BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 63, AFSCME, AFL-CIO

and

CITY OF RACINE (WATER UTILITY)

Case 640
No. 61214
MA-11854

LOCAL 2807, AFSCME, AFL-CIO

and

CITY OF RACINE (WASTEWATER)

Case 639
No. 61213
MA-11853

Appearances:

Mr. John P. Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Unions.

Mr. Mark L. Olson and **Daniel J. Chanen,** Davis & Kuelthau, S.C., Attorneys at Law, appearing on behalf of the Employer.

ARBITRATION AWARD

The Unions and parties named above are parties to 2001-2003 collective bargaining agreements that provide for final and binding arbitration of certain disputes. The parties jointly requested the Wisconsin Employment Relations Commission to appoint the undersigned as arbitrator in a dispute involving retirees insurance. A hearing was held on January 15, 2003, in Racine, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on May 1, 2003.

ISSUES

The parties did not agree on the framing of the issues. The Unions frame the issue as follows:

> Did the Utility violate the Local 63 and Local 2807 collective bargaining agreements when it increased the deductibles for current and future retirees from $100 single/$300 family to $200 single/$500 family effective January 1, 2002 and by further increasing the maximum out-of-pocket exposure for current and future retirees to $1,500 single/$3,000 family, effective January 1, 2002, and to $2,000 single/$4,000 family effective January 1, 2003? If so, what is the appropriate remedy?

The Employer raises two issues and frames them as follows:

> First, is the grievance arbitrable, in that it attempts to raise issues that are applicable only to retirees, and not to current employees?
>
> Secondly, did the Utility violate the provisions of Article 19 of the Local 2807 contract and Article 25 of the Local 63 contract when the Utility made retirees subject to placement within the insurance program established for active employees?

The Arbitrator prefers the Employer's framing of the issues.

BACKGROUND

This dispute is the same for both Locals 63 and 2807, and this Award will use the term "Union" to include both Locals. The dispute is over insurance language in the contracts. The Locals bargain for their contracts separately, but the language is the same in this case. The current contracts cover the period of 2001-2003. The language at issue states:

> All retirees after September 1, 1993, shall be subject to placement within the insurance program established for active Utility employees. It is further understood that this placement of retirees, by way of this settlement, shall have no precedential value nor impact upon any future transaction between the Racine Wastewater Utility, the Racine Water Utility, the City of Racine and any of its collective bargaining units now represented by Council 40, AFSCME, AFL-CIO.

The above language appears in Article 19, Section A of Local 2807's contract and in Article 25, Section A of Local 63's contract.

At hearing, the parties stipulated to the following statements:

> In the 1989 to 1990 collective bargaining agreements, Utility employees and retirees were covered under the referenced Blue Cross/Blue Shield plan. That plan featured a $50 single/$100 family deductible. In 1991 to the 1992 agreements, the deductibles under that same Blue Cross/Blue Shield plan were raised to $75 single/$225 family. There was no effect to retirees. They maintained the $50/single/$100 family deductible. In 1993 to 1994 agreements, the new City of Racine Partnership Health Plan was created. It had many features including an increase in the lifetime maximum benefit from $50,000 to $1,500,000. Retirees at that time were afforded the option of remaining in the Blue Cross/Blue Shield plan or opting into the City of Racine Partnership Health Plan. The new plan featured a deductible of $100 single/$300 family. In 1995 through the year 2000, the insurance remained *status quo*. There were no increases in employee cost, there were no increases in deductibles, and there were no increases in maximum out-of-pocket exposure. In 2001, the parties reached agreement for a three-year contract for the years 2001 through 2003. The contract was settled by a modification of deductibles that went to $200 single/$500 family effective January 1, 2001. The maximum out of pocket exposure increased to $2,000 single/$4,000 family effective January 1, 2003. This has been implemented effective January 1st of 2001 to current, past and future retirees, except for those who may have opted to maintain the Blue Cross/Blue Shield plan.

As noted above, when the City offered a new health insurance plan in 1993, retirees of record were allowed the option of maintaining the old Blue Cross/Blue Shield plan or moving into the new City of Racine Health partnership Plan. There were no changes in the insurance plans until the current contracts.

