STATE OF WISCONSIN
BEFORE THE ARBITRATOR

In the matter of the arbitration of a dispute involving **THE SHEET METAL WORKERS HEALTH AND BENEFIT FUND**	Case #1 No. 53734 A-5442 1995-96 Deposit Liability Rate

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North River Center Drive, Suite 202, Post Office Box 12993, Milwaukee, WI 53212, by **Ms. Naomi E. Soldon** appearing on behalf of the Employee Trustees.

Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, WI 53202, by **Mr. Robert D. Rothacker** and **Mr. Lee J. Geronime** appearing on behalf of the Employer Trustees.

Supplemental Arbitration Award

The Trustees of the Sheet Metal Workers' Health and Benefit Fund requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen, an arbitrator on its staff, to hear and decide a dispute over the 1995-96 deposit liability rate. The undersigned was so designated. A hearing was held on December 8 1995, in Brookfield, Wisconsin, at which times the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. A stenographic record was made, and a transcript was received by the undersigned on December 23, 1996. The parties provided an agreement holding the Commission and the undersigned harmless for any actions arising from the determination of the dispute. The parties submitted post-hearing briefs which were exchanged through the undersigned and the record was closed on February 26, 1996. The result in the case was communicated to the parties on April 22, 1996 in a Summary Award, with a Supplemental Award to follow.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Supplemental Award.

I. Issue

The issues in this case are:

1) Should the deposit liability rate for 1995-96 be increased from the 1994-95 level of $418.00 per month to $451.00 per month; and, if so

2) When should the new rate should go into effect?

II. Relevant Documents

PLAN DOCUMENT

ARTICLE 3
ELIGIBILITY

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Section 3.4 Continued Eligibility

Once an Employee meets the initial Eligibility requirement, he shall continue to be Eligible as long as he is working for a Contributing Employer, or Employers, who are making contributions on his behalf which amount to the deposit liability charged to his individual account. The monthly deposit liability that is charged to each Employee's account will be determined by the Board of Trustees and, from time to time, will be changed to correspond to the cost of benefits. Contributions made for an Eligible Employee will be maintained on an individual basis. All contributions which exceed the deposit liability shall be accumulated in a bank to pay future deposit liability. The maximum any individual will be allowed to accumulate in his bank will be the cost of twelve months of deposit liability as determined by the trustees.

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RESTATED AGREEMENT AND DECLARATION OF TRUST

ARTICLE III
BOARD OF TRUSTEES

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Section 3.13 Manner of Acting in the Event of a Deadlock

(a) A deadlock shall be deemed to exist whenever a proposal, nomination, motion or resolution made or proposed by any one of the Trustees is not adopted or rejected by a majority vote and the make of the proposal,

> nomination, motion or resolution notifies the remaining Trustees in writing that a deadlock exists.
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> (b) In the event of such deadlock arising, the Trustees shall meet for the purpose of agreeing upon an impartial umpire to break such deadlock by deciding the dispute in question. In the event of the inability of the Trustees to agree upon the selection of such impartial umpire within a reasonable time, then, on the petition of either group of Trustees, the senior judge on duty of the District Court of the United States for the Eastern District of Wisconsin shall appoint such impartial arbitrator. Such impartial umpire shall immediately proceed to hear the dispute between the Trustees and decide such dispute, and the decision and award of such umpire shall be final and binding upon the parties. The reasonable compensation of such umpire and the costs and expenses (including, without limitation, attorney's and reporting fees) incidental to any proceedings instituted to break a deadlock shall be paid by the Trust Fund.
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> (3) Any impartial umpire selected or designated to break a deadlock shall be required to enter his decision within a reasonable time fixed by the Trustees. The scope of any such proceeding before such impartial umpire shall be limited to the provisions of this Trust Agreement and to the provisions of the rules, regulations and by-laws adopted by the Trustees and to the plan of benefits established by them. The impartial umpire shall have no jurisdiction or authority to change or modify the provisions of this Trust Agreement or of the Health and Benefit Plan or to decide any issue arising under or involving the interpretation of any collective bargaining agreements between the Union, the Associations and other Employers, and such impartial umpire shall have no power or authority to change or modify any provisions of any such collective bargaining agreements.
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III. Background

The Trustees oversee a multi-employer trust which provides insurance benefits to 3,500 active and retired sheet metal workers and their 6,000 dependents in Wisconsin. Half of the 16 Trustees represent the employees and half represent the employers. The Fund is operated subject to the provisions of the Employee Retirement Income Security Act (ERISA), and the Trustees are fiduciaries, obligated to act "solely in the interest of the participants and beneficiaries" in accordance with the "prudent person rule", exercising "...the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."

