BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNIONS 75 AND 563	
and	Case 1 No. 45857 A-4795
MORNING GLORY FARMS REGION, AMPI	

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Scott D. Soldon, 1555 N. River Center Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of the Local Unions 75 and 563.

DiRenzo & Bomier, by Mr. Howard T. Healy, 231 East Wisconsin Avenue, P.O. Box 788, Neenah, WI 54957-0788.

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between Morning Glory Farms Region, AMPI (hereafter the Employer) and Teamsters Local Unions 75, 563 and 662 (hereafter the Unions), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to act as impartial arbitrator of a dispute between them involving Sickness and Accident Insurance Plan premium payments. The Commission appointed Sharon Gallagher Dobish as arbitrator, who made full written disclosures to which no objections were raised. Hearing was held in Menasha, Wisconsin on November 7, 1991. No stenographic transcript of the proceedings was made. The parties filed their written briefs by December 9, 1991 and they agreed to waive their right to file reply briefs herein. The parties also stipulated to waive the Article 11 requirement that the undersigned issue her decision " . . . within five (5) days . . . after the completion of the hearings."

After the hearing had been held and the briefs exchanged, the Employer advised that the parties had reached a voluntary settlement of the captioned case and that the undersigned should hold the case in abeyance pending final resolution. On March 30, 1992, the undersigned received a letter from the Employer advising that the tentative settlement had not been approved and that the undersigned should prepare and issue this Award.

ISSUES:

The parties stipulated that the following issues should be determined here:

> Did the Employer violate the collective bargaining agreement by making deductions from employe paychecks for the cost of the Sickness and Accident premiums, as alleged in the grievance?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS:

> ARTICLE 5 - MAINTENANCE OF STANDARDS

The Employer agrees that all conditions of employment in his individual operation relating to wages, hours of work, differentials and general working conditions shall be maintained at not less than the highest standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement. It is agreed that the provisions of this Section shall not apply to inadvertent or bona fide errors made by the Employer or the Union in applying the terms and conditions of the agreement if such error is corrected within ninety (90) days from date of error.

No employer shall be bound by the voluntary acts of another Employer when he may exceed the terms of this Agreement.

ARTICLE 32 - HEALTH AND WELFARE

The Employer agrees to provide for all employees and their dependents the following hospital and surgical group insurance program:

> Blue Cross Series 2000 (365 day) hospital program; Blue Shield SM100 (25,000.00 maximum) full maternity surgical program;
>
> Major Medical, with HMP alternate, $250,000 maximum, $50 deductible, 80/20 coinsurance; and a $2,000.00 single, $5,000.00 family, stop loss provision added to the HMP Major Medical Program; Dental care program, $5,000 maximum, 80/20 coinsurance, no deductible, with orthodontic benefits, $1,000 lifetime maximum; 60/40 coinsurance. Blue Cross-Blue Shield - Unlimited X-Ray and Laboratory Program. Full Ambulance Benefit. Dependents through age 25 or lifetime if totally disabled.
> Effective, January 1, 1988, Chiropractic coverage shall be added to the HMP alternate.

The Employer shall provide for all employees and their dependents the Teamsters Local 563 Vision Plan.
The Employee shall pay the cost of the Income Protection Insurance Plan. The Income Protection Insurance Plan shall provide a benefit of $280.00 per week for twenty-six (26) weeks; first day of accident or hospitalization; fourth day of illness.

The cost of the Income Protection Insurance Plan shall be deducted from employees' wages on a pro rata basis for each pay check so that disability pay shall not be considered gross income pursuant to the Internal Revenue Code.

The Employer shall provide $10,000.00 life insurance with $10,000.00 accidental death and dismemberment for each employee.

> The Employer shall pay the full premium cost for the aforementioned insurance benefits for each month in which an employee performs any work. If an employee is laid off, the Employer shall pay the premium cost for the month following that in which the layoff occurred. If an employee is absent because of illness or off-the-job injury, the Employer shall continue to pay the premium cost for a period of six months following the month in which the employee last worked. If an employee is absent because of an on-the-job injury, the Employer shall continue premium payments until such employee returns to work, provided, however, the Employer's liability for premium payment shall not exceed the twelve (12) months following the month which the employee last worked.
>
> . . .

BACKGROUND:

The Employer operates a dairy business in the State of Wisconsin with facilities located at Green Bay, Shawano, Wittenburg, Appleton and Marshfield. The Employer employs a total of 180 employes in the Union's various bargaining units. Members of Teamsters Local 75 are employed at the Employer's Green Bay and Shawano facilities; members of Teamsters Local 662 are employed at the Marshfield facility and members of Teamsters Local 563 are employed at the Employer's Wittenburg and Appleton facilities. Labor agreements between the Employer and these various Teamster Locals date back to the 1940's. For the last four labor agreements, these Teamsters Locals have bargained as a group with the Employer and during this time period the parties have reached single collective bargaining agreements covering all Teamster members employed by the Employer, for the applicable years.

The parties had been represented by the following individuals at their joint bargaining sessions during the time they have engaged in joint bargaining:

> Local 563 and Secretary-Treasurer Chief Spokesman for Teamsters Locals - Dennis
> Local 563 Business Agent - Neil Hietpas;
> Local 662 Representatives - Fred Gegare and Merle Baker;
> Morning Glory Farms AMPI - Attorney Howard Healy,
> Mark Eggert (Regional Manager for AMPI) and
> Donald Mosher (Appleton Plant Manager)

In 1986 the predecessor of the Employer, Consolidated Badger Cooperative, merged with Associated Milk Producers, Inc., to become Morning Glory Cooperative, now known as the Employer. At this time, the Unions and the Employer agreed that despite having reached a full-blown 1986-87 labor agreement, they would suspend most of the substantive provisions of that agreement and put in place from January 1, 1986 through December 31, 1987 an Addendum Agreement which reduced the contract hourly wage rates by 65 cents, suspended the Employer's obligation to pay employe pension payments, suspended both the accrual and use of sick leave unless employes already had sick leave credits in their "reserve bank," suspended the contractual clothing allowance for employes, cut employe vacation entitlement by one week per employe, suspended employe accrual and use of personal leave days, allowed the Employer to schedule employes on a 4 day/10 hours per day work week, and to suspend the 45 hours per week guarantee in the labor agreement. The only item listed in the Addendum Agreement which was an improvement to be paid for by the Employer

was the income protection insurance (S&A plan) which was increased from $175/week to $250/week.

