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.

SUPPLEMENTAL ARBITRATION AWARD

The panel issued its Interim Award in this matter on July 22, 1999, which found, *inter alia:*

. . .

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.
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> . . .

Jurisdiction was retained pursuant to the express agreement of both parties at the initial March 26, 1998, arbitration hearing which gave rise to the Interim Award.

There, both parties also agreed that this proceeding should be bifurcated into two parts: the first part would center on whether the Company violated the contract by placing grievant Robert Muente on L-2 rather than layoff status, and the second part would center on Muente's entitlement to a pension service credit.

Attorney Marianne Goldstein Robbins on behalf of the Union thus stated: "a second issue would be addressed as to Mr. Muente's entitlement to a pension service credit, credit hours under the pension plan, which the parties agree is an issue that the arbitrator can decide." She added: "the Company's position is that after the – after there is an award on both issues, that Mr. Muente would actually have to apply to the Pension Board for a pension and the Board would have to make a recommendation on it. It is the Union's understanding that the Pension Board would be bound by the arbitration decisions in reaching its determination."

Attorney Richard A. Hooker on behalf of the Company then stated:

> . . .
>
> A couple of things. The pension plan administrator would clearly be bound by the arbitrable interpretation of the pension plan provided it was proper in all other respects.
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> The second aspect, in all fairness I should mention, is that part of this agreement with the Union, the Company has agreed for purposes of this case only to waive its jurisdictional objection to consideration subsequently of the pension plan issue on the basis of an argument that it hasn't been appropriately raised in this case. In other words, we would agree to arbitrate it nonetheless.
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> . . .

Resolution of the grievance in Muente's favor would greatly improve the amount of his pension. If he, in fact, is entitled to the "30 and out" pension he seeks – which entitles an employee to retire after 30 years irregardless of his age – he would be eligible to retire with a monthly pension of about $1,280. If he is ineligible for such a pension, he has two choices: He can take early retirement at age 57 (he now is 54), at which time he will receive about $370 a month. Or, he can wait until he is age 62, at which time he will receive about $588 a month.

After the Interim Award was issued, the Union stated that it wanted to proceed with the second part of the proceeding and hearing was held in Milwaukee, Wisconsin, on November 8, 2000, before the undersigned and panel members Edgar Douglas, Jr., and Scott Bauer who were appointed by the Union, and Robert F. Trednic and Jeannie M. Daniels who were appointed by the Company.

The parties thereafter filed briefs and the Union filed a reply brief that was received on January 22, 2001.

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

ISSUES

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

1. Is the grievance arbitrable?

2. If so, whether grievant Robert J. Muente is entitled to use up all of the hours of his pension bank for a two-year period after he was laid off in March, 1993, and, if so, what is the appropriate remedy?

BACKGROUND

The facts surrounding Muente's grievance are set out in the Interim Award and thus need not be repeated. It suffices here to relate that Muente was hired in August, 1964; that, as found in the Interim Award, he was laid off on March 1, 1993, rather than being placed on disability leave as contended by the Company; and that he then had a total of 4,092 hours in his pension credit bank which, if applied over the next two years following his March, 1993 layoff, would enable him to retire on a "30 and out" pension irregardless of his age. Conversely, if he is allowed to use his pension bank hours for only one year as the Company contends, he then only will have 29 years of eligibility, thereby making him ineligible for a "30 and out" pension.

The Company purchased and took over the assets of A.O. Smith's Automotive Product Company in 1997, and the Company and A.O. Smith on January 27, 1997, entered into an Asset Purchase Agreement ("Agreement"), (Joint Exhibit 8), which stated, *inter alia*, that the Company would assume all liabilities relating to "any employment action or practice in connection with persons previously employed or seeking to be employed. . ." based upon "breach of employment or labor contract. . ." Said Agreement also stated that A.O. Smith would be responsible for handling the "question of pension eligibility by leaving all benefits based on service prior to April, 1997. . ." and that the Company would be responsible for "all benefits based upon service after 1997. . ." The Agreement further stated that the Company would be responsible for certain listed grievances, including Muente's (there listed as 1G-C80-95 and described as "Layoff vs. inactive status".)

