BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNITED STEELWORKERS OF AMERICA, LOCAL 2138	
and	Case 9 No. 43460 A-4575
PHOENIX STEEL, INC.	

Appearances:
Mr. Donald E. Schmitt, Staff Representative, United Steelworkers of Americ
Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Mr. Joseph A. Melli,

ARBITRATION AWARD

United Steelworkers of America, Local 2138, hereinafter referred to as the Union, and Phoenix Steel, Inc., hereinafter referred to as the Employer, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned was designated to arbitrate the dispute. A hearing was held before the undersigned on March 8, 1990 in Eau Claire, Wisconsin. A stenographic transcript was made of the record which consisted of the stipulations of the parties and the parties submitted post-hearing briefs in the matter by April 6, 1990. Based on the record and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

1. Was the grievance timely filed?

2. If so, when the Employer became self-insured as of October 1, 1989, was it required under the parties' collective bargaining agreement to provide the coverages in effect on October 1, 1987 under the Midelfort HMO Plan which were modified or eliminated by the Midelfort HMO Plan on October 1, 1988?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE XI
GRIEVANCES

Differences of opinion or disputes concerning the interpretation of or adherence to the terms and provisions of this Agreement shall be handled in the following manner:

The employee originating the grievance shall immediately discuss the matter with the foreman in charge as to his grievance. If the grievance is not immediately resolved the employee shall then initiate Step One of the grievance procedure under Article XI of the labor contract. All grievance claims shall be presented within five (5) working days, except in wage claims, when the employee has been absent from work, he shall have five (5) days after returning to work to present his claim.

. . .

If any of the preceding time limits are not met, the party not in compliance shall be deemed to "have Lost the Grievance". Time limits may be extended by mutual agreement. The arbitrator shall have no right to amend, modify, nullify, ignore or add to or subtract from the provisions of this Agreement or extend its duration, and any grievance not involving a provision of this Agreement or its interpretation shall be denied. He shall consider and decide only the particular issue(s) presented to him in writing by the Employer and the Union, and his decision and award shall be based solely upon his interpretation of the meaning or application of the terms of this Agreement to the facts of the grievance presented.

. . .

ARTICLE XIII
INSURANCE

> The Company shall have the option of changing insurance carriers provided the benefits are equivalent or better than those presently provided by this contract. If the Company should self-insure, they shall be required to continue to provide the benefits of the State mandated programs, as presently provided by this contract. For the duration of the contract the Company agrees to pay the entire cost of the stipulated insurance coverage with the exception of $6.22 per month family and $3.18 per month individual. The contribution shall be deducted from each employee's earnings during the month preceding that coverage. The Midelfort HMO Plan will be the base plan. Employees may enroll in other approved plans provided they pay any additional cost beyond the base plan cost.

BACKGROUND

The parties stipulated to the facts in this matter which are as follows:

The parties current collective bargaining agreement became effective on October 1, 1987 to continue in effect until September 30, 1990. Article XIII of this agreement provided that the Midelfort HMO Plan would be the base plan for health insurance. The agreement also provided that the Employer could self-insure but would be required to provide the benefits, "as presently provided by" the agreement. The Midelfort HMO Plan on October 1, 1987 required a deductible on prescription drugs of $2.00, a deductible on emergency room services of $10.00 and also provided a $25.00 prescription eye glass contribution once every two years. On October 1, 1988, the Midelfort HMO Plan modified the coverage which increased the prescription drug deduction from $2.00 to $4.00, the emergency room deductible increased from $10.00 to $25.00 and the $25.00 eye glass contribution was eliminated. No grievance was filed at that time on these reductions in benefits under the Midelfort HMO Plan. In August, 1989, Midelfort HMO Plan announced further reductions in benefits effective October 1, 1989. Instead of continuing the Midelfort HMO Plan, the Employer became self-insured on October 1, 1989, providing the same benefits in effect since October 1, 1988. Thereupon, the instant grievance was filed and processed through the grievance procedure to arbitration.

UNION'S POSITION

Timeliness

The Union contends that it is not challenging the changes made by the Midelfort HMO Plan on October 1, 1988 because the Employer had not changed the plan and Article XIII provided that the Midelfort HMO Plan was the base plan and any changes made by the Plan were not grievable on October 1, 1988. The Union claims that the benefits provided by the Employer under its self-insurance plan which were different from those on the effective date of the agreement were grievable as of the date of self-insurance, October 1, 1989, and the grievance is therefore timely.

Merits

The Union contends that the first sentence of Article XIII requires the Employer to provide the same or better benefits as the health insurance plan that was in effect on the effective date of the agreement, namely October 1, 1987. It asserts that the words "presently provided" must be interpreted as the benefits in effect on the effective date of the agreement and not the benefits as changed on October 1, 1988 by the Midelfort HMO Plan. It maintains that the parties intended to control what benefits would apply to employes should the Employer self-insure and both parties were knowledgeable of the benefits at the beginning of the agreement.

The Union argues that the changes in contract language from the 1983 contract to that of the 1986 and 1987 contracts support its position. It points out that the 1983 contract provided that upon self-insurance by the Employer only substantially equivalent benefits to those on the effective date of the agreement need be provided, but in 1986, the language was changed so that equivalent or better benefits must be provided upon a change to self-insurance, a significant improvement in contract language. The Union asks that the arbitrator rule in its favor and grant the grievance.

