BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662
affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO

and

W.S. DARLEY & COMPANY
CHIPPEWA FALLS, WISCONSIN

Case 13
No. 55459
A-5609

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of General Teamsters Union, Local 662, affiliated with the International Brotherhood of Teamsters, AFL-CIO, referred to below as the Union.

Lindner & Marsack, S.C., by **Attorney Gary A. Marsack**, 411 East Wisconsin Avenue, Suite 1000, Milwaukee Wisconsin 53202, appearing on behalf of W.S. Darley & Company, Chippewa Falls, Wisconsin, referred to below as the Employer or as the Company.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of John Miller and Jeff Cronin, who are collectively referred to below as the Grievants. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on June 16, 1998, in Chippewa Falls, Wisconsin. A transcript of the hearing was filed with the Commission on June 25, 1998. The parties filed written briefs by October 16, 1998.

ISSUES

The parties were not able to agree on the issues for decision. I have determined the record poses the following issues:

Are the grievances substantively arbitrable?

If so, are the Grievants entitled to Company contributions to their pension plans for the period from the end of their probationary period on March 3, 1995, to their enrollment in the plan on July 1, 1996?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2
PROBATIONARY PERIOD

Section 1. A new employee shall work under the provisions of this Agreement but shall be employed on an **eight (8) week** trial basis, during which period the employee may be discharged without a further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of leaving a vacant position unfilled or discriminating against Union members. Except as expressly provided to the contrary elsewhere in this Agreement, probationary employees shall not be entitled to any form of paid leave, nor shall they be entitled to any other fringe benefits.

. . .

ARTICLE 8
GRIEVANCE PROCEDURE

Section 1. A grievance within the meaning of this Article shall be limited to a dispute arising between the parties hereto involving interpretation of (sic) application of the provisions of this Agreement. . . .

ARTICLE 9
ARBITRATION

Disputes involving the interpretation or application of the provisions of this Agreement are subject to arbitration. . . .

The arbitrator shall only interpret the Agreement and shall not modify, amend, add to or delete from any of its provisions in deciding the issue(s) submitted to him/her by the parties. . . .

ARTICLE 32
PENSION

Employer contributions on behalf of eligible bargaining unit employees to the Section 401(k) plan established and maintained pursuant to the terms of the operative plan documents shall be Twenty-five ($25.00) per week as of June 1, 1994, with contributions increasing to Thirty Dollars ($30.00) per week as of June 1, 1995, and to Thirty-five Dollars ($35.00) per week as of June 1, 1996.

BACKGROUND

The Union filed grievances on behalf of Miller and Cronin. Cronin's is dated November 12, 1996, and Miller's is dated November 14, 1996. Each grievance alleges the Company "has failed to make contributions to (the Grievant's) 401K plan in accordance with the collective bargaining agreement." Each grievance cites Article 32 as the governing provision and each grievance requests that each employe is "to be made whole."

The Company manufactures fire pumps and other fire-fighting equipment. The Union was certified in 1994 as the exclusive bargaining representative for the bargaining unit including the Grievants. For roughly fifty years prior to the Union's certification, the unit was represented by an independent union known as the W.S. Darley Employees' Association.

The grievances have deep roots. In May of 1994, the Company and Union began bargaining for their first collective bargaining agreement. That bargaining spanned over thirty face-to-face meetings and mediation before the Federal Mediation and Conciliation Service. On May 25, 1995, the parties executed a labor agreement covering June 1, 1994 through May 31, 1997. To set the background to the grievances, it is necessary to give an overview of that portion of the bargaining history concerning pension benefits.

Prior to the 1994-97 labor agreement, the Company made contributions to a profit sharing plan, which is referred to below as the 401(a) Plan. These contributions were made on an annual basis in amounts determined at the Company's discretion, and distributed under a complicated formula. The 401(a) Plan did not permit employe contributions and did not afford employes the authority to direct how contributions were invested. The 401(a) Plan permitted employes to borrow against their vested balance for the purchase of a principal residence, for uninsured medical expenses or for educational purposes. The 401(a) Plan restricted eligibility to those employes who were twenty-one or older and had served the

Company for at least one year in which they had put in at least 1,000 hours of work. The 401(a) Plan permitted employes to enter the plan on the first day of the January or July next following their attainment of the age/time of service requirements noted above. To become fully vested in the 401(a) Plan required seven years of service.

Mike Thoms served as the Union's chief spokesman in the negotiations for the 1994-97 labor agreement. James Ward served as the Company's. The Union summarized the status of negotiations on pension issues in a proposal made to the Company on April 10, 1995. That proposal stated:

> The Union would propose that the Company would set up a 401K plan for all covered employees and that it would transfer all monies from the existing benefit plan into the new 401K plan effective June 1, 1995. The new 401K plan would provide the following features:
>
> A.) A five (5) year vesting requirement for employees with less than five (5) years of service and newly hired employees. All current employees with five (5) or more years of service would be 100% vested.
>
> B.) The new 401K plan would allow employees at least three (3) investment vehicles for employees to individually choose from for their individual accounts.
>
> C.) Employees would be allowed to borrow against their account to the extent provided by law.
>
> D.) Employees would be allowed the option to make self-contributions to their accounts to the maximum extent provided by law.
>
> E.) The Company would make annual contributions to each employee's account equal to 15% of the employee's annual earnings.

The parties were able to agree on some of these proposals. Ward summarized such items in a letter to Thoms dated April 25, 1995, which states:

> Enclosed you will find my updated draft of the provisions of the first collective bargaining agreement between the parties over which tentative agreement has already been reached.
>
> . . .

> We have similarly reached tentative agreement relative to other aspects of Article 17. This consists of those subitems listed at Item 6 B) through 6 D) of the Union Proposals presented on April 10, 1995. There is further agreement on the general concept of a 401(k) plan in lieu of the 401(a) plan presently in effect. Subject to whatever agreement is ultimately reached with respect to vesting, all sums in the old plan will be rolled over into the new plan. . . .

On May 3, 1995, the parties met with an FMCS Mediator to attempt to resolve the remaining issues between them.

