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BEFORE THE  
ARBITRATION SERVICE OF PORTLAND

NORTHWEST DIRECT TELESERVICES,  
INC., an Oregon corporation,

Claimant,

v.

MAX ZWEIZIG, an individual,

Respondent.

ASP No. 050511-1

OPINION AND ORDER

Because of a variety of circumstances this matter has not reached a conclusion for an extended period of time.

The parties have now had ample opportunity to put on their witnesses and have presented the exhibits they wished.

The parties have also submitted lengthy memoranda.

The time for additional argument or submissions has now expired.

The vitriol found in the submissions and the accusations of fraud, lying, and intentional misconduct have been of little benefit to the arbitrator.

I find that, by and large, the witnesses (with the exception of Mr. Kawiuk) were credible. It seems clear from the exhibits introduced that Mr. Kawiuk searched for documents intended to discredit Respondent, although he denied such an effort. Promptly upon the report of Respondent of what he believed to be wrongful or illegal conduct, an active search was commenced to locate all correspondence that might put Respondent in a bad light.





1 Because of the lapse of time from the beginning of the dispute (through no particular  
2 fault of anyone, with the regular change of counsel by both parties contributing significantly to  
3 the delays), memories have dimmed and testimony has been based on memories of events that to  
4 a large extent happened years ago. Therefore, I find that when memories conflict among the  
5 witnesses and parties, or the exhibits, I must rely on contemporaneous writings to resolve the  
6 conflicts.

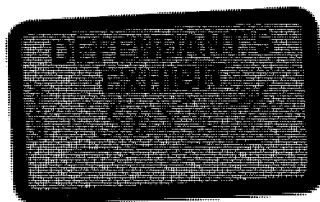
7 For example, Claimant relies in several instances in his briefing on Exhibit 1, page 64,  
8 and his testimony on May 24, 2010, pages 168-170. (The actual quote comes from page 160 of  
9 the transcript.)

10 "Rote explained his response to Zweizig's 'So I take it I'm fired' email:

11 "And I said, 'Yes, so you seem to want that. You seem to kind want to exit on an  
12 exclamation point, in spite of the fact you've asked for this additional time, in  
13 spite of the fact we're working together, you seem to want to exit with some kind  
14 of drama. And so here it is, some kind of drama.'" Post-Hearing Memorandum  
15 of Northwest Direct Teleservices, p. 67.

16 While "Yes" might have been an appropriate response to the comment in Respondent's  
17 email if that had been the intention, it was not so expressed until the hearing. The responsive  
18 email from Mr. Rote is quite different than his testimony about what he said. Indeed, a part of  
19 the response in Mr. Rote's email states "If you think you can get more money for your work  
20 effort, elsewhere, you should seek other employment and give your notice according to the terms  
21 of your contract." Although I do not find that Mr. Rote intentionally misrepresented the  
22 exchange, it does represent an example of why I find that the exhibits prepared  
23 contemporaneously with the dispute are more reliable than the memories dimmed by time.

24 The parties are in disagreement about when the October 2, 2003, email was prepared and  
25 sent. The testimony of the experts leaves questions open about that controversy, but to the  
26 arbitrator it is difficult to harmonize this email with the one written by Mr. Rote just 80-90 hours  
earlier.





1 The regular exchange of emails from October 2, 2003, do not suggest that Respond  
2 has been terminated, but rather are consistent with the expectation of continued employment. As  
3 late as October 23, 2003, Mr. Rote sent an email to Respondent: "Hope all is OK Max. Let me  
4 know if I can help." (Exhibit 1, page 83)

5 Only after the report by Respondent of his concerns over the possibility of overcharging  
6 and correspondence with the State of Oregon to that effect did Mr. Kawiuk start his search for  
7 emails trying to discredit Respondent and did the correspondence between Respondent and  
8 Mr. Rote take on the hint that termination was imminent.

9 I turn first to the claims of the claimant, Northwest Direct Teleservices, Inc.

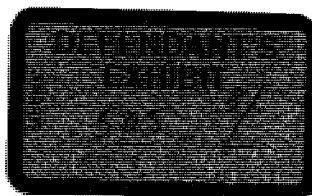
10 **First Claim for Relief**

11 Claimant's primary claim is that Respondent breached his employment agreement by  
12 deleting, destroying, or otherwise failing to return to Claimant certain software programs, codes,  
13 and applications all to Claimant's damages of \$56,320.

14 Respondent denies any such deletion, destruction, or failure to deliver all property in his  
15 possession belonging to his employer.

16 It appears from the testimony and exhibits that another employee, Cox, was able to  
17 extract data, create reports, and send data to clients as needed. His testimony was that the  
18 programs were readily available and that he routinely accessed the programs for his own use.

19 Claimant during these proceedings attempted to belittle Cox or accuse him of disloyalty  
20 because of his resignation, but it also appears that Cox was the only one in Claimant's employ  
21 who could have recovered the claimed destroyed, deleted, or lost information. That, coupled  
22 with the continuous use of the involved computers over a period of years, seemingly made it  
23 impossible for the various experts called by the parties to confirm or deny any deletion or  
24 destruction. Claimant was, or should have been, advised by his counsel at the beginning of the  
25 threat of litigation that the preservation of the integrity of the computers and the information to  
26 be found there was paramount to proving the claims now made.





1 Given that the burden is on Claimant to prove this claim, the arbitrator cannot find the  
2 the burden has been borne and, therefore, this claim for relief is denied.

3 **Second Claim for Relief**

4 Claimant's second claim for relief is one for conversion and requires the exercise of  
5 dominion or control over a chattel. The arbitrator finds no evidence to support a claim of  
6 conversion.

