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 **Marianne Goldstein Robbins,** on behalf of Smith Steel Workers D.A.L.U. 19806, AFL-CIO.

Varnum, Riddering, Schmidt & Howlett, LLP, by **Bryan R. Walters and Richard A. Kay**, on behalf of Tower Automotive Products Company, Inc.

Krukowski & Costello, by **Mark A. Johnson**, on behalf of A.O. Smith Corporation.

CLARIFICATION OF AWARDS ON REMAND

The panel, with Tower's members dissenting, 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. (Id. at 10).

. . .

The panel, with Tower's members dissenting, issued its Supplemental Arbitration Award on May 7, 2001, which found, *inter alia*:

. . .

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. (Id. at 15).

. . .

Muente then applied to Tower for his pension, but was turned down by the administrator of Tower's pension plan, AON Consulting, on the ground he had no credited service time with Tower.

Thereafter, the Union sought enforcement of the Awards pursuant to Section 301 of the Labor Management Relations Act against Tower in federal district court where it also joined A.O. Smith Corporation, (herein "Smith"), as a party.

Muente on May 14, 2003, applied to Smith for his pension but was turned down by the administrator of Smith's Retirement Plan. Muente then appealed that denial, but he again was turned down.

District Judge Lynn Adelman on September 25, 2003, issued a Decision and Order in Case 01-C-0905 wherein he concluded that the Awards are ambiguous, and that the issues

concerning their meaning therefore must be remanded to the arbitration panel for clarification. (Id. at 13). He also stated:

> For the above-stated reasons, this matter will be remanded to the arbitration panel for clarification of two issues: (1) whether the panel intended solely to explicate Muente's rights, or whether it intended to impose obligations regarding Muente's rights on either of the defendants (reserving the determination of which defendant for a different forum); and (2) whether the panel intended to confer on Muente a 30 and out pension or only the right to use all of the hours in his pension credit bank in applying to the retirement plan of one of the two defendants for a 30 and out pension. (Id. at 16).

. . .

Thereafter, the Union, Tower, and Smith all agreed on the remand and that I should serve as the sole arbitrator without a panel. By letter dated November 14, 2003, Attorney Mark A. Johnson on behalf of Smith stated that Smith objected to being considered as one of the parties before me; that Smith "would not be waiving any of the positions it has taken in the district court lawsuit"; and that, "By its limited appearance related to the remand, it is not waiving position on these or other matters."

The Union, Tower, and Smith filed briefs and reply briefs that were received by January 15, 2004.

The Union contends that the Awards imposed "obligations on either or both Tower and A.O. Smith ("reserving the determination of which defendant for a different forum"); that under both Awards, "either or both defendants jointly" must provide Muente with a '30 and out' pension"; that I have the authority to order that Muente is entitled to receive a pension; and that "Defendants cannot avoid the arbitration Award by claiming that the Award does not mandate a pension plan, but only the right to apply for one." The Union adds that "The employer(s) cannot avoid the arbitration award by assuming the role of administrator"; that the retirement committees do not exercise jurisdiction to determine "a negotiated benefit which could impact any employee laid off more than one year at the time he or she seeks to utilize his or her pension credit bank"; and that since Muente already has applied for his pension and has been turned down by both Tower and Smith, there is no need for him to apply again. The Union also states that "The panel could and did impose obligations to provide a '30 and out' pension to Robert Muente without recourse to another forum under ERISA"; that the question of whether Smith and its retirement plan "are bound by the awards is pending in district court"; that the "doctrine of claim preclusion does not apply"; that Smith cannot avoid liability by claiming its retirement plan is a separate entity; and that the grievance is arbitrable.

Tower maintains that the Supplemental Award "did not award Muente a '30 and out' pension under either the Tower or the A.O. Smith Retirement Plans", and that the Supplemental Award "is the basis for Muente to apply for a '30 and out' pension with the A.O. Smith Retirement Plan". Tower also claims that "Smith has acknowledged for the third time that it, not Tower, is the party from which Muente should be seeking pension benefits"; that "pension disputes are not arbitrable under the Agreement"; and that, "The 'make-whole' remedy in the Supplemental Award should not be read to require Tower to pay Muente a pension."

Smith states that its participation in the remand does not waive its positions that: (1), the arbitration panel had no jurisdiction over Smith or its retirement plan; and (2), the grievance is not arbitrable as it relates to whether its retirement plan must pay Muente a pension. It also contends that "the panel did not intend to impose obligations beyond the obligation to classify Muente's status as 'lay off'"; "that the panel never intended to impose any pension obligations on either Smith or its retirement plan"; and that if "Muente wants to pursue his alleged rights to a 30 and out pension any further, he must do so in another forum under ERISA". It argues that Smith and its retirement plan "were not parties to and did not participate in the arbitration"; that the "doctrine of claim preclusion bars this second litigation over A.O. Smith's denial of Muente's request for a 30 and out pension"; that its retirement plan "is a separate legal entity that has the exclusive authority to decide whether to grant or deny pension benefits"; and that the question of whether Muente is entitled to receive pension benefits under its plan is not arbitrable. Smith also claims that Tower has failed to relate that "the Asset Purchase Agreement required it to create a retirement plan including pension (credit bank) that mirrored A.O. Smith's Retirement Plan"; that Tower then agreed to "assume pension-related liabilities awarded by an arbitration"; and that only Tower can be ordered to pay Muente a pension because it assumed the collective bargaining agreement and Muente's grievance.