The 1986-87 agreement (Article 32) included the following language regarding the Sickness and Accident Plan (otherwise known as the income protection insurance plan):

. . .

> The Employer shall provide income protection insurance providing $175.00 per week for twenty-six (26) weeks; first day of accident; eighth day of illness.
>
> Employees receiving off-the-job illness or accident income protection payments who have unused sick leave shall be limited to receiving sick leave to a maximum of the difference between their normal eight (8) hours per day straight time earnings and the amount of income protection payments due under this Article. Said unused sick leave shall then be reduced accordingly.

. . .

The 1986-87 labor agreement, effective January 1, 1986 through December 31, 1987, the parties agreed to the following Addendum Agreement which essentially suspended the major terms of 1986-87 labor agreement summarized above:

> This Addendum Agreement incorporates by reference the current Collective Bargaining Agreement between the parties which expired on December 31, 1985. The terms of the expired Collective Bargaining Agreement shall remain in full force and effect for the term of this Addendum Agreement except that to the extent that the terms of the Addendum Agreement modify the terms of the Expired Collective Bargaining Agreement. The terms of the Addendum Agreement shall supercede the terms of the expired Collective Bargaining Agreement and shall be the controlling language for the term of the Addendum Agreement.
>
> 1. ARTICLE 3, SECTION 5. During the term of this Addendum Agreement the Employer shall not be required to make pension contributions pursuant to Article 41 for students and seasonal employees.
>
> 2. ARTICLE 27. During the term of this Addendum Agreement, employees shall neither accrue nor be paid sick leave except that employees who have 'reserve bank' sick leave credits as of 12/31/85 may continue to utilize such 'reserve bank' sick leave credits during the term of this Agreement.
>
> 3. ARTICLE 28. During the term of this Addendum Agreement employees shall not receive the five (5) personal leave days or personal leave week provided in Article 28. Employees shall continue to receive only the six (6) legal holidays designated in Article 28.

4. ARTICLE 29. During the second year of this Addendum Agreement the Employer may schedule employees to work a work schedule of four (4) ten (10) hour days during a work week. If the Employer elects to schedule such a work schedule, employees shall receive (2) weeks notice and the employee shall continue to work such schedule for a period of two (2) weeks. Employees working such schedule shall receive straight time pay for hours worked in excess of eight (8) hours on a work day, up to ten (10) hours per workday.

5. ARTICLE 30. During the term of this Addendum Agreement each employee shall receive one (1) less week of vacation per year, consistent with the vacation schedule set forth in Article 30.

6. ARTICLE 32. During the term of the Addendum Agreement the income protection insurance shall increase to Two Hundred Fifty and 00/100 ($250) Dollars per week only for the term of such Addendum Agreement. Coverage shall be first day accident, fourth day illness.

7. ARTICLE 35. The Employer shall have the right to terminate the current clothing service and elect to provide employees with five (5) new sets of work clothes. If the Employer elects to provide such work clothes, employees thereafter shall be responsible for maintaining and providing their own clothing and shall receive a Thirty ($30) Dollar semi-annual clothing allowance commencing July 1, 1986 for the period from January 1, 1986 to June 30, 1986. This Article shall not apply to student and seasonal employees.

8. ARTICLE 45 - TERM OF AGREEMENT. This Addendum Agreement shall go into effect January 1, 1986 and shall continue in full force and effect through December 31, 1987.

Wage Deferral. Effective upon ratification of this Addendum Agreement until the last payroll period of 1987, which commences December 20, 1987, the current wage schedule in the Contract shall be reduced Sixty-Five (65 cents) per hour. . . .

1988-90 Negotiations:

At the start of negotiations for the 1988-90 agreement, employes had not had the use or accumulation of sick leave for two years during the term of the 1986-87 addendum. Union agent Hietpas stated (and former Union agent Vandenbergen corroborated) that the quid pro quo for the suspension of sick leave had been the Company's agreement to pay an increased S&A benefit to employes during 1986 and 1987 (from a $175/week benefit to $250/week benefit). Upon the expiration of the 1986-87 addendum, S&A employe benefits went back to $175 per week. Notably, the Company took the position in the 1988 negotiations that employe sick leave should be eliminated entirely. The parties ultimately reached agreement on a 1988-90 agreement which contained a termination of all sick leave benefits (12 day per year), a 42 cents per hour increase, personal days were eliminated but employes received two new fixed holidays by the end of the three year agreement, chiropractic care was added, clothing allowance and

bereavement benefits were increased and Employer pension contributions were increased in the last week of the agreement while the parties agreed to significantly change the seniority provisions at the Appleton plant (apparently eliminating the 45 hour guaranteed work week). The income protection insurance language of Article 32 was amended by the parties in the 1988-90 agreement and that amended language then remained the same as that quoted above in the Relevant Contract Provisions section of this Award.

In gaining member ratification of the 1988-90 agreement, Dennis Vandenbergen used the following document to show members at the various locals' ratification meetings the Union's cost/analysis of the termination of employe sick leave:

SICK LEAVE CONVERSION

12 Days x 8 hours = 96 Hours Sick Leave Per Year

96 Hours x $9.82 ("B" Rate) = $942.72 Value Year

$942.72 / 2080 Hours = 45.3 cents Per Hour Value

Company Paid S&A Coverage = $175.00 Per Week and Was taxable.