To prepare for the May 3 mediation, the Union prepared a written summary of open issues as of May 1, 1995. That document summarizes "Pension" thus:

> **The Company's Offer is:**
>
> The Company will move all money from the existing 401A program into a new 401K program effective 6-1-95. The Company wants a 7 year vesting period and will agree to contribute $26 per week per employee effective 6-1-95 and $27 per week effective 6-1-96.
>
> **The Union's Proposal is:**
>
> There should be a 5 year vesting period and the Company should contribute an amount equal to 10% of the employees (sic) annual income into the 401K.

The mediation stretched into the morning hours of May 4, but did result in a tentative agreement on a new labor agreement.

In a letter to Thoms dated May 5, 1995, Ward stated:

> Per our discussion yesterday afternoon, this letter will set forth the details of the Section 401(k) Plan about to be implemented.
>
> Those areas of tentative agreement first noted in my letter of April 25, 1995 should be reiterated. More specifically, the Section 401(k) Plan will contain at least three separate investment vehicles from which employees may choose at their discretion; employees will be allowed to borrow against their respective account balances to the extent provided by law; and, employees will be allowed to make self-contributions to their own accounts, again to the maximum extent provided by law.

> Also as stated in that letter, all sums in the Section 401(a) Plan presently in effect will be rolled over into the new Section 401(k) Plan. Inasmuch as the parties have now agreed to maintain the same vesting schedule as previously in effect, each employee's account balance should remain precisely the same at the time of transition from the old plan to the new plan. That transition will, of course, be implemented as soon as practicable. . . .

In a follow-up letter also dated May 5, 1995, Ward informed Thoms that Jeffrey Darley, the Company's Vice President and Manager of the Chippewa Falls operations, had informed Ward that his earlier letter of May 5 contained an error. Ward's letter states:

> The error relates to the scope of borrowing to be permitted under the Section 401(k) Plan. Rather than authorizing borrowing to the extent permitted by law, such borrowing should be limited to what is permitted under the current plan. In particular, borrowing is limited to financing the purchase of a home, higher education, or uninsured medical expenses.
>
> Upon rechecking my bargaining notes from the April 17, 1995 bargaining session, I am satisfied that Jeff is correct. I presume you will concur after reviewing your own notes.
>
> I apologize for this inadvertent mistake on my part. It hopefully will not pose any problem in terms of ratification.

From this point, the parties began a tortuous path toward creating the 401(k) plan to be implemented under the terms of the labor agreement.

The Trustee for the 401(k) plan was the Old Kent Bank. The Bank's Trust Officer with primary responsibility for implementing it was John Falduto. The Company arranged for Falduto to conduct a meeting among all unit employes to be covered by the 401(k) plan. Attendance at the meeting was mandatory, and employes who could not attend were provided with relevant documents and a video tape of the meeting. The meeting took place on June 15, 1995. At the meeting, Falduto distributed a document entitled "Plan Highlights" which states the "Participant Eligibility" thus:

> Minimum age – 21 years old . . . One year of service (12 months and 1,000 hours worked)

The document states the plan's "Enrollment Dates" thus: "The first January 1 or July 1 following attainment of eligibility requirements." The document states the plan's "Employee Contributions" thus:

> Employee contributions are voluntary. May contribute from 1% to 15% of gross pay. May contribute maximum of $9,240.00 in 1995. May change contribution percentage as of the first day of January, April, July and October. (30 days written notice prior to the date of change must be given to the plan administrator).

The document stated "Company Contributions" thus:

> The company will make a contribution to the plan for each eligible employee in the amount of: $25. for each week of service from June 1, 1994 through May 31, 1995. $30. for each week of service from June 1, 1995 through May 31, 1996. $35. for each week of service from June 1, 1996 through May 31, 1997.

The document stated under the heading "Vesting" that employe contributions "are always 100% vested" and that Company contributions were not 100% vested until seven years of service. The document set forth a vesting schedule, which ran from 0% for employes with less than two years of service to 100% for employes with seven years of service. The document stated "Participant Loans" thus: "Loans are administered by the plan administrator for unusual medical expenses, college education or the purchase of a principal residence. . . ." The Company invited Thoms to this meeting, but due to prior commitments he could not attend. He did, however, view the video tape and related materials.

Thoms wrote a letter to Darley dated December 6, 1995, which is headed "Pension Contributions" and states:

> Jeff, following our telephone conversation on Monday, December 4, 1995, concerning the questions I have raised concerning the 401K plan as referenced under Article 23 (sic) of the Labor Agreement, and given your offer to address my concerns, I . . . submit the following. . . .
>
> - During the course of negotiations, the Union had proposed that the Company should convert the existing 401A plan to a 401K plan.

- We also proposed that the Company would make weekly contributions into the new 401K plan.
- We also proposed that the new 401K plan would include the money rolled over from the old 401A plan.
- There would be at least three (3) investment vehicles that employees would also be able to make self-contributions into on a pre-taxed basis to the extent provided by law.
- Employees would be able to borrow money from their individual accounts consistent with the law.
- We then proposed a seven (7) year schedule in order to avoid problems associated with converting from the 401A to the 401K.

Bottom line is that we reached an agreement which included all the elements that I have outlined above with little debate.

The only sticky point as I remember was how much the weekly contribution should be. Ultimately, we reached agreement on the weekly contribution levels of $25.00 per week effective June 1, 1994, $30.00 per week effective June 1, 1995, and $35.00 per week effective June 1, 1996.

Effective June 1, 1995, the old 401A plan should have been terminated; the money should have been rolled over into the new 401K plan and the operative plan documents should reflect the elements that I have referenced early in this letter.

On June 15, 1995, the Company sponsored an enrollment presentation for the new 401K plan. . . .

Shortly thereafter I viewed the video and examined the enrollment materials and determined that everything appeared to be in order.

On November 22, 1995, I received a telephone call from one of your employees who told me that he had just received a copy of his quarterly 401K statement, which was for the period of July 1, 1995 through September 30, 1995. He told me that the statement indicated that there were no contributions made by the Company during this period. I told the employee that I thought that perhaps there was some sort of mistake made in preparing the reports.