DISCUSSION

Judge Adelman has asked for clarification of "(1) whether the panel intended solely to explicate Muente's rights, or whether it intended to impose obligations regarding Muente's rights on either of the defendants (reserving the determination of which defendant for a different forum.") (Id. at 16).

The panel intended the latter. That is why its Supplemental Award stated that Muente "therefore is entitled to receive whatever benefit is payable under a '30 and out' pension from that time forward," and why it then also ordered that 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." (Id. at 15).

This obligation was imposed because Muente was entitled to use up all of the hours from the pension-credit bank that was negotiated between the Union and Smith in 1983, and which thereby was provided for under the collective bargaining agreement in effect in 1995 when he filed his grievance.

That is why the Supplemental Award, at 7, stated, "the Union and A.O. Smith in 1983 expressly negotiated over the pension credit bank which is the focus of this dispute", and which allows Muente to have 30 years of credited service so he can receive a '30 and out' pension.

That is also why the Supplemental Award stated:

. . .

> 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. (Id. at 19.)

. . .

The "arbitrable interpretation of the pension plan" referenced by Attorney Hooker on behalf of Tower thus centered on whether Muente, in fact, is entitled to a pension, as opposed to merely explicating his theoretic rights to a pension without resolving whether he, in fact, is entitled to a pension. Indeed, that is why the Supplemental Award stated: "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." (Id. at 10). That ruling was predicated on the recognition that Muente is entitled to a pension, and that Tower and Smith must resolve between themselves who is to pay for it under the terms of their 1997 Asset Purchase Agreement.

Judge Adelman also asked for clarification of: "(2) whether the panel intended to confer on Muente a 30 and out pension or only the right to use all of the hours in his pension credit bank in applying to the retirement plan of one of the two defendants for a 30 and out pension." (Id. at 16.)

The panel intended the former. That is why it stated that Muente "is entitled to receive whatever benefit is payable under a '30 and out' pension from that time forward", and why it then also ordered that Muente "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." (Id. at 15.) (Emphasis added). They key word here is "receive" because the Supplemental Award addressed and resolved the question of whether Muente is entitled to "receive" the pension benefits that have been improperly denied to him for the last nine years.

That also is why the Supplemental Award stated: "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." (Id. at 9). The "ruling here" centered on whether Muente is entitled to "receive" a pension and whether the Plan Administrator would pay it, because it makes no sense for the Plan Administrator to "heed the ruling here" if the ruling only centered on Muente's right to apply for a pension, which is a right he obviously has anyhow and which does not require the Plan Administrator to "heed" anything.

That also is why the Supplemental Award stated: "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." (Id. at 10). As related above, this recognizes that Muente is entitled to receive a pension under the collective bargaining agreement, with the only open question being who is to pay for it.

It is true that the Interim Award referred to Muente's right to "apply to use the excess hours in the Pension Credit Bank for the purpose of determining whether he is entitled to a pension." (Id. at 10). Such references, however, were only meant to show that Muente had to formally ask that all of his banked hours be used up to see if he had 30 years of credited service, which is a simple ministerial act. That is why the Supplemental Award subsequently stated: "Muente is a qualified employee who can use up all of the hours in his pension bank . . .", regardless of whether he was laid-off for one or two years. (Id. at 14).

That, coupled with Attorney Hooker's March 26, 1998, statement that the "pension plan administrator would clearly be bound by the arbitrable interpretation of the pension plan. . .", is why the Supplemental Award stated:

. . .

> 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. (Id. at 15).
>
> . . .

The word "eligible" in this context meant that Muente is to receive his pension because he has the 30 years of credited service needed to receive a "30 and out" pension.

The Union thus correctly points out, in its Main Brief, at 11: "The make-whole obligation confirms the intention that Muente's receipt of a pension is not contingent on the outcome of the application process but has already been determined by the award." As a result, Muente has a contractual right to that pension regardless of whether it is paid by either the Tower or Smith retirement plans, or by either Tower or Smith out of their general funds. See LADISH V. INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, 966 F.2D. 250 (7th Cir., 1992) It therefore is up to Judge Adelman to decide who assumed that obligation in the 1997 Asset Purchase Agreement.

Tower and/or Smith nevertheless claim that Muente's grievance is barred by the doctrine of claim preclusion; that his grievance is not arbitrable; that Muente is not entitled to receive such a pension because only the Plan Administrator can determine who is eligible for a pension; and that he must file a separate claim under the Employees' Retirement Income Security Act, ("ERISA"), to obtain the pension benefits he believes he is entitled to receive.

Smith claims that Muente's claim is barred under the doctrine of claim preclusion from seeking any relief from Smith and its retirement plan because of the federal lawsuit they instituted in 1996 asking for injuncture relief and a declaration that they had not violated ERISA by denying Muente a "30 and out" pension.