7 **Third Claim for Relief**

8 The arbitrator makes no finding as to whether Respondent had a fiduciary duty to  
9 Claimant. The existence of a fiduciary relationship between master and servant is one that is  
10 subject to great controversy and disagreement.

11 Having found that Claimant did not prove the destruction or deletion of the subject  
12 materials, this claim is also denied.

13 **Fourth Claim for Relief**

14 Claimant claims damages of \$125,000 in the form of attorney fees and costs incurred to  
15 defend Respondent's litigation commenced in the Superior Court of New Jersey. Claimant  
16 claims that the employment agreement obligated Respondent to participate in mandatory  
17 mediation and arbitration, thus foreclosing any right to proceed in courts.

18 Respondent believed correctly that he had a right to a determination by a court with  
19 appropriate jurisdiction whether he was bound by the agreement limiting his legal rights. It  
20 appears that Claimant failed to give notice within 90 days of an intent to mediate any and all  
21 disputes arising out of the employment of Respondent by Claimant and thus waived that  
22 exclusive remedy. The employment agreement further provides that the arbitrator shall have no  
23 power to alter, amend, or modify any provision of the employment agreement.

24 Respondent had a legal right to a determination of whether his legal remedies were  
25 limited to those set forth in the employment agreement. If Claimant is correct that there was  
26 such a limitation and that filing the action was wrongful, an immediate response advising the





1 court of Claimant's position should have been done to mitigate damages. In any event,  
2 Respondent had the right to a court decision as to the scope of his remedies.

3 This claim is, therefore, denied.

4 **Fifth Claim for Relief**

5 The arbitrator finds that Claimant has a claim for the \$4,316.94 paid for court reporting  
6 fees that were the obligation of Respondent and it is so ordered. Claimant may have judgment  
7 against Respondent in that amount.

8 **Respondent's Claims**

9 It is clear from the exchange of emails between the two prior to the actual termination  
10 that trouble was brewing. Mr. Rote, as is his custom, expressed himself rather strongly in his  
11 belief that Respondent's performance was unsatisfactory. It is likely that the relationship of  
12 employer and employee was doomed to an early grave given the animosity and concerns  
13 expressed by both parties with or without the notice of improper billings.

14 I find that the catalyst for the termination at the time it took place was in retaliation for  
15 the action Respondent took over his belief that there might have been efforts at overbilling some  
16 clients.

17 I need not, and do not make, any finding or conclusion as to whether Respondent's  
18 concerns were true, but I do find that he had a reasonable belief that they were.

19 Because of my conclusion that Respondent was terminated at the time he was because of  
20 retaliation, I must then determine the damages suffered by Respondent.

21 As mentioned above, it is clear that the relationship was not going to last long. I  
22 conclude that the damages suffered by Respondent must correspond to that likelihood.

23 Therefore, I find that Respondent's damages must be confined to a reasonable period of  
24 time during which he could have expected his employment to continue. A reasonable period of  
25 time for these purposes is nine months.

26





1 Respondent is entitled to recover his salary for a period of nine months from  
2 November 15, 2003. He is, therefore, entitled to a judgment of \$67,500 plus one week's pay  
3 reflecting vacation pay in the amount of \$1,875. Respondent also seeks attorney fees, which I  
4 decline to award.

5 Respondent also claims damages as a consequence of the actions taken by Claimant or its  
6 agent in pre-discharge actions as set forth in Respondent's reply brief at pages 32-33. Although,  
7 as discussed above, Mr. Rote's messages are frequently abusive and inflammatory, Respondent  
8 should have become accustomed to such behavior and developed a tolerance for it. I find that  
9 any claim for damages for the circumstances described there cannot be sustained, and I award  
10 none.

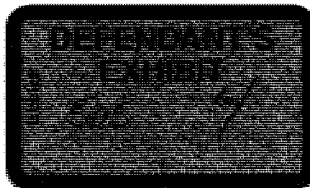
11 Respondent also seeks damage for the post-discharge actions as describe in the reply  
12 brief at page 33. Respondent did suffer damages because of the report to the Department of  
13 Labor that he had been discharged for fraud and because he was required to appear at a hearing  
14 to obtain unemployment benefits to which he was rightfully entitled. I find that his damages in  
15 connection with those activities are \$1,000.

16 Respondent's claimed damages for the actions of Mr. Rote in a letter to Judge Kugler, the  
17 letter sent suggesting to former co-workers that they should keep children away from  
18 Respondent, and the report to insurers of theft are more difficult of assessment. There is no  
19 evidence in the record that insurers relied on those reports; and, in fact, they refused the claims  
20 submitted. There is no evidence that Respondent has been damaged as a result of any insurance  
21 company actions. Given other actions of which Judge Kugler is aware, it is doubtful that he put  
22 much stock in those letters, and it is more likely the letters resulted in injury to the author's  
23 reputation than to Respondent. I can find no reason to award damages for those letters to  
24 Respondent.

25 Claimant claims (Post-Hearing Memorandum of Northwest Direct Teleservices, p. 92)  
26 that it filed complaints with law enforcement officials on advice of counsel. The Arbitrator has

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EXHIBIT 3 - Page 6 of 8  
Declaration of Max Zweizig



1 searched the record but can find no support for that assertion. The letter to co-workers wa  
2 unwarranted and seemingly was done solely in an effort to embarrass Respondent. Such actions  
3 were done in retaliation for Claimant's perceived misconduct by Respondent and his apparent  
4 anger. It is particularly difficult to find an appropriate remedy for such conduct, but a reasonable  
5 sum to award for it and its consequences is \$5,000, and it is so ruled.

6 Dated this 31st day of March, 2011.

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9 William B. Crow  
Arbitrator

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