breaks, and an unpaid thirty-minute lunch break. Person 2 used the computer to assist his employees in properly punching in and out for breaks. When he was not on duty, however, the time recording by his employees became very disorderly.

Under the Employer's computerized time reporting system, one of the problems for a supervisor may be described as follows. If an employee does not punch out for a scheduled break, the failure to "punch out" puts the employee in the position of obtaining 15 minutes of overtime for that day, unless the employee "clocks out" fifteen minutes early. Since the store director had in force a policy of zero tolerance for overtime, a supervisor had the obligation of giving a specific explanation for every instance of overtime. It was a constant problem to get employees to punch out for breaks, and some employees seemed not to concern themselves with the problems they caused their supervisor in taking breaks, yet not clocking out for them. If an employee was authorized to work through a break, the employee was obviously entitled to overtime pay. Supervisor Person 2's policy, however, was that no employee was authorized to work any overtime. If overtime appeared to be necessary, the employee was required to obtain approval before overtime could be worked. If the employees failed to punch out for breaks, Person 2 would adjust their time cards to properly reflect the scheduled time worked. If circumstances were such that an employee did in fact work overtime, and did not receive

approval to do so, Person 2 was available to talk with the employee and deal with the matter in an appropriate fashion.

Person 1, the Food Manager, was the person to whom the supervisors of the Deli, the Pizza A, the Restaurant A and Grill A reported.

Person 2 resigned his position as Team Leader of Grill A, effective December 6, 1996. Before leaving his position, Person 2 was directed to train Employee, since the plan was to combine the supervision of the operations of the Restaurant A and Grill A into one Team Leader position. As part of the training, Person 2 showed Employee how to use function 13 on the computer so that he would be able to assist employees in having time reports in keeping with their work schedules Team Leaders regularly filled in for employees to enable employees to take scheduled breaks. Given the zero tolerance for overtime, and the fact that employees were not scheduled for overtime if employees did not tell Person 2 about the necessity to work overtime, when he reviewed their time records on the computer, he adjusted the times to reflect the no overtime policy and schedule. Person 2 acted on the assumption that the employees did not work overtime, because no overtime was authorized, and he adjusted their records to comply with this reality, even though, if left alone, the hours shown on the time records would cause overtime calculations to be made Person 2 said that he deleted entries numerous times without consulting with the employee, because he was operating on the assumption that the employee was following his directions. If an employee actually worked overtime without telling him, and Person 2 was advised of this later by the employee, he would change the records and pay the overtime when he learned of it. However, he reserved the right to "write them up" for unauthorized overtime. Normally, however, his deletions to

the records happened only in situations in which the employee actually took the rest breaks and the lunch break, but failed to clock out for such breaks.

Person 2 testified that he showed Employee how to use "function 13" in the same manner he had used it. Employee testified that he did not know anything about function 13 until he learned it from Person 2. While function 13 was not used at the City B Store, it was clear that it was used at the City C Store Person 1 testified that it was not realistic to issue a directive that managers were never to use function 13. She stated that there were legitimate reasons for using function 13, and they included: (1) wrong punches; (2) forgotten punches; and (3) out-of-sequence punches. She acknowledged that the City C Store did not adopt the City B Store's policy of forbidding the use of function 13.

Person 3 worked at the City C Store from July to September of 1997. She worked in the Food Court, as a Specialty Clerk, at a pay rate of \$6.35, under the supervision of Employee. She knew that she was to clock in and out for the two paid breaks, as well as for the unpaid lunch break, and that it was necessary to clock out at the end of the shift. She was told by Employee that she would be written up if she had overtime. She questioned this. She said she thought this was a "bunch of bull." She felt as if she was being punished for not taking a lunch break.

