BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SMITH STEEL WORKERS D.A.L.U. 19806, AFL-CIO

and

TOWER AUTOMOTIVE PRODUCTS COMPANY, INC.

Case 2
No. 55630
A-5623

(Grievance of Robert J. Muente)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Marianne Goldstein Robbins,** on behalf of the Union.

Varnum, Riddering, Schmidt & Howlett, LLP, by **Mr. Richard A. Hooker**, on behalf of the Company.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "Company", are signatories to a collective bargaining agreement providing for final and binding arbitration before a five-person Board of Arbitration. Pursuant thereto, hearing was held in Milwaukee, Wisconsin, on March 26, 1998, before the undersigned and panel members John Paul Hartig and Scott Bauer who were appointed by the Union, and Daniel G. Bender and Robert F. Trednic who were appointed by the Company. The hearing was transcribed and both parties filed briefs that were received by May 7, 1998. There, both parties agreed to a bifurcated hearing and that I should retain my jurisdiction if the grievance is sustained. Thereafter, I provided my fellow arbitration panel members with a copy of my draft Award on July 9, 1998. I subsequently met with them in executive session on June 9, 1999, to discuss certain issues relating to my proposed Award.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows:

> Did the Company violate Article IX, Section E, of the contract when it placed grievant Robert J. Muente on L2 status in March, 1993, rather than on lay-off status, if so, what is the appropriate remedy?

BACKGROUND

The Company operates a facility in Milwaukee, Wisconsin, where it manufactures truck frames and truck frame components. It purchased and took over said facility in 1997 from the A.O. Smith Corporation, the predecessor employer.

Grievant Muente, a Senior Shop Clerk in Department 7971, has been employed there since August, 1964. Muente experienced recurring medical problems with his feet because of degenerative arthritis, so much so that the Company's doctor placed restrictions in his ability to stand, walk, and to climb ladders (Joint Exhibit 3).

Muente returned from vacation on March 1, 1993, at which time he was told by John Ziperski, his immediate supervisor, that his job duties had changed and that he henceforth would be required to help lift automotive frames weighing about 200 pounds. Muente replied that his medical restrictions prevented him from lifting such heavy objects. Muente testified that Ziperski then told him that he was being laid-off out of the department and out of the plant and referred him to the Company's Manpower office which is responsible for placing employes throughout the plant.

Supervisor Ziperski testified that Muente's job had changed by March 1, 1993, because there was a diminished need for his clerical duties, a matter not in issue here. He denied telling Muente on March 1, 1993, that he was being laid off.

After speaking to Ziperski, Muente went to the Manpower office where he was told by Clinton Day to report to two departments for possible placement. Muente went there as ordered, but he was told there were no jobs for which he was then qualified. Muente returned to the Manpower office where he was released from duty and told by Day that he could apply for sick leave. Muente testified: "My understanding of my status was laid-off."

In this connection, Manpower Coordinator James J. Schmidt testified that employes who are disqualified from plant jobs because of medical disabilities or restrictions are placed on L2 status which means "Inactive, no job found"; that said status has been used by the Company since about 1986 or 1987; that the Union every Thursday is provided with documents showing which employes have been placed on L2 status; that the Union in March, 1993, was given an activity report, (Company Exhibit 4), showing that Muente and two other employes had been placed on L2 status; and that the Union has never grieved anyone's L2 status.

On cross-examination, Schmidt – who has never sat in on any contract negotiations – stated:

> "You can't use the word 'layoff' [in describing Muente's status] because that means there's somebody with less seniority than [sic] working, and if there's people with less seniority than [sic] working, you can't lay off on the line of seniority. So it can't be called a layoff."

Schmidt added that Muente never received the March, 1993, activity report (Company Exhibit 4), that listed him on L2 status; that said report also referred to layoffs; that Company Exhibit 3 and 4 do not refer to Muente's pension or benefits status; and that he has heard the term "Layoff, no job found".

Employe Benefit Clerk Specialist Benita Raney, a 14-year employe, testified that an employe on layoff loses his/her dental benefits on the date of layoff, as opposed to employes on sick leave who retain those benefits for up to two years. She added that employes with more than 10 years seniority who are on L2 status retain their group health and group life insurance benefits for up to two years, as opposed to laid off employes who continue to receive them for only up to three months. She also said that Muente had been provided with a summary plan description which spelled out this distinction (Company Exhibit 6).

On cross-examination, she acknowledged that Company Exhibit 5 only address health benefits and that Company Exhibit 6 only refers to group life and disability benefits without mentioning health benefits or pension. She also said that she had never heard the term "Layoff, no job found."