Various witnesses testified at the November 8, 2000, reconvened hearing.

Retired A.O. Smith employee Robert J. French served on the Union's bargaining team in the 1983 contract negotiations with A.O. Smith involving the then-existing pension plan. He testified that the Union then proposed to eliminate the 1,700 hour requirement needed to qualify for a full year of credited pension service; that A.O. Smith rejected that proposal; that the Union then proposed a 1,000 hour requirement; that A.O. Smith rejected that proposal and countered with a proposal to give credit for periods of layoff that employees might incur after 1981 by allowing them to bank any hours worked in excess of 1,700 to a maximum of 2,080; and that the Union then agreed to A.O. Smith's proposal. Before then, there was no pension credit bank.

French added that A.O. Smith's representatives in the 1983 negotiations never said that the bank could only be used for up to one year after layoff and that no cutoff was ever discussed. He also said that the Union's representatives then believed employees "could apply whatever hours were in the bank to fill up the void of 1,700 hours for any particular year, and that they could use that until the bank was exhausted." He also testified that the 1983 negotiations over the pension credit bank took place within the larger context of the parties' negotiations over a successor collective bargaining agreement. That is why the "19806 Contract Report" at p. 3, (Union Exhibit 10), refers to the pension credit bank agreed to in those negotiations, along with the other items agreed to in the 1983 contract negotiations (including other changes in the pension plan). That also is why bargaining unit members were asked to vote on the tentative contract at August 9 and August 10, 1983, membership meetings.

On cross-examination, French acknowledged that there was no signature line on the 1980 Plan document (Union Exhibit 9), or any Plan document thereafter.

Union committeeman Dale Scholl also sat in on the 1983 negotiations. He agreed with French's testimony of what then took place regarding the pension credit bank and said there was no discussion of how long employees could use the pension credit bank prior to retirement. He also said that there never was any such discussion in subsequent contract negotiations and that the Union as of March, 1992, had never signed off on any more changes to the pension plan.

On cross-examination, Scholl testified that there were negotiated changes in the pension plan in 1991 which were apparently mandated under ERISA, and that those changes were subsequently implemented. He also said there may have been other changes at that time.

Grievance Chair John P. Hartig, a member of the Union's bargaining team since 1992, testified that the parties since 1992 never have negotiated a limitation on the use of the pension credit bank. He also said that former employee Annie Day was laid off on October 22, 1993, for about 20 months before she was recalled in May, 1995, and that she received credit for that time from her pension credit bank. He also said former employee Eddie Grady received 2.3 years' credit from the pension credit bank when he was laid off, and that the Company's records failed to show any employee other than Muente who had been denied a pension because they had been on layoff more than a year just prior to retirement. He also said that as of March, 1995, there was no signed Pension Plan document (Company Exhibit 7), and that 1988 was the last signed document.

On cross-examination, he testified that Day was not on layoff or sick leave status before she retired; that Day was allowed to use her pension credit bank for the time of her prior 1993-1995 layoff; that a summary plan document was distributed to employees in 1993 or 1994; and that he never asked A.O. Smith's benefits department for any information relating to retirement.

Grievant Muente, who is 54 years old, testified that he contacted A.O. Smith's Employee Benefits Department in 1995 and spoke to Jannine Peterson who told him he was not eligible for a "30 and out" pension because he was on sick leave status; that he filed a written appeal (Union Exhibit 14), and that his appeal was denied in a March 13, 1995, letter that stated, *inter alia*: "Therefore, if you believe your classification is incorrect, you should appeal the determination through the appeal process established under the labor agreement." (Union Exhibit 15). Muente then took no further action under the A.O. Smith plan because of his pending grievance here. He thus did not contact A.O. Smith's Benefits Department until after the panel issued its Interim Award when he was told to contact A.O. Smith, which he did. Thereafter, he put his request in writing on April 3, 1999, and A.O. Smith by letter dated April 27, 1999, informed him that he was ineligible for a "30 and out pension" because his change in L-2 status to laid-off "will allow you to use hours in your pension credit bank to earn an additional year of credited service for a total of 29 years."