Smith's Main Brief, at 7-8, therefore quotes from Judge Myron Gordon's May 11, 1996 Decision and Order in that matter which stated in pertinent part:

> . . .
>
> The plaintiffs state that Mr. Muente applied for pension benefits in late 1994, seeking benefits under the "30 and Out Eligibility" provision of the plan. (***Id***. ¶ 12). They assert that the information Mr. Muente by letter dated January 17, 1995, that as of March 1, 1994; he had accrued twenty-eight years of credited service under the plan. (***Id***.)
>
> A.O. Smith and the plan maintain that on or about March 1, 1995, Mr. Muente appealed to the director of employee benefits A.O. Smith's determination that he

was ineligible for benefits under the "30 and Out" provision. (Complaint ¶ 13) They claim that he asserted that he had been laid off and was therefore entitled to draw hours from the pension credit bank to satisfy the remaining two years of service that he needed to attain thirty years of service. (***Id***.)

The plaintiffs state that by letter dated March 13, 1995, A.O. Smith, as plan administrator, denied Mr. Muente's appeal. (***Id***. ¶ 14). They allege that Mr. Muente was informed that he was not entitled to draw from the pension credit bank because he had been on inactive status on unpaid sick leave since March 1, 1993 and had been laid off. (***Id***.)

(AOSPFOF 29: Muente Dep., Exhibit 32, Decision and Order pp. 4-5) The Decision and Order went on to say:

> The plaintiffs also assert that, in denying immediate pension benefits to Mr. Muente, the plan administrator was acting in a fiduciary capacity as defined by ERISA. ERISA §502(a)(3) permits the maintenance of a civil action by a fiduciary to "obtain. . .appropriate relief. . .to enforce the provisions of this subchapter or the terms of "the plan. . ." 11 U.S.C. §1132(a)(3)(I). The plaintiffs claim that under the plan, the plan administrator is vested with the authority to interpret and apply the provisions and apply the provisions of the plan. Discretionary determinations are subject to review under the arbitrary and capricious standard. See *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115-15 (1989); *Wahlin v. Sears Roebuck & Company*, 78 F.3d 1232, 1235 (7th Cir. 1996).
>
> *The plaintiffs contend that A.O. Smith did not act in an arbitrary and capricious manner in denying Mr. Muente benefits under the "30 and Out" provision of the plan. They maintain that he has completed only 28 years of service and that he cannot use "banked" hours to make up the difference because he is not laid off. They request declaration upholding A.O. Smith's determination that Mr. Muente does not qualify for the enhanced benefits that he seeks under the plan.*
>
> . . .

ORDER

. . .

> *IT IS ALSO ORDERED that A.O. Smith, as plan administrator, is entitled to this court's finding that it did not act in an arbitrary or capricious manner in interpreting and applying the plan to Mr. Muente's claim for pension benefits under the plan.*

(Decision and Order pp. 7-8) (emphasis added)

The Judgment in Case No. 96-C-1048 dated May 16, 1996, stated, in part:

> IT IS ALSO ORDERED that A.O. Smith, as plan administrator, is entitled to this court's finding that it did not act in an arbitrary or capricious manner in interpreting and applying the plan to Mr. Muente's claim for pension benefits under the plan.

. . .

However, that lawsuit and the above-quoted extract from Judge Gordon's ruling were in response to Muente's then-pending separate equal rights complaint he had filed with the State of Wisconsin, which was eventually dismissed.

It therefore did not deal with the issue here: i.e., is Muente entitled to a "30 and out" pension under the collective bargaining agreement and the 1983 collectively bargained-for pension credit bank which allowed him to have 30 years of credited service. That is why the above-quoted excerpts from Judge Gordon's Decision and Order do not refer to Muente's collective bargaining claim. That is also why no injuncture or declaratory relief was granted regarding Muente's then-pending grievance. It thus, instead, only stated that Smith and its plan administrator did not act improperly "in interpreting and applying the plan. . .", which is a separate legal question from the contractual issue presented here.

Furthermore, while Judge Gordon referred to parts of Carlson's March 13, 1995, letter to Muente, there was no mention that Carlson in that same letter also told Muente: "The establishment of an individual's status is determined by the human resources department of the company, not the Plan. Therefore, if you believe the classification is incorrect, you should appeal the determination through the appeal process established under the labor agreement." Hence, Judge Gordon never addressed, let alone ruled upon, the separate questions of whether Muente is entitled to a "30 and out" pension under the collective bargaining agreement and whether Muente's then-pending grievance could go forward.

Muente's grievance therefore is not barred by the doctrine of claim preclusion.

Smith and Tower also claim that Muente's real dispute is with the Plan Administrator, as they point out that Muente's pension request already was denied by Duane R. Carlson, Smith's Retirement Committee Secretary. By letter dated July 29, 2002, (Tab 9 to Tower's Main Brief), Carlson informed Muente that his request for a "30 and out" retirement benefit under the Plan had been rejected because, *inter alia*;

. . .