Of 3,500 participants in 1995, only 153 individuals are self-payers. The vast majority of the benefits provided by the trust are funded by employer contributions made pursuant to collective bargaining agreements. Employer contributions are credited each month to individual employee "dollar banks", based upon a certain amount per hour worked. For 1995, this amount was set at $2.85 per hour. At the beginning of each month, the Fund charges the employees' dollar banks for insurance coverage. This charge, the deposit liability rate, is analogous to a monthly insurance premium. If the dollar bank does not have enough money credited to it to cover the liability rate, the employee is obligated to pay the difference. If the employer contribution for the month exceeds the deposit liability rate, the excess accumulates in the employee's dollar bank. Employees are allowed to accumulate up to twelve months of the deposit liability rate in their dollar banks. Any contribution beyond this maximum is credited to the general fund, rather than any individual bank.

The amount of the employer contribution and the deposit liability rate for active bargaining unit participants are annually determined by the Trustees, and are generally effective July 1st. The Trustees first receive advice from actuarial consultants. The actuaries have historically recommended employer contributions based upon projections of the overall expenses of the Fund, while the recommended deposit liability rate is based upon projections of claims experience. While the Board of Trustees has never accepted the recommended employer contribution, instead negotiating among themselves to determine that figure, they have generally accepted the recommended deposit liability rate. In 1990, 1991, 1993 and 1994, the Trustees accepted the actuary's recommended deposited liability rate. In 1992, the Trustees set the rate $5 above the recommended monthly level, in order to provide a subsidy to retired participants:

Time Period Beginning	**Actuary's Recommended Deposit Liability Rate**	**Liability Rate Actually Adopted**
7/1/90	$255.00	$255.00
7/1/91	$293.00	$293.00
7/1/92	$338.00	$343.00
7/1/93	$378.00	$378.00
7/1/94	$418.00	$418.00

In 1995, the Employee Trustees raised the possibility of providing a subsidy for laid-off participants, so that their monthly deposit liability rate would roughly equal one

unemployment compensation check, but the Board deadlocked on the proposal. In light of the deadlock on the subsidy proposal, the Employee Trustees decided to oppose any increase in the deposit liability rate for active employees in 1995-96. At the June meeting, the Board took up the matter of the actuary's recommendation for an increase in the deposit liability rate from $418 per month to $451 per month, effective July 1st. The Employer Trustees uniformly supported the increase, while the Employee Trustees all voted against it. The resulting deadlock had the effect of leaving the rate at $418 pending an arbitration.

A hearing was held on the dispute, and both groups of Trustees presented witnesses in support of their competing proposals. In addition to the amount of the deposit liability rate for 1995-96, the parties disputed the effective date of an increase should the Employer Trustees prevail. The Employer Trustees took the position that any increase must be fully retroactive, while the Employee Trustees asserted that a retroactive increase would be administratively burdensome and of questionable legality.

The evidence produced at the hearing showed the following historical data on the deposit liability rate, the number of self-payers, the hours worked per month and the number of employees who had reached the maximum accumulation in their dollar banks:

Time Period	Deposit Liability Rate	Average # Self-Payers	Average Hours	Average # Max. Dollar Banks
1990	$255.00	101	149.97	***
1991	$293.00	109	150.37	***
1992	$343.00	188	152.09	***
1993	$378.00	237	153.69	80
1994	$418.00	205	153.76	117
1995	$418 / $451	153	*****	314

Information was also presented on the Fund's reserves, showing how many months and days the Fund could operate if its flow of employer contributions was interrupted:

Year	Months of Reserves	Defensive Interval
1990	13.74	470 days
1991	11.84	405 days
1992	10.24	367 days

1993	9.47	361 days
1994	10.38	384 days
06/95	11.40	

Additional facts, as necessary, are set forth below.