On cross-examination, Muente acknowledged that he has been receiving Social Security disability benefits since August, 1993, and said he did not make a claim under the pension plan because: "The plan limits you in making that application within one year of being off work. That year passed, and I'm no longer eligible for it." He acknowledged that he could have applied in 1993, but that he did not do so because: "I didn't plan on being permanently disabled." Asked why he did not use the pension plan's appeal procedure after A.O. Smith denied him a pension, he answered: "Because previously I was directed to use the grievance procedure. I'm right in the middle of a grievance." He added: "I've been going through this for six years. It's back and forth. Nobody wants to take responsibility for anything." Muente acknowledged that he does not have any credit under the Company's pension plan.

Union President Duane McConville on or about March 20, 1997, received a letter from the Company (Union Exhibit 17), which stated that the Company was responsible for a number of grievances, including Muente's. He testified that the Company and A.O. Smith have disagreed between themselves as to which party is responsible for certain pension benefits.

On cross-examination, McConville acknowledged that Muente does not have one hour of active service with the Company, and that if a person's service was entirely before April of 1997, the benefit paid on that service would be entirely A.O. Smith's responsibility.

Benita Raney processes pension benefits for the Company's salaried and hourly employees. She testified about a conversation she had with Muente on March 31, 1999, in which she told him that the Company was not responsible for paying him a pension "because he has not worked since 4-18-97. . ." and because he thus would have to contact A.O. Smith direct. . ." (Company Exhibit 13).

On cross-examination, she said that she has been processing pension benefits for about the last five years and that her knowledge of A.O. Smith's pension policies has been gained since that time. She added that Muente has 4,092 hours in his pension credit bank; that he would have 30 years of credited service if he were allowed to use all of the hours in his bank; that Muente as of March 1, 1994, ceased to be an employee under the pension plan; that there are two separate pension plans; and that he is covered under Plan II because he was hired after 1955. She also stated that an employee is eligible for a "30 and out" pension if he/she has "30 or more years of credited service"; that Muente is eligible for a deferred vested benefit under Plan 2 because Section 2-6 therein has a different definition of "Employee"; and that Muente therefore would receive lower monthly payments under that provision.

Asked whether the word "employee" means "different things at different times in this document", she answered: "There are specific definitions of employee under certain sections of the Plan." She then referred to Section 3.3 of Plan 2 which deals with deferred vested benefits, but later acknowledged that Section 2.6 does not define eligibility for retirement.

POSITIONS OF THE PARTIES

The Union contends that the "arbitration panel has jurisdiction to resolve this dispute"; that the panel also "has the requisite personnel jurisdiction to decide this grievance"; that the present dispute is "ripe for adjudication"; that Muente is entitled to use up all of the hours in his pension credit bank "to obtain service credit during his layoff, until the bank is exhausted"; and that a decision to deny benefits here must be reviewed under a *de novo* standard. As a remedy, the Union asks that Muente be allowed to utilize his pension credit bank until his bank of 4,092 hours is exhausted and that those credits be transferred so that he becomes eligible for a "30 and out" pension; that he be made whole for all losses suffered; and that the panel retain its jurisdiction "to resolve any disputes concerning application. . ." of the award.

The Company, in turn, contends that "the Arbitrator has no jurisdiction to adjudicate grievant's rights under the A.O. Smith Plan because neither A.O. Smith nor the Plan are parties to this proceeding; because Muente's only recourse is through the Plan and not the collective bargaining agreement; that the dispute is not ripe because Muente "has taken no steps to appeal from the response. . ." he got from A.O. Smith; that Muente is not entitled to a "30 and out" pension because the Plan expressly states that a laid-off employee after a year no longer is an eligible employee under that part of the Plan; and that the proper standard of review here is whether A.O. Smith's initial denial of Muente's "30 and out" pension is "arbitrary and capricious".