Company Cost was 58 cents/$10.00 week/month
17.5 units x 58 cents = $10.15 cost to Company (Per Month)

New $280.00 - $175.00 = $105.00 Increase

$105.00 week costs $10.5 x 58 cents = $6.09 extra

$6.09 / 173 hours = $3.5 cents per hour to make improvement

$10.15 + $6.09 = $16.24 per month S&A Cost

Saying in the contract that the Employee pays the $16.24 per month, makes the full $280.00 weekly benefit tax free.

$.453 Sick Leave Value - Minus 3.5 cents cost of improvements equals 41.8 cents per hour

Rounded up Equals 42 cents per hour

Placed on the Base Wage Rates effective 1/1/88.

Former Union agent Vandenbergen stated that he definitely used the above-quoted document as a tool at ratification time and that he "believed" he gave a copy of it to the Company. On cross-examination, Vandenbergen stated that he did not specifically recall giving a copy of his "Sick Leave Conversion" document to the Company. Union agent Hietpas corroborated that Vandenbergen used the above-referenced document at ratification meetings and Hietpas stated that he "believed" that the Union presented the Company with a copy of the above-quoted document during negotiations for the 1988-90 agreement. Both Hietpas and Vandenbergen stated that they understood the relevant language of Article 32 meant (in the context of negotiations) that employes would "pay" for S&A premiums by agreeing to eliminate sick leave days and converting their annual contractual sick time (12 days) into a cents-per-hour raise and subtracting from this, 3.5 cents per hour for the improvement in the S&A weekly benefits which employes wanted. Hietpas stated that he understood that under this deal, employes would not have to pay any S&A premiums in 1988-90. Vandenbergen corroborated this statement. In addition, Hietpas stated that in the past, the Company had always paid any increases in S&A premiums which occurred during the term of multi-year labor agreements; that there had been no discussion in those negotiations about who would bear the cost of any increases in S&A premiums for 1988-90; and that he (Hietpas) therefore assumed the Company would bear the cost of any S&A premium increases during the term of the 1988-90 agreement as it had done in the past. Both Hietpas and Vandenbergen indicated that they understood that the $280 weekly S&A benefit would be free from taxes and that no deductions would be made from employe paychecks when

they received these benefits during 1988-90.

It is undisputed that during the term of the 1988-90 collective bargaining agreement, the Employer did not make any deductions from employe pay for S&A premiums. However, Donald Mosher, the Company's Appleton Plant Manager stated that he understood that S&A premiums were to be deducted from employe paychecks in 1988-90 and that this had been the intent of the parties in reaching the 1988-90 agreement.

Mosher stated that he had served on the Company's bargaining team during negotiations which resulted in the 1986-87 Addendum, the 1988-90 and 1991-93 agreements. He confirmed that in negotiations for the 1988-90 agreement, the Company wanted to eliminate contractual sick leave. Mosher also stated that he was involved in costing the Employer's proposals for the 1988-90 agreement. In this regard, Mosher costed the 1988-90 package for the Company and created a document, which admittedly was never shared with the Union, showing Mosher's understanding of costs the 1988-90 agreement as follows:

SAVINGS ACQUIRED BASED ON CHANGES IN 1988 CONTRACT

			FRINGE RATE	TOTAL PER YEAR	CONTRACT LIFE
PERSONAL LEAVE DAYS (AVERAGE A RATE)		83,253	1.1273	93,851	281,553
REPLACEMENT COST	35%	29,139	1.1273	32,848	98,544
SICK PAY (AVERAGE A RATE)		200,448	1.1273	225,965	677,895
REPLACEMENT FOR SICK LEAVE	13%	25,056	1.1273	28,246	84,737
INSURANCE PREMIUM DEDUCTION ($122 X 200 EMP) = $.058		24,400	1.0000	24,400	73,200 73,200
JOB POSTING (ESTIMATED SAVINGS)		37,000	1.0000	37,000	111,000
CLOTHING		26,000	1.0000	26,000	78,000
REDUCED RATE FOR ENTRY LEVEL EMPLOYEES		35,000	1.5463	54,121	162,362
MIX DRIVER OVER TIME (ONE NEW DRIVER)		2,000	1.5463	3,093	9,278
REDUCED RATE FOR SEASONAL EMPLOYEES		8,400	1.1273	9,469	28,408
REDUCED RATE FOR STUDENTS		5,200	1.1273	5,862	17,586
NO PENSION PLAN FOR SEASONAL/STUDENT		22,000	1.0000	22,000	66,000
RATE SAVINGS GOUDA PACKERS (6 EMP. .32 PER HR)		3,994	1.5463	6,176	18,528
TOTAL SAVINGS				569,030	1,707,090

ECONOMIC IMPACT
1988 CONTRACT VERSUS 1985 CONTRACT

INCREASES NEW CONTRACT $1,752,282

SAVINGS OVER 85 CONTRACT	$1,707,090
NET INCREASES	$ 45,192

ADDED COSTS 1988 CONTRACT OVER 1987 PAYROLL COSTS

CONTRACT YEAR	1988	1989	1990
WAGE INCREASES	688,289 1/	755,927	816,941
HOLIDAY PAY	37,300	74,600	114,065
REPLACEMENT PAY	13,055	26,110	39,923
SICK/ACCIDENT PREM.	43,965	43,965	43,965
CHIROPRACTIC PREM.	8,784	8,784	8,784
INCREASED PENSION CONTR.	0	0	4,800
ADDED COST MOZZ PACKERS	91,407	91,407	91,407
RATE INCREASE 12/01/90 MOZZ			3,162
TOTAL	$882,800	$1,000,793	$1,123,046

SAVINGS 1988 CONTRACT OVER 1987 PAYROLL COSTS

INSURANCE PREMIUMS	24,400	24,400	24,400
JOB POSTINGS	37,000	37,000	37,000
MIX OVER TIME	3,093	3,093	3,093
TOTAL	64,493	64,493	64,493
NET ADDED LABOR COSTS OVER 1987	818,308	936,301	$1,058,554

