BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
PACK AIR ASSEMBLY, INC.	
and	Case 1 No. 42323 A-4448
GENERAL DRIVERS AND DAIRY EMPLOYEES UNION LOCAL NO. 563	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, by Mr. Scott D. Soldon, appearing on behalf of the Union.
Gill and Gill, Attorneys at Law, by Mr. Bruce N. Evers, appearing on behalf on the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1987-88 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the pay raise grievance of Charles Meyer.

The undersigned was appointed and held a hearing on August 1, 1989 in Neenah, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on September 14, 1989.

ISSUES

The Union proposes the following:

1. Did the Employer violate the contract as stated in Grievance 8411?

2. If so, what remedy is appropriate?

The Company proposes the following:

1. Has the National Labor Relations Board already decided whether the Company pledged wage increases to probationary employees?

2. Was the grievance timely and properly presented to the Company under Articles 5 and 6 of the Agreement?

3. Was the grievance timely presented for arbitration under Articles 5 and 6 of the Agreement?

4. Did the Company promise the grievant a wage increase?

5. Did the Company violate the Agreement by not providing the wage increase the Grievant is alleging was promised him?

RELEVANT CONTRACTUAL PROVISIONS

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Article 1 Intent and Purpose

It is the intent and purpose of the parties hereto to set forth herein the entire Agreement covering rates of pay, wages, and hours of employment, to be observed in good faith between the parties hereto, and in the mutual interest of the Company and the employees, to provide for the operation of the plant under methods which will further, to the fullest extent possible, the economic welfare of the Company and its employees, the safety of the employees, economy of operation, quality

and quantity of output, cleanliness of plant and protection of property. It is recognized by this Agreement that it is the duty of the Company, the employees, and their elected representatives, to cooperate fully, individually, and collectively for the advancement of said conditions.

Article 2 Recognition

Section 1. The Company recognizes the General Drivers & Dairy Employees Union, Local No. 563 as the sole and exclusive bargaining representative of all employees of the Company employed at its Menasha, Wisconsin, facility. Excluded from this Agreement are office clerical employees, sales employees, professional employees, managerial employees, guards, and supervisory employes as defined by the National Labor Relations Act, as amended.

Section 2. All present employees who are members of the Union on the effective date of this sub-section shall remain members of the Union in good standing as a condition of employment. All present employees who are not members of the Union and all employees who are hired hereafter shall become and remain members in good standing of the Local Union as a condition of employment on and after the 31st day following the effective date of this subsection or 61 days following employment, whichever is the later.

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Article 5 Grievance Procedure

Section 1. For the purpose of this Agreement, a grievance shall be defined as any controversy between the Company and the Union, or between the Company and any employee or group of employees concerning the effect, interpretation, application, claim of breach or violation of this Agreement.

Section 2. Every effort shall be made to settle any grievance, complaint, or dispute as defined above in the following manner:

a. Any employee or group of employees subject to this Agreement having any complaint that any of the provisions of this Agreement have been violated shall have the right to invoke the grievance procedure.

b. Saturday, Sunday, and any paid holiday shall not be counted as regular working days in any steps in the grievance and arbitration procedure.

c. Any time limits provided in the grievance procedure and arbitration procedure may be extended by mutual consent of the Company and the Union.

d. The parties involved at any stage of grievance procedure may mutually agree to forego any step of this grievance procedure section.

e. If the Company does not answer an appeal of a grievance within the specified time limits, the employee or the Union may elect to treat the grievance denied at the step and immediately appeal the grievance to the next step, including arbitration.

f. Failure of the employee or Union to comply with the time elements set forth in the grievance and arbitration procedure for reporting a grievance and taking appeals, shall result in waiver of the rights of the employee or Union to proceed further. All steps under the grievance procedure must be exhausted before proceeding to arbitration, unless the parties mutually agree otherwise.

Section 3. If any such grievance or dispute should arise, it shall be settled in the following manner.

Step 1 -- Grievance(s) shall first be discussed with the employee's immediate supervisor within three (3) regular working days of the incident giving rise to the

grievance. The supervisor shall give his decision to the employee within three (3) regular working days after being so contacted by the employee.

Step 2 -- If no satisfactory solution is reached at Step 1, then the matter will be reduced to writing, signed by the employee and his/her steward, and be submitted to the Shop Superintendent within three (3) regular working days after the supervisor's response. If no satisfactory solution is reached following submission of the written grievance or complaint, the Company shall reply to the Union in writing as its response at Step 2.