The 2000-2002 collective bargaining agreement between the City and Local 67, AFSCME, has language that differs from the contracts with Locals 63 and 2807. That language states:

> All employees who retire on or after January 1, 1996 shall be subject to placement within the insurance program established for active bargaining unit employees and as further modified by active bargaining unit employees.

That language came into effect in the 1995-1997 contract for Local 67. That language is the same in Local 2239, AFSCME's contracts for 2001-2003, except the date noted is 1994, not 1996. Local 2239 is split into two units, one called the City Hall Unit and the other called the Police Department Unit.

Robert Kaplan served on the bargaining committee for the Union during the last round of negotiations that produced the current contract. He testified that the City made proposals in bargaining for changes in insurance benefits but never stated in bargaining talks that it intended to change the deductibles and co-pays for both active employees and retirees. Marc Jensen also served on the bargaining committee for the 2001-2003 agreement, and agreed with Kaplan that the Employer's proposals regarding insurance changes did not reference retirees. Jensen testified that the Utility never stated its intent in bargaining to change deductibles and co-pays for both active employees and retirees.

The parties reached a tentative agreement and the Employer prepared a draft of the agreed upon items on May 1, 2001. The agreement refers to the increases in deductibles and out-of-pocket maximum amounts but does not make any reference to either active employees or retirees. When the Union got a draft of language prepared by the Employer, it objected to that language. The Union refused to sign the contract language that the Employer had prepared.

Attorney Mark Olson represented the Employer. He sent a letter to Thomas Bunker, General Manager of the Racine Water and Wastewater Utility, with the following regarding insurance:

> Article 25. Insurance contains a necessary and appropriate change, from the standpoint of the plan structure for retired employees. The revised language, as presented at page 23 of the draft of the 2001-2003 collective bargaining agreement, reads as follows:
>
> > "The annual deductible for retirees shall be as applied to all active employees as detailed by the contractor during the collective bargaining time period the employee retired in."
>
> However, I would revise the above-stated sentence to read as follows, in order to reflect the full scope of the change in plan structure to which the parties agreed as a part of this settlement:
>
> > "The annual deductible and out-of-pocket maximum aggregate amount for retirees shall be as applied to all active employees as detailed by the contractor during the collective bargaining time period in which the employee retired."
>
> This is, the change which is to apply to retirees, as well as to current employees, should reflect not only the new deductible which is to be applied, but also the out-of-pocket maximum aggregate, to which the parties have also agreed as a part of this settlement. Such changes should be applicable to current

> employees and retirees, which the above-suggested sentence would accomplish. In the absence of this change, a retired employee might argue that he/she is subject only to the increased deductible amounts, and not to the out-of-pocket maximum changes. Such is clearly not the intention of the parties, and the draft of the contract should reflect this intention.

A draft of the contract reflected the language in the above portion of the letter. Jensen testified that he was not going to sign the contract with that language. The draft was eventually changed to remove that language.

Kaplan, Jensen and other Union negotiating team members believe that they would keep the same plan they had as active employees when they retire, despite any changes active employees would make in the plan after that time.

Barry Henkel and Steven Blegen were on the bargaining team for Local 2807 when the parties bargained for the current contract. The insurance proposals made by the Employer to the Union did not refer to retirees, and Blegen and Henkel did not recall any discussion during bargaining to the effect that changes would affect both active employees and retirees. Local 2807 and the Wastewater Commission reached a tentative agreement and the Employer prepared a draft dated May 2, 2001. The draft of the tentative agreement refers to the increased amounts in deductibles and out-of-pocket maximum amounts but does not state anything about active employees or retirees. When the draft of the contract was sent to the Union, a copy of Olson's letter dated September 19, 2001, was included. The following is the relevant portion of that letter:

> Article 19 – Insurance-Retirement contains a necessary and appropriate change, from the standpoint of the plan structured for retired Commission employees. The revised language, as presented at page 25 of the draft of the 2001-2003 collective bargaining agreement, reads as follows:
>
> > "The annual deductible shall be identical to the active employees' health plan upon date of retirement."
>
> However, I would revise the above-stated sentence to read as follows, order to reflect the intent of the change in plan structure to which the parties agreed as a part of this settlement.
>
> > "The annual deductible and out-of-pocket maximum aggregate amount for retirees shall be identical to the active employees' health plan upon date of retirement."
>
> That is, the change which is to apply to retirees, as well as to current employees, should reflect not only the new deductible which is to be applied, but also the out-of-pocket maximum aggregate, to which the parties have also agreed as a part of this settlement. Such changes should be applicable to current employees and to retirees, which the above-suggested change would accomplish.

> In the absence of this change, a retired employee might argue that he/she is subject only to the increased deductible amounts, and not to the out-of-pocket maximum changes. Such an argument is clearly not the intention of the parties, and the draft of the contract should reflect this intention and the full scope of the tentative agreement.

Henkel testified that the bargaining unit had not agreed to the changes that were shown in the draft of the contract, so the Union decided to not sign it. Richard Kras, the Local Union President, sent a letter to General Manager Bunker, which states in relevant part:

> Our first area of concern has to be with the language changes found in Article 19 – Insurance – Retirement, Section C – Insurance for Retired Employees, paragraph 5 – The annual deductible…
> According to our negotiating team, the only areas negotiated on, and agreed to in Article 19 – Insurance – Retirement were the changes to our annual deductibles and out-of-pocket costs, which can be found on page 3, item number 7 of our Tentative Agreement.
> The proposed changes to the language for Article 19, Section C, Paragraph 5 (i.e. Annual Deductible) were not, according to the negotiation team discussed or agreed to during contract negotiations for the 2001-2003 Collective Bargaining Agreement. Consequently, the changes noted in the draft on page 26 will not be agreed to.

Former City Human Resources Director James Kozina coordinated the collective bargaining for the City and consulted with the Utility regarding bargaining for the two Locals at the Utility. Kozina took part in the 1993 negotiations and was familiar with the language at issue in this case. He had to explain the new health insurance program during that bargain and negotiate its details. The proposal to Local 2807 notes that all changes in coverage applicable to active employees are also to be applicable to retirees. Kozina testified that in the past, employees who retired from the City retained what benefits they retired with, and the new program allowed all those retirees an opportunity to opt into the new health insurance plan. If they decided to opt into it, they would then be covered by whatever benefits were negotiated for active employees.

A summary of the 1993-1994 settlement was prepared by the Employer in April of 1993. It contains the language that is now in the Union contracts, although the date of September 1, 1993 was eventually used instead of a July date originally proposed due to insufficient time to allow retirees the chance to opt into the new plan. The 1993-1994 contract also contained language to cover a transition period in deductibles. After 1993, the deductibles were set forth in the contract and retirees after September 1, 1993, were included in the new plan.

In March of 1993, the Employer prepared a preliminary final offer to Local 63, which included the proposal that all changes in coverage applicable to active employees are also to be applicable to retirees. The parties agreed on the same language as Local 2807 in mediation. Kozina kept minutes from a mediation session on April 23, 1993, with Local 2807. The contract was settled on that date. The notes show that retirees will have insurance changes as for active employees.

Kozina testified that he understood the language at issue here to mean that effective September 1, 1993, all retirees shall be placed in the new health insurance program. He noted that the second sentence regarding the settlement having no precedential value was because the two Locals at the Utility were the first locals in the City to agree to the change in the new health insurance plan. The City agreed not to use these contracts as a precedent for bargaining with other units and not use them as internal comparables in any mediation or arbitration. All the other bargaining units agreed to the same insurance program eventually.

The language in the 2000-2002 contract between the City and Local 67, AFSCME, is slightly different than the language in the contracts for Locals 63 and 2807. Local 67's language states:

> All employees who retire on or after January 1, 1996 shall be subject to placement within the insurance program established for active bargaining unit employees and as further modified by active bargaining unit employees.