ADDED COST TO COOPERATIVE 1988 CONTRACT

RATE INCREASE	01/01/88	01/01/89	01/01/90	TOTAL FOR CONTRACT PERIOD
AMOUNT OF RAISE	0.4200	$300	0.6200	
ADD FRINGE COST 0.5463	0.2294	38.19	0.3387	
TOTAL COST OF RAISE PER HR.	0.6494	338.19	0.9587	
ANNUAL HRS WORKED	2,080	0.00	2,080	
COST PER EMPLOYEE	$1,350.85	$338.19	$1,994.11	
COST OF BONUS		67,638		
1988 ADDED TO 89		$270,170		
COST PER EVERY 200 EMP.	$ 270,170	$337,809	$ 398,822	$1,006,790
FRINGE RATE ON BONUS COMPUTED AT 12.73%				
ADDED COST OF INCREASE HOLIDAY PAY				
	01/01/88	01/01/89	01/01/90	
NUMBER OF DAYS	2	4	6	
ANNUAL HRS PAID PER EMP	16	32	48	
RATE PER HR	10.34	10.34	10.54	
FRINGE 0.1273	1.32	1.32	1.34	
TOTAL COST PER HR	11.66	11.66	11.88	

1/ This represents $0.65 + $0.42 = $1.07 x 1.5492.

TOTAL COST PER EMP.		$187	$373	$570	
COST PER EVERY 200 EMP.	$37,300	$74,600	$114,065	$225,965	
REPLACEMENT COST	0.35	$13,055	$26,110	$ 39,923	$ 79,088
SICK/ACCIDENT INS. PREMIUM		39,000	39,000	39,000	
FRINGE COST	0.1273	4,965	4,965	4,965	
COST		43,965	43,965	43,965	$131,894

Mosher testified that his costing showed employes would be paying a part of the S&A premiums for 1988-90. Mosher stated that he assumed that deductions in the amount of $24,400 per year of the agreement would be made from employe paychecks for S&A premiums beginning in 1988. However, this was not done. Mosher stated that he did not find out that payroll deductions for S&A premiums had not been made in 1988 through 1990 until late December, 1990 or early January, 1991 during negotiations for the 1991-93 agreement.

The Company had been unable to insure that S&A benefits received by employes in 1988 remained tax free, as provided by Article 32. In fact, the amounts had been treated as taxable income and employes who received 1988 S&A benefits had had amounts deducted from their $280 weekly benefits for Social Security. This was done because the Company had failed to demonstrate or indicate to their insurance carrier that employes had paid for part or all of the premiums for S&A benefits so as to exempt them from FICA deductions. Apparently it was not until early 1989 when W-2 forms were issued to employes for 1988, that the Company and employes realized that FICA deductions had been made on all 1988 S&A benefits received by employes in 1988. The Union filed grievances regarding the deductions made which were processed by the parties.

A series of letters and memos were exchanged by the parties herein regarding this problem. On March 31, 1989 the Company's Director of Human Resources, Arnold Hoecherl, wrote to Union Agent Hietpas indicating that the Company would reimburse employes for FICA deductions made from their S&A benefits received in 1988 as follows:

. . .

> The checks to reimburse the employees for taxes taken out of their Accident & Sickness insurance (United Wisconsin Insurance) will be issued Tuesday, April 4, 1989.
>
> Each check will reflect the amount of taxes corresponding with the enclosed printout from UWI under the FICA Tax column.

. . .

Enclosed with this letter was a printout showing the S&A benefit amounts received by each employe in 1988, and the amount of FICA deducted in each case. The total 1988 FICA deductions from S&A benefits for all employes amounted to $4,823.06.

On April 4, 1989 Cheryl Koenig, the Company's Human Resources Secretary, wrote to Cheryl Huebner of the United Wisconsin Insurance (UWI), the Company's insurer, in relevant part, as follows:

. . .

> We have erroneously reported to you that the Short Term Disability insurance (0001117-0002) is Company paid.

> Effective January 1, 1988, this insurance was negotiated to be employee paid. During Union negotiations the employees were given a raise ($.23) and then part of that increase ($.03) was retracted as premium for this insurance. It is too late to deal with the 1988 circumstances, but for 1989 we would like United Wisconsin to show that this is employee paid and tax exempt.
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> . . .

Ms. Koenig copied Union Agent Hietpas on this letter.

A May 17, 1989 opinion letter from Blue Cross/Blue Shield to Human Resources Director Hoecherl stated that Federal Tax regulations required three-year averaging of premium payments by the employer/employes for FICA purposes, such that even if in one of three years, employes had paid all annual S&A premiums for that year, the government would still deduct 66.75% of the FICA tax from employes' S&A benefits for that three year time period and treat that portion of the benefit as taxable income. 2/

Finally, on September 20, 1989, Mr. Hoecherl sent Union agent Hietpas two memos (one of which would ultimately be given to employes) which read in relevant part as follows:

> We apologize for the IRS rules that have caused so many problems with your sickness and accident benefits received during 1988. A copy is attached for your perusal so you can see what we've been struggling against. Your management is concerned that you don't suffer unduly because of these rules.
>
> To provide appropriate tax payment reimbursement some documentation is required. Submit copies of the following:
>
> 1. Your income tax return for 1988.
>
> 2. A notification of your income without the S&A payment.
>
> 3. Copies of the federal tax chart showing the net tax due a) with S&A, b) without S&A payment.
>
> Upon verification of data, a check for the difference in taxes paid will be issued to you. Should you have any questions feel free to phone me or Cheryl Koenig (715/526-2131).

In the cover memo, Hoecherl indicated employes would have to contact the Company by October 15, 1989 if they wished to receive reimbursement of amounts deducted for 1988 from their S&A benefits.

2/ The language contained in Article 32 assuring that benefits would be non-taxable was therefore rendered unenforceable by the law and the federal regulations surrounding it.