DISCUSSION

The first issue that must be decided here is whether the grievance is arbitrable.

As to that, and as related above at pp. 2-3, Attorney Hooker and Attorney Robbins both agreed at the initial March 26, 1998, arbitration hearing that this matter should be bifurcated and that the second phase would center on Muente's eligibility for pension service credits. Moreover, Attorney Hooker then agreed "we would agree to arbitrate it nonetheless" even though, in the Company's view, the grievance had not been properly processed. The parties' joint agreement there as to how to proceed here should answer this arbitrability question.

But, even if there were no such agreement, one cardinal fact stands out relating to whether the grievance is arbitrable: the Union and A.O. Smith in 1983 expressly negotiated over the pension credit bank which is the focus of this dispute.

Thus, French testified without contradiction that A.O. Smith's representatives then raised the issue of a pension credit bank after they had rejected two Union proposals aimed at lowering the amount of credited time needed for eligibility purposes. In addition, both French and Scholl testified without contradiction that A.O. Smith's representatives never claimed that the bank only could be used for up to 12 months.

The parties on September 2, 1983, therefore executed a document entitled "A.O. Smith Corporation Milwaukee Industrial Pension Plan (Smith Steel Workers) Agreement" which stated, *inter alia*, that A.O. Smith would not amend the Plan "except as may be required by the Internal Revenue Service. . ." or ERISA and which went on to state at page 11:

. . .

> Pension Credit Bank: An account in which the Employee may accumulate Hours of Service in excess of 1,700 but not more than 2,080 hours for each calendar year commencing on or after January 1, 1981; provided, however, that such account shall not be established and Hours of Service shall not begin to accumulate until the following year in which such Employee attains five years of seniority, as shown on the records of the Company.

. . .

Said pension credit bank was subsequently referenced in the 1988 Plan and it also was referenced in the 1992 Plan (Company Exhibit 7), which states:

. . .

> (vii) At the time of retirement or termination an Employee shall be eligible to receive additional Credited Service from the Employee's Pension Credit Bank for any periods of layoff, commencing with the later of Plan Year 1981 or the Plan Year following the year in which the Employee attained five years of seniority (as shown on the records of the Company). Hours from the Pension Credit Bank Service subaccount will automatically be transferred to any year in which the Employee is credited with less than 1,700 Hours of Service on account of layoff. The transfer will commence with the later of Plan Year 1981 or the Plan Year following the completion of five years of seniority and proceed year by year until the year of termination or retirement or, if earlier, until the amount of Hours of Service in the Pension Credit Bank Service subaccount is exhausted. The Hour of Service transferred for any year will be the minimum number of Hours necessary to maximize the Employee's Credited Service. The unused portion of an Employee's Pension Credit Bank Service subaccount shall be eliminated after the required transfer to all applicable Plan Years.

. . .

Article IX, Section E, of the parties' current collective bargaining agreement refers to the pension plan by stating: "The A.O. Smith Corporation Milwaukee Industrial Pension Plan applicable to employees covered by this agreement is set forth in a separate agreement between the Company and the Union."

All this goes to the guts of this case because it shows that the Union and A.O. Smith in 1983 negotiated over the pension credit bank; that the end product represented the fruits of their collective bargaining efforts; and that their agreement was referenced in their collective bargaining agreement. Moreover, those pension credit bank negotiations took place within the larger context of the parties' negotiations for a successor contract which included other changes in the pension plan. Thereafter, all of those changes, including the pension credit bank proviso, were voted upon at the Union's membership meetings. (See Union Exhibit 10 which reports all those negotiated changes to the Union's membership.)

There thus was a direct connection between the pension credit bank and the collective bargaining agreement that then was being negotiated. Accordingly, and because neither the collective bargaining agreement nor the pension plan precludes arbitration over such a dispute, this matter is arbitrable under Article VII of the contract which states: "If the Union or any employee believes that a justifiable request or complaint exists, they shall bring it to the attention of the appropriate immediate supervisor."