IV. Arguments Of The Parties

A. The Employee Trustees' Brief

The Employee Trustees argue that any increase in the deposit liability rate would violate the fiduciary duty of the Trustees. ERISA requires that the fund be prudently administered in the sole interests of the participants. To this end, the Trustees must seek to provide the best benefits at the lowest possible cost. It follows that, if an increase in the deposit liability rate is not required in order to maintain benefits, the Trustees are obliged not to increase the rate. An increase in the rate is clearly not required. The Fund has substantial reserves, at the high end of the recommended level, and these are unlikely to be affected by any change in the deposit liability rate. Moreover, the fact is that benefits have been maintained since last summer without any change in the rate. By preserving the $418 rate, the Trustees will allow more money to accumulate in dollar banks, thus benefiting the participants, without adversely affecting either current benefits or the financial strength of the Fund. For these reasons, maintaining the current rate is the only course of action which is consistent with the fiduciary responsibilities of the Trustees.

The Employer Trustees argue that the Plan Document requires that the rate exactly equal the cost of benefits, but this ignores the fact that the Trustees have chosen to charge more than the cost of benefits in order to subsidize retirees. "Costs" need not be merely benefit costs, and the deposit liability rate need not be viewed as a synonym for benefit costs. Instead it should also reflect policy decisions of the Trustees and the overall condition of the Fund. In connection with this, the Employer Trustees err when they argue that reserves and the financial condition of the Fund should not be considered when setting the deposit liability rate. The overall condition of the Fund must be weighed in making decisions about contribution rates and deposit liability rates. Obviously, if the fund is earning vast amounts of interest, the Trustees must take a different approach to these issues than they would if the Fund had a negative balance. In the former situation, the liability rate may be supplemented by interest income, while in the latter, the Trustees would be obligated to increase the rate to a level greater than the cost of benefits in order to keep the fund operating.

The Employee Trustees note that industry standards are one measure of "prudence" under ERISA. The evidence presented at the hearing shows that a majority of funds operated

for a like purpose offer subsidies to members, where other income sources make such a subsidy possible. The funds discussed at the hearing averaged a 50% subsidy. The subsidy proposed by the Employee Trustees is only 8%. This is a very conservative approach by industry standards, and falls well within the standard of prudence.

If the arbitrator were to determine that the deposit liability rate should increase to $451.00, the employee Trustees argue that the increase must be imposed prospectively. The Fund will incur substantial administrative costs in attempting to recover back payments if the increase were made retroactive, including the potential of having to sue participants. Such a retroactive increase would also be manifestly unfair, since participants were never warned that the cost of their benefits might be raised. Finally, the employee Trustees note that any retroactive increase would be of questionable legality, and illegal conduct is obviously a violation of the standard of conduct for fiduciaries.

B. The Employer Trustees' Brief

The Employer Trustees take the position that deposit liability rate must be increased to $451.00 per month, and that this increase must be retroactive to July 1, 1995. The Trustees have long been guided by the recommendation of their actuarial consultant, and there is no basis for changing this long standing methodology. The Plan Document requires that the liability rate be "changed to correspond to the cost of benefits." The Fund's actuary has always followed this dictate in calculating the liability rate, and its projection of $451.00 per month, a 12% increase for 1995-96, is the result of the same methods and assumptions that have been applied ever since the fund's inception. The 12% projection is conservative, given the 15% actual increase in claims experienced since July of 1995. The Employer Trustees point out that there was no evidence whatsoever to draw into question the validity of the assumptions used to calculate the $451.00 monthly rate.

