BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SCHWARTZ MANUFACTURING COMPANY

and

LOCAL UNION NO. 236-T, COUNCIL OF THE UNITED TEXTILE WORKERS OF AMERICA

Case 10
No. 61724
A-6035

(401(k) Grievance)

Appearances:

Mr. Gene L. Krull, International Representative, United Food and Commercial Workers, International Union, AFL-CIO & CLC – TAG Council, P.O. Box 1174, Appleton, WI 54912-1174, on behalf of Local Union No. 236-T.

Mr. Harlan Schwartz, President, Schwartz Manufacturing Company, 1000 School Street, P.O. Box 328, Two Rivers, WI 54241, on behalf of the Company.

ARBITRATION AWARD

Schwartz Manufacturing Company (Company) and Local Union No. 236-T, Council of United Textile Workers of America (Union) are parties to a collective bargaining agreement covering the years 2001-2004, which provides for final and binding arbitration of grievances through the Wisconsin Employment Relations Commission. Pursuant to the Union's request, the Wisconsin Employment Relations Commission appointed Sharon A. Gallagher to hear and resolve a dispute between them regarding the timing of the Company's contributions to its 401(k) plan on behalf of employees. Hearing in the matter was originally scheduled for January 7, 2003, but was postponed to January 16, 2003, at the request of the Employer. The hearing was held on January 16th, at Two Rivers, Wisconsin. No stenographic transcript of the proceedings was made. The parties waived the right to file post-hearing briefs and orally argued the case on the day of hearing. However, the record herein was kept open for receipt of the 2001-04 labor agreement which had not been typed as of the date of the hearing. That document was received by the undersigned on March 7, 2003.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues for determination in this case. However, the parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument and the suggestions of the parties in this case. The Union suggested the following issues:

> Did the Company violate the employees' rights by not making payday payments to the existing 401(k) plan? If so, what is the appropriate remedy?

The Company refused to suggest an issue in this case. Rather, it made the following statements at hearing:

> The Company did not violate employee rights; there was never any specific agreement regarding when matching payments for the 401(k) plan would be made by the Company; the Company made full and correct payment at the end of the tax year for all employees who had contributed to the 401(k) plan and/or were eligible for contributions from the Company.

Based on the relevant evidence and argument in this case, as well as the Company and Union positions stated herein, the Arbitrator concludes that the following issues shall be determined herein:

> Did the Company violate the employees' rights or the labor agreement by not making payday payments to the existing 401(k) plan? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE 1998-2001 LABOR AGREEMENT

ARTICLE XX
MEDICAL BENEFITS, WEEKLY INDEMNITY, DEATH BENEFIT,
SECTION 125 AND 401(k) PROGRAMS

. . .

7. The Company shall institute a 401(k) plan to allow employees to contribute to their own retirement plan. The Company will make no contribution to the 401(k) plan.

RELEVANT PROVISONS OF THE 2001-2004 LABOR AGREEMENT

On February 4, 2003, the Arbitrator sent a letter to the parties stating that the Award herein could not be drafted and issued until relevant portions of the 2001-04 were received by the Arbitrator. On March 7, 2003, the Arbitrator received the following language which both parties agreed reflects the agreed-upon changes in the language of Article XX, paragraph 7 of the 1999-2001 contract:

> 7. The Company instituted a 401k plan in 1999 (negotiated Nov 1998) to allow employees to contribute to their own retirement plan. The Company initially made no contribution to the 401k plan. In 2002 (negotiated Nov 2001) the Company agreed to contribute to the 401k plan on the basis of $.10 for each employee dollar contribution up to a limit of 6% of the employees annual gross earnings. This Company contribution is scheduled as follows for this Contract:
> Year I @ $.10; Year II @ $.10; Year III @ $.12

BACKGROUND

The Company makes filters for milk production on the farm. It employs approximately 16 employees at its facility located in Two Rivers, Wisconsin. The Company and the Union have had a collective bargaining relationship for some time.