Moreover, while the Company asserts otherwise, it is unnecessary to have either A.O. Smith or the Plan administrator as necessary parties, as the grievance only goes to whether the terms of the 1983 bargained-for pension credit bank are being violated.

In addition, it does not necessarily follow that the Plan's administrator would not adhere to whatever decision is reached here. To the contrary, Attorney Robbins at the initial March 26, 1998, hearing stated: "It is the Union's understanding that the Pension Board would be bound by the arbitration decisions in reaching its determination." Attorney Hooker echoed that understanding by stating: "The pension plan administrator would clearly be bound by the arbitrable interpretation of the pension plan, provided it was proper in all other respects." Given the parties' confidence that the Plan administrator will heed the ruling here, there simply is no need for him/her to be a necessary party at this point.

It also is unnecessary to here decide whether the Company or A.O. Smith is responsible for paying Muente's pension, as that is apparently a matter of dispute between them as evidenced by a July 26, 2000, letter from A.O. Smith's Associate General Counsel Kenneth J. Maciolek to Attorney Hooker (Union Exhibit 18), wherein he stated, *inter alia*:

. . .

> "any additional liability that the A.O. Smith Retirement Plan incurs because of the Muente arbitration is a labor liability under Section 1-4 of the Asset Purchase Agreement between Tower Automotive Inc. and A.O. Smith. Tower has assumed this liability and A.O. Smith will expect full indemnity for any losses related to this matter as provided in Section 9.3(b)(iii) of the Agreement."
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> . . .

Any disagreement between the Company and A.O. Smith over which party is responsible for Muente's pension thus must be resolved in another forum.

The Company's reliance on certain court cases involving *res judicata* and collateral estoppel are thus inapposite since I need not decide what effect, if any, the Award will have on subsequent events and on other parties. See SCHOLL V. LUNDBERG, 178 WIS. 2D 259, 504 N.W. 2D 115 (Wis. App. 1993); INDUSTRIAL WORKERS V. KROGER & CO., 900 F.2D 944 (6th Cir., 1990); NORTHERN STATES POWER CO. V. BUGHER, 189 WIS. 2D 541, 525 N.W. 2D 723 (Wis. 1995); WARM SPRINGS LUMBER CO. INC., 181 NLRB 600 (1970).

The Company also cites several cases in support of its claim that the Plan's appeal procedure represents "the exclusive mechanism for adjudication of those rights." See IAM, DISTRICT 10 V. WAUKESHA ENGINE DIV., DRESSER INDUSTRIES, INC., 17 F.3D 196 (7th Cir., 1994); PRINTING SPECIALTIES, LOCAL 680, V. NABISCO BRANDS, INC., 833 F.2D 102 (7th Cir., 1987).

In IAM, SUPRA, the Court ruled that a grievance involving a group health plan and whether a person had to be precertified was not arbitrable because the language of the "CBA and the Plan reveals that WAUKESHA and IAM did not intend to subject determinations of medical necessity to arbitration." Id., at 198. There, the contract stated that the arbitrator was "limited to the construction and application of the terms of this Agreement, as applied to the specific grievance presented for arbitration." The contract's only reference to the group health plan stated that the employer would continue to provide coverage "as specified in the Summary Plan Booklet" which, in turn, stated that no medical expense benefits would be paid for "Charges for services and supplies that are not medically necessary, as determined by Aetna." Id., at 198. The Court found that coverage was always available and that the administrator "simply denied. . . the request for precertification", thereby not implicating any terms of the contract. The Court distinguished another case, AIR LINE PILOTS ASS'N INT'L V. DELTA AIR LINES, INC., 863 F.2D 87 (D.C. Cir. 1988), *cert denied*, 493 U.S. 821 (1989), on the ground that it involved "the overall eligibility of a pilot for disability benefits, whereas here the dispute concerns one specific claim by an eligible plan beneficiary." Id., at 199.