The Employer Trustees assert that using arbitration to change the methodology for calculating the deposit liability rate is a clear violation of the fiduciary duty of the Board of Trustees. The Plan document already defines the basis for determining the liability rate, and the Trustees and the arbitrator are bound to follow the Plan Document. Thus the liability rate must reflect the cost of benefits, and not be used to pursue other policy aims of the Trustees. The Employer Trustees point out that introducing a subsidy by

setting the rate below the actual costs is an enormously significant change in philosophy for the Fund, and would create expectations among participants which would make it very difficult to reverse course in the future. Such a profound change must not be made without thorough study, yet the Employee Trustees have not engaged in any analysis or investigation, nor have they secured any expert advice to persuade their colleagues to support a subsidy. Indeed, the Employee Trustees have not even articulated a philosophy to guide future decisions on the liability rate. They merely seek to abandon the current practice. Such an approach does not meet the requirement of prudence which must guide the Fund's fiduciaries.

One of the basic duties of the Board of Trustees is to provide benefits within the means of the Fund. Over the long term, the Fund is not financially able to afford a subsidy. While reserves have increased in 1994 and 1995, this may well be a short term phenomenon which could easily be reversed by a slump in the construction industry. Investment income greatly influenced the positive move in reserves in 1995, but investment income is notoriously variable. Granting a subsidy, on the other hand, is certain to increase the benefits to participants and the costs to the Fund. An 8% subsidy translates into a $400 increase in 2200 employees' dollar bank, and an increased liability for the Fund of $880,000 per year. Prudence dictates that the Fund take advantage of good financial times to bolster its reserves in anticipation of more difficult times in the future, rather than putting its long term stability at risk.

Given that the $451.00 monthly rate is required by traditional and accepted actuarial methods, and since there is no basis for the radical philosophical change urged by the Employee Trustees, the arbitrator should find in favor of the position taken by the Employer Trustees. In setting a $451.00 monthly rate, the arbitrator should make the increase fully retroactive. There is nothing in the law or the Plan and Trust documents which would prohibit a retroactive rate increase, and the Plan Document strongly supports changing the rate at the same time each year, so that the rate is "changed to correspond to the cost of the benefits". There has never been any representation by the Trustees that the rate would not be changed effective July 1, 1995, and thus there is no basis for arguing that the Fund is somehow estopped from imposing such an increase. As a practical matter, the $451.00 rate must be made fully retroactive in order to discourage future deadlocks. If the Employee Trustees are led to believe that a deadlock will automatically delay future increases, they will have no incentive to negotiate in good

faith over the deposit liability rate. Instead, they will simply deadlock the issue in order to delay the increase.

V. Discussion

There are two issues in this arbitration. The substantive issue is whether the deposit liability rate should be set at $451 per month, or should remain at the 1994-95 level of $418. If a rate increase is appropriate, the question becomes whether the increase should apply retroactively. Each is addressed in turn.

A. The Deposit Liability Rate

The deposit liability rate has historically been set at the level that the Fund's actuarial consultant projects for claims experience across the coming year. There is no real dispute that the calculation of $451.00 for the year beginning July 1, 1995 was accurately done, in accordance with sound and accepted actuarial principles. Instead, the dispute centers on whether the Board should look beyond projected claims costs in setting the deposit liability rate, and factor in the overall financial condition of the Fund. The Employee Trustees assert that it should, and that the Fund is healthy enough to offer a subsidy to participants by keeping the rate below projected costs. By keeping the rate at $418.00 per month, the value of employees' dollar banks would be enhanced, and the self-paying participants would receive a direct subsidy of $33.00 per month for their insurance premiums. Such subsidies would be in the interests of the participants, according to the Employee Trustees, because it is not reasonable to raise the premium when an increase is not necessary for the continued health of the Fund.

The Employer Trustees' motion to increase the deposit liability rate was made in accordance with the established practices of the Board, and is consistent with Section 3.4 of the Plan Document: "The monthly deposit liability that is charged to each Employee's account will be determined by the Board of Trustees and, from time to time, will be changed to correspond to the cost of benefits." The proposed $33.00 increase corresponds to the cost of benefits, as that calculation had normally been made. On its face, the proposed increase is consistent with the Board's fiduciary duty to see to the continued financial health of the Fund.