During negotiations for the 1998-01 labor agreement, the Company agreed to set up a 401(k) plan to which employees could contribute. The parties expressly agreed that the Company would not be responsible to make any contributions to the 401(k) plan during the term of that agreement. After the 1998-01 labor agreement was agreed to, the Company hired a plan administrator, Wojta-Krey, to assist it in setting up the 401(k) plan and administering same. Company President Schwartz filled out a questionnaire necessary to set up the plan and in doing so, as the IRS requires, Mr. Schwartz had to answer a battery of questions regarding how the Company 401(k) plan would function and how the Company would make matching 401(k) plan contributions on behalf of participating employees, if such contributions were required in the future. Mr. Schwartz stated herein that the Company's 401(k) plan administrator advised him that for small companies, one end-of-the-year contribution is the simplest method and he relied upon Wotja-Krey's advice on this point. As such, Mr. Schwartz filled out the following questions that formed the basis for the 401(k) plan at its inception, as was required by the IRS and his plan administrator:

. . .

FORMULA FOR DETERMINING EMPLOYER MATCHING CONTRIBUTIONS (Plan Section 12.1(a)(2))

NOTE: Regardless of any election below, if the ACP test safe harbor is being used (i.e., Question 30.c. is selected), then the Plan automatically provides that only Elective Deferrals up to 6% of Compensation are taken into account in applying the match set forth below and that the maximum discretionary matching contribution that may be made on behalf of any Participant is 4% of Compensation.

a. [ ] N/A. There will not be any matching contributions (Skip to Question 33).

b. [X] The Employer … (select 1. or 2.)

1. [X] may make matching contributions equal to a discretionary percentage, to be determined by the Employer, of the Participant's Elective Deferrals.
2. [ ] will make matching contributions equal to ____% (e.g., 50) of the Participant's Elective Deferrals, plus:
   a. [ ] N/A.
   b. [ ] an additional discretionary percentage, to be determined by the Employer.

AND, in determining the matching contribution above, only Elective Deferrals up to the percentage or dollar amount specified below will be matched:
(select 3. and/or 4. OR 5.)

3. [ ] _____% of a Participant's Compensation.
4. [ ] $_____.
5. [X] a discretionary percentage of a Participant's Compensation or a discretionary dollar amount, the percentage or dollar amount to be determined by the Employer on a uniform basis to all Participants.

c. [ ] The Employer may make matching contributions equal to a discretionary percentage, to be determined by the Employer, of each tier, to be determined by the Employer, of the Participant's Elective Deferrals.

d. [ ] The Employer will make matching contributions equal to the sum of ____% of the portion of the Participant's Elective Deferrals which do not exceed ____% of the Participant's Compensation or $____ plus ____% of the portion of the Participant's Elective Deferrals which exceed ____% of the Participant's Compensation or $____ but does not exceed ____% of the Participant's Compensation or $____.

NOTE: If c. or d. above is elected, the Plan may violate the Code Section 401(a)(4) nondiscrimination requirements if the rate of matching contributions increases as a Participant's Elective Deferrals or Years of Service (or Periods of Service) increase.

PERIOD OF DETERMINING MATCHING CONTRIBUTIONS
Matching contributions will be determined on the following basis (and any Compensation or dollar limitation used in determining the match will be based on the applicable period):
e. [X] the entire Plan Year.
f. [ ] each payroll period.
g. [ ] all payroll periods ending within each month.
h. [ ] all payroll periods ending with or within the Plan Year quarter.

. . .

The Company's 401(k) plan was adopted on January 1, 1999, and the summary of the plan and the terms of the plan have not changed in any way since January 1, 1999. Mr. Schwartz stated herein that he did not recall discussing the subject when possible future employer contributions would be made with Wojta-Krey representatives in 1999 and he did not recall that he had filled out the above questionnaire on the subject of future employer contributions until after the grievance was filed in this case. Mr. Schwartz stated that at the time he met with his plan administrators and filled out the initial questionnaire, the subject of when employer contributions might be made meant nothing to him, as the 1998-01 labor agreement did not require any Company contributions.