Step 3 -- If the grievance is not settled at Step 2, and the Union desires to proceed to Step 3, the Union shall so notify the Company in writing within three (3) regular working days after the Step 2 response. The Union and the Company shall have the right to call in their respective outside chosen representatives to assist in arriving at a mutual agreement.

Step 4 -- If the grievance is not settled at Step 3, and the Union desires arbitration, the Union shall notify the Company in writing within (5) regular working days after the Step 3 response. The Secretary-Treasurer and/or Executive Board of the Local Union shall have the right to determine whether or not the grievance warrants submission to arbitration by the Union.

Article 6 Arbitration

Section 1. The party desiring arbitration shall notify the other party of its desire to arbitrate, in writing, and within five (5) regular working days submit the dispute directly to the Wisconsin Employment Relations Commission for the appointment of an arbitrator from its staff.

Section 2. The arbitrator shall conduct hearings and receive testimony relating to the misunderstanding or dispute and make a decision in the matter. The decision of the arbitrator shall be final and binding on the Company, the Union and the employee and/or employees.

Section 3. It is understood that the arbitrator shall not have the authority to change, alter, modify any of the terms or provisions of this Agreement.

Section 4. The expense of a court reporter (if mutually requested) shall be shared by both parties.

Section 5. The arbitrator lacks any authority to award as part of his/her decision any backpay or benefits in excess of one hundred twenty (120) working days. Any backpay or benefits awarded by any arbitrator or court is limited to one hundred twenty (120) working days. Further, the arbitrator lacks any authority to award backpay or benefits in a situation where the arbitrator finds that the Company assigned overtime and/or work in violation of this Agreement. Under these circumstances, the remedy will be limited to assigning overtime lost or work hours lost to the grievant as additional overtime hours or hours of work within three (3) months of the arbitration award. Specifically, under these circumstances, the Company cannot be required to pay an employee for time not worked.

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Article 11 Seniority

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Section 2. Probationary Period. A new employee, or employees rehired after a break in service shall serve a probationary period of sixty (60) calendar days, unless an extension of the probationary period is requested by the Company and approved by the Union. During such sixty (60) calendar day probationary period, the employee will not accrue seniority rights and the Company shall have the unrestricted right to

lay off or discharge said employee(s) and its action will not be subject to the grievance procedure. Employees successfully completing their probationary period shall become regular employees and shall be credited with seniority from the last date of hire.

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Article 23 Extra Contract Agreement

The Company agrees not to enter into any agreement with the employees covered by this Agreement individually or collectively which in any way reduces wages, hours or working conditions of said employees or any individual employee or which conflicts with the terms of this Agreement.

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Article 36 Wages and Job Classifications

Section 1. The parties have agreed that there are two job classifications in the plant for purposes of this Agreement. The job classifications are fabrication and assembler.

Section 2. The Company has agreed to grant, at a minimum, a five percent (5%) wage increase across the board to all full time regular employees who were on the payroll on the date of ratification of this Agreement, January 15, 1988. This wage increase is retroactive to October 1, 1987, or the employee's hire date, whichever is the later, and is based on the hourly rate of pay paid to employees on or about January 15, 1988.

Article 37 Maintenance of Standards

Section 1. The Company agrees that all conditions of employment in its individual operation relating to wages, hours of work, differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this section shall not apply to inadvertent or bona fide errors made by the Company or the Union in applying the terms and conditions of this Agreement if such error is corrected within ninety (90) days from date of error.

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Article 40 Complete Agreement

This is the full and complete Agreement between the parties concerning wages, hours and conditions of employment. Any matter not covered by this Agreement shall remain in the sole discretion of the Company to change, modify or delete.

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DISCUSSION

Upon review of the evidence and arguments in this matter, I conclude that even assuming that the Company engaged in the conduct complained of by the Union, the collective bargaining agreement does not provide me with authority to remedy it.