The Employer Trustees focus solely on the long term, and from that perspective their proposal to increase the deposit liability rate to $451.00 per month is a prudent step for the continued financial health of the Fund. Its impact is, however, greatly overstated by the Employer Trustees. The direct effect of the deposit liability rate on the Fund's cash

flow is in the amounts paid by self-payers, who make up a very small percentage of the participants. In 1995-96, the impact of the Employee Trustees' proposed subsidy would be $44,000. Should the number of self-payers increase dramatically, there would be adverse effects on the Fund, but this would not be because of the deposit liability rate. An increase in the number of self-payers would signal a slump in the industry, layoffs from the participating employers and an interruption of the employer contributions to the Fund. The deposit liability rate would not be irrelevant in this situation, since it helps to determine the Fund's outstanding liability for participant benefits, but its role in the resulting drain of the Fund's reserves would be relatively minor. In short, failing to increase the rate has an extremely limited practical impact on the overall financial health of the Fund. Thus while the increase in the deposit liability rate is consistent with prudence, it is not absolutely mandated by prudence.

The rationale of the Employee Trustees' proposal for a subsidy is that the Fund can afford a small subsidy, and it would be consistent with the goal of providing the best possible benefits at the lowest possible price. The current level of reserves confirms the Employee Trustees' position that the Fund is healthy and can afford the cost of the proposal:

Year	**Months of Reserves**	**Defensive Interval**
1990	13.74	470 days
1991	11.84	405 days
1992	10.24	367 days
1993	9.47	361 days
1994	10.38	384 days
06/95	11.40	

Granting the Employer Trustees' point that the current state of the reserves results in large part from favorable investment returns, and that these can always drop if the markets suffer a reversal, the subsidy is only a problem in that event if the Board of Trustees itself does not take action to secure the health of the Fund. The Board has a broad range of actions available to it, including terminating the subsidy, raising the employer contribution, and reducing or liquidating the participant's dollar banks. In order to give controlling weight to this argument, I must assume that the Board will place

a higher value on continuing the subsidies than on keeping the Fund viable. That is not a reasonable assumption.

The Employee Trustees are correct in claiming that the Fund can easily afford the subsidy they have proposed. Such subsidies are not unusual in funds such as this, and an attempt to limit the costs to participants is not at odds with the dictates of prudence. There is a point at which increasing the revenues of the Fund without regard to whether the money is needed for the Fund's central purpose -- providing reasonably priced benefits to participants -- ceases to be in the best interests of the participants. In connection with this, I do not read Section 3.4 of the Plan Document as requiring that the deposit liability rate exactly reflect the projected claims experience. Rather it requires that the deposit liability rate be set at the level necessary to cover costs, and this requires the Trustees to consider the entire financial picture. If the reserves dropped to zero for some reason, the Trustees would probably be compelled as a matter of prudence to set a deposit liability rate above projected claims experience.[1] Likewise, if the reserves are enormous relative to the cost of providing benefits, prudent persons focused on the best interests of participants would have to consider collecting something less than the cost of benefits. The current reserves do not place the Fund at either of these extremes. At 11.4 months of reserves, the Fund has the option of providing a subsidy, but failing to provide a subsidy cannot be said to violate the Trustees' fiduciary duties.

The primary defect in the position of the Employee Trustees is that providing a subsidy to all active employees is a major change in the philosophy of the Fund, a change that has never been discussed, much less analyzed, by the Board of Trustees. Trustee Jerry Voechting candidly admitted that the deadlock over the liability rate was prompted by the earlier deadlock over the Employee Trustees' desire to introduce a subsidy for laid-off employees. Voechting also conceded that the Employee Trustees chose to arbitrate the issue of freezing the deposit liability rate rather than pursuing a subsidy for laid-off participants because they felt they had a better chance of prevailing on a freeze.