Kozina negotiated the above language and testified that his intent was to have the same language in every other bargaining unit, that retirees who opted to go into the new plan would be subject to any changes as negotiated by active employees. Local 67 was the last unit to make the insurance change and there was no longer a need for the non-precedential language. Kozina interpreted Local 67's language to mean the same thing as the language in contracts in dispute here and stated so in bargaining.

Kozina also prepared a summary of tentative agreements between the City and Local 2239, AFSCME for the 1993-1994 contract. Since this contract was settled later than the Local 63 and 2807 contracts were settled, the retirement date stated in the contract was for January 1, 1994. The language for Local 2239 is the same as the language for Local 67, except for the retirement date. Kozina believed that the language in Local 67 and 2239 contracts meant the same as the language in Local 63 and 2807 contracts and expressed that during negotiations.

Retirees were given a one-time option to switch into the new health plan. Once the decision was made, retirees had to abide by it. Kozina testified that once retirees decided to go into the new plan, they would be affected by whatever was negotiated with the active employees. The City sent letters to retirees explaining the changes and their options. Then

Kozina and Terry Parker, Assistant Manager of Human Resources, held informational sessions for retirees to explain the new health plan and told them that they would be governed by changes negotiated by active employees. Kozina testified that he made statements to that effect at the bargaining table with all the units that he bargained with.

Between 1993 and 1996, Parker was Personnel Labor Relations Officer and responsible for the benefit program for the City. He met with retirees of the Utility in 1993 to see if they wanted to switch over to the new plan. He went over the benefits with retirees and told them that if they went into the new plan, they would be subject to the same things as active employees. Kozina directed him to tell them that so that they knew the options and could make informed decisions.

Before Bunker became General Manager of the Utility, he was the Chief of Operations. He was involved with collective bargaining and contract administration on behalf of the Utility for 24 years. He was in negotiations with the former General Manager, Thomas White, along with Attorney Mark Olson. Bunker recalled that Kozina was involved in the 1993 negotiations because of the health insurance changes. The Utility took the position during the 1993 negotiations with its Locals that all retirees were going to receive the same coverage as active employees. Bunker described the change in benefits as a win-win for the Employer and Union and retirees, since the lifetime maximum went from $50,000 to $1,500,000. Bunker recalled that during contract talks for the current contract, the Utility took the position that the language was clear that retirees were subject to the same plan as the active employees. Bunker testified that the Utility would not have agreed to settle the current contracts if the insurance changes did not apply to retirees.

There were employees who retired during the term of the current contracts.

The Union representing the City's firefighters previously raised the same issue that is being raised here. The issue went to arbitration before Arbitrator Amedeo Greco, who found that retirees were covered by whatever the active employees had.

THE PARTIES' POSITIONS

The Union

Since the Employer raised the issue of substantive arbitrability, the Union responds to that first. The Union notes that in GREEN COUNTY V. GREEN COUNTY DEPUTY SHERIFF'S ASSOCIATION, Dec. No. 21144, the Commission found the County had a duty to bargain with the Association with respect to a proposed retiree benefit. In LOCAL 1947-B, AFSCME, AFL-CIO AND CITY OF TOMAH, CASE 34, NO. 51165, MA-8516 (MAWHINNEY, 4/95), this Arbitrator found the Union had standing to seek an interpretation of the benefits for retirees

and found the grievance to be arbitrable. Moreover, a number of employees retired under the terms of the current bargaining agreements. In VILLAGE OF GREENDALE V. THE LABOR ASSOCIATION OF WISCONSIN, CASE 66, NO. 57540, MA-10669 (MAWHINNEY, 1/00), it was determined that the Union represents current employees who retire during the term of a contract and that the Union has standing on behalf of such retired members. For a similar result, see PEMBINE EDUCATION ASSOCIATION AND SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, CASE 32, NO. 57088, MA-10516 (CROWLEY, 7/99).