The parties dispute a wide variety of procedural matters, down to the level of who should pay for the filing fee and the cost of the room retained for the hearing, and also dispute whether or not the Grievant was in fact promised a pay increase, but it is clear that the substantive issue identified as Company's issue No. 5 above affects other grievances arguably pending between the parties. (An additional issue is whether the parties agreed to treat the Meyer grievance as a test case or whether, as the Company alleges, the Union waived all other similarly situated employes' rights in electing to process the Meyer grievance at the hearing herein.) Thus an analysis of the facts relating to that specific issue subsumes most of the other issues in dispute; and the discussion here will accordingly be directed to the question of whether the contract could be violated by such a promise.

Grievant Charles Meyer was hired by Pack Air, Inc. on December 8, 1987 as a welder. On February 29, 1988 he was told that he was to be laid off by Pack Air, Inc. and rehired by Pack Air Assembly, Inc. at a new facility, building steel racks. Meyer testified that there was a change in his job location but not in his job. There is no dispute that in starting the Pack Air Assembly plant the Company told employes that that facility was a non-union plant, and that the Union subsequently filed a charge with the National Labor Relations Board alleging that the Company violated sections of the National Labor Relations Act by its conduct related to the opening of that plant and the transfer of employes. Subsequently, the Company entered into a settlement with the National Labor Relations Board, as one condition of which it agreed to recognize the Union and apply the existing collective bargaining agreement at the new plant.

In the interim, Meyer testified, he was hired at the new plant at $5.00 per hour, but was told that if he worked out he would get $6.00. Meyer testified that he believed this referred to the 90-day probationary period the Company had unilaterally established at the new plant. There is also no dispute that the Company never paid the $6.00 per hour pay rate allegedly promised to Meyer, though it did raise his pay rate to $5.30 by the time the Union struck the Company in April, 1989. Nine employes filed grievances similar to Meyer's; Meyer's is dated August 8, 1988, and all of the others were signed between that date and August 2, 1988.

On March 23, 1988 the Union filed its original NLRB charge against the Company, under both names; this resulted in a decision by the Board, adopting a settlement stipulation which was reached by the Regional Director and the Company over the Union's objections. The order adopting the settlement stipulation refers to the Company and General Counsel of the Board reaching said agreement on August 9, 1988; and the decision is dated November 30, 1988. Among other terms, the order requires the Company to refrain from "unilaterally granting wage increases, changing the probationary period of or changing any term or condition of employment of our employees in the unit without first giving the Union notification of and the opportunity to bargain about such changes, however, the wage increases granted employees shall remain in effect." On April 7, 1989, the Union filed a fresh NLRB charge against the Company, contending in part that the Company was not following the terms of the settlement in the prior case. The Board's Regional Director, and subsequently its Office of Appeals, refused to issue a complaint in this matter, and in pertinent part the denial by the Office of Appeals stated, "Further, contrary to your contention, the settlement agreement did not require the Employer to pay unilaterally promised future wage increases. Rather, the settlement precluded such action."

The Company contends that it has complied in all respects with the National Labor Relations Board decision/settlement and that the Union has failed to process the grievance involved here in a timely fashion pursuant to the collective bargaining agreement. But assuming for purposes of argument that the grievance was timely and properly processed at all levels, that this issue is appropriately in arbitration, and that Meyer should be credited over his supervisor, Dale Gruszynski, to the effect that when hired into the new plant Meyer was in fact promised a $1.00 per hour pay increase following his probationary period, the collective bargaining agreement still does not provide a basis for the Union's requested remedy.

In its brief, the Union makes on this point the general argument that because the Company promised the employes raises and did not deliver, a remedy should be ordered. Article 1 was cited in the Union's brief in support of the proposition that it was within this Arbitrator's authority to make such a remedy; and at the hearing, the Union cited several other contractual articles as relevant to this matter. I will consider each in turn as it affects the merits of this issue.

Of the contractual sections cited by the Union, Articles 1 and 2 are the customary "intent" and "recognition" clauses which establish the obligation of the Employer to negotiate with the Union, but do not specify exact terms and conditions of employment that are guaranteed by the Agreement. The sole material arguably relevant to this matter is contained in Article 1, in which there is both a reference to the contract being "the entire Agreement" between the parties and a general exhortation to the Company, as well as the employees and Union, to "cooperate fully." The Union argues that the requirement to "cooperate fully" is violated by the promise of a wage increase not subsequently implemented. But even if "cooperate fully" is taken to include so unusual a circumstance as this, and therefore the clause is considered relevant, an interpretation of this clause to the effect that a non-contractual wage increase should be enforced is opposed by more specific language in Article 40. That clause states that the Agreement is complete as to wages, etc. and goes on to state that "Any matter not covered . . . shall remain in the sole discretion of the Company to change, modify or delete." The Union advances no reason why a non-contractual promised wage increase would not be governed by that clause; and as discussed below, no other clause in the Agreement serves to clothe the alleged promise to the Grievant with contractual status.