The Fund has devised a means of breaking deadlocks, but that procedure is not a substitute for the debate and deliberation of the Board of Trustees. While neither of the proposed deposit liability rates would violate the prudent person rule, prudent persons in

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[1] This is similar to what the Trustees did in 1992, when they set the rate above projected claims experience to allow for a lower rate for retirees.

the position of the Trustees would not change established norms of funding and embark on a broad program of subsidies without first carefully examining and discussing the implications of the change. The subsidy proposed here impacts all participants, yet the debate among the Trustees was over a far more limited subsidy to laid-off employees. If a general subsidy is warranted, it should formulated on some more reasoned basis than just freezing the deposit liability rate and counting the year's benefit cost increase as the subsidy. It may be that a $33 subsidy is appropriate, but the figure was not arrived at because the Trustees thought that 8% was the ideal amount. The amount of the proposed subsidy is more a matter of happenstance in that it happened to be the actuary's calculation of the cost increase for 1995-96. There is nothing in the record to indicate that the Employee Trustees were prevented from engaging experts for advice and analysis, or from making a reasoned case for a general subsidy. To simply deadlock the Board at the 1994-95 deposit liability rate on the assumption that the subsidy proposal, if made, would be rejected is not consistent with the Trustees' duty to act prudently in the sole interests of the participants and their beneficiaries.

The Fund is financially able to subsidize participants, but it is not so financially strong that a subsidy is required. The prudent amount of a possible subsidy would vary, depending upon whether it is a general subsidy or a targeted subsidy, such as that formerly proposed for laid-off employees. However the decision to provide a subsidy represents a major change in philosophy for the Fund, and if some level of subsidization is to be put in place, that decision -- whether it is made by the Board or by an arbitrator -- must be made in the context of a full discussion and debate on the merits. It should not be arrived at through the back door, at a level arbitrarily determined by a choice of tactics. For that reason, I have concluded that the 1995-96 deposit liability rate should not include a general subsidy, and should instead be set at the $451.00 per month proposed by the Board's actuarial consultant.

B. Effective Date

Having determined that the deposit liability rate should be increased to $451.00 per month, the question remains whether the increase should be retroactive to July 1, 1995 or should be imposed prospectively. The $451 deposit liability rate was recommended as an appropriate amount for the period from July 1, 1995 through June 30, 1996. Since the methodology used to set this figure was appropriate, it follows that there should be a presumption in favor of making the increase retroactive. Nothing in the Plan Document, Declaration of Trust or other document governing the operations of the Fund precludes a retroactive increase. However, under the specific circumstances of this case, I cannot conclude that a retroactive rate increase would be consistent with the fiduciary duties of the Trustees.

The Fund's Administrative Manager, Alice Grosskreuz, testified that there would be enormous practical problems with recalculating dollar banks and making necessary adjustments to the Fund's records and accounts. Granting that this would require considerable effort and some expense, there is nothing remarkable or onerous about the task. It is similar to the effort undertaken by any employer when a labor agreement is settled with retroactivity. More importantly, the need to make such calculations is a virtually inevitable by-product of the deadlock procedure established in the Declaration of Trust. Since there will always be a time lag in submitting a dispute to arbitration and receiving an Award, retroactivity will be an issue in every deadlock involving annually recurring decisions. Concluding that retroactivity is not an option based on administrative inconvenience would effectively transform a deadlock into a temporary veto, and would place a greater value on the clerical administration of the Fund than on its financial administration. Such an emphasis is clearly inappropriate.

While administrative inconvenience cannot defeat the presumption in favor of retroactive application, Grosskreuz also testified that it would be necessary to recover the $33 per month difference from the individuals and institutions that have made direct payments to the Fund since July of 1995. None of these self-paying participants have been warned that the rate they have been paying is tentative or that a retroactive increase is a possibility. Even if it was legally possible to impose a retroactive increase on these participants[2], the Trustees would in effect be "sandbagging" a group in whose best

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[2] Grosskreuz testified that the Fund's counsel had advised her that a retroactive increase in the deposit liability rate would be illegal. This opinion was not reduced to writing,

interests they are obligated to act. The very fact that they are self-payers indicates that these participants are not working and have limited financial means. Although these participants share the generalized interest of all participants in maintaining the Fund's viability, the particularized impact on them of a retroactive assessment would outweigh that generalized interest. Had the Trustees warned all of the Fund's participants that a retroactive increase was a possibility, the self-payers and those who could anticipate becoming self-payers during the year could have made arrangements to budget for the increase, or could have elected not to carry coverage. Without such notice, retroactively increasing the deposit liability rate is not an action "in the interests of the participants", and thus is not an appropriate order for the arbitrator to enter.[3]