EMPLOYER'S POSITION

Timeliness

The Employer contends that the grievance is not timely because it attempts to grieve the benefit changes made on October 1, 1988, a year before the grievance was filed. It submits that the Employer has not reduced any

benefits as a self-insurer and it provides the same benefits that the Midelfort HMO Plan was providing. It points out that the contract provides a five working day limit for filing grievances, a provision the arbitrator cannot ignore, and a timely grievance could only have been filed in October, 1988 when the change in benefits provided by the Midelfort HMO Plan occurred. It concludes that a grievance over changes made a year earlier is not timely and the Union has acquiesced in the changes and waived the right to grieve them later at the time the Employer adopted the base plan on a self-insurance basis.

Merits

The Employer contends that the language of Article XIII, "presently provided by this contract," means it must provide the benefits in effect at the time the Employer became a self-insurer. It points out that the contract states that the Midelfort HMO Plan will be the base plan and the agreement does not prevent the base plan from reducing benefits which it did on October 1, 1988. The Employer asserts that it provided the benefits in effect under the base plan at the time it self-insured and thus did what was required under the contract.

The Employer contends that this position is supported by bargaining history. It notes that in the 1983 agreement, the Employer was required to provide benefits equivalent to those in existence on September 30, 1983 if it changed the plan and/or carrier. The Employer refers to the 1986 agreement which did away with the language on the effective date of agreement level of benefits and replaced it with the requirement of benefits "presently provided" which means that the Employer need not restore benefits back to the start of the agreement, but need only provide those existing at the time of self-insuring. The Employer asserts the change in contract language was proposed by the Union and it should be construed against the Union if there is any ambiguity. The Employer further argues that the dictionary definition of "presently" supports its position and that acceptance of the Union's argument would lead to harsh, absurd and nonsensical results. The Employer insists it has complied with Article XIII and the grievance is without merit and must be dismissed.

DISCUSSION

Timeliness

The parties' arguments with respect to timeliness really beg the issue. If Article XIII is found to have the meaning espoused by the Union, then the grievance is timely. On the other hand, if Article XIII has the meaning argued by the Employer, then the grievance is not timely as well as having no merit. Thus, a determination of the meaning of Article XIII, particularly the words, "presently provided" must be determined in order to resolve the timeliness issue. Thus, the merits will be considered.

MERITS

The instant dispute involves the interpretation of the words "presently provided" in Article XIII. While both parties have made persuasive arguments for their interpretation of Article XIII and each interpretation is plausible, a review of the record and the arguments of the parties leads the undersigned to conclude that the interpretation argued by the Employer is slightly more persuasive. The dictionary definition of "presently" is "now" 1/, that is, the language could be read as "now provided" and the appropriate interpretation of the level of benefits are those provided at the time of self-insurance. More significantly, such a conclusion is supported by the change in language from the 1983 to 1986 contracts. The 1983 contract read, in part, as follows:

ARTICLE XIII
INSURANCE

> The Company shall have the option of changing insurance plans and/or carriers provided substantially equivalent benefits are provided. The Company may, in its discretion, self insure such benefits. If the Company changes the present HMO plan the Company will provide benefits equivalent to those in existence on September 30, 1983. . . .

The 1986 contract provided, in part, as follows:

ARTICLE XIII
INSURANCE

> The Company shall have the option of changing insurance carriers provided the benefits are equivalent or better than those presently provided by this contract. If the Company should self-insure, they shall be required to continue to provide the benefits of the State mandated programs, as presently provided by this contract.

The 1983 contract specifically provided in the third sentence of Article XIII that a change in the present HMO plan must provide benefits equivalent to those at the start of the contract. The 1986 contract eliminated the third sentence and changed the required benefits tied to a specified date to benefits "presently provided under the contract." Although the standard also changed from "substantially equivalent" to "equivalent or better", this is not as significant for the instant case as the elimination of the date certain. The issue here is not whether the benefits are equivalent or better but rather involves when in point of time the level of benefits that must be provided are established. There is no dispute that the parties intended that the Midelfort HMO Plan be the base plan. Article XIII provides that the Employer upon self-insuring must provide benefits equal to or better than the base plan. It is undisputed that the base plan changed during the contract term and before the Employer became self-insured. By dropping the date certain, it appears that the base plan in effect at the time of the change to self-insurance must be the standard, otherwise going back to the beginning of the agreement would require the Employer to provide benefits that the base plan was not providing. The parties' intent was to establish the base plan as the standard and requiring greater benefits than the base plan would not follow this intent, especially when the date certain no longer appeared in the contract. Therefore, it must be concluded that the Employer was only required to provide equivalent or better benefits as of the time of its change to self-insurer status rather than back to a certain specified date. In this instant case, the evidence established that the Employer provided the same benefits that the base plan was providing under the contract at the time of the change to self-insured status and thus, the grievance must be found to lack merit and consequently is untimely.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

The grievance is denied.

1/ Webster's New World Dictionary, Second College Ed. (1974).

Dated at Madison, Wisconsin this 18th day of June, 1990.

By _____
David E. Shaw, Arbitrator

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