> As of your last day of work with A.O. Smith Corporation on March 1, 1993, you had 28 years of Credited Service under the Plan. As a result of an arbitration decision on July 22, 1999, your job status was changed from L2 ("Inactive, no job found") to layoff. In a separate arbitration opinion issued May 7, 2001, the same arbitrator interpreted the Plan provisions and awarded you a "30 and out" pension based on hours you had in your Pension Credit Bank. Neither A.O. Smith Corporation nor the Plan was a party to either arbitration decision. The arbitrator was clearly without authority to rule on your eligibility for a "30 and out" pension.
>
> The Retirement Committee of the Plan has the exclusive duty to interpret and apply the terms of the Plan and is not bound by the decision of the arbitrator awarding you a "30 and out" pension. After reviewing the arbitrator's decision we have concluded that it is not correct because it is inconsistent with the Plan terms and rules and the prior application of such terms and rules.

. . .

Carlson, however, conveniently overlooked his earlier March 13, 1995, letter to Muente (Tab 2 to Tower's Main Brief), which then informed Muente:

. . .

> Dear Mr. Muente:
>
> Subject: A. O. Smith Corporation Milwaukee Industrial Pension Plan (Smith Steel Workers)
>
> This is in response to your letter dated March 1, 1995 regarding the crediting of service under the above named Plan.

Under the terms of the Plan, hours of service are used to determine vesting and credited service. Hours of service are earned for hours paid for services performed for the company or when an individual is paid for vacations, holidays, sick leave, funeral leave or jury duty. Hours of service are also earned while an individual is on an approved personal or military leave, even though (s)he is not paid, and provided (s)he returns to work within the period authorized for the leave.

The pension credit bank was established to provide individuals the opportunity to "bank" hours worked in excess of 1,700 in any Plan Year (but not more than 2,080). These "banked" hours could then be used as hours of service in years where an individual, due to layoff, had not worked the necessary number of hours to be credited with a full year of vesting or credited service.

The pension Plan records confirm that according to company records you have been on sick leave since March 1, 1993. The establishment of an individual's status is determined by the human resources department of the Company, not the Plan. Therefore, if you believe the classification is incorrect, you should appeal the determination through the appeal process established under the labor agreement. (Emphasis added).

Sincerely,

A.O. SMITH CORPORATION

Duane R. Carlson /s/
Duane R. Carlson, Manager
Pension & Savings Plans

Carlson's March 13, 1995, representation that a person's status "is determined by the human resources department of the Company, not the Plan", and that Muente could "appeal the determination through the appeal process established under the labor agreement" is at variance with Carlson's subsequent July 29, 2002, claims that "The arbitrator was clearly without authority to rule on your eligibility for a '30 and out' pension," and that, "The Retirement Committee of the Plan has the exclusive duty to interpret and apply the terms of the Plan and is not bound by the decision of the arbitrator awarding you a "30 and out" pension."

Muente did, in fact, file a grievance with Smith, and he has pursued that grievance for the last nine years. In addition, Smith continued to process Muente's grievance up until 1997 when Tower took over. Moreover, Smith then acknowledged that Muente's grievance was still pending in 1997 because it was expressly referenced in a schedule to the Asset Purchase Agreement. In addition, Smith states in its Reply Brief, at 2: "The liabilities that Tower assumed under the Asset Purchase Agreement specifically included pension-related liabilities awarded by an arbitration", thereby showing that Smith in 1997 knew that the "pension-related liabilities" related to Muente's employment as a Smith employee, and that that issue would be resolved in arbitration.

Furthermore, and as related in the Supplemental Award, Article VII of the contract defines grievances very broadly 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." (Id. at 9). Here, a "complaint" exists because Muente was not allowed to use up the two years worth of credited service he was entitled to use under the pension credit bank, and because that refusal led to the denial of the "30 and out" pension Muente is entitled to receive under the contractually-negotiated pension plan referenced in Article IX, Section E, of the contract.

Since Muente did exactly what Carlson told him to do in 1995 - i.e. to pursue his grievance through the contractual grievance/arbitration procedure - and since Carlson was Smith's agent at that time, Carlson's actions are imputed to Smith. See STRUCK CONSTRUCTION CO., 74 LA 369, 373 (Sergent, Jr. 1980); METRO CONTRACT SERVS., 68, LA 1048, 1053 (Moore, 1977); MICRO PRECISION CASTING CO., 40 LA 87, 90 (Dworkin, 1962).

Carlson and Smith are thus estopped from now claiming that arbitration is the wrong forum for resolving Muente's grievance because it is well-recognized that estoppel is to be applied when a party "has induced another person to act in a certain way, with the result that the other person has been injured in some way", which is exactly what would happen here if Muente's nine year-old grievance is determined to be not arbitrable. See, Elkouri and Elkouri, *How Arbitration Works* (BNA, 6th Ed., 2003), p. 558.

Moreover, even if estoppel does not apply, there is no merit to Tower and Smith's claims that Muente must now file a separate action to receive his pension since this record establishes that:

1. Muente in 1995 applied for a "30 and out" pension and was turned down by Carlson and Smith. His subsequent grievance has led to this nine-year proceeding.

2. After the first Award was issued on April 3, 1999, Muente applied to Smith for his "30 and out" pension, but was again turned down on April 27, 1999.

3. Muente applied to Tower for his "30 and out" pension, but was turned down by Tower's plan administrator.

4. Muente on May 14, 2002, applied to Smith's retirement plan for a "30 and out" pension, and was turned down by Carlson on July 29, 2002.