Here, by contrast, grievances are not "limited to the construction and application of the terms of this Agreement. . ." as they were in IAM. Rather, and as related above, Article VII of the contract here allows for a broader reach by stating: "If the Union or any employee believes that a justifiable request or complaint exists, they shall bring it to the attention of the appropriate immediate supervisor." IAM is also distinguishable because the Court there found that there was "one specific claim by an eligible plan beneficiary" whereas the grievance here turns on Muente's overall eligibility for a "30 and out" pension – a matter that also can affect other laid-off employees who want to use up all of the hours of their pension credit bank for more than one year. Hence, given its broader implications, Muente's grievance is hardly fact-specific, as it raises the broader question of whether the terms of the 1983 agreement on the pension credit bank are being violated not only to his own individual situation, but also to any other similarly-situated laid off employees who need to use their pension credit bank for more than a year in order to qualify for a pension.

In PRINTING SPECIALTIES, LOCAL 680, SUPRA, the Court ruled that a grievance seeking early retirement benefits under the employer's pension plan was not arbitrable because a "wealth of forceful evidence. . ." showed that there was only a "passing reference to the Pension Plan. . ." in the contract; that there was no "clear relationship between the Pension Plan and . . ." the contract; and that the employer there expressly rejected the union's attempt to bargain over the pension plan that had been unilaterally established. Id. at 104-105. Thus, the Court found that "The Pension Plan was not established through collective bargaining with this Union. . ." Id. at 105. The Court added, however, that it "might reach a different result if Nabisco and the Union had explicitly bargained over the terms of the Pension Plan and made their agreement a part of the collective bargaining agreement." Id., at 105.

Here of course, and as established by French and Scholl's undisputed testimony, the Union and A.O. Smith did bargain over the pension credit bank back in 1983. Moreover, that agreement became part of the collective bargaining agreement since the Union's membership voted on that very issue when it ratified the overall contract in August, 1983. Hence, the facts here are the very opposite of the facts in PRINTING SPECIALTIES, LOCAL 680, SUPRA. as the Court's *dicta* there indicates that it would reach a contrary result here given the "clear relationship" between the pension credit bank and the parties' 1983 collective bargaining agreement.

The cases relied upon by the Company also are distinguishable because both parties here agreed at the original March 26, 1998, hearing to resolve this dispute in this forum. See LADISH CO. INC., V. IAM LOCAL 1862, 966 F.2D 250, at 254, citing JONES DAIRY FARM V. LOCAL NO. P-1236, 760 F.2D. 173, 175. (7th Cir. 1985), (*cert denied*, 474 U.S., 845, 1985), which states: "if a party voluntarily and unreservedly submits an issue to arbitration he cannot later argue that the arbitrator has no authority to resolve it." The Court in LADISH also cited UNITED INDEPENDENT FLIGHT OFFICERS, INC., V. UNITED AIRLINES, INC., 756 F.2D. 1274 (7th Cir., 1985), to state: "that an employer that acts in these dual roles does not breach any

fiduciary duty by agreeing during bargaining to a certain commitment, and then administering the plan in accordance with the terms of the final agreement." *Ibid*.

In addition, the grievance here involves an issue of general application which can affect other bargaining unit employees who may be laid off for more than a year - which is unlike the situations cited by the Company where the disputes were fact-specific and centered on whether particular employees could receive benefits based upon their individual circumstances. This general issue therefore can be resolved through the grievance arbitration procedure because that is the very procedure the parties have agreed to follow in determining whether negotiated benefits are being improperly withhheld. See GULF & WESTERN MFG. CO., v. STEELWORKERS 128, LRRM 2330, (D.N.J. 1988), where the Court ruled that a pension dispute was arbitrable because the parties bargained over pension benefits and because the administrator in that plan only addressed issues relating to "an individual's benefits under the plan,", as opposed to addressing questions involving "an entire group of employees. . ." who seek resolution of a question involving "general entitlement to pension benefits." Id., at 2335-2336.