. . .

I called you on Monday, December 4, 1995, to find out what the Company was going to do relative to this situation. You told me that the Company had

> decided to make a contribution to the 401K on January 1, 1996, for the period of June 1, 1995 through December 30, 1995, and would make future contributions on a monthly basis.
>
> I asked you whether you intended to make the employees whole by paying the interest on earnings that they would have made had the Company made the required contributions on a weekly basis per the contract. You told me "no". I then told you that I have no choice but to file a grievance on behalf of the bargaining unit. Enclosed is that grievance. . . .
>
> In addition to utilizing the grievance procedure, I feel that it is only fair to advise you that unless the Company reconsiders its position on this matter, and agrees to the "make whole" remedy that I have suggested, I will be filing charges with the National Labor Relations Board and file a complaint with the Department of Labor who is currently investigating employer activities concerning the funding of 401K plans. . . .

At the time of this letter, the Company had rolled over the 401(a) Plan into an investment vehicle, which was to become part of a 401(k) plan to be filed with the Internal Revenue Service (IRS). Company contributions were being made into that vehicle, but had not been noted on employe statements.

On January 9, 1996, the Company issued letters to Cronin and Miller, which stated:

> An error was made on our part on behalf of your 401K deductions.
>
> You had elected to have $50.00 per week deducted from your paycheck.
>
> According to the Plan, your are not eligible to participate in the plan until July 1, 1996 as your date of hire is January 6, 1995. Your participation in the plan will commence on the first day January or July after which you have completed one year of service.
>
> We have notified Old Kent Bank of this error, and a check . . . will be sent to your home.

The Company issued each employe a check as referred to in these letters. The Union did not grieve the return of this money.

In early February of 1996, Old Kent Bank provided the Company a copy of "the Old Kent Bank Defined Contribution Master Plan and Trust Agreement and the Non-Standardized Adoption Agreement" which were to constitute the 401(k) plan. The Adoption Agreement was headed "Nonstandardized Code Sec. 401(k) Profit Sharing Plan." Section 1.03 of the Adoption Agreement formally named the Plan as the "Darley Employees' Association Benefit Plan." Section 2.01 of the Adoption Agreement governed eligibility requirements. To meet those requirements, an employe had to be at least twenty-one years old and have at least one year of service with the Company. The section also provided that employes could enter the Plan on the first day of the Plan year and on the first day of the seventh month of the Plan year. Section 2.02 of the Adoption Agreement demanded that an employe work at least 1,000 hours of service to establish a year of service under Section 2.01. Darley forwarded a copy of these documents to the Union.

Thoms stated the Union's view of the proposed plan documents in a letter to Darley dated February 21, 1996, which reads thus:

> (A)fter months of waiting, you finally have provided me with the alleged plan documents that you say have been used to administer the 401K plan that is covered under Article 32 of the collective bargaining agreement. . . . I have since reviewed these documents and have concluded that they do not reflect the terms and conditions of Article 32 and that you have unilaterally imposed provisions contrary to those that were bargained.
>
> . . . (T)he first problem that I see is the description of the plan. You call it a "profit sharing plan", where in fact it is a <u>defined contribution plan</u>. The Article 1, 1.03 defines the <u>Plan</u> "as the plan adopted by the employer is the Darley employees' (sic) Association Benefit Plan." The <u>Darley Employees' Association</u> is nonexistent . . .
>
> Furthermore, there is no mention of the "<u>weekly contribution rates</u> as defined in the labor agreement. (sic)
>
> It appears to me that the documents that you have provided me clearly indicate two things. They are:
>
> 1.) That you have unilaterally implemented provisions that were contrary to those agreed upon in bargaining.
> 2.) That Old Kent Bank is totally ignorant of how to administer a 401K plan of this nature.

> In my opinion, you have engaged in "bad faith bargaining", which is in violation of the National Labor Relations Act. Therefore, at this time I will proceed accordingly by filing charges with the N.L.R.B.
>
> Furthermore, I will file a complaint with the Department of Labor, Pension Administration . . .

The Company brought this letter to Falduto's attention. Ward summarized his response in a letter to Thoms, dated March 1, 1996, which states:

> . . . According to Mr. Falduto, the reference to a "profit sharing plan" is not a misnomer at all. If you do not trust the source of his information, perhaps you may wish to verify this for yourself.
>
> With respect to the title of the plan, Mr. Falduto assures us that a change of names would be a very simple undertaking. Jeff has already stated to me he is perfectly willing to do so. What name would you like to use?
>
> Your February 21, 1996 letter indicates that you may have other concerns as well. However, since you fail to specify precisely what those concerns may be, it is impossible to respond in a meaningful fashion. Would you care to enlighten us?
>
> . . .

In a letter to Darley dated March 14, 1996, Thoms questioned the timing of the issuance of quarterly statements under the Plan as well as the quality and quantity of the data included with the statements. Thoms also included a suggestion that Falduto return to Chippewa Falls to address employe concerns on the point. Darley brought the concerns voiced by Thoms to Falduto and forwarded to Thoms, in a letter dated March 27, a copy of Falduto's written response.

Ward summarized the status of the implementation of the Plan in a letter to Thoms dated April 22, 1996, which states:

> Having received no response to my letter of March 1, 1996, I am writing once again in hopes of reviving the stalled discussions over the finalization of the necessary documentation for the Section 401(k) plan presently in effect.

> As a result of the concerns raised in your letter of February 21, 1996, the Company has refrained from executing the Non-Standardized Adoption agreement which Jeff Darley presented to you on February 8th . . . This omission obviously could prove problematic in the event of an audit. It also precludes the filing with the IRS of a request for a determination as to the qualification of that plan.
>
> The Company would like to continue moving forward. Since the main stumbling block from the Union's standpoint appears to relate to the frequency of contributions, we seemingly should be able to agree to disagree for now, pending the resolution of that issue in the upcoming grievance arbitration proceeding. If you would feel more comfortable in doing so, the parties could certainly execute a formal written stipulation to that effect.
>
> I recognized that one additional item noted in your letter of February 21st warrants modification. Thus, in lieu of the plan name "Darley Employees' Association Benefit Plan", why not simply call it the "Represented Chippewa Falls Darley Employees' Benefit Plan"? If any other unresolved issues remain outstanding, it would be greatly appreciated if you could specifically identify those issues so that the Company and/or Old Kent Bank can address them.
>
> . . . If you feel that a face-to-face meeting would be helpful, the Company would like to establish one as well.