The specific incidents relied upon by Store Director, Person 5, to discharge Mr. Employee occurred during the week of August 16, 1997. They involved the time record of Person 3 who worked in Grill A. On Tuesday, August 12, she began her shift at 6 28 a.m. She was scheduled to work until 3:00 p.m., but she asked Person 1 if she could go home early because she did not get her half-hour for lunch. She was permitted to leave after she cleaned the dining area. She clocked out at 2.39 p.m. The computer payroll

program rounds daily hours to the nearest quarter hour, thereby reflecting 8.25 hours for that day. Person 3 worked under a collective bargaining agreement which provided for overtime after eight hours. Employee said he did not know that Person 1 had given Person 3 permission to leave, because Person 3 did not tell him, and Person 1 did not tell him. When he noticed the time card report for Person 3, he changed the records by inserting a ten minute break between 2:10 and 2:20. This had the effect of reducing the hours to the number of scheduled hours. Overtime was not scheduled, and overtime was not paid.

On Friday, August 15, Person 3 clocked in at 6.31 a.m. At about 10:35, she left the store to make a doctor's appointment. She did not clock out. She said her actions were based on a discussion she had had with Mr. Employee earlier. Accordingly to Person 3, Employee told her the Employer owed her 45 minutes, and that he would let the records reflect that. She returned after about one hour and fifteen minutes and worked until 3.00 p.m. Employee inserted a lunch break from 2:00 to 2.30, thereby giving her credit for the 45 minutes of work she did not work that day. Employee, however, testified that he knew nothing of the doctor appointment He said that employee Person 3 did not report her schedule change to him. He inserted the lunch break, because based on the information he had, she had forgot to punch out and in for lunch.

Person 3 told the bakery team leader, Mr. Person 5, of the arrangements allegedly made by Mr. Employee for her on Friday, August 15 Person 5 reported the matter to Person 1. The matter became the subject of an investigation. During the investigation, Employee readily admitted that he changed Ms. Person 3's time records to reflect her scheduled shift The Employer concluded that Employee manipulated time records with

the intention of deleting overtime, a violation of Employer policy. Store Director Person 6 concurred with the recommendation of termination, and Employee was terminated on September 15, 1997.

OPINION

As a matter of procedure, the burden of proving just cause for discharge is on the Employer, and the burden of proving unlawful discrimination on account of national origin is on the employee. After evaluating the evidence in the light of the arguments of counsel, I find that the evidence does not establish unlawful discrimination I further find that the evidence does not establish just cause for discharge.

The Employer asserts that Employee violated its policy against using computer overrides to eliminate overtime. The policy states, in relevant part as follows:

Associates who perform overrides will be responsible for showing good cause for the override. Overrides on the Payroll Reporting System, as well as calls into Payroll to alter time records, will be monitored at both store level and corporately. IF FOUND TO BE USING AN OVERRIDE FOR OTHER THAN LEGITIMATE, BUSINESS REASONS, YOUR EMPLOYMENT WITH EMPLOYER WILL BE TERMINATED. [Emphasis in original]

The Employer necessarily concluded in its investigation that Employee did not have a legitimate reason to use the overrides with respect to Person 3's work during the week of August 15, 1997. After reviewing all of the evidence, including but not limited to the testimony of Employee, Person 2, Person 1 and Person 3, I am persuaded that Employee presented good cause for using the computer overrides Similarly, I am not persuaded that the evidence shows that Employee did not have legitimate business reasons to use computer overrides.

I find that Employee truly believed that he was doing his job as he was expected to do it. He tracked the time records of his employees in the same manner as he was taught by Person 2. He adopted the same method of managing used by Person 2 he required employees to take the scheduled breaks and to seek permission before working overtime He reasonably assumed that unless he was notified to the contrary, the employees for whom he was responsible were following their posted work schedules. When he was on duty, he assisted employees in maintaining their work schedules by relieving them so they could take their breaks I find that he had no intent to take legitimate overtime away from employees. His intent was to eliminate the mistakes in the time records, prior to the printing of the payroll checks. It was common for employees to fail to clock out for breaks, even though they took the breaks.

The software design of the payroll system makes it easy for employees to activate overtime improperly. By taking a break without clocking out, or by taking more than the seven-minute grace period on the way to the clock-out station at the end of a work shift, an employee can unwittingly activate overtime on the payroll reporting system. The payroll software was written to automatically pay overtime, if the scheduled breaks were not properly recorded, and the software was written to allow 15 minutes of overtime for an employee who stopped to shop in the store for more than 7 minutes on the way to the clock-out station at the end of a shift. By clocking out at 2:39 p.m. on Tuesday, instead of between 2:30 p.m. and 2:37 p.m., Person 3 went over the grace period and caused overtime to kick in on the computerized records. Employee was not advised that overtime was authorized by Person 1, and when he inserted the break time, he believed that he was merely keeping the record straight.