That is precisely the situation here because this dispute can cover all laid-off employees who want to use up all of the hours in their pension credit bank if they are laid off for more than a year. In this connection, other courts have ruled that a pension dispute was arbitrable because it involved a negotiated contractual provision. See LOCAL 369, UTILITY WORKERS V. BOSTON EDISON CO., 752 F.2D (1st Cir. 1984); LADISH, SUPRA, at 966 F.2D. 250; UNITED STEELWORKERS OF AMERICA V. TITAN TIRE CO., 204 F.3D 858 (8th Cir. 2000); AIW LOCAL 232 V. BRIGGS AND STRATTON CORP., 837 F.2D. 782 (7th Cir. 1988).

As for the Company's claim that this matter is not "ripe", the record shows that:

Muente lost his job when he was placed on L-2 status in March, 1993.

Muente first learned that he could not use the hours in his pension credit bank because of his L-2 status in January, 1995.

Muente was told by an A.O. Smith representative that he was not eligible for a "30 and out pension" and that he would have to file a grievance under the labor contract in 1995.

After the Interim Award was issued, Muente again contacted A.O. Smith and was told that he still was ineligible for a "30 and out" pension in April, 1999.

Given the extraordinary amount of time that already has lapsed since Muente was first told in 1995 that he was ineligible for such a pension and that he would have to use the contractual grievance procedure, and given that this issue can impact other retirees who may

not have the luxury of waiting six years for a resolution of their pension eligibility, I find that this issue is, indeed, "ripe". There thus is no merit to the Company's contrary assertion that his "entitlement under the A.O. Smith Plan is not ripe for determination under any circumstances" because Muente did not appeal A.O. Smith's initial denial of his benefit claim (Emphasis in original).

Turning now to the merits of Muente's grievance, the Company asserts that Muente is not entitled to use more than one year's worth of banked pension credits because the term "Employee" in Section 1.1(i) of the Plan II (Company Exhibit 7), is defined as follows:

. . .

> Employee: Any person on the active hourly employment roll of the Company at its Milwaukee Works who is included in the collective bargaining unit represented by Smith Steel Workers and whose service date with the Company is on or after January 1, 1955. In addition, for purposes of this Plan, an Employee not actively at work because of approved personal leave, sick leave or layoff shall continue in the employment of the Company on the active hourly employment roll while on such leave or layoff through the later of the date which is one year from the date last worked or one year from the date the Employee last received accident/sickness or worker's compensation benefits.

. . .

There are several problems with this claim.

The first centers on A.O. Smith's failure to ever tell the Union's negotiators in the 1983 negotiations over the pension credit bank – or at any other time for that matter – that the pension credit bank has a one-year limitation for employees who are on layoff and who wish to retire. Thus, Union negotiators French and Scholl both testified without contradiction that no such limitations were ever discussed in the 1983 negotiations which created the pension credit bank.

That is why, apparently, no such limitation appears in that part of the Plan which states that employees can use the pension bank "until the amount of Hours in Service in the pension credit bank service subaccount is exhausted." (Company Exhibit 7, p. 3; Union Exhibit 6, pp. 12-13). Period. There thus is no limitation on how long that valuable benefit can be used. The Company therefore in effect urges that this language should be construed to read: "until the amount of hours in service in the pension credit bank service subaccount is exhausted, or in the case of employees on layoff status up to 12 months, whichever occurs first." The problem, of course, is that this is not what this proviso states. The same is true for the original 1983 language related above.

As a result, the plain language of this proviso must be accorded its ordinary meaning, which means that the pension bank can be used by all employees until all of the hours are used up irregardless of whether they are on layoff. This interpretation is in line with what was discussed in the 1983 negotiations and it is the one that must be followed here because it was A.O. Smith which proposed this proviso in the 1983 negotiations. Hence, any ambiguity in the language must be construed against it because: "It is a standard rule of contract interpretation that ambiguous language will be construed against the party who proposed or drafted it." (Footnote citations omitted). See *How Arbitration Works*, Elkouri and Elkouri (BNA, 5th Ed., 1996), pp. 509-510.