The parties ultimately agreed to meet, with Falduto, on May 15, 1996. In a letter to Thoms dated May 2, 1996, Ward asked that the Union state their questions regarding the Plan in writing before the meeting "so that Mr. Falduto will be prepared to answer them." Ward's letter also stated:

> With the obvious exception of the contribution frequency issue involved in the pending grievance arbitration proceeding, I am cautiously optimistic that we may be able to resolve most, if not all, of our remaining differences. Because there was so little discussion at the bargaining table regarding the substantive terms of the Section 401(k) plan to be implemented, the Company has basically been guided by its general understanding that aside from those areas where the parties expressly agreed to the contrary, the features of the old Section 401(a) plan would remain intact. Perhaps a more detailed explanation as to the similarity of features between the two plans might be helpful.

I am assuming that an important area of inquiry may pertain to initial eligibility for new hires. In a recent telephone conversation you indicated that some of those new hires were disappointed to learn that their voluntary self-contributions needed to be returned to them because they were not yet eligible to participate. Even though such self-contributions were not a feature of the old plan, we certainly can explore various options that may be available.

I will now await receipt of your list of questions. . . .

Thoms responded in a letter dated May 9, 1996, which states:

. . .

Given the purpose of this meeting, all five (5) union stewards will be participating.

Mr. Falduto's presence and participation is essential . . .

You have asked me to prepare a list of questions for Mr. Falduto concerning the 401k plan. My questions are as follows:

1.) Why can't we get the quarterly statements within a reasonable time period following the quarter's end?
2.) Why don't the statements that we receive include all the account activities . . .
3.) Why can't someone meet with the employees to explain how to interpret their statements?

These are the most frequently asked questions.

In addition to the questions listed above, there are other issues yet to be resolved like **new hire participation.** ***Why not let new hires enroll during the next open enrollment period following their probation period?*** After all, employer contributions should begin as soon as they become regular bargaining unit employees. ***Why can't enrollment be accomplished on a quarterly basis?***

Why doesn't the plan document reference the collective bargaining agreement and include a copy of the relative contract language as an exhibit? Then, as we increase or decrease employer contributions, the exhibits would act as amendments to the plan document as a whole.

> Finally, I would suggest that the name of the plan be changed to read "The W.S. Darley Hourly Employee 401k Plan". This is not a "profit sharing plan" anymore. . . .
>
> As I see it, the problem with trying to use the old 401A profit sharing plan documents to administer the new 401k defining contribution plan are obvious. First of all, contributions to the old plan were predicated on the company's profits and disbursements were made annually and were based on a unique formula. The new plan is funded in part by mandated weekly contributions by the employer in addition to individual salary deferral. That is why the old plan document provided for annual open enrollments; because disbursements were only done once a year.
>
> In closing, I too share your optimism that this meeting will be fruitful. . . .

The parties met on May 15 to discuss these and other points.

Thoms served as the Union's chief spokesman for the meeting. Five Union Stewards assisted him: Jerome Benson; Anthony Monpas; Tom Schimmel; Ken Schick; and Ed Wanish. Ward served as the Company's chief spokesman. Two representatives of Old Kent Bank, including Falduto, assisted him. Darley, Mary Knutson, and Frank Bucheger also appeared for the Company. Knutson is the Company's Personnel Manager for the Chippewa Falls plants. Bucheger serves as the Plant Manager for one of those plants. The meeting lasted roughly two hours.

Ward, Darley, Thoms, Schick, Schimmel and Wanish testified concerning the discussion which took place at that meeting. Thoms, Schick, Schimmel and Wanish testified that Ward stated that although employes would not qualify for a Company contribution until the January or July 1 following their completion of one qualifying year of service, the Company would pay, for employes who otherwise met the eligibility requirements, a contribution for the period between the employe's completion of their probation period until their enrollment in the Plan. Thoms stated that Ward noted the purpose of this retroactive payment was to avoid making payments to employes who did not demonstrate a long-term commitment to the Company. Thoms also noted that Ward did not mention Article 2 during these discussions. Thoms' notes from the meeting on this point state:

> Employer contributions made the next enrollment period following 12 months of employment. Jan 1 – July 1 Employer contributions would accrue from end probationary period and be deposited upon enrollment.

Ward denied making the statement, noting, among other points, that retroactive Company contributions had never been discussed in bargaining and that he had never been authorized to offer such a benefit. He noted that the Company did not object to permitting employes to make self-contributions to the 401(k) plan at the completion of their probation period, but that the Company was not interested in expanding employe eligibility for Company contributions beyond that established under the 401(a) Plan. Ward testified that he informed the Union that the Company was not interested in assuming new costs or jeopardizing the tax status of the Plan. Ward stated he was aware of the Union's desire to commence Company contributions for new employes as soon as possible following completion of the probation period. His notes reflect this as a "BIG ISSUE." He also noted the Union asked for, and received, a Company waiver of grievance timelines to permit the Union to check this issue with its attorneys.

Knutson kept notes of the meeting for the Company. Her notes concerning the discussion on Company contributions read thus:

> Participation of new hires: Why can't enrollment be on the next quarter following completion of their eight week trial period?
>
> The plan could be adopted to allow a new employee to make contributions after the eight week trial period & on the beginning of the next quarter.
>
> The employer contributions are made following the employee satisfying eligibility; age 21, 1 yr. of service & 1,000 hrs. work -- enrollment dates would be either January 1 or July 1. The Company contribution date would begin on the new employees (sic) enrollment date.
>
> The Union felt the employer should start making contributions when the new hire became a regular bargaining unit employee, following his eight week trial period.
>
> Jim Ward noted during negotiations there was very little discussion on the pension plan. The Company has the understanding when they agreed to change from a 401(A) plan to a 401(K) plan everything would remain the same unless negotiated differently. An employer contribution was negotiated, the employee's ability to make contributions, the employees being able to make investment decisions. Different terms for employee eligibility was (sic) not negotiated.
>
> The Union felt it was not necessary to negotiate eligibility requirements when they negotiated a defined contribution.
>
> The Union requests the Company to waive the time limits on the grievance opportunity while they seek legal counsel. . . .