Article 5 is the grievance procedure, which plainly makes no reference to the merits of the grievance. Article 11, Section 2, by referring to a 60-calendar-day probationary period, would demonstrate that the Company violated that clause by enacting unilaterally a 90-day probationary period for the Grievant; but the Grievant was not discharged, and that is not part of the subject matter of the grievance in any event.

Article 23, meanwhile, prohibits the Company from entering into agreements individually with an employe. This clause would be clearly be violated by the presumed Company action of promising Meyer a $1.00 an hour pay increase as an individual employe. Such clauses, however, are customarily placed in collective bargaining agreements as a protection to employes against employers negotiating lower wages and working conditions with them individually, a purpose clearly intended by the specific wording of Article 23. Here, enforcement of this clause would simply abrogate the higher rate arguably agreed to; the Union does not argue for this result; and nothing in the clause provides an arbitrator with authority to enforce the improper agreement once it is agreed to.

The remaining article cited by the Union is Article 37, Maintenance of Standards. I note that in this clause the reference is made to maintaining "not less than the highest standards in effect at the time of signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement." The pay raise argued by the Union to be owing to the Grievant was not in existence at the time of signing of the Agreement, and was clearly not part of the "specific provisions for improvement" made in the Agreement. Accordingly, Article 37 provides no authority for enforcement of that pay increase.

The Company, meanwhile, relies in part on Article 36, Section 2, in which I note the language that "the Company has agreed to grant, at the minimum, a five per cent wage increase across the board to all full-time regular employes who were on the payroll on the date of ratification of this Agreement, January 15, 1988." But this clause refers to a raise to be implemented as of six weeks before the Grievant was laid off and rehired. Failure to pay that raise is not argued as a basis of the grievance here. I note, however, that by specifying the date of that pay increase and by making no other reference to any increase, this section implies no contractual support for the Grievant's subsequent claim for payment of the disputed $1.00 per hour.

More to the point, the Union's fundamental argument is one of equity. In its brief the key passage is as follows:

> "Where an Employer promises money to employes, it should be forced to honor that promise. Here, Article 2 (sic) says that the Employer will do its best to cooperate with the Union. The wage article provides a minimum beyond which the Employer may go if it chooses to do so. When the Employer chooses to do so, it must live up to its promise. Backpay should be awarded . . ."

But I have noted that no particular article of the Agreement requires the Employer to pay more than the January 15 wage increase. And I must also note that Article 6, Section 3 specifies that "the arbitrator shall not have the authority to change, alter, modify any of the terms or provisions of this Agreement." Meanwhile, Article 5, Sections 1 and 2 limit the definition of a grievance as involving "breach or violation of this Agreement" and do not broaden the definition to include other kinds of acts which might generally be perceived as unfair. It is not necessary for me to condone the Company's acts to hold that this Agreement does not provide authority for an arbitrator to read into every action in which a party has engaged in unfair conduct the implied authority to enforce the consequences of that conduct, regardless of the specific language of the Agreement. Rather, and as is customary in arbitration clauses, this Arbitrator is restrained to interpret the terms of the Agreement, applying principles of equity only where a specific but ambiguous term of the Agreement is arguably violated. Here, as noted, I can find no section of the Agreement which is violated by the Company's alleged conduct in promising Meyer
a pay increase when it thought it was non-Union, and then declining to pay that

increase once it discovered otherwise. Accordingly, even were the Union to prevail on every preliminary issue raised by the Company in this matter, it could not prevail on the central issue. 1/

1/ The only issues not governed by this conclusion are two which the parties discussed at the hearing, but which the Company did not refer to in its brief: Whether the Company has the obligation to pay half the filing fee for arbitration, and whether the Union has the obligation to pay part or all of the cost of the hearing room. Neither of these questions is raised by the grievance herein, and I conclude that neither issue is properly before me for disposition.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company did not violate the Agreement by not providing the wage increase the Grievant alleged was promised him.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 27th day of November, 1989.

By _____
Christopher Honeyman, Arbitrator