1991-93 Negotiations:

Negotiations between the parties for the 1991-93 labor agreement were difficult on several levels. Aside from certain serious personal problems Chief Union Spokesperson Dennis Vandenbergen was involved in, there was apparent friction between Vandenbergen and other representatives of the various Teamster locals at the table. 3/ At the beginning of the negotiations for the 1991-93 agreement, the Employer also made it clear that it wanted a successor agreement to contain percentage employe contributions toward Health, Dental and Vision insurance premium payments. This was a hotly contested issue resisted by the Union until the very end of negotiations. Indeed, no written proposals were ever made by the Company on this point and the Union agreed to an employe contribution only after Vandenbergen and Healy had met privately at the eleventh hour of negotiations.

There were several negotiation meetings between the parties, but the seminal meetings for purposes of this case occurred on January 29, 1991 and February 27, 1991. The parties are in dispute regarding what if anything was said at these meetings regarding the deductions of S&A premiums from employe paychecks. The January 29th meeting was a mediation session with FMCS mediator Dean Sederstrom present. The February 27th meeting was held after the Union membership had ratified the 1991-93 agreement and final contract language was then worked out by the Union (Vandenbergen and Hietpas) and the Company (Healy and Eggert). Between these meetings several offers were exchanged between the parties, on January 31st, February 6 and 12. Ratification votes were conducted by Vandenbergen on February 11, 12 and 14 at Wittenburg, Appleton and Marshfield, respectively. Hietpas then confirmed ratification to the Company by his letter of February 18th.

It is significant that at no time during negotiations for the 1991-93 agreement did the Company make a proposal or seek to discuss S&A premium payments. The only discussion(s) which occurred regarding S&A premium payments were had in Vandenbergen's office at the Local 563 Union hall, away from the bargaining table and away from both the Union and Company caucus rooms at that facility. According to Company witnesses, these discussions occurred on January 29th and February 27th.

With regard to the January 29th meeting, Company Manager Eggert testified that sometime during the afternoon that day, he, Attorney Healy and Mediator Sederstrom left the Company caucus room and went into Vandenbergen's office where Vandenbergen was alone. At this time, Eggert stated Healy said that the Company had not been taking out S&A premiums as required by the (expired) agreement and that the Company intended to do so in the future, as stated in the agreement. According to Eggert, Vandenbergen said, "If that's what it says, go ahead and do it." Vandenbergen did not request bargaining or make any other comments, according to Eggert. Eggert stated that the Mediator was standing off to the side, staring out a window in Vandenbergen's office at this time and that he (Sederstrom) did not take notes or participate in the conversation in any way. Eggert stated that he and Healy then returned to the

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3/ The Company proffered extensive testimonial as well as some documentary evidence (ER Exh. #9) of derogatory and threatening remarks made by some Union bargaining representatives to Dennis Vandenbergen. I find these remarks to be irrelevant and immaterial to this case and I have not considered them in reaching my decision. I note that in offering this evidence, the Company stated that the evidence was not being offered to discredit Mr. Vandenbergen's testimony.

Company's caucus room where they joined Appleton Plant Manager Mosher who had remained in the caucus room during the above-described meeting. Later, when Mediator Sederstrom returned to the Company's caucus room, he made no mention of S&A premium deductions and did not make any report to the Company, as was his custom. Rather, Sederstrom sat and listened to the Company team.

Appleton Plant Manager Mosher testified that although he was not present for the conversation in Vandenbergen's office on January 29th, before Eggert and Healy left to speak to Vandenbergen, the statement had been made in the Company's caucus room that the Company "should make sure we got the withholding from the employes" for S&A premiums. Mosher took bargaining notes for the Company at negotiations. His notes of the January 29th meeting were placed in evidence. However, they indicated only that the Healy, Eggert and Mosher had discussed S&A in the Company's caucus room. Mosher's notes do not reflect any further reference to S&A either by the Company or the Mediator and they do not show that any agreement was reached on S&A premium payments. Mosher confirmed by his testimony that Sederstrom did not mention S&A at any time on January 29th. 4/

Significantly, Vandenbergen denied there was ever any discussion or reference made to deducting S&A premium payments from employe paychecks on January 29th. Vandenbergen stated that in fact, there was never any discussion of this issue at negotiations for the 1991-93 agreement. Union Agent Hietpas confirmed Vandenbergen's latter statement. Hietpas stated that Vandenbergen said nothing to him or to the Union's bargaining team about the Company's intention to deduct S&A premiums from employe paychecks. Hietpas indicated and Vandenbergen confirmed that it was Vandenbergen's practice to report back to the Union committee if he (Vandenbergen) met privately with the Company representatives. Hietpas stated Vandenbergen made no such report during the negotiations for the 1991-93 agreement regarding S&A premium payments. Attorney Healy was not called to testify herein and no explanation was offered by the Company for its decision not to have him testify.

It should also be noted that the Company proffered no evidence of its costing data for the 1991-93 agreement. In addition, Mosher stated that in doing the Company's costing on the 1991-93 package, he did not do any calculations on S&A premiums (or premium savings) as he had for 1988-90, because he thought that the employes would be paying the entire premiums. Furthermore, the offers to settle the contract which were exchanged by the parties from January 29 through February 12, made no reference to S&A premiums nor did they reference the Company's avowed intent to begin deducting S&A premiums from employe paychecks beginning in 1991.

Union Agent Hietpas' letter of February 18th, indicated that the employes had ratified the 1991-93 settlement reached by the parties and requested immediate implementation of the new contract terms. Attorney Healy wrote Hietpas a letter in response, which read in relevant part as follows:

4/ The Company offered testimonial evidence from Mosher regarding what Eggert and/or Healy told Mosher had been said in their private meeting with Vandenbergen on January 29th. The Union objected to this evidence as hearsay. I reserved ruling upon the Union's objection until the issuance of the Award and took the Company's offer of proof on the point.