Knutson's notes confirm Thoms' testimony that the parties discussed how much of the labor agreement should be incorporated into the Plan. Her notes of that discussion read thus:

> Plan Document reference the labor agreement:
>
> The Company noted it was in the union's best interest to reference the contract w/i the 401(K) plan document.
>
> We are dealing w/ a prototype plan document that has been reviewed by IRS. If you attach any exhibits or make amendments the plan document must be reviewed again by the IRS at a large cost to the plan participants. Every time you have the IRS review the plan you face disqualification of the plan if the amendment is outside of the regulations.
>
> Union agreed it would be best to reference the labor agreement w/i the plan document. . . .

Thoms' and Knutson's notes state that the meeting adjourned at 6:00 p.m.

Darley faxed Falduto a list of items for Old Kent Bank to respond to as a result of the May 15 meeting. That fax, which was not issued to the Union, reads thus:

> . . .
>
> 1) New employees entering the plan the first quarter after probationary period:
> A.) We will allow new employees to enter plan only on employee contribution payroll deferred.
> B.) The Company will continue with its contribution to employees as we know eligibility today.
>
> . . .

Falduto responded to Darley in a letter dated May 29, 1996, which states:

> I have reviewed my notes and your memo dated May 22, 1996 pertaining to our meeting the previous week. Our notes contained the same issues to be addressed. Please find my responses to issues as listed in your memo.

> 1) I have confirmed that the proposed prototype plan document will allow two eligibility structures. The eligibility for the new defined employer contribution can remain the same as it had been in the former profit sharing plan. We do have the ability to allow for employee contributions to the plan as discussed; as of the entry date (first day of the calendar quarter) following the completion of the probationary period.
>
> . . .

Ward forwarded a copy of Falduto's May 29 letter to Thoms in a letter dated May 31, 1996. In the final paragraph of that letter, Ward asked Thoms to "let me know if you have any additional questions, or if any of the questions you raised initially remain unanswered."

Thoms responded in a letter to Darley dated June 12, 1996, which states:

> . . . I am in receipt of the letter that John Falduto sent to you dated May 29, 1996, concerning the above captioned pension plan. I have reviewed its content and believe that it accurately reflects the issues that were raised at out (sic) May 22, 1996, meeting. Therefore, I think you should proceed by providing me with a copy of the revised plan documents and adoption agreement. If they are in order, you can take whatever steps that are necessary to execute them.
>
> Unless you have some objection, I would like to go through the process of electing the Union Trustee, who will serve on the administrative committee. This would be done at our next membership union meeting. . . .

In a letter to Thoms dated July 26, 1996, Darley enclosed "the Old Kent Bank Defined Contribution Master Plan and Trust Agreement and Adoption Agreement Nonstandardized Code 401(k) Profit Sharing Plan," which is referred to below as the Plan. Darley's letter states:

> . . . These documents have now been updated to reflect all agreed upon terms we have discussed throughout the ongoing communication, meetings, and correspondence we have had to date. We now ask that you review and approve it before final execution by the Company, the Administrative Committee, and Old Kent Bank. Once the document is executed by the appropriate parties it will then be filed with the Internal Revenue Service for final determination. . . .

Section 1.03 of the Plan's Adoption Agreement names the Plan as "W.S. Darley & Co. Chippewa Falls Shop Employees' 401(k) Plan." Section 2.01(a) of the Adoption Agreement states "Attainment of age 21" as a condition to eligibility "(t)o become a Participant in the Plan." Section 2.01(b) requires the following "Service requirement" as a condition to eligibility: "Eight week probationary period per the Collective Bargaining Agreement following the Employee's Employment Commencement Date." Section 2.01(c) of the Adoption Agreement specifies "Special requirements for non-401(k) portion of plan." Subsection (1) states that Section 2.01(c) requirements apply to "(t)he allocation of Employer nonelective contributions and Participant forfeitures." Subsection (2) states, as an eligibility condition "(f)or participation in the allocations described in (1)," the following: "One year of Service following the Employee's Employment Commencement Date." Section 2.01(f) specifies the "Plan Entry Date" thus:

> . . . first day of the calendar quarter following the completion of the probationary period for 401(k) participation. The first day of the plan year and the first day of the seventh month for employer nonelective contributions and Participant forfeitures.

Section 2.02 of the Adoption Agreement requires employe completion of "1,000 Hours of Service" during "(t)he Plan Year, beginning with the Plan Year which includes the first anniversary of the Employee's Employment Commencement Date" for participation in the Plan. Article III of the Adoption Agreement governs "Employer Contributions and Forfeitures." Section 3.01(a) obligates the Company to contribute, under the Section 401(k) component of the Plan, an employe's individually determined salary deferrals. Section 3.01(d) governs "Nonelective contributions." Subsection (1) of this section states that the Company can contribute "(t)he amount (or additional amount) the Employer may from time to time deem advisable." This subsection incorporates the contribution negotiated at Article 32.

Thoms responded to Darley in a letter dated July 30, 1996, which states:

> . . . I am in receipt of your letter dated July 26, 1996, as well as the corresponding information that was included.
>
> I have reviewed the **Old Kent Bank** Defined Contribution **Master Plan and Trust Agreement**, and the **Adoption Agreement**, and have found them to be in order and consistent with our understanding and agreement. Therefore, I am in concurrence of your plans to execute these documents and the subsequent filing with the IRS.

Sometime after Darley received this response, the Company executed the Adoption Agreement and

filed it with the IRS. As noted above, the grievances were filed after it became apparent to the

Grievants that the Company had not made a contribution under Article 32 for the period of time between their completion of their probation period and their meeting the Plan's eligibility requirements.