In October and November of 2001, during negotiations for the 2001-04 labor agreement, the parties agreed that the Company would begin making matching contributions for employees participating in the 401(k) plan in the specific amount(s) listed in the 2001-04 contract. It is undisputed that the parties never discussed in negotiations for the effective labor agreement when the Company would make its 401(k) contributions on behalf of employees. 1/ The 2001-04 labor agreement does not contain any language regarding when matching employer contributions to the 401(k) plan must be made.

1/ Since its inception, participating employees have been contributing to their accounts out of each bi-weekly paycheck.

In June, 2002, employees went to Company President Schwartz to inquire regarding the status of the 401(k) plan, as the Company had recently changed administrators, from Wojta-Krey to Ansay. During this meeting, employees asked Mr. Schwartz when 401(k) contributions would be made by the Company for participants. Mr. Schwartz responded that he thought that Company contributions would be made bi-weekly but that he was unsure about this because he was not an expert in the plan and he had received a thick document from the administrator which he had not read.

Later, Mr. Schwartz discovered that his statement to employees in June, 2002, was wrong and that he had executed the original 401(k) plan document to provide for one end-of-the-year Company contribution on behalf of participants. Mr. Schwartz then notified his accountant of this and the accountant then placed the following notice in employee paychecks issued August 8, 2002:

> This paycheck includes the first deduction for 401(k), if you choose to participate. Balances from the previous plan have been transferred to Lincoln Financial Group.
> The company match will be calculated at year-end and a contribution will be made at that time. Originally, a contribution was going to be made after each paycheck.

. . .

On August 19, 2002, the Union filed the instant grievance which read as follows:

. . .

> Union & Harlan agreed in Nov. & again June of 2002 on Harlan matching .10 per dollar up to 6% and to be paid every pay day.

. . .

The Company's answer to the grievance dated October 21, 2002, came after several meetings with the Union, and it read in relevant part as follows:

. . .

> In October and November of 2001 the Company and the Union bargained on contract proposals submitted by the Union and the Company. Negotiations on these proposals were resolved and a three year agreement was concluded in late Nov 2001.
>
> The Union proposal regarding the 401k plan which was in effect from the previous contract without a Company contribution now asked for a Company contribution for this contract. The initial Union proposal was for $.25 for each employee dollar up to 15% of earnings. This monetary issue was bargained in the meetings of 10/25/01, 11/01/01, 11/08/01 and 11/24/02 when agreement was reached on a contribution of $.10 for years I & II of the contract and $.12 for year III of the contract up to 6% of the employees gross earnings.

> No mention of any other conditions regarding the Company contribution to the 401k program were intoduced [sic] by either the Union or the Company.
>
> In June of 2002 the Union requested a progress report on the 401k plan as the Company had switched administrators of the plan from Wojta-Krey to Ansay and progress in effectuating the plan was slow. This progress report was 6 months after the finalization of the contract and cannot in any way be considered to have any bearing on the previously concluded contract.
>
> In the course of that meeting I was asked when the Company contributions would be made. I replied that I thought that they would occur each payroll, but I cautioned that I was not expert in the plan and had received a thick document that I had as yet to digest.
>
> As it turned out I was wrong in thinking that the Company contribution would occur each payroll.
>
> We participate in a "boilerplate" plan that has IRS approval. Ansay had prepared documents which required my signature. Because of the technical detail I had to get their help in understanding what the documents were saying. In the matter of the timing of the Company contribution the plan called for a single contribution at the end of the year.
>
> The Company, in the contract, only agreed to the contribution amount stated above and did not discuss and therefore did not agree to make a contribution every pay day. The meeting in June had nothing to do with the contract.

Sometime in December, 2002, the Company received a document entitled "Summary Plan Description." That document, addressed to employees and designed to answer their questions regarding the Plan, states at page 5:

> . . .
>
> Will the Employer contribute to the plan?
>
> > Each year, in addition to your salary deferrals, we may contribute to the Plan matching contributions.
>
> . . .