The second problem with the Company's claim that the term "Employee" should exclude employees who have been laid off for more than one year is that: (1), there is no evidence that the Union ever agreed to or signed off on that definition in 1992 or at any other time; and (2), said definition conflicts with what was agreed to in the 1983 negotiations. Thus, Union negotiators Scholl and Hartig testified without contradiction that the Union has never signed off on the 1992 revisions and the Plan's definition of "Employee". Moreover, there is no proof that this definition was even negotiated. Absent any such agreement, a laid off employee who otherwise is entitled to use up all of the hours of his/her pension credit bank for the reasons just stated above, cannot be denied receiving that negotiated benefit through the back-door device of redefining who is an employee for pension purposes.

The Company contends that the absence of a signed 1992 Plan document is immaterial because "there is no record evidence any of the parties' pension plans embodied a 'signed' agreement after the 1980-83 Plan" and because every bargaining unit member has enjoyed the "fruits" of the 1992 Plan without complaint. But, there is no proof whatsoever that the Union and the Company ever agreed to the one-year definition of "Employee" found in Section 1.1(i), above. Absent such proof, it simply is too much of a stretch to conclude that that definition was ever bargained over merely because various Plan documents were never signed by the Union.

Hence, Muente is a qualified employee who can use up all of the hours in his pension bank irregardless of whether he has been laid-off one year or two years. To claim otherwise would in effect mean that Muente – and all other similarly-situated laid-off employees – can be denied this important negotiated benefit via a unilaterally-established definition the Union never agreed to. Since that would in effect negate what was agreed to in the 1983 negotiations, such a result, and definition, cannot stand.

In addition, the one-year definition of "Employee" in Section 1.1(i) must be read alongside the definition of "Employee" in Section 2.6 which states that an "Employee" is entitled to deferred vested beneifts" and which does not limit benefits to those employees who have been laid off for more than one year. Moreover, the Union submits there is no reason

why Muente's two additional years of service credit – all drawn from his pension credit bank – cannot be granted before he is considered to be on layoff status for pension purposes. If that is done, the Plan's definition of "Employee" can be met.

Lastly, the Company asserts that an "arbitrary and capricious" standard must be applied to determine whether the Plan's earlier rejection of Muente's pension request can be overturned. I disagree. This "arbitrary and capricious" standard was never negotiated with the Union. Furthermore, since only staff and not the Plan's administrator responded to Muente's initial request, it does not appear that this standard covers the staff's actions. Moreover, since Muente for the reasons stated above is entitled to use up all of the hours in his pension credit bank pursuant to the 1983 collective bargaining negotiations, it in any event is "arbitrary and capricious" to deny him full use of that negotiated benefit.

Based upon the foregoing, it follows that Muente can use up all of the 4,092 hours in his pension credit bank so that he receives two more credited years of service. Such hours therefore are to be transferred and credited to his account so that he becomes eligible for a "30 and out" pension. He also is entitled to be made whole for all sums of money that he has not yet received because of the failure to award him a "30 and out" pension in March, 1995, when he first became eligible to receive it.

Based upon the above, it is my

AWARD

1. That the grievance is arbitrable.

2. That grievant Robert J. Muente is entitled to use up all of the 4,092 hours of his pension credit bank for a two-year period after he was laid off in March, 1993. Such hours are to be transferred and credited to his account so that he becomes eligible to receive a "30 and out" pension in March, 1995. He therefore is entitled to receive whatever benefit is payable under a "30 and out" pension from that time forward.

3. That grievant Robert J. Muente also is to be made whole for all sums of money that he has not yet received because of the failure to award him a "30 and out" pension in March, 1995.

4. That to resolve any questions that may arise over application of this Award, I will retain my jurisdiction indefinitely.

Dated at Madison, Wisconsin this 7th day of May, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

Jeannie M. Daniels, Robert F. Trednic /s/
I dissent.

Edgar Douglas, Jr., Scott Bauer /s/
I concur.

AAG/gjc
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