The parties stipulated that the Company contribution claimed by the Grievants under the 1994-97 labor agreement has been resolved in the 1997-2000 labor agreement.

Further facts will be set forth in the **DISCUSSION** section below.

THE UNION'S POSITION

After a review of the evidence, the Union contends that pension plan eligibility requirements are ambiguous. This ambiguity reflects that the Company's "obligation to make pension contributions began as soon as the parties ratified the agreement, 14 months before the plan documents were completed." The time period at issue here, from March 3, 1995 through July 1, 1996, preceded the parties' completion of the plan documents.

The ambiguity is manifested by the "Company's treatment of individual 401(k) contributions." The Company allowed the Grievants "to begin their 401(k) contributions after their eight week probationary period," then the Plan administrator "returned their contributions" claiming they were ineligible. The Union concludes this conduct belies the Company's assertion that "the plan's eligibility requirements are unambiguous." The conflicting interpretations of the Company and the Plan administrator establish the ambiguity of the Plan.

Nor was this the parties' sole misunderstanding, since they "also had a dispute about the timing of the Company's weekly defined contributions." The Company advocated annual contributions, while the Union insisted on monthly contributions.

To resolve the ambiguity, the Union contends that a "review of bargaining history" is necessary. Initially, the Union argues that the Company's contention that "the old profit sharing agreement was in effect until the new plan was completed" is without merit since it was not negotiated, conflicts with the terms of the 1994-97 agreement, and conflicts with the language of the Plan.

The terms of the 1994-97 agreement establish the obligation asserted by the grievance. Company assertions that the Plan was not in effect until August of 1996 show no more than that Article 2 of the 1994-97 agreement governs the ambiguity. The contractual denial of fringe benefits to probationary employes establishes a "clear inference that employees *do* receive benefits once they complete their probationary period." The parties' practice

regarding other benefits, including vacation, is consistent with this inference. Even if the Plan document applies to the period between March of 1995 and July of 1996, "nothing in the plan document expressly negates the grievants' entitlement to their accrued pension contributions."

A detailed review of the parties' bargaining history confirms that the parties mutually understood "that the employer contributions would be retroactive to the end of the probationary period." None of the testifying Union witnesses had any reason to misrepresent the relevant discussions, and the testimony of Company witnesses offers no direct or persuasive rebuttal.

The Union concludes by requesting that "the grievances be sustained and that (the Grievants') pension . . . contributions for March 3, 1995 through July 1, 1996 be deposited into their accounts with interest."

THE COMPANY'S POSITION

After a review of the evidence, the Company contends that the "issue in dispute is whether the Plan documents require that the Employer's contribution to the non-401-(K) portion of the 401(K) Plan be made retroactive to the conclusion of the eight week probationary period, once an employee becomes a Plan participant." The Company argues that the language of the Plan, its predecessor and relevant bargaining history establish that the Company obligation to make "the defined weekly contribution . . . is prospective only."

Threshold to this issue, however, is an "issue of substantive arbitrability which evolves from the context of the parties' respective position relative to the subject dispute." More specifically, the Company argues that the Union "made no written proposal nor were there discussions relative to retroactivity," while the Company urges that the predecessor profit sharing plan continued except as modified by the parties' bargaining for a 1994-97 labor agreement. Because there was no express agreement on retroactivity, the Company concludes that "the Union, in actuality, is seeking 'contract formation' rather than 'contract interpretation' in this proceeding."

"Contract formation" is beyond an arbitrator's jurisdiction under Article 9 and cannot be considered within the "presumption of arbitrability" set forth by the Steelworker's Trilogy, since under federal law, "a party cannot be required to submit to arbitration any dispute which it has not agreed to submit." In the absence of a "meeting of the minds" there is no agreement for an arbitrator to interpret: "The national labor policy militates against the arbitration of issues surrounding labor contract formation."

Even if there is an arbitrable dispute, the Company contends that the contract will not support the grievance. Article 32 is, according to the Company, clear and unambiguous. It

obligates the Company "to make the defined weekly contribution" to "eligible" unit employes. The labor agreement is, however, silent on eligibility requirements. Thus, "the Plan documents . . . provide the requisite conditions . . . which are controlling." Arbitral precedent requires determining the parties' intent at the time agreement provisions were negotiated. In this case, then, the issue is what the parties intended "in May of 1995 when negotiations . . . reached their conclusion."

Evidence of bargaining history "demonstrates conclusively a mutual intent to be bound by the terms and conditions of the predecessor 401(A) plan, unless a term or condition was modified by the 1994-95 negotiations." Thoms' December 6, 1995 letter establishes that the Union sought to convert the old 401(a) plan to a 401(k) plan. Because the Union "did not propose to eliminate the former . . . plan" and failed to make any proposal regarding eligibility or retroactivity, it necessarily follows that the eligibility requirements of the old plan were carried into the Plan.

Bargaining history underscores this. The Company consistently provided the Union with Plan documents which carried forward the eligibility requirements from the 401(a) Plan. The Union never objected to this. When the parties discussed Union objections to the conversion, those discussions did not cover eligibility. The Company summarizes the relevant discussion and correspondence thus:

> (T)he Union did not make one proposal concerning eligibility or retroactivity, which, of itself demonstrates that the contribution terms of the predecessor plan were to prevail. Furthermore, the conduct of the Union, after the 1994-97 contract was negotiated, demonstrates that they were in full agreement with the eligibility requirements of the former plan.

Nor did the May 15, 1996 meeting alter this. Union assertions that Ward committed the Company to make retroactive payments have no support in any documentation of the Plan or its predecessor. Ward denied making the statement, and Company witnesses corroborated his testimony. Even if the testimony of Union witnesses is credited, there is no reason to consider the testimony since eligibility requirements are clear and unambiguous and since that testimony flies in the face of Union conduct.

Nor can the provisions of the 1997-2000 agreement be considered to support the grievance. The removal of any reference to the 401(a) Plan cannot obscure that the agreement expressly incorporates the eligibility requirements of that plan, thus establishing that the parties "have thereby reaffirmed their intention to bind themselves to the provisions of the former 401(A) plan." Nor can the provisions of Article 2 undercut this conclusion. A general reference that employes receive benefits upon completion of their probationary period cannot overcome the specific terms of Article 32.