My conclusion takes into consideration that there was a break-down in communication between Person 1 and Employee, as well as between Person 3 and Employee. Mr. Employee acted on information he had, and according to that information and the directives he had communicated with the employees for whom he was responsible, his actions were appropriate. I find that he believed, reasonably, that he had a legitimate business reason to use the computer overrides for the record of Person 3 for the week in question. Under his directive, it was incumbent on the employee to notify him of approved changes in the work schedule. I find his directive to be reasonable under all the circumstances in evidence. He merely enforced the same standing directive used by Person 2. If the employees had followed the directive, there would have been no problems. In my judgment, neither the Store Director nor the corporate office gave sufficient weight to the fact that Employee was merely following in good faith what he had been taught to do by former manager, Person 2. If the Employer did not want managers to use such a directive, or if the Employer felt that such a directive and its application was a violation of the collective bargaining agreement or the wage and hour laws, it was incumbent on the Employer to specifically advise Mr. Employee to that effect, and to take prospective disciplinary action to enforce it. The general notices provided to Employee in 1995, and later, did not clearly indicate to him that his use of the computer override under the circumstances in effect on Tuesday and Friday of the work week in question was not for legitimate business reasons.

The testimony on the issue of discrimination on account of national origin does not rise to the level of persuasiveness required for a finding of illegal discrimination on that account. Employee has been an American citizen since 1990 or 1991. He has learned

English on his own, and he has difficulty reading English. He testified that he can read English "a little bit". There is reason to believe he can read and understand English documents better today than in February 1995, when he was hired. He was proficient in operating Chinese restaurants. His experience came from Restaurant B and Restaurant C in the ten years prior to his employment by Employer. Since he knew the Chinese restaurant business, he knew more than the people who initially trained him, and it is likely that his training was not as intensive, as is now suggested by the Employer.

The evidence of discrimination relied upon by Mr. Employee consists of the alleged lack of friendliness toward him by Store Director, Person 5, and the fact that the Store Director expected him to work up to 60 or 70 hours without extra pay, if such hours were necessary to get the job done. With respect to this, it is important to point out that Mr. Employee held a 48-hour managerial job, a more desirable job than the 40-hour managerial jobs. Occasionally, it is necessary for a manager, who is exempt under the wage and hour laws, to work long hours without any extra pay. It is not improper for salaried employees to work such hours, nor is it illegal for a salaried employee to receive no overtime under the law. Similarly, I am not persuaded that the alleged lack of friendliness by the Store Director was a result of discriminatory intent.

Mr. Employee's concern that Person 1 was permitted to take two vacations while he was denied a vacation was not, in my judgment, based on arbitrary treatment related to his national origin, rather it was based on the fact that the business in the restaurants was so great, and on the further fact that Mr. Employee was the one responsible for taking care of such business.

Mr. Employee testified about recommending a person of Asian descent for consideration of employment by Person 1. He brought in an application for that person. Person 1 called him at home and asked him about it. She was concerned that he not act on the premise that he had the power to hire employees. He said that he told her he was not attempting to hire the person, but he just brought the application in for her to look at. When Person 1 did not follow this up by scheduling an interview with that person, Employee felt she was being discriminatory. The evidence, however, is not complete enough for me to reach that conclusion. It is not clear to me that Person 1 was actively seeking applicants at that time. Nor is it clear that, on the face of it, the substance of the application reasonably suggested that an interview was in order.

In conclusion, the evidence does not establish discrimination on account of national origin, nor does the evidence establish just cause for termination. It follows that Employee is entitled to relief.

AWARD

1. The Appeal of Employee is hereby granted.
2. The Employer is directed to grant reinstatement to Employee, with back pay as defined and limited in the Termination Appeal Provisions, Section M, Relief, Paragraph 2, *supra*. The Arbitrator hereby retains jurisdiction for the purpose of determining the amount of back pay. The Employer shall have fourteen days from receipt of this Award to exercise the option set forth in paragraph 3 of Section M.