Given this nine-year delay - wherein Smith and its retirement plan have turned down Muente's pension request on three separate occasions, and wherein Tower has rejected Muente's pension claim since 1997 - Muente need not now go through yet more legal Ping-Pong and perhaps wait another nine years to receive the "30 and out" pension he was entitled to receive in 1995.

In addition, Smith's April 27, 1999, letter to Muente stated that Muente could only use up to one year's credit from his pension credit bank, and that "the additional year of service will only apply if the arbitration award is final." Smith then never claimed that this arbitration proceeding was the wrong forum for resolving Muente's pension grievance. To the contrary, Smith stated that Muente's pension status would be determined "if the arbitration award is final."

Given that delay and Smith's earlier representation in 1995 that Muente's pension grievance is arbitrable, I find that Smith has waived its claim that his grievance is now, suddenly, not arbitrable. This delay also distinguishes this case from those cases relied upon by Smith in support of its contrary claim – i.e., INTERNATIONAL ASSOCIATION OF MACHINISTS V. FANSTEEL, INC., 900 F.2D 1005 (7th Cir., 1990); ARCO CORP. V. ANGLIN, 216 F.3D. 589 (7th Cir., 2000); LUKENS STEEL CO. V. UNITED STEELWORKERS OF AMERICA, 989 F.2D 668 (3rd. Cir., 1993).

Smith also claims that its retirement plan is a separate legal entity that has "the exclusive authority to decide whether to grant or deny pension benefits", and that, "The only proper defendant in the Plaintiff's lawsuit to enforce the award would be the Plan."

That may be true in other circumstances which only involve one employee and which are fact-specific to that employee. But here, and as related in the Supplemental Award:

> 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 [Muente's] 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 to qualify for a pension.

. . .

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 withheld. 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 F2D (1st Cir. 1984); LADISH, SUPRA, AT 966 F2D. 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). (Id. at 11, 12).

. . .

Muente and the Union therefore can grieve the general application of how the pension credit bank is to be administered without naming either the Smith Retirement Plan or the Tower Retirement Plan as named parties, because it was Smith, not the Retirement Plans, which refused in 1995 to let Muente use up all of the hours in his pension credit bank so he could receive 30 years of credited service and a "30 and out" pension that goes with such credited service. Since ERISA was meant to supplement rather than to supersede a collective bargaining agreement which can provide for greater obligations and benefits than under ERISA, Muente's grievance properly addresses his contractual rights. See UAW V.

KEYSTONE CONSOLIDATED INDUSTRIES, 793 F.2D. 810 (7th Cir., 1986); AMERICAN FLINT GLASS WORKERS V. BEAUMONT GLASS, 62 F.3D. 574 (3rd Cir., 1995).

Smith and Tower also claim that Muente's grievance is not arbitrable because Article IX, Section E, states: "The A.O. Smith Corporation Industrial Pension Plan applicable to employees covered by this Agreement is set forth in a separate agreement between the Company and Union." Smith therefore asserts that since Article IX, Section E, "separates the Plan from the collective bargaining agreement – instead of incorporating – and because the panel had no authority to award any pension-related relief under Tower's collective bargaining agreement" the grievance is not arbitrable. They add that Article VII, A, Step 5, of the contract states that the Board of Arbitration's authority "shall be within the scope and terms of the contract"; that "the Milwaukee Industrial Pension Plan contained its own dispute resolution procedure"; and that, "The interpretation of the Milwaukee Industrial Pension Plan was not within the scope of the agreement to arbitrate under the assumed collective bargaining agreement by Tower."

This claim, again, ignores one crucial fact: Carlson and Smith in 1995 expressly told Muente to grieve because "the human resources department of the Company, not the Plan determines a person's status." Moreover, even though the contract refers to the retirement plan as a "separate agreement", there is nothing in the contract stating that disputes regarding the pension plan are not arbitrable under Article VII which states without limitation: "If the Union or any other employee believes that a justifiable request or complaint exists, they shall bring it to the attention of the appropriate immediate supervisor." Well here, a "complaint" certainly exists relating to Muente's use of the pension credit bank so he can receive the "30 and out" pension that is provided to employees with those years of service. See RITTMAN NURSING AND REHAB CENTER, 113 LA 284 (Kelman, 1999), where a handbook was incorporated by reference into the contract, and PENNSYLVANIA POWER CO., 113 LA 217 (Duff, 1999), where a memorandum of agreement was incorporated by reference into the contract.

Smith and Tower therefore in effect claim that Article VII must be read as providing: "If the Union or any other employee believes that a justifiable request or complaint exists for any matters not involving the collectively bargained-for pension bank and the pension benefits that an employee believes he/she is entitled to receive via use of that pension credit bank, they shall bring it to the attention of the appropriate immediate supervisor." Article VII, of course, does not state that, which is why it is improper to now read the above-underlined phrase into it.

Tower and Smith also in effect claim that Article VII must be read as providing, "If the Union or any other employees believes that a justifiable request or complaint exists regarding any matters other than a pension question which can only be resolved through the internal

dispute resolution procedure of the Milwaukee Industrial Pension Plan, they shall bring it to the attention of their immediate supervisor." Again, Article VII does not state that.