The Company concludes by requesting that "the grievances be denied in their entirety."

DISCUSSION

The Company, unlike the Union, contends that the grievances pose a threshold issue of arbitrability. According to the Company, the grievances pose issues not of contract interpretation, but of contract formation.

The Company appropriately cites AT&T TECHNOLOGIES v. CWA, 121 LRRM 3329 (1986), as the authority generally governing the determination of arbitrability. The AT&T Court (121 LRRM at 3331) noted that "(t)he principles necessary" to determine arbitrability issues "are not new . . . (and) were set out by this Court . . . in a series of cases known as the Steelworkers Trilogy," citing STEELWORKERS v. AMERICAN MFG. CO., 363 U.S. 564, 46 LRRM 2414 (1960); STEELWORKERS v. WARRIOR & GULF NAVIGATION CO., 363 U.S. 574, 46 LRRM 2416 (1960); and STEELWORKERS v. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 46 LRRM 2423 (1960).

The AT&T Court drew the following four principles from the Steelworkers Trilogy:

> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit."
>
> . . .
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability . . . is undeniably an issue for judicial determination."
>
> . . .
>
> The third principle is that . . . a court is not to rule on the potential merits of the underlying claims."
>
> . . .
>
> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n order to arbitrate . . . should not be denied unless it may be said with positive

> assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 121 LRRM AT 3331-3332.

The first principle highlights the Company's contention that the grievances do not involve contract interpretation, but contract formation. The second and third are applicable here only to highlight that the issue of arbitrability is a legal issue which, to be honored in this contractual forum, must be addressed as a threshold issue to any determination of the merits of the grievances. As noted above, the labor agreement contains an arbitration clause, and thus the final principle highlights that there is a presumption that the grievances are arbitrable, unless it can be said with positive assurance that the contract cannot be read to cover them.

As preface to addressing this issue, it is necessary to note that the grievances do not pose the legal issue whether a grievance arbitrator can interpret or enforce the Plan itself. The issue is not, for example, whether Old Kent Bank has failed to properly interpret the eligibility requirements of the Plan. Rather, the grievances pose the issue whether Article 32 can be interpreted to demand the retroactive payments sought by the Union.

Articles 8 and 9 submit disputes "involving the interpretation or application of the labor agreement" to arbitration where those disputes cannot be handled at earlier steps of the grievance procedure. There is no agreement provision which would specifically bar arbitration of disputes concerning the contributions set forth in Article 32. That article, on its face, incorporates "the Section 401(k) plan established and maintained pursuant to the terms of the operative plan documents." The Plan provides for a nonelective "(d)iscretionary contribution" from the Company. Article 32 specifies what that discretionary contribution will be. The grievances, by seeking a retroactive contribution of the amounts specified in Article 32, thus make a claim governed on its face by Article 32. This must be characterized as a "dispute involving the interpretation or application" of Article 32.

The Company's arbitrability claim states a defense to the merits of the grievance. Evaluation of the defense demands an interpretation of the language of Articles 32 and the incorporated Plan provisions in light of relevant bargaining history. That evaluation process is contractual and factual in nature, and thus cannot be considered to state a bar to arbitration. The Union claims that Article 32, read in light of Article 2, extends to the Grievants a right to a retroactive Company nonelective contribution under the Plan. The Company's defense to this claim is that the parties never in fact agreed that Articles 2 and 32 could be applied in that fashion. The defense falls short of establishing that the cited agreement provisions cannot be read as the Union asserts, thus establishing a contractual void on the point. Rather, the defense asserts that, in light of relevant evidence, the cited agreement provisions cannot persuasively be read as the Union asserts. This line of argument is contractual, not legal, in nature. The grievances are, under Articles 8 and 9, arbitrable.

I have adopted the Union's statement of the issue as that appropriate to the merits of the grievances. That issue questions whether the Grievants are entitled to the Plan's non-401(k) Company contributions between March 3, 1995 and July 1, 1996. To address this contention requires setting out the logical chain asserted by the Union to establish the entitlement. As noted above, Article 32 sets out the amount of the Company's nonelective, discretionary contribution. By stating the specific amounts in the labor agreement, the parties relieved themselves of the need to periodically amend the Plan to reflect negotiated changes to the contribution levels. Read alone, the Plan's eligibility requirements under 2.01 and 2.02 would preclude the Company contributions sought by the grievances. The Union contends, however, that those eligibility requirements do not stand alone and must be read in light of Article 2 and relevant bargaining history.

Article 2, in the Union's view, implies that employes qualify for fringe benefits, such as pension payments, at the completion of an eight week probation period. The Union asserts this implication was made express during negotiations, as highlighted by the May 15, 1996 meeting. Against this background, the eligibility requirements of Sections 2.01 and 2.02 establish a bar designed to preclude Article 32 payments to short-term employes. For an employe who eventually meets those requirements, the bar is temporary and the employe must be paid the Article 32 amounts accrued between the close of the probation period and entry into the Plan. This reading of the labor agreement is logical and has support in bargaining history.

The Union's view is not, however, persuasive. Evidence of bargaining history supports the Company's reading of the contract over the Union's. The necessary preface to examination of this point is to note that the agreement provisions disputed by the parties cannot be considered clear and unambiguous. As noted above, the Union's reading of Article 2 to establish an eligibility rule rests on an implication from the terms of the provision. More significantly, Article 32 cannot be considered clear and unambiguous. As the Union persuasively argues, the parties' ongoing disputes regarding the provision underscore this point. Nor can the relationship of Article 32 and the Plan documents it incorporates be considered without ambiguity. For example, Section 3.01(d) makes Company contributions to the non-401(k) aspect of the Plan "discretionary." This reference is, standing alone, broad enough to permit the retroactive payments sought by the Union. Whether it stands alone and how other Plan and contract provisions affect it introduce ambiguity into Article 32 and its incorporation of Plan provisions.