I agree with the Union. I can think of no exception to the hearsay rule which would require the admission of this testimony and therefore, I have not considered it in reaching this Award.

. . .

> Please be advised that I have scheduled a meeting with all supervisors, management and administrative personnel of AMPI on Friday, February 22, 1991. At that time I will explain the provisions of the contract including changes to wages and benefits. After the meeting my client will place the increase into effect as soon as possible given the lead time necessary to implement the changes in wages and benefits. A matter of concern is the necessity that all members of the bargaining unit participate in the cafeteria (Section 125) plan. Mark Eggert has contacted Valley Trust and is attempting to secure the necessary information and forms. The cooperation of all members will be required. I suggest that we enroll members as quickly as possible. I will contact you concerning further information. . . .

As stated above, the meeting of February 27 occurred after the Union membership had ratified the 1991-93 agreement and that meeting was intended to finalize and check over contract language for execution. It was not a negotiation session. On February 27th, Eggert stated expansion of the parties' existing Section 125 plan, (known as the Milk Flex Plan), for use in 1991 was mentioned. At this time, Healy, Eggert, Hietpas and Vandenbergen were present at the Union's offices. The Union responded that the Company should seek a tax attorney's advice on whether this could be done. Hietpas stated that at the time of this discussion he was uncertain what the employes would use the Milk Flex Plan for in 1991, but he admitted that he was aware that the Company had agreed to pay 100% of all Health, Dental and Vision premiums for 1991 and that employe contributions to Health, etc., insurance premiums would not begin until 1992.

Vandenbergen testified that the first time the subject of S&A premium deductions was brought up was on February 27th. Vandenbergen recalled that he, Hietpas, Healy and Eggert were present in his office in the afternoon of that day and that it was stated (by either Eggert or Healy) that there was a problem with S&A coverage under the labor agreement; that Eggert was under the impression that Human Resources Director Hoecherl (who had left the Company) had possibly handled an agreement from previous negotiations incorrectly or inappropriately. Eggert stated he was trying to rectify the situation. Healy then tried to explain what Hoecherl had done wrong. Eggert and Healy stated that S&A premiums should have been deducted from employe paychecks in 1988-90. Vandenbergen stated that this position was wrong - that no deductions needed to be made because employes had paid for S&A by loss of their sick days. Vandenbergen stated that the Company indicated it wanted to make the deductions and, "We agreed to disagree. I told them that they'd have to do what they had to do."

On or about the biweekly payroll period ending March 16, 1991 the Company began deducting $7.37 from each employe's paycheck for S&A premiums. Those deductions continued to the date of hearing. At the time of hearing, S&A premiums were $31.93 per month for each of the approximately 180 bargaining unit employes of the Company.

On April 18, 1991, Hietpas wrote a letter to the Company indicating that these deductions had recently been discovered and that the Union wanted them to cease because they constituted a "direct violation of the way the S&A program was negotiated and agreed upon." This case was thereafter filed and processed to hearing.

POSITIONS OF THE PARTIES:

Union:

The Union asserted that the overall evidence supports its request for relief. It urged that the current collective bargaining agreement as well as past agreements show that the Employer violated Article 32 of the effective agreement by deducting S&A premium payments from employe paychecks. In this regard, the Union noted that Dennis Vandenbergen's calculations/notes used at ratification meetings with Union members showed that pursuant to the parties' agreement, the employes would "pay" for S&A benefits/improvements by giving up their annual sick leave days (12 paid days) effective January 1, 1998 in exchange for a cents per hour pay increase in that year (45.3 cents) less the cost of S&A improvements (3.5 cents) for a total pay increase of 42 cents. The Union observed that this evidence of employe "payment" was supported by certain written admissions made by Employer agents (Hoercherl and Koenig) in March, April and September of 1989. These admissions confirm the accuracy of Vandenbergen's calculations and demonstrate that the parties intended that employes should "pay" for S&A benefits in this manner. Furthermore, the Union noted, the Company apologized and reimbursed employes for any taxes withheld or captured by the IRS for 1988 S&A benefits paid to them. The Union observed, the fact that the Company never deducted any amounts from employe paychecks for S&A premiums during 1988 through 1990, further support the Union's analysis/ arguments here. Finally, the evidence showed that employe wage rates in 1988 were 42 cents higher than they were in 1987, which equals the cents per hour value of the sick days relinquished by employes less the value of S&A improvements for that year.

Therefore, the Union urged, the language of Article 32 must be read, understood and interpreted in light of the bargaining history and the parties' avowed and demonstrated intent. Notably, the language of Article 32, first placed in the agreement in 1988, has not changed and remains the same in the effective agreement. The Union pointed to the language of Article 32 which stated that disability pay would not be considered (taxable) gross income. This, the Union asserted was part of the quid pro quo for employes to give up their sick days.

The Union observed, in addition, that the Employer failed to discuss or to seek to negotiate any change in Article 32 during the parties' negotiations for the 1991-93 agreement. Not until February 27, 1991, after ratification by Union members of the parties' tentative agreement, did Company representatives raise Article 32 and problems the Company perceived had occurred in administration of the language. On March 16, 1991, the Union asserted, the Company unilaterally and in violation of the parties' long-established practice of interpreting and applying Article 32, first deducted S&A premiums from employe paychecks. The Union contended there was no precedent or basis for this action. The Union argued that absent a change in the language of Article 32, a successful attempt to renegotiate that language prior to ratification of the 1991-93 agreement, the parties' three year practice of applying Article 32 must be adhered to and must be continued for the term of the 1991-93 agreement.