The hollowness of these claims also can be seen through Tower and Smith's failure to cite any bargaining history or other parol evidence in support of the proposition they advance here: i.e. that the Union agreed that employees can "complain" and grieve about almost any aspect of their employment relationship except for the pensions they are to receive for the rest of their lives.

Absent such parol evidence, and absent any written agreement stating otherwise, it must be concluded that Article VII allows employees to grieve and "complain" about not being credited with enough service under the pension credit bank so that they can receive the proper pension that goes with 30 years of credited service. Hence, Muente's grievance was within the scope of the agreement to arbitrate under the collective bargaining agreement Tower assumed in 1997.

Given Carlson's March 13, 1995, letter to Muente stating that Muente would need to file a grievance because "The establishment of individual's status is determined by the human resources department of the Company and not the Plan," and given Smith's subsequent April 27, 1999, letter to Muente stating "The additional year of service will only apply if the arbitration award is final", I also find that Smith has clearly and unmistakably agreed that the merits of Muente's grievance are to be resolved in this forum. See NOLDE BROS. V. BAKERY AND CONFECTIONERY WORKERS LOCAL 358, 430 U.S. 243 (1997); JOHN WILEY & SONS V. LIVINGSTON, 376 U.S. 543 (1964).

In addition, his grievance is arbitrable because the United States Supreme Court ruled in STEELWORKERS V. AMERICAN MANUFACTURING CO., 363 U.S. 564, 567-68 (1960):

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances, the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for."
>
> . . .

Here, for the reasons noted above, the Union has sought arbitration over a matter which "on its face" is governed by the contract – i.e. Article IX, Section E, of the contract which expressly incorporates the Smith Retirement Plan into the contract, thereby making it

grievable under Article VII of the contract which states that employees can "complain" about violations of the contract.

The United States Supreme Court also ruled in A.T. & T. TECHNOLOGIES v. COMMUNICATIONS WORKERS, 475 U.S. 643, 584-85 (1986), that an arbitration clause carries with it a "presumption of arbitrability in the sense that: "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with the positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

Here, there simply is no basis for finding that Muente's grievance "is not susceptible of an interpretation that covers the asserted dispute." Moreover, even if doubt exists, "Doubts should be resolved in favor of coverage."

See also LOCAL 369 UTILITY WORKERS v. BOSTON EDISON CO., 752 F.2D. 1, 3 (1st Cir., 1984), where the Court ruled in a similar pension grievance:

. . .

> [T]he plan cannot logically be read. . .to vest the administrators with the authority not only to administer the plan and make fact specific decisions, but to determine with utter finality all legal standards or rules applicable to the whole class of plan beneficiaries. The present dispute is not, after all, a dispute of fact bearing on an employee's claim of benefits under the plan, but rather one impacting a policy issue as to "whether undisputed facts about the circumstances of being laid off constitute being 'terminated' as that term is used in paragraph 4 of the plan." A decision on the meaning of 'terminated' resolves not only the standard to be applied to Mr. Clegg's claim, but the standard to be applied to all employees who are, or may become, laid off under the plan.

. . .

This same reasoning applies here because Muente's grievance centers on whether he and other employees, as a general matter, can use up to two years of credited service under the negotiated pension credit bank.

Smith's reliance on IAM v. WAUKESHA ENGINE DIV., DRESSER INDUSTRIES, 17 F.3D 196 (7th Cir., 1994); PRINTING SPECIALTIES AND PAPER PRODUCTS UNION LOCAL 680 v. NABISCO BRANDS, INC., 833 F.2D. 102 (7th Cir., 1987); and RCA CORP. v. LOCAL 241, 700 F.2D. 921 (3rd Cir., 1983), in support of its contrary claim is misplaced.

In WAUKESHA ENGINE, the Court determined that the contract and insurance plan "did not intend to subject determinations of medical necessity to arbitration", and it distinguished its earlier decision in LOCAL 232, ALLIED INDUSTRIAL WORKERS V. BRIGGS & STRATTON CORP., 837 F.2D. 782, (7th Cir., 1988), because Briggs and Stratton "changed terms of its retirement plan, which we found violated the clause in the parties' collective bargaining agreement which stated that the existing retirement plan as amended by this agreement will be maintained during the term of this agreement." (Emphasis in original), (17 F.3D at 198, n.I.) The Court then added: "Here, there was no changes in the terms of the Benefits Plan and therefore no failure by Waukesha to maintain the Benefits Plan as provided in the CBA."

WAUKESHA ENGINE therefore is inapposite because Smith did change the terms of the retirement plan it negotiated with the Union when it refused to let Muente use up all of the credited hours he had in the negotiated pension credit bank.

In PRINTING SPECIALTIES, the Court ruled that the union's grievance was not arbitrable because the contract there only contained a "passing reference" to the pension plan and because the pension plan was not negotiated with the Union. That is why the Court stated: "The Pension Plan was not established through collective bargaining with this Union; instead, the Pension Plan was in existence covering Nabisco's employees nation-wide before the Union organized and represented the Marseilles plant employees" thereby showing "the Pension Plan's independence and separation from the Union's collective bargaining agreement." (833 F.2D., at 102-5.)