Muente in January, 1995, spoke to Jannine Peterson in the Company's benefits office who told him that he could not use the accumulated hours in his Pension Credit Bank for retirement purposes because he was on L2 status. That, said Muente, "was the first time I have heard that." It appears that Muente has about 4000 excess hours in the Pension Credit Bank, thereby possibly making him eligible for a pension.

The Pension Credit Bank is provided for in the Milwaukee Industrial Pension Plan Smith Steel Workers ("Plan") (Joint Exhibit 7), which states in pertinent part:

. . .

> The purpose of the Pension Credit Bank is to provide you, if eligible, with an opportunity to accumulate Hours of Service in excess of 1,700 up to a maximum of 2,080 which you earn in any year starting in 1981. Thus, if you earned 2,080 Hours of Service in one year, 380 Hours would be deposited in your account. Your accumulated Hours are withdrawn from your Pension Credit Bank Account when you terminate or retire. <u>These Hours are added to the Hours in those years in which you fall short of the 1,700 Hours or 1,000 Hours necessary to earn a full year of Credited Service or Vesting Service, respectively, due to layoff</u>. (Emphasis added).
>
> The Pension Credit Bank is effective on and after January 1, 1981. However, an account will not be established and Hours of Service shall not begin to accumulate until the year following the year in which the employee attains five years of seniority. Hours from the Pension Credit Bank can only be applied to years which are the later of 1981 or the year after the employee attains five years of seniority. At the time of termination or retirement, any unused Hours of Service in your Pension Credit Bank account are eliminated.

Said Plan is incorporated by reference in Article IX, Section E, of the parties' contract which states:

> "The A.O. Smith Corporation Milwaukee Industrial Plan applicable to employees covered by the Agreement is set forth in a separate agreement between the Company and Union."

Muente subsequently contacted the Union after he spoke to Peterson and the instant grievance was filed on February 24, 1995. The Company in December, 1996, notified Muente that he was being laid-off at that time because his seniority no longer entitled him to a position.

Muente acknowledged that he received a September 12, 1994 letter (Company Exhibit 1), from the Company stating that he was on "disability leave"; that he has received Social Security total and permanent disability benefits since August, 1993; that he received health, dental and life insurance benefits for two years following March 1, 1993;

that he in March, 1995, was granted total and permanent disability benefits under the Company's life insurance policy; and that he has not paid any Union dues since March 1, 1993, which is a requirement that laid-off employes must meet.

Earlier, Muente in 1993 applied for worker's compensation benefits on the ground that he injured himself on the job, but he was turned down. The Company in said proceeding asserted that Muente's injuries were not job-related and that he had been laid off. Administrative Law Judge Neil Krueger on April 12, 1996, denied Muente's worker's compensation claim, as he found: "When [Muente] returned from vacation, the applicant was told that due to job restructuring he was unable to return to his old job and was laid off." (page 2). Muente appealed said denial to Wisconsin's Labor and Industry Review Commission. The Company in said appeal filed a Memorandum In Opposition to Petition for Review on May 21, 1996, which stated, *inter alia*: "From 1990 until his layoff in March, 1993, Applicant's job position was as a clerk." (p. 2). The Commission on July 12, 1996, denied Muente's appeal. Muente appealed said denial to the Waukesha County Circuit Court. The Company on February 19, 1997, filed a brief in said proceeding which stated, *inter alia*: "Muente went on vacation in February of 1993. Upon his return, Muente was informed that due to corporate restructuring, he was laid off." (page two). The Circuit Court on June 11, 1997, dismissed Muente's appeal.

Union Grievance Chair William Krueger testified that he "in the late '80's or early '90's" asked Manpower Director Trudy Fredenberg what L2 referred to and that she answered, "Laid-off, no job found." Asked if there were any discrepancy between "laid-off" and "L2 status", Krueger replied: "I thought they were both layoff."

On cross-examination, Krueger was unable to recall the specific details that caused him to question Fredenberg. He initially agreed that employes on lay-off status would lose their dental insurance, health insurance, and life insurance earlier than employes on L2 status and that the Union receives a personnel activity report every week from the Company. On redirect examination, Krueger backed off this testimony by stating that he had not studied whether laid-off employes lose their health, life, and dental benefits much sooner than employes on L2 status.

Subsequent to the hearing, Manpower Director Fredenberg participated in an April 3, 1998, telephone conference call wherein she denied ever telling Krueger that L2 status meant "Laid-off, no job found."

POSITIONS OF THE PARTIES

The Union argues that the Company violated the contract when it refused to recognize Muente's post-March 1, 1993, status as a lay-off and when it, instead, placed him on L2 status, thereby preventing him from using his excess accumulated hours under the Pension Credit Bank for the purpose of qualifying for a pension. The Union thus contends that Muente was laid-off under the ordinary definition of that term; that the Company itself in Muente's worker's compensation proceeding admitted that he was laid-off; that the "term L-2 is used nowhere in the contract"; that Fredenburg told Krueger that L-2 status meant "Laid-off, no jobs found"; and that in "reality, L-2 status is just one form of a layoff." As a remedy, the Union requests an interim ruling finding that the Company violated the contract when it "failed to recognize Muente's lay-off status. . ."