Prior to reviewing the bargaining history, it is necessary to stress that the Union's reading of Plan eligibility rests on an inference drawn from the terms of Article 2. This does not mean its view cannot be considered persuasive. Rather, it highlights the need for evidentiary support for that view. A review of the evidence of bargaining history will not afford the Union's view the support it needs.

A review of the proposals exchanged by the parties indicates the Union's view of the eligibility for Company contributions was not made express until Thoms' letter of May 9, 1996. The Union contends that this reflects its assumption that Article 2 set the eligibility standard, and negotiating a defined contribution plan was all that was necessary to establish that standard. This should not obscure that prior to that point, no express proposals established the Union's view. While the Company cannot point to a specific proposal definitively establishing its view of eligibility, the "Plan Highlights" set forth at the June 15, 1995 meeting set forth separate entries for employe and Company contributions. The parties' dispute concerning 401(k) employe contributions in 1995 may not directly speak to the dispute concerning non-401(k) Company contributions, but it did establish that the Company was not reading the then existing plan documents to follow the Union's view of eligibility. The plan documents submitted to the Union in February of 1996 offered no support for the Union's view of eligibility, yet the Union's initial challenge of them did not pose a specific issue regarding the impact of Article 2 on eligibility.

More significantly, the Company, from Ward's letter of May 2, 1996, consistently and clearly took the position that the provisions of the 401(a) Plan would continue except as expressly modified in bargaining. This position is well-rooted in the parties' bargaining history. The proposals which preceded the tentative contract agreement in May of 1995 touched on only a small portion of the components of a 401(k) plan. It is not apparent how a 401(k) plan could be constructed without some reliance on the predecessor 401(a) Plan. It is, however, apparent that a number of the features of the 401(a) Plan were incorporated, with no apparent discussion, into the Plan.

As noted above, Thoms expressly stated the Union's opposing view in his letter of May 9, 1996. This set the stage for the meeting of May 15, 1996. Setting aside that meeting for the moment, however, the parties' conduct following the May 15 meeting affords more support for the Company's view of bargaining history than for the Union's. Darley's May 22, 1996 fax to Falduto clearly stated that the Company wished to continue the 401(a) eligibility considerations into the non-401(k) aspect of the Plan. This letter, standing alone, has no significance beyond showing the consistency of the Company's view, since it was not shared with the Union. Falduto's letter of May 29, 1996, is, however, no less clear than Darley's fax, and Ward supplied the Union with that letter. The Union's June 12, 1996 and July 30, 1996 letters affirm the accuracy of the Plan documents. The least that can be said of these two letters is that they afford no basis to conclude the Union expressly challenged the Company's consistently articulated view of employe eligibility for Article 32 payments under the non-401(k) aspect of the Plan. As a matter of bargaining history, the Union's reading of eligibility under Article 2 thus stands on an assumption made by the Union, briefly and indirectly communicated to the Company. The Company's reading of eligibility under Article 32 and the Plan stands on express views consistently communicated to the Union.

Nor does evidence on the May 15, 1996 meeting afford a persuasive basis for any other conclusion. That meeting can be viewed as a stark statement of a fundamental credibility

dispute. While the credibility issues underlying that meeting are undeniable, the evidence affords scant support for viewing that meeting as the defining moment of the parties' bargaining history. Rather, the meeting confirmed the conflicting assumptions brought to the meeting by the parties. Both the context of the meeting and the testimony concerning what was said afford no reason to discredit the views of the Union or the Company's witnesses.

The meeting took place against long-simmering disputes concerning the 401(k) and the non-401(k) aspects of the Plan. The Company heard, and agreed to a different view of eligibility for 401(k) contributions; heard concerns regarding the eligibility for non-401(k) contributions; and agreed to waive grievance timelines for the point to be more fully explored by the Union. Against this background, it is unremarkable that Union representatives could hear agreement to all the points raised, without distinguishing between the 401(k) and the non-401(k) aspects of the agreement.

More significantly, what reliable corroborating evidence there is favors the Company's view. It is undisputed that Ward did not mention Article 2 in making the statements the Union contends establish their view of eligibility for retroactive non-401(k) contributions. That the Union had never made this point express prior to or during the meeting makes it easier to conclude that some confusion existed on the point than to conclude that Ward agreed to the Union's position on eligibility. Beyond this, the Company's position on carrying forward 401(a) Plan eligibility into the non-401(k) aspects of the Plan before and after the meeting make it difficult to conclude it abandoned this position during the meeting. That the Company's view was more clearly stated than the Union's before and after the meeting underscores this. That the Union did not challenge Falduto's May 29, 1996 letter further underscores this.

Beyond this, the most complete, reliable and readable set of notes from the meeting is Knutson's. This is not surprising since she, unlike Ward or Thoms, was not required to both speak and take notes. Both Thoms' and Ward's notes show unmistakable signs of being drafted by a meeting participant. Both are sketchy to the point of being threadbare in their explanation of topics covered. The handwriting in each manifests inevitable haste. Knutson's notes, to the contrary, show the detail to be expected of one who was not burdened with spokesperson duties. More significantly, her notes confirm Thoms' notes in enough respects to make it impossible to conclude she drafted them to counter Thoms'. More to the point, her notes indicate the Company's view never varied from the position asserted by Ward before and after the May 15 meeting.

In sum, the Company's view of Article 32 is more firmly rooted in the language of the Plan and Article 32 than is the Union's. Because that article is not clear and unambiguous, evidence of bargaining history becomes relevant. That evidence establishes that the Company consistently and clearly stated its view that 401(a) plan eligibility would carry forward into the non-401(k) aspect of the Plan. The Union's view of eligibility rests on an inference which can

be drawn from Article 2, but is less reliably rooted in bargaining history than the Company's. To adopt the Union's view risks creating agreement through arbitration which was never made by the parties in bargaining. For that reason, the grievances must be denied.

AWARD

The grievances are substantively arbitrable.

The Grievants are not entitled to Company contributions to their pension plans for the period from the end of their probationary period on March 3, 1995, to their enrollment in the plan on July 1, 1996. The grievances are, therefore, denied.

Dated at Madison, Wisconsin, this 12th day of January, 1999.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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