Here, on the other hand, the pension plan was negotiated with the Union and the pension plan is not independent and separate from the contract. Indeed, that is why the Court in PRINTING SPECIALTIES was careful to add: "In this case, we might reach a different result if Nabisco and the Union had explicitly bargained over the terms of the Pension Plan and make their agreement a part of the collective bargaining agreement." (833 F.2D., at 105).

In RCA, the court ruled that a retirement plan did not provide for the arbitration of a grievance relating to the unilateral increase of the interest rate assumption used in calculating lump sum retirement benefits because negotiations over that retirement plan "are conducted separately, [have] always been so from negotiations covering the general collective bargaining agreement." 700 F.2d, at 927.

However, that was a separate question of whether a grievance in that case could be filed under the contract. On that key issue, the Court ruled that parts of the grievance were arbitrable, which is why it upheld the district court's order requiring such arbitration. 700 F. 2D., at 926-927. Moreover, the pension plan here was not separately negotiated, but rather, was negotiated when the parties negotiated over the collective bargaining agreement. In addition, this grievance centers on a specific issue that was agreed to in these 1983

negotiations i.e. – how is the pension bank credit to be administered. The interest rate calculation in RCA, however, apparently was never expressly bargained between these parties.

Moreover, this claim – that the separate pension plan agreement is not arbitrable - was expressly raised and expressly rejected in a prior arbitration case involving Smith and the Union. See A.O. SMITH CORPORATION, MILWAUKEE, WISCONSIN, and SMITH STEEL WORKERS, DIRECTLY AFFILIATED LOCAL UNION 19806, Case L-4679, (CHI-L-137, Grievance No. 22-99-64, 65, (1965), (Union Exhibit 7).

There, an arbitration board chaired by Gerald G. Somers ruled that the grievance was arbitrable even though it centered on the separate pension plan agreement.

Smith in that case argued:

ISSUE I: ARBITRABILITY

> The Company contends that the issue is not arbitrable because the pension plan was negotiated by the parties as a separate, self-contained agreement. It is not part of the general labor contract between the parties. The Unions and the Company expressly recognized that the retirement plan was not covered by the general labor contract by specifically indicating in that contract (Article X, E) that the retirement plan is set forth in a separate agreement between the company and the Union."
>
> In the Company view, since the pension plan is not part of the general contract, questions arising under the plan are not subject to arbitration pursuant to the contract. The plan itself does not provide for any form of arbitration. Indeed, the statement of the pension plan indicates that decisions made by a majority of the pension committee "shall be binding and conclusive on all persons." The arbitration board cannot contravene this explicit language without exceeding its authority as provided in Article IX, A of the labor contract. Since compulsory retirement is provided for in the pension plan and the plan is expressly excluded from the labor contract, it must follow that the exercise of the right to compel retirement is not arbitrable under the labor contract. The Company's policy of compelling retirement under the pension plan was not adopted or carried out in an arbitrary manner and, therefore the Company policy cannot give rise to arbitration or any claim of inequitable treatment of employees. Even though the Union claims an understanding during the 1964 contract negotiations that terminated employees would have access to the grievance procedure, the only fact is that the language requested by the Union was not included in the contract.

> Finally, the Company points out that other arbitrators have held that inconclusive bargaining history cannot vary the clear terms of written agreements; that in the absence of contractual limitations to the contrary, the right to compel retirement is reserved to management; that a company does not violate a collective bargaining agreement by enforcement of a compulsory retirement plan when such plan is buttressed by past practice; that compulsory retirement pursuant to a unilaterally established pension is not arbitrable under a union contract. (Id., at 4-5).
>
> . . .

That is the same argument Smith makes here. The arbitration board, however, rejected Smith's argument. It ruled:

> The grievance procedure is broad in the coverage it provides for disputes which may be processed through the various grievance stages. Article IX refers to "any dispute" and notes that "should any employee feel that he has been treated unjustly. . ." he may initiate the grievance procedure. Since it is clearly the intent of Article VII of the contract that seniority play a major role in governing termination of employment, an employee who feels "that he has been treated unjustly" in being terminated might logically feel that this was "a dispute pertaining to this contract involving the Company and the Union." This point was apparently discussed during contract negotiations and there was apparently some verbal agreement that the question of termination of employment would normally be considered an arbitrable issue under the provisions of the grievance procedure. But even if there was no such verbal understanding, under a contract with seniority provisions such as those in the instant case, it is reasonable to conclude that an employee who feels that he has been unjustly terminated would have recourse to the grievance procedure.
>
> The fact that Albert Huxhold's termination stemmed from the provisions of a separate agreement does not alter the foregoing conclusion. A separate agreement may provide the justification for an employee's termination and thereby deprive the grievance of any substance, but it cannot prevent an employee who feels that he has been unjustly terminated from having the merits of his grievance determined under the procedures indicated in the labor contract.
>
> The separate pension agreement does not specifically deny the use of the grievance procedure in resolving differences over the administration and interpretation of the pension agreement. Since employees are denied the right to strike in order to resolve such differences, it is reasonable to conclude, in

keeping with recent Supreme Court decisions, that a grievance procedure is to be used for the resolution of disputes under the agreement.