Turning to the merits, the Union asserts that no agreement was reached between the parties for the 2001-2003 contracts that indicate changes in insurance benefits for active employees would affect retirees. The proposals to the Union did not state an intent by the Utility to modify insurance benefits for retirees. Union witnesses on both bargaining teams had no recollection of the Utility stating an intent that changes in insurance benefits were to affect retired members. When bargaining concluded, the Utility prepared a summary of tentative agreements, and those summaries do not indicate agreements reached regarding modifications to insurance to affect retirees. When the Utility prepared a draft of the contracts, the language affecting retirees was something the Union had never seen before and had not agreed to in bargaining. The Utility's counsel prepared a letter that accompanied the drafts. The Union refused to sign the drafts which contained language suggested by counsel – language that had never been negotiated bilaterally. The final drafts that became signed agreements did not contain language that indicates the changes in health benefits affect retirees.

Union witnesses testified that their understanding was that health benefits for retirees are locked in at the levels in effect on their date of retirement. Management's own initial draft supports that theory.

The Union argues that the contact language does not support the implementation of revised health benefits for retirees. The language in both contracts at issue here differs substantially from language in other agreements in the City. Locals 67 and 2239 contain a phrase that says " . . . and as further modified by active bargaining unit employees." The issue of modifying retiree benefits is contemplated in those agreements. That language is clearly absent from the bargaining agreements in dispute. Thus, implementation of the modified retiree insurance benefits is a clear violation of the bargaining agreements.

The current contract language, in place since 1993, does not support the Utility's position. Subsequent collective bargaining agreements through the year 2000 did not modify insurance benefits. In 2001, the parties negotiated increases in deductibles and out-of-pocket exposure for active employees. There is no practice which supports the Utility's position, as there were no modifications to the insurance program from 1993 through 2000.

While the Employer believes that its proposals for the 1993-1994 contracts indicate its intent that future changes in benefits for active employees would have an identical impact on retirees, this is not true. The Employee did not accomplish its goal. Retirees were not

required to opt for the new Partnership insurance plan, but were given the option of remaining in the old Blue Cross plan. Also, the language agreed to does not state that retirees who opt into the new Partnership plan would be subject to modifications in benefits after retirement, as is the case with other bargaining units in the City. Therefore, the Employer cannot rely on language agreed to in 1993 to justify changing benefits for retired members in the year 2001.

The Union asks – isn't the Utility's understanding of the language evident where it indicates that the "annual deductible for retirees shall be as applied to all active employees as detailed by the contractor during the collective bargaining time period the employee retires in?"

The Employer

The Employer first argues that the grievance is not arbitrable because retirees are not covered by the collective bargaining agreement. See ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 V. PITTSBURGH PLATE GLASS CO., 404 U.S. 157 (1971). ALLIED CHEMICAL and its progeny prevent the Union from seeking a remedy for groups of individuals whom it does not represent. Arbitrator Crowley stated in PEMBINE EDUCATION ASSOCIATION. V. SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, CASE 32, NO. 57088, MA-10516 (CROWLEY, 1999) that a remedy for retirees who retired some years ago may be defended on the basis of a lack of standing. The remedy sought herein impacts only the rights of retirees. The Seventh Circuit held in ROSETTO V. PABST BREWING CO. 128 F.3D 538, that the Union does not have any right to represent retirees making up the class unless each of the retirees assents to its representation. The Seventh Circuit noted that whether the Union has standing to clarify the contract is not the end of the inquiry when determining whether the Union has standing to seek a remedy on behalf of retirees. Moreover, a finding that the grievance is arbitrable forecloses the retirees' rights to enforce their claim in court.

Turning to the merits, the Employer argues that the contract language is clear and unambiguous and it entitles retirees to whatever benefit structure is negotiated for active employees. When a contract defines retirees' health benefits in relation to the active employees' health benefit, any change to the active group's benefits will mandate a corresponding change for the other group, absent separate contractual provisions to the contrary. See LOCAL 1946-B, AFSCME, AFL-CIO V. CITY OF TOMAH, CASE, 34, NO. 51165, MA-8517 (MAWHINNEY, 4/95). The language in this case is even more clear than the language in the TOMAH decision. What retirees are entitled to after September 1, 1993, is clearly defined by the dynamic statement of a benefit, i.e. the insurance program for active Utility employees.