DAVID L. BECKMAN

VOLUNTARY ARBITRATION PROCEEDINGS

Termination Appeal Procedure

David L. Beckman, Arbitrator

In the Matter of Arbitration between:

EMPLOYER

And

EMPLOYEE

SUPPLEMENTAL OPINION AND AWARD

Date of Opinion and Award: May 3, 1998

Backpay Issue Raised: June 19, 1998

Receipt of Employee Brief: June 26, 1998

Receipt of Employer Brief: July 10, 1998

Date of Decision: August 14, 1998

BACKPAY ISSUE

What is the total amount of back pay due Employee from his discharge on September 15, 1997 until his reinstatement, effective May 26, 1998?

RELEVANT TERMINATION APPEAL PROVISIONS

Section L

Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate's termination from employment. The arbitrator shall have the authority to determine whether the termination was lawful under applicable federal, state and local law and to determine whether the Employer had just cause for termination.

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or

which was raised at the arbitration hearing and which was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business.

If the arbitrator finds that the associate-violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the associate was terminated for that violation, the associate's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser action.

Section M

Relief

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the awarded] the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment compensation payments, and any amount attributable to the associate's failure to mitigate the damages.

Salary (September 15 to December 1)	\$ 6,655 00
Bonuses (For 10th and 11th Period)	376.40
COBRA Reimbursement	884.86
Short Term Disability (weekly indemnity)	6,355.00
Unused Paid Vacation	1,210.00
Unused Personal Day	242.00
TOTAL	\$ 15,723.26

EMPLOYEE POSITION

It is the position of Mr. Employee, by counsel, that Employee is entitled to \$23,895 66 in back pay. Employer's claim that the back pay benefits should be reduced

by some undermined amount must be rejected for all of the reasons advanced in our brief
In summary, those reasons are as follows:

- (1) The "failure to mitigate" under State A Law is an affirmative defense for which Employer had the burden of proof on the date of the arbitration, and the failure of Employer to raise the issue and offer proof on the date of the arbitration hearing amounted to a waiver of the issue.
- (2) Even if Employer had not waived the issue of "failure to mitigate" the specific facts in this case do not indicate a failure to mitigate under State A Law. The plain language of Section M does not provide for a medical offset. Employee had no duty to do what was impractical in mitigating damages. He did undertake all reasonable efforts to mitigate his damages. The Employer's proffered proof is too speculative to warrant consideration.
- (3) The Employer's position is so unreasonable as to justify an award of attorney fees to Mr. Employee for having to address this issue. Mr. Employee requests an additional \$2,000 as reasonable attorney fees to research and answer this matter.

PROCEDURAL BACKGROUND

The Termination Appeal Procedure which Employer (herein referred to as Employer or Employer) makes available to a managerial employee (herein referred to as Appellant or Employee) who has been discharged contains provisions which allow for final and binding arbitration Under the Termination Appeal Procedure, David L Beckman, Louisville, Kentucky was selected as Arbitrator to decide the propriety of Employee's termination. The hearing was held at the Hotel A, City A, State A on

February 25, 1998, and an award was entered, dated May 3, 1998, providing for the reinstatement of Employee with back pay.

On June 19, 1998, the parties advised the arbitrator that they had a dispute with respect to the amount of back pay due Mr. Employee. After hearing the nature of the dispute, it was agreed that each party would brief the issue. The brief from counsel for Mr. Employee was received on June 26, 1998, and the brief from counsel for Employer was received on July 10, 1998.

FACTUAL BACKGROUND

On May 3, 1998, the undersigned arbitrator entered a remedial Award in favor of Employee, as follows.

2 The Employer is directed to grant reinstatement to Employee, with back pay as defined and limited in the Termination Appeal Provisions, Section M, Relief, Paragraph 2, supra. The Arbitrator hereby retains jurisdiction for the purpose of determining the amount of back pay. The Employer shall have fourteen days from receipt of this Award to exercise the option set forth in paragraph 3 of Section M

The Employer did not exercise the aforesaid option. Employee was reinstated, effective May 26, 1998. The Employer does not dispute the back pay due Mr. Employee for the period of September 15, 1997, the date of his termination, to December 1, 1997. This back pay is calculated as eleven weeks of salary of \$605.00 per week, or a total of \$6,655.00 (less applicable deductions). The Employer admits that Employee is entitled to performance bonuses for the Employer's 10th and 11th business periods (October 12 to November 8 and November 9 to December 6), amounting to \$376 40. There is also agreement that Employer will reimburse Mr. Employee \$884 86 for the cost incurred by him in maintaining health benefits for himself under COBRA, less the normal weekly

contributions he would have paid through payroll deductions if he had remained employed.