The Company, in turn, contends that, "By traditional definition and common sense, grievant's release should be deemed a medical leave of absence" because of "the parties' clear, consistent and unequivocal past practice" and that waiver and estoppel "prevent grievant and the Union from successfully arguing grievant was laid off on March 1, 1993." The Company also makes clear that its actions herein in not raising a timeliness objection should not be taken as a waiver of any future timeliness objections.

DISCUSSION

This is a difficult issue to resolve for a number of reasons.

For starters, the term "L-2" does not appear either in the parties' collective bargaining agreement or in the Pension Plan. As a result, this case turns on how this term has been applied outside the face of the contract.

Secondly, both parties present reasonable – but competing - arguments as to why Muente was, or was not, on "lay-off". The term "lay-off" is critical because, as related above, the Pension Plan that is incorporated by reference in Article IX, Section 9, of the contract, states in pertinent part:

> "These hours (in the Pension Credit Bank) are added to the Hours in those years in which you fall short of the 1,700 Hours or 1,000 Hours necessary to earn a full year of Credited Service or Vesting Service, respectively, due to layoff."

The Union asserts that the term "layoff" is defined in *Webster's Seventh New Collegiate Dictionary* as: "the act of laying off an employee or a workforce", or "a period of inactivity or idleness", or "to cease to employ (a worker), usually temporarily." Here, Muente's absence from work after March 1, 1993, can certainly be deemed "a period of inactivity or idleness" that marked the temporary cessation of his employment.

On the other hand, the Company points out that Muente was told in September, 1994, that he was on disability leave status, (Company Exhibit 1), and that he was not laid-off because "lay-off" has been defined to "include any suspension from employment arising out of a reduction in the workforce. . ." See *How Arbitration Works*, Elkouri and Elkouri, p. 770 (BNA, 5th Ed., 1997). Since there was no reduction in the work force here, the Company argues that Muente was never laid-off, but rather, was placed on a medical leave of absence.

Both of these definitions are reasonable, which is why it is difficult to now ascertain Muente's precise legal status after March 1, 1993.

However, the Company did not contest Muente's unemployment compensation claim at that time, thereby indicating that the Company viewed Muente's status as some sort of layoff since unemployment compensation is usually given to laid-off employes. Moreover, the Union makes a plausible argument that "L-2 status is just one form of lay-off. An employe in L-2 status is laid-off because of medical limitations and their seniority status since there can be no placement if there is no job with the employe's limitations."

The Company asserts, though, through the combined testimony of Schmidt and Fredenburg, that a well-developed past practice has arisen to the effect that L-2 does <u>not</u> refer to layoff, but rather, to "no job found." Grievance Chair Krueger, however, flatly denied that this was so, as he claimed that Fredenburg once told him that L-2 meant "Laid-off, no job found." While both parties assert that the testimony of their respective witnesses must be credited on this score, I conclude that that is simply impossible to do, as the testimony of both Union and Company witnesses on this issue appears plausible.

The Company's case, however, is undercut by the fact that Employe Benefits Clerk Raney testified that she never heard of the term "L-2". Given her expertise as a benefits expert, one would think that she would be aware of such an important term if it were commonly used since one's L-2 status is determinative of how long certain benefits will be offered.

Moreover, there is no evidence showing that Muente himself knew what the L-2 designation meant. To the contrary, Muente said: "My understanding of my status was laid-off."

Muente's understanding certainly was justified because the Company itself represented in his worker's compensation case that he had been laid-off. Thus, the Company's May 21, 1996, brief stated: "From 1990 until his layoff in March, 1993, applicant's job position was as a clerk." (page 2). (Emphasis added). Its subsequent February 11, 1997, brief stated: "Muente went on vacation in February of 1993. Upon his return, Muente was informed that due to corporate restructuring, he was laid off." (page 2). (Emphasis added).

The Company asserts "its worker's compensation counsel was simply and obviously mistaken." The Company offers no explanation, however, as to how its own counsel could have made that critical mistake. In addition, I credit Muente's testimony that he believed he was laid-off on March 1, 1993, since there is no evidence that the Company then ever clearly told him that he was not being laid off.

The Company's failure to clearly communicate that message to Muente at that time is the key to this case. For since the issue herein turns on whether Muente can use his bank of excess hours to qualify for a pension after working for 28 years, fundamental fairness dictates that Muente should have been fully informed that his L-2 status prevented him from qualifying for his pension unless his status changed. Had he received such information, Muente and the Union may have done something to protect his possible pension rights. Since the Company bore the burden of providing Muente with that information – it after all promulgated and put him on L-2 status – it, rather than him, must bear the cost of whatever confusion has arisen over this issue.