POSTIONS OF THE PARTIES

The parties chose not to submit briefs herein and simply orally argued their positions in this case at the hearing. The Union submitted a typed version of what it read into the record as its position in this case:

> Todays case is very short and to the point. The past contract with Schwartz Manufacturing and Local 236T of the United Food and Commercial Workers expired on November 5. 2001. During negotiations for a new Collective Bargaining Agreement an agreement on contributions to the existing 401k plan was agreed upon. The 401k plan in the previous agreement did not have any matching contributions from the Employer, just contributions from the employees. In the existing agreement, which was negotiated in November of 2001, the employer agreed to contribute to the plan also. The amount of that contribution is not the question before the Arbitrator today but when the Employer makes that contribution is. It took the employer about eight months to get the employee contributions in effect and the Local membership, although not happy with the length of time it took, under stood [sic] it does take time to deal with the Federal regulations. In the early part of last June, the Union requested a meeting with the Company to fine [sic] out the status of the 401k plan. It was at that meeting Mr. Schwartz stated that he thought the matching payment would be at each paycheck. On August 9.2002, Mr. Schwartz included a statement with the employees paycheck. It was from that statement that the employees learned that the matching contributions would be made on a yearly basis. The statement stated "originally a contribution was going to be made after each paycheck." So it would be apparent that the employer, up to this time, also assumed that matching funds would be paid at each payday. This is exactly what the employees thought would happen.
>
> . . .
>
> The Union admits that during negotiations the terms of when the Employer would make the contribution was never discussed, but then neither was when the Employees contribution would be made. The Local membership feels that lacking any specific contract language, matching funds, to any reasonable person, would mean to match the amount bargained for at the time of contribution. The Local can not understand why an
>
> employer would take away from its employees something they feel they had negotiated. We feel you, the Arbitrator, will agree with the Union that once a year contributions to the employees 401 k plan is not reasonable.

The Company referred the Arbitrator to its October 21, 2002 letter to flesh out its arguments in this case and it referred the Arbitrator its statements made in regard to the issues, quoted above on page 2 of this decision.

DISCUSSION

I note that Article III – Management, of the 2001-04 collective bargaining agreement states:

. . .

> 4. Unless specifically covered by this Agreement, the conduct of all other phases of the operation of the Company are reserved exclusively to the Company.

In addition, I note that the evidence in this case showed that the Union and the Company never had a meeting of the minds that the Company would make payday payments on behalf of employees participating in the 401(k) plan. In fact, the evidence herein was undisputed that the Union and the Company never discussed when the Company should make such payments either at bargaining over the 1998-01 contract or at bargaining over the 2001-04 contract.

Indeed, when the 401(k) plan was originally agreed to in the 1998-01 contract, the parties specifically stated therein that "[t]he Company will make no contribution to the 401(k) plan." In the 2001-04 contract, the Company agreed to begin making contributions to the 401(k) plan for participating employees. However, the agreed-upon language in the 2001-04 contract does not address the date or dates on which the Company was expected to make its contributions to the 401(k) plan for participating employees.

Mr. Schwartz' (mistaken) statement to employees in a meeting in June, 2002, regarding when Company 401(k) plan payments might be made was made outside of negotiations and during the term of the 2001-04 contract. As such, the statement was not binding upon the Company. Furthermore, the notice received by employees with their August 8, 2002 paycheck did not constitute a violation of the labor agreement, as the labor agreement is silent regarding when the Company should make 401(k) plan payments.

Thus, the language of Articles III and XX, support a conclusion that the timing of the Company's contributions to the 401(k) plan were left to the Company to determine. Significantly, the 401(k) plan documents submitted herein do not require a contrary conclusion. In this regard, I note that the timing of employee 401(k) plan contributions is a separate provision or term of the 401(k) plan, not connected to or dependent upon when the employer contributions can be made. In addition, Mr. Schwartz' reasons for making one end-of-the-year payment for participating employees (that he was following the plan administrator's advice and that one annual payment is simplest for small companies) were not unreasonable, arbitrary or capricious.

In all of the circumstances of this case, and given the fact that the Union failed to present any relevant evidence of a violation of the labor agreement herein, I issue the following

AWARD

The Company did not violate the employee's rights or the labor agreement by not making payday payments to the existing 401(k) plan. Therefore, the grievance is denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 27th day of March, 2003.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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