At issue is the back pay due between December 1, 1997 and May 26, 1998, a period of 25 weeks. The Employer has asserted that full back pay is not proper for that entire period, because Employee was so seriously ill during that period of time that he would not have been able to work, and instead of salary, he would have received short term disability for 13 weeks, in the amount of \$6,355 00 and nothing for the remaining 12 weeks.

OPINION

The initial inquiry is whether Employer waived the right to raise an issue of mitigation by not presenting proof of same on the date of the arbitration hearing. Counsel for Employee relies on certain State A cases which place the burden of proving the affirmative defense of failure to mitigate at the original hearing Counsel for Employer responds that the arbitration forum does not have formal rules of pleading, and that it is appropriate to address the issue of medical inability to work, especially since much of the inability occurred after the original hearing on February 25, 1998.

I find no waiver here. The question of medical inability to work in a back pay situation is relevant under Section M, because the premise of that section is that the employee would have been able to work, but for the unjust termination action. The reality of this case is that while Mr. Employee was off for the full period of time in question, because of the proceedings necessary to clear up the unjust termination issue, he would not have been able to work during portions of that time, because of his serious illness.

However, I am not persuaded that Mr. Employee could not have worked for the full 25 weeks, as claimed by the Employer.

Counsel for Mr. Employee next argues that the "failure to mitigate" position of the Employer is too speculative to warrant consideration. The Employer responded to this by asking the arbitrator to grant a continuance for the parties to develop further evidence on the point. I am not persuaded that the matter is too speculative, and I do not believe that a further evidentiary hearing is needed. First of all, neither party wanted an evidentiary hearing on June 19, 1998, when this issue was first raised with the arbitrator. Secondly, there is no dispute that Employee became seriously ill during the period in question. He was operated on for colon cancer, and he entered upon chemotherapy treatments thereafter. The treatments occurred three times per month in January, February, March and April, and four times in May. His last treatment was on June 11, 1998.

Evidence in the record established that Employee was hospitalized from December 3 through December 6, 1997, and from December 15, through December 20, 1997. Further, it is clear that he could not have worked for a five-week period surrounding that time. Employee claims through his counsel that, but for the aforesaid periods, he was ready, willing and able to work at Employer.

The claim of Employee is not supported by the oncologist. While the oncologist initially advised Employer officials that Employee would not have been allowed to work during the period of the chemotherapy, the oncologist later advised that Employee would have been able to work between February 2 and May 21, 1998. The dispute in the evidence needs resolution.

As the trier of the disputed facts, I find that with respect to the 25 weeks between December 1, 1997 and May 26, 1998, Employee would not have been able to work for 17 of the weeks. I further find that he qualified for short term disability benefits for 13 of the weeks, and that he should be paid his regular salary for the remaining 8 weeks.

The claim of counsel for Employee for additional attorney fees is denied. The issue raised by Employer was not raised in bad faith. Nor was Employer unreasonable in raising the issue.

In conclusion, I find the back pay due Employee under the arbitration award, entered on May 3, 1998, is as follows:

Salary (September 15 to December 1)	\$ 6,655.00
Bonuses (For 10th and 11th Period)	376.40
COBRA Reimbursement	884.86
Short Term Disability (13 weeks)	6,355.00
Additional Salary (8 weeks at \$605)	4,840.00
Unused Paid Vacation	1,210.00
Unused Personal Day	242.00
TOTAL	\$ 20,563.26 ¹

BACK PAY AWARD

The total back pay due Employee under Section M, Relief, is hereby determined to be \$20,563.26.

DAVID L. BECKMAN

¹All of this amount, except for the reimbursement of COBRA health insurance benefits, is subject to income tax withholding.