The Union insisted that the fact that Union agent Vandenbergen did not seek to bargain when, on February 27, 1991, (after the contract had been ratified) Company representatives stated that the Company intended to change its application of Article 32, does not require a different conclusion. The time for negotiations had passed and, the Union asserted, Vandenbergen had no obligation to bargain Article 32. The Union contended that the Company is now attempting to make employes pay twice for S&A benefits contrary to the parties' intent. The Union argued the evidence showed that no "agreement" that employes

should pay a portion of S&A premiums was ever reached between Vandenbergen and Company officials and that no third party corroboration of such an "agreement" was offered by the Company. Simultaneously, the hard evidence belies the Company's contentions, the Union asserted.

In the circumstances, the Union sought that the grievance be sustained that the Company be ordered to cease making S&A premium deductions and that employes be made whole for S&A premiums deducted with interest thereon.

Company:

The Company argued that the language of Article 32 is clear and unambiguous. Under arbitral principles, the Company asserted, the Arbitrator must enforce the clear meaning of Article 32 which requires employes to pay S&A premiums during the term of the 1991-93 agreement. In addition, the Company contended that on January 29, 1990 Company Vice President Mark Eggert followed long-established past practice when he told Union Representative Vandenbergen that the Company intended to enforce the literal language of Article 32 during the 1991-93 agreement. The Company noted that its representatives had a practice of speaking to Vandenbergen alone regarding important contract issues and that they had done so many times in the past. Thus, according to Eggert, when Vandenbergen neither objected nor sought to bargain on the subject, Eggert thought the point had been covered. The Company contended, therefore, that the Union acquiesced in the Company's decision to strictly apply Article 32, by ratifying the 1991-93 agreement after Eggert and Vandenbergen spoke on January 29th.

This conclusion is further supported by the Union's failure to respond to Attorney Healy's letter of February 21, 1991 seeking to promptly enroll employes in the Company's Section 125 plan, the Company contended. The Company pointed out that the only item which would have been immediately subject to Section 125 Plan deductions in 1991 were the S&A premiums that the Company had indicated it would be making. On February 27, 1991 (after union ratification of the tentative agreement), the Company observed that Eggert again told Union agents Vandenbergen and Hietpas that the Company intended to begin deducting S&A premiums from employe paychecks and again no objections or requests to bargain were stated by these Union agents.

In regard to the Union's arguments that the Company's failure to implement S&A deductions in 1988 showed the parties never intended that employes should pay S&A premiums, the Company argued as follows: The reasons that the S&A deductions were not made in 1988 was due to problems related to the implementation of the Section 125 plan and apparent inadvertent error, which Company official Mosher indicated was contrary to his understanding of the deal struck in 1988, and contrary to the costing he prepared for 1988. Also, the Company asserted that the Union failed to demonstrate that it shared Vandenbergen's 1988 Sick Leave Conversion calculations with Company officials, showing that employes "paid" for S&A benefits in 1988. Thus, the Company indicated that these calculations should not now bind the Company. 5/

The Company noted that the undersigned could resolve the instant grievance by simply applying the clear language of Article 32 which directs the deductions of S&A premiums from employe pay must be made. The Company observed that under generally accepted principles of construction, Article 5, a

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5/ The Company notes that even if one could conclude that the employes "paid" for the S&A benefits as they existed in 1988, the premiums have risen another $15.69, for which no quid pro quo was given.

maintenance of standards clause, is a general clause which may not be enforced to circumvent the specific language contained in Article 32. The Company acknowledges that Hietpas and Vandenbergen's testimony directly conflicts with Eggert and Mosher's testimony but the Company urged that its letter of February 21st proves that Eggert notified Vandenbergen of the Company's intent to deduct S&A premiums before ratification and before the parties' February 27 meeting. Thus, the Company urged that its witnesses' testimony was more probably accurate than the Union witnesses' testimony.

The Company argued that the S&A deductions "did not arise out of the contract negotiations" for 1991-93 because the contract language already permitted the Company to do what it did. Thus, the Company had no obligation to bargain about Article 32 during negotiations for the 1991-93 agreement. The fact that the Company chose to discuss its decision "to change the practice and follow the language" of Article 32, the Company urged, demonstrated the Company's good faith. The Company was obliged only to bargain over the affects of the change in this case, if the Union sought to do so. The Union never sought such bargaining, however, the Company noted. Therefore, based on the evidence the Company urged that the grievance be denied and dismissed in its entirety.

DISCUSSION:

A preliminary question to be addressed in this case is whether past practice should be considered in determining the meaning of Article 32. Under generally accepted arbitral principles, past practice may be considered for the following purposes: (1) to provide the basis of rules governing matters not included in the written contract; (2) to indicate the proper interpretation of ambiguous contract language; (3) to support allegations that clear language of the written contract has been amended by mutual action or agreement. 6/

In this regard, I note that the pertinent language states that "[t]he employee shall pay the cost of the Income Protection Insurance Plan . . ." and that "[t]he cost of the Income Protection Insurance Plan shall be deducted from employees' wages on a pro rata basis for each pay check so that disability pay shall not be considered gross income . . ." (emphasis supplied). The Company has argued that this language means that it can deduct the cost of the S&A Plan, that is S&A premiums, from employe paychecks on a pro rata basis without violating the agreement. I agree with the Company that the language of Article 32 is clear on its face and would allow the Company to deduct S&A costs from employe paychecks. However, the record evidence of past practice and bargaining history tends to support the Union's allegations that the clear language of Article 32 was amended by the parties' mutual action or agreement to mean something different from what it says. In this regard, the Union has argued that assuming the language of Article 32 is clear, the Company's actions in failing to deduct S&A premiums from Company employe paychecks for a two year period as well as Company letters and memos sent after January 1, 1989 show that the parties never intended the language of Article 32 to require S&A premium deductions be made from employe pay.