The fact that the City subsequently negotiated contracts with Locals 2239, 67 and the firefighters with language slightly different does not alter or ameliorate the clarity of the

language of Locals 63 and 2807. The bargaining history and the clear language of the contracts, as well as a previous arbitration award show that the retirees are subject to any insurance changes which are negotiated for active bargaining unit members.

The Employer asserts that arbitration precedent establishes that contract language which purports to fix or freeze an insurance benefit at the time of retirement must be more specific that the language which allows the benefit to adjust along with the benefits offered to current employees. See VILLAGE OF GREENDALE V. THE LABOR ASSOCIATION OF WISCONSIN, INC., CASE 66, NO. 57540, MA-10669 (MAWHINNEY, 01/00). The outcome is GREENDALE should be the same here in view of the close similarity of the facts.

The Employer notes that in exchange for relatively minor changes in deductibles in 1993, retirees got significant and major benefit improvements in their lifetime maximum benefit, which went from $50,000 to $1.5 million. Retirees are best served by a dynamic and evolutionary health insurance plan which will permit them to remain consistent with insurance benefit changes which are negotiated for active employees. Putting retirees in the path of a *status quo* must inevitably inure to their detriment.

The bargaining history establishes that the intent of the parties during negotiations was to have any modifications to the health plan apply to retirees. The Utility presented uncontested evidence that the intent in negotiating the 1993-94 contract language was to have changes to the insurance plan for active employees inure to current and future retirees. Kozina's testimony shows there was discussion and agreement during those negotiations with Locals 63 and 2807 to have post-1993 retirees subject to any future insurance changes for active employees. Bunker corroborated Kozina's testimony. While Jensen testified that he did not recall any discussion about insurance affecting current and future retirees, Kozina did have such recollection and produced detailed notes made by him at the time of bargaining. Parker advised retirees in 1993 that they would be subject to any benefits and benefit changes to which active employees were subject to in the future.

In response to the Union, the Employer notes that there was no need to re-negotiate the effect of changes to health insurance in the 2001-2003 contract settlement. Those changes had been in existence since 1993 and no further clarification was needed during the 2000 negotiations. Contrary to the Union's assertion, the Utility specifically informed the Union during the bargaining of the 2001-2003 contracts that any changes to the insurance plan would affect retirees. The Union asserts that the Utility cannot rely on the language ultimately agreed to in 1993 to justify changing benefits for retired members in the year 2001. It is precisely this language which is at issue. One cannot ignore the 1993 contract language which continues to remain in force.

The Employer also states that there is no past practice concerning the application of the relevant contract provision. The Union notes that the pre-1993 retirees were not required to opt into the new plan but were given the option to remain in the old plan. Those who opted

into the new plan were informed by Parker that future changes to insurance for active employees would impact their insurance. The only relevant considerations in this record are the terms of the language and the relevant bargaining history.

The Union fails to draw the proper inference from contracts with other bargaining units, according to the Employer. The fact that subsequent City contracts contain the language "as further modified by active bargaining unit employees" does not lessen the clear intent that the language in the Local 63/2807 contracts requires retirees to be within the insurance which is bargained for active employees. The Employer was creating a unified system of insurance for all bargaining units in which changes to the plan would affect retirees. All retiree health insurance language was to be negotiated on an individual bargaining unit basis, pursuant to the Union's insistence on the non-precedential language agreed to in the 1993 contract. However, all the language meant the same thing. Moreover, the draft language of the 2001-2003 agreements was not included in the contracts, and the comments make it clear that the Utility understood the contract as requiring changes to the insurance policy for active employees would cause changes for retirees.