Although there is a conflict of testimony on this point, a careful review of the transcript leads to the conclusion that grievances have been filed and entertained over the question of compulsory retirement in the past. Although the evidence of such past practice is not necessary to support the arbitrability of the instant dispute, it gives further weight to a decision in favor of abitrability. Thus, the pension agreement is a separate agreement between the parties. But when actions taken under that agreement affect the rights of employees as laid down in the general labor contract, then the grievance procedures of the general labor contract may be invoked. It may be found that the specific provisions of the separate agreement take precedence over the provisions of the general labor contract, but this is not to deny an employee who feels he has a grievance under the general labor contract the right to have the merits of that grievance judged in the grievance procedure. (Emphasis added), (Id. at 7-8).

. . .

Ditto today, which is why employees can grieve and arbitrate over how the pension credit bank is being administered, and why the prior 1965 arbitration award between the parties is *res judicata* as to whether a similar grievance is arbitrable. See *How Arbitration Works*, supra, at 578.

Smith also claims that it was not a party to the collective bargaining agreement after Tower took it over in April, 1997, and that it therefore "cannot be sued under §301 to enforce the arbitration."

In fact, the issue here centers on whether the contract was violated in March, 1995, when Smith refused to grant Muente the 30 years of credited service he needed to receive his "30 and out" pension, and when it told Muente to grieve that refusal. Moreover, Smith knew in April, 1997, that Muente's grievance was still pending because it is expressly referenced in a schedule to the Asset Purchase Agreement. In addition, the Smith Retirement Plan told Muente that it is responsible for paying Muente's pension on April 27, 1999, and July 29, 2002. Smith and the Smith Retirement Plan therefore are not strangers to this controversy.

There also is a question of just how separate Smith, is in fact, from Smith's Retirement Plan. Thus, both entities in 1996 filed a joint action in federal court asking for a declaration that Muente is not entitled to a "30 and out" pension under the Smith Retirement Plan. In addition, Carlson was Smith's employee and agent in March, 1995 when he told Muente he was not entitled to such a pension and that he should grieve if he did not agree with that

determination. Carlson's subsequent July 29, 2002, letter denying Muente's pension request thereby raises the question of whether he was then serving Smith's interests, rather than the supposed separate interests of the Smith Retirement Plan and Smith's retirees. In any event, even though the Smith Retirement Plan is a separate entity under 29 U.S.C. §1132(d), and even though the it otherwise may have to be a named party in an ERISA action in different circumstances, there is no reason to have Carlson and the Smith Retirement Committee again decide whether Carlson's initial 1995 denial of Muente's pension request was proper under the collective bargaining agreement then in effect.

In summary:

1. The panel determined that Muente is entitled to a "30 and out" pension effective March, 1995, and that he is to be paid and made whole by whichever entity is required to pay that pension under the 1997 Asset Purchase Agreement. In addition, Muente has a contractual right to that pension, regardless of whether it is paid by either the Tower or Smith Retirement Plans, or by either Smith or Tower out of their general funds, which is a matter Judge Adelman will have to decide.

2. Muente's grievance is not barred by the doctrine of claim preclusion because Judge Gordon's 1996 Decision and Order only addressed Muente's ERISA rights as they related to Muente's then-pending equal rights complaint without ever addressing Muente's grievance and the separate question of whether Muente is entitled to the relief he seeks under the collective bargaining agreement, a matter that was never raised before Judge Gordon, let alone decided.

3. Muente's grievance is arbitrable because Tower and Carlson are estopped from claiming otherwise after Carlson told Muente in 1995 to grieve and after Muente relied to his detriment by doing what he was told to do; because Smith has waived its right to object to arbitrability after Carlson told Muente in 1995 to grieve, and after Smith told Muente in 1999 that his status would be determined after "the arbitration award is final"; because Muente and the Union can grieve the general applicability of how the pension credit bank is administered under the broad arbitration clause of the contract which gives employees the right to grieve if they have a "complaint" about whether the pension credit bank is being properly administered; and because the question of whether grievances can be filed involving the pension plan agreement referenced in the contract was decided in 1965, thereby triggering the principle of *res judicata*.

4. Muente is not required to either file an ERISA claim or to file his pension request with either the Smith or Tower Retirement Plans because Muente's claim is based on his rights under the 1983 negotiated pension credit bank and the collective bargaining

agreement in effect in 1995 when he complained over Smith's refusal to grant him the 30 years credited service needed to receive a "30 and out" pension.

In light of the above, I issue the following

CLARIFICATION OF AWARDS ON REMAND

1. The Awards were intended to impose concrete obligations on the part of one of the defendants regarding grievant Robert J. Muente's pension rights, reserving the determination of which defendant is responsible for that payment for a different forum;

2. The Awards were intended to grant grievant Robert J. Muente a "30 and out" pension effective March, 1995, because the bargaining history and the collective bargaining agreement in effect in 1995 established that he is entitled to that pension, and because he has satisfied all of the collectively bargained requirements to receive it.

3. I will continue to retain my remedial jurisdiction indefinitely until all remedial issues are resolved.

Dated at Madison, Wisconsin this 5th day of February, 2004.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

AAG/gjc
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