The Company points out that Muente for nearly two years after March 1, 1993, continued to receive health and dental benefits and it thus argues: "A party is prevented from claiming entitlement by its own knowing inaction and acceptance of status, coupled with reliance by the other contracting party" and that, moreover, employes who accept such benefits have "unilaterally waived or relinquished their claimed remedy for the breach." The Company thus cites CITY OF DEPERE, 86 LA 733, 734 (1986), a prior decision of mine where I ruled to that effect.

DEPERE is distinguishable. It centered on an express oral agreement reached between a city and a union representative over whether sick leave would be paid under certain circumstances and whether said agreement – which benefited employes for nearly

seven full years – should be negated. I there found that the union "is estopped now from attacking the validity of the very bargain which its own spokesperson initiated and struck." Id. at 734.

Here, by contrast, there is no clearly expressed bargain to the effect that Muente agreed to give up his right to use the excess hours in the Pension Credit Bank in exchange for receiving insurance benefits for two years, rather than the several months that he otherwise may have received. Instead, this case turns on whether Muente is now estopped from using the Pension Credit Bank because there was an implicit bargain to this effect.

The evidence shows that there is not one single document that provided Muente with notice to that effect since: (1), Muente was not told by the Company until 1995 that he had been on L-2 status; (2), Muente was never provided with the March, 1993, weekly data sheet which was provided to the Union and which showed his L-2 status (Company Exhibits 3 and 4); and (3), the insurance plan descriptions provided to him (Company Exhibits 5 and 6), did not explain that receiving said benefits made him ineligible to use his Pension Credit Bank – an issue the Union disputes in any event. In other words, there is insufficient proof that Muente knowingly relinquished his right to use the excess hours in his Pension Credit Bank so that he could qualify for a pension.

Since Wisconsin law defines a waiver as the "voluntary relinquishment of a known legal right", he did not waive his right to use the Pension Credit Bank. See BANK OF SUN PRAIRIE V. OPSTEIN, 273 N.W. 279, 86 Wis. 2D 669 (1979); FAUST V. LADYSMITH-HAWKINS SCHOOL SYSTEMS, JOINT DIST. NO. 1, BD. OF ED. OF LADYSMITH, 277 N.W. 2D 303, 88 Wis. 2D 525, opinion reconsidered, 281 N.W. 2D. 611, 88 Wis. 2d. 525. That also is what distinguishes this case from the other cases cited by the Company wherein arbitrators have found waivers, i.e. JUDSON PARKING, INC., 84 LA 210 (Dworkin, 1985); COLONIAL BAKING CO., 32 LA 193 (Piercey, 1959); CHRYSLER CORP., 6 LA 389 (Wolff, 1947).

The record does show that the Union failed to charge Muente the $1 per month union dues that laid-off employes must pay for the Union-sponsored death benefit coverages and that, furthermore, the Company told Muente in September, 1994, that he was in a disability leave status. While supporting the Company's case, these facts are insufficient to constitute a waiver because: (1), it is possible that the Union erred in not charging him $1 a month in union dues; and (2), it was not unreasonable for Muente to have concluded that he was on lay-off status because of his disability.

The Company therefore erred in placing Muente on L-2 status and thereby preventing him from using the excess hours in his Pension Credit Bank. In addition, I find that there is no merit to the Company's claim that such a ruling should be applied prospectively and that the requested relief herein should be denied. For while the Company has acted in good faith throughout this matter and while Muente himself perhaps should have been more diligent in ascertaining his precise status, those considerations are insufficient to strip Muente of the hard-earned pension to which he may be entitled.

Lastly, the Company states that issues relating to Muente's "entitlement and his obligation to repay the Plans should he be successful here need not be dealt with. . . by the [arbitration] Board. . ." I agree, which is why I have not done so.

In light of the above, it is my

INTERIM AWARD

1. That the Company violated Article IX, Section E, of the contract when it placed grievant Robert J. Muente on L-2 status in March, 1993, rather than on lay-off status.

2. That Muente is entitled to apply to use the excess hours in the Pension Credit Bank for the purpose of determining whether he is entitled to a pension.

3. That to resolve any questions that may subsequently arise in this matter, I shall retain my jurisdiction indefinitely pursuant to the agreement of the parties.

Dated at the City of Madison, Wisconsin this 22nd day of July, 1999.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

Daniel G. Bender /s/ Daniel F. Trednic /s/
I dissent.

Scott Bauer /s/ John Paul Hartig /s/
I concur.

AAG/gjc
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