DISCUSSION

Arbitrability

The parties have defined a defined a grievance as follows:

> Should a difference arise between the Commission and the Union or an employee concerning the interpretation, application or compliance with this Agreement . . . such difference shall be deemed to be a grievance and shall be handled according to the provisions herein set forth. (Article 9 in Local 2807's contract, Article 12 in Local 63's contract)

This dispute is over the interpretation and application of a provision of the Agreement, namely, insurance for retirees. The Employer has argued that the grievance is not arbitrable because retirees are not covered by the collective bargaining agreement, and that ALLIED CHEMICAL & ALKALI WORKERS OF AMERICA, LOCAL UNION NO. 1 VS. PITTSBURGH PLATE GLASS CO., 404 U.S. 157 (1971), and its progeny prevent the Union from seeking a remedy for groups of individuals whom it does not represent. In ALLIED CHEMICAL, the U.S. Supreme Court said that retirees are not to be considered employees, not members of the bargaining unit, but that if an employer consents to contract provisions for the benefit of retirees, they have vested contract rights:

> Since retirees are not members of the bargaining unit, the bargaining agent is under no duty to represent them with the employer . . . This does not mean that when a union bargains for retirees – which nothing in this opinion precludes if the employer agrees – the retirees are without protection. Under established contract principles, vested retirement rights may not be altered without the pensioners' consent. (Footnote 20)

Other federal courts, relying on the principles set out in ALLIED CHEMICAL, found that once a company binds itself by contract to provide benefits for retirees, the company could violate their contractual rights by failing to provide for those contracted benefits. See UNITED STEELWORKERS OF AMERICA, AFL-CIO VS. CANRON, INC., 580, F.2d 77 (1978). See also TEXTILE WORKERS OF AMERICA, AFL-CIO, LOCAL 129 VS. THE COLUMBIA MILLS, INC., 471 F.SUPP. 527 (1978), where a U.S. District Court ordered arbitration based upon a contract violation, noting that the union had a legitimate interest in protecting the rights of retirees and was entitled to seek enforcement of the contractual provisions for retirees through the arbitration process.

In support of its defense of lack of standing, the Employer also cites Arbitrator Crowley in PEMBINE EDUCATION ASSOCIATION. VS. SCHOOL DISTRICT OF BEECHER-DUNBAR-PEMBINE, CASE 32, NO. 57088, MA-10516 (CROWLEY, 7/99). However, the Arbitrator found the grievance to be arbitrable and said:

> As to standing, the District claims retirees are not parties to the collective bargaining agreement and citing ROSETTO VS. PABST BREWING CO., 128 F.3d 538 (7th Cir., 1977) asserts there is no authorization to proceed on their behalf. The District's reliance on *Rosetto,* supra, is misplaced. *Rosetto* stands for the proposition that a Union has no duty to represent retirees, but retirees can make the Union their agent if they so choose. ROTH V. CITY OF GLENDALE, 224 Wis. 2d 800 (Ct App, 1999). A review of the grievance filed on November 3, 1998, does not list a retiree as the grievant, but is generic in that it was filed by the grievance committee on behalf of the Association members (Jt. Ex.-2). The Association represents current employees who may retire during the term of the contract and as such may raise the issue as to their early retirement benefits under the collective bargaining agreement. Certainly, present employees covered by the collective bargaining agreement have the right to challenge the District's interpretation of the benefits they will receive upon retirement particularly where the retirement occurs during the term of the contract. Thus, the Association has standing on behalf of employees to proceed on the grievance. The issue of a remedy for retirees who retired some years ago may be defended on the basis of a lack of standing, however, issues of standing as to the remedy applicable to certain individuals does not mean that the Association lacks standing to prosecute the grievance. Therefore, the defense of lack of standing does not preclude a decision on the merits.

Other arbitrators have found grievances involved retirees' benefits arbitrable. See COMMONWEALTH TELEPHONE CO., 100 LA 611 (FEIGENBAUM, 1993), where the Arbitrator found that while the Union had no legal obligation to represent retirees and the Company had no legal obligation to bargain on benefits for retirees, the Union did represent retirees and the Company was willing to negotiate. Thus the Union had standing to grieve over retiree benefits for which it negotiated. In ST. LOUIS POST-DISPATCH, 99 LA 976 (MIKRUT, 1992), the Arbitrator found he had subject matter jurisdiction in a dispute over a retiree's benefit, noting that the parties voluntarily entering into an agreement for the benefit and the labor contract generally defined a grievance as a dispute arising over the interpretation and application of existing contract language. For a similar result and rationale, see REXHAM CORP., 95 LA 858 (EISENBERG, 1990).