An analysis of the evidence regarding the 1988-90 agreement, tended to prove that the conversion of annual sick leave in the 1988-90 agreement to a cents-per-hour increase was intended as a buyout for the total elimination of paid sick days. This conclusion is supported by documentary evidence from both the Company and the Union. Dennis Vandenbergen's "Sick Leave Conversion" calculation, used at ratification, shows that contractual sick days were converted into a 45.3 cents per hour increase. This amount was diminished by 3.5 cents per hour which equaled the cost for the improvement employes sought in the weekly disability benefits, from $175 per week to $280 per week. Significantly, even Donald Mosher's costing for the 1988-90 agreement also refers to a 42 cents per hour increase for 1988. In addition, the Company did not attack the accuracy of Vandenbergen's calculations in this proceeding. 7/ The Company's costing for 1988-90, which Mosher admitted he never shared with the Union, showed that the S&A premiums were costed by the Company for 1988-90 at $122 per employe per year, for 200 employes which equaled $24,400 per year with no provision made by Mosher for any increase in S&A premiums after 1988. Similarly, no reference was made in Mosher's costing to the cost of the improvement in weekly disability payments which the Union sought and gained during the 1988-90 negotiations, which Vandenbergen had costed at $6.09/month or $14,600 for 200 employes per year of the 1988-90 agreement.

6/ Elkouri and Elkouri, How Arbitration Works, (BNA, Fourth Edition, 1985), p. 437.

7/ Union witnesses were not certain that they shared Vandenbergen's document with management. Company witnesses stated they never received a copy of it. I credit the Company's witnesses on this point given the Union witnesses' lack of certainty. In addition, it seems plausible that had the Union shared this document with the Company circumstances affecting this case might have been quite different.

Based upon the above analysis, if one assumed the Company's costing was correct for the 1988-90 agreement, employes would have lost their paid sick days (worth 45.3 cents per hour). In return, the employes would apparently have received the value of the S&A improvement (3.5 cents per hour) and a 42 cent per hour increase with which to pay their portion of the S&A premiums. Thus, the evidence generally supports the Union's claims that there was a buyout of sick leave days for the cents per hour increase, a trade of 42 cents per hour for elimination of a benefit worth approximately the same amount. Neither Mosher's costing nor the Employer's deduction from employe paychecks of $7.37 biweekly, equaling $191.62 per year supports the Company's assertion that the parties intended employes to "pay" 42 cents per hour (or $853.60) for S&A premiums.

The evidence that over the 1988 through 1990 contract term, the Company failed to deduct any S&A premiums from employe pay is most significant in my view. Add to this evidence, the various written admissions of Company officials, issued after January 1, 1989, apologizing to employes for their error, explaining to their insurer how employes had "paid" for S&A out of deferral of a cents per hour increase, and offering to reimburse employe losses on S&A benefit payments. It is difficult to understand how the Company could have neglected to deduct S&A premiums from employe paychecks for over two years. Yet this is what the Company did. All of this evidence supported the Unions' analysis and arguments in this case.

In any event, the status quo at the end of the 1988-90 agreement was that the Company had paid the entire S&A premium cost for the life of that agreement, and it continued to pay the premiums during the negotiations for the 1991-93 agreement. It is in this context that nothing was said by the Company, no statements were made and no letters were sent, indicating that the above-described practice of paying S&A premiums would be discontinued upon expiration of the 1988-90 agreement.

It is generally recognized in arbitration case law that where a past practice is contrary to the clear meaning language of the agreement, either party may unilaterally repudiate the practice upon expiration of the agreement by giving due notice of intent not to carry the practice over into any successor agreement. Upon receipt of such notice, the other party bears the burden of having the practice codified in the successor agreement to prevent its discontinuance. The evidence is in dispute on the question whether the Company properly repudiated its practice of paying S&A premiums. The testimony of Mark Eggert stands alone against that of Dennis Vandenbergen. As noted above, the Company did not call or attempt to explain why it did not call Attorney Healy to corroborate Eggert's testimony. Notably, it was the Company's burden to show

that it effectively repudiated its two year past practice of paying S&A premiums.

Based on the evidence submitted, I believe the Company has failed to meet this burden of proof. In this regard, I note that the Company did not mention any problems with or concerns about S&A premiums even according to its assertions until January 29, 1991, during a period when the parties were exchanging final offers. The very brief discussion of S&A premiums by Eggert and Vandenbergen was not summarized by Mosher in his bargaining notes. Nor did Mediator Sederstrom mention it at bargaining, as was his practice. Similarly, Vandenbergen never discussed the topic with his Union committee during negotiations, which would have been contrary to his practice also.

Furthermore, I find that the discussion of S&A premium payments which occurred on February 12 was insufficient to repudiate the practice, coming as they did after the 1991-93 agreement was ratified. The letter from Attorney Healy was similarly untimely and it could not stand as a proper repudiation of the practice in issue. In addition, I do not find Attorney Healy's letter sufficiently clear in its wording to demonstrate that Eggert had in fact repudiated the practice on January 29th or to demonstrate that the Healy letter otherwise confirmed a clear repudiation of the practice by the Company.

In all of the circumstances of this case and based upon the relevant evidence and argument in this case, I issue the following

AWARD

The Employer violated the collective bargaining agreement by making deductions from employe paychecks for the cost of the Sickness and Accident premiums.

The Employer shall cease and desist from deducting S&A premiums from employe paychecks for the term of the 1991-93 agreement. The Employer shall

make all affected employes whole for any losses they may have suffered due to the Employer's deduction of S&A premiums from employe paychecks. 8/

Dated at Madison, Wisconsin this 3rd day of June, 1992.

By _____
Sharon Gallagher Dobish, Arbitrator

8/ The Union sought interest to be paid on the amounts due employes but did not cite any case law thereon or state a reason therefor. As a general matter, unless an employer has acted in bad faith or committed egregious acts, interest on backpay shall not be awarded. Because there was no evidence of bad faith or egregious acts in this case, interest on the amount due is inappropriate.

In addition, in applying this Award, the parties should make any tax and/or FICA consequences the responsibility of the employes. The evidence failed to prove a clear past practice had been established by the Company's one-time agreement to reimburse employes for FICA and or tax amounts deducted from their weekly S&A benefit checks for 1988.