In rejecting retroactivity, I am mindful of the Employer Trustees' concern that a group of Trustees might henceforth cause a deadlock solely to put off rate increases. As noted above, retroactivity is presumptively appropriate and is not prohibited by any rule governing the Trustees. The lack of advance notice to participants that an increase effective July 1st was possible is what prevents retroactive application of the new rate. The Trustees are obligated to act in the interests of the participants, and this obligation would extend to warning participants of any similar future disputes. Such a warning is necessary in order to protect the general interest of participants in having a prudent and appropriate deposit liability rate while also protecting their individual interests in being able to make informed judgments about the purchase of insurance benefits. Once that obligation is satisfied, the retroactivity problem presented here should not be a factor in future disputes, and no group of Trustees should have an incentive to deadlock solely for the purpose of delay.

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nor was it shared with the Trustees. Grosskreuz was not able to say what the basis of the attorney's opinion was, and no other evidence on this point was introduced at the hearing.

[3] It is true, of course, that the self-payers are only about 4.5% of the total participants, and that one way around the lack of notice would be to exempt that small group from the retroactive increase. As a practical matter, that creates the very subsidy for laid-off participants that the Trustees discussed and deadlocked over in early 1995. I have already determined that a subsidy should not be imposed through arbitration unless the matter has first been fully explored and analyzed by the Trustees. Given the choice of two evils -- delaying the deposit liability rate increase beyond the point at which it should have become effective or creating a subsidy never considered by the Trustees -- the former in my opinion does less damage. Any adverse impact on the Fund from the delay may be addressed by the Trustees in setting employer contributions and future deposit rates, or through adjusting their investment philosophy. The precedent of an arbitrator-induced subsidy would likely prove more problematic in the long run.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

1) The appropriate deposit liability rate for 1995-96 is $451.00 per month;

2) The increase in the deposit liability rate should be made effective on May 1, 1996 or as soon thereafter as is practical.

Signed and dated this 13th day of May, 1996 at Racine, Wisconsin:

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Daniel Nielsen, Arbitrator

IN ARBITRATION
BEFORE ARBITRATOR DANIEL NIELSEN

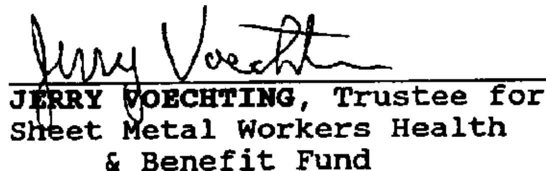
In Re:

SHEET METAL WORKERS HEALTH & BENEFIT FUND
(deposit liability arbitration)

HOLD HARMLESS AGREEMENT

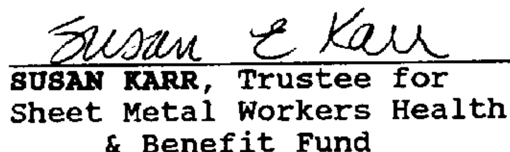
In consideration of the services performed by the Wisconsin Employment Relations Commission's Arbitrator Daniel J. Nielsen, the Wisconsin Sheet Metal Workers Health & Benefit Fund agrees to indemnify and hold the Wisconsin Employment Relations Commission and Daniel J. Nielsen harmless with respect to any and all manner of suits, claims for any damages, judgments, or orders arising from or resulting from or relating to the performance of the Arbitrator's duties or any arbitration award rendered in the above-entitled matter, including, but not limited to, claims, actions or proceedings under the Employees Retirement Income Security Act or any related law, rule, or regulation of any kind.

Dated: Feb 13, 1996



JERRY VOECHTING, Trustee for
Sheet Metal Workers Health
& Benefit Fund

Dated: Feb. 12, 1996



SUSAN KARR, Trustee for
Sheet Metal Workers Health
& Benefit Fund