In this case, the parties voluntarily agreed to provide for retirees' insurance benefits in their collective bargaining agreement. They also defined a grievance in general terms as a difference arising between the Commission and the Union or an employee concerning the interpretation, application or compliance with this Agreement. Moreover, as the CANRON and COLUMBIA MILLS cases indicate, there can be a contractual violation where the parties have provided for the benefits in the contract. It follows then that the Union can grieve the contractual violation (or alleged violation). Accordingly, I find that the Union has standing to bring this grievance and it is arbitrable.

The Merits

The starting point is, of course, this language:

> All retirees after September 1, 1993, shall be subject to placement within the insurance program established for active Utility employees.

The statement that retirees are placed "within the insurance program established for active Utility employees" is very convincing that retirees would get the same program as active employees. What else could the language mean? While the Union argues that retirees had always been allowed to leave with the same level of benefits that they had as active employees, that was before 1993 when this language came into the contract and changed the situation for retirees.

These parties are well known to this Arbitrator, and they are savvy and sophisticated negotiators. If they had intended to fix or freeze the benefit levels for retirees at their dates of retirement, they would have known how to write language to accomplish this. They did not write any such language that fixes or freezes the benefits at the date of retirement. This is a major flaw in the Union's case, since that language is really necessary to accomplish such a benefit, particularly in light of clear language to the contrary.

The Union concentrates on the 2001-2003 negotiations and argues that there was no agreement in that round to modify insurance benefits for retirees while there were proposals to modify benefits for active employees. The Employer had already made it clear in the 1993 round of negotiations that all retirees would be in the same plan as active employees, following the one chance to opt out of the new plan at that time. The language that went into the 1993 contract stayed in place in successive contracts, including the contract at issue. While there were no changes in the insurance plan for several years until the 2001-2003 contract, the language meant the same as it did when negotiated in 1993 and it was never changed by the parties.

The Union correctly notes that the Employer attempted to change language in the 2001-2003 contract by the drafts that it prepared, but the Union refused to sign the language that was originally drafted by the Employer. However, the 1993 language continued to be in force, which is the language that puts retirees in the same insurance plan as active employees. It follows that when the plan changes for one group, it changes for both groups. To hold otherwise would be to modify the language and add to it.

The Union also makes an interesting point that subsequent contracts with the City, such as those with Locals 63 and 2239, contain a further phrase: "All employees who retire on or after January 1, 1996, shall be subject to placement within the insurance program established for active employees and as further modified by active bargaining unit employee." That final phrase (underlined above) is not seen in the contracts with Locals 63 and 2807. However, the absence of that phrase does not change the language to mean that retirees get the same plan that they had when they retired. The additional phrase put into the subsequent contracts appears to be more or less a redundant phrase, adding more clarification to language that is pretty clear in the first place. And it does not change the meaning of the contracts for Locals 63 and 2807.

All in all, I am convinced that the parties knew in 1993 negotiations that retirees would be put in the same plan as active employees. The Employer's negotiators stated so and notes made contemporaneously confirm the same. Union negotiators knew what they were getting into. People may have forgotten over the years, where no changes were made to the insurance plan. However, the language remained in place and meant the same thing since 1993. When the parties negotiated the 2001-2003 contracts, they made changes to benefit levels, deductibles and out-of-pocket maximum amounts, but they never changed the language or the fact that retirees were placed within the insurance plan established for active employees. The parties both believe that the 2001-2003 contracts maintained the *status quo* – they just disagree on what the *status quo* actually is. It is what it was in 1993 – that retirees got the same plan as active employees. The parties would have needed to write different language to freeze retirees' benefits at their dates of retirement, and they did not do that. Therefore, there is no contract violation by making retirees subject to placement within the insurance program established for active employees, or subjecting retirees to increased deductibles and out-of-pocket maximums that are established for active employees.

AWARD

The grievance is arbitrable but is denied.

Dated at Elkhorn, Wisconsin, this 9th day of June, 2003.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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