IN THE MATTER OF ARBITRATION **BETWEEN** **UNITED STEELWORKERS OF AMERICA** **LOCAL UNION 13-750** **(Union)** **-and-** **MOTIVA ENTERPRISES, LLC** **(Company)**	**FMCS No. 05-53799-3** **Retiree Medical Benefits**

Arbitrator: Lynne M. Gomez, selected through the procedures of the Federal Mediation and Conciliation Service.

HEARING

A Hearing was held in the above matter on August 15, 2006 at the Airport Hilton in Kenner, Louisiana. The witnesses were sworn but not excluded from the Hearing. The Hearing was transcribed and the Arbitrator was provided with a copy of the transcript. Post-hearing briefs were received by the Arbitrator by October 30, 2006. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

For the Union

Louis Robein	Attorney for the Union
Nancy Picaro	Attorney for the Union
Lou Sinquefield	Former Union President, witness
Dean Perniciaro	Former Union President, witness
Michael Turnage	USW Local 750 President
John H. Link, Jr.	USW International Representative
Aaron A. Gordon	USW Chemical Chairperson, Local 750
Darren C. Viola	USW Motiva Convent Chairman, Local 750
Charles M. Aleman	USW Motiva, Norco, La. Chairman, Local 750

For the Company

L. Chris Butler	Senior Litigation Counsel for the Company
Alicia Smith	Manager, Health & Welfare Plans, witness
Russ Dennis	Former Manager, Health & Welfare Plans, witness
David R. Souber	Manager, Industrial & Employee Relations
Phil Metzler	Vice President, Compensation Benefits & Policy

APPEARANCES (CONTINUED)

Ira Snyder	Retired
Larry Heasley	Manager, Human Resources, Norco, LA
Brian Rollins	Manager, Human Resources, Deer Park, TX

ISSUE

The Parties did not stipulate to a statement of the issue. The Union proposed the following:

> Did the Company violate the Articles of Agreement by adjusting contributions for post-retirement medical treatment beginning in 2003 inconsistent with historic agreements based on the 80/20% agreement? And if so, what is the appropriate remedy?

The Company contends that the subject matter of the grievance is not arbitrable. Therefore, it declined to propose an issue during the Hearing and asked the Arbitrator to formulate the issue. Nevertheless, the Company asserts that it did not violate any negotiated provision(s) and, therefore, that the grievance should be denied.

Having considered the Parties' positions, the Arbitrator frames the issues as follows:

1. Is this matter arbitrable?

2. If so, did the Company violate the Articles of Agreement by adjusting its contributions for post-retirement medical treatment for Medicare-eligible retirees between January 1, 2003 and January 1, 2006?

BACKGROUND

Motiva Enterprises LLC, a joint venture owned in part by Shell Oil Company, operates the Norco Refinery East Site.[1] On April 19, 2004 the Union[2] filed a grievance on behalf of "all employees and retired employees" asserting that:

> It is the Union's understanding the Company, through previous negotiations, the Alliance 80%/20% hospitalization program (sic)

[1] Shell Chemical LP retained ownership and operation of the Norco East and West Site chemical operations.

[2] The Paper, Allied-Industrial, Chemical & Energy Workers International Union ("PACE"), Local 4-750 initiated this grievance in mid-April, 2004. Subsequently, it merged with the United Steelworkers.

was for all medical plans, including future retirees. When converted to the Shell benefit program, no mention was made not to include future or present retirees under the Alliance benefit program. Now our retirees are having to contend with increase(d) insurance premiums.

The Company's commitment on previous negotiations is that the Company paid 80%/20% on all medical programs, including retirees.

* * *

The Union is demanding as a remedy that proper pay is applied as applicable, this situation is rectified, the employee(s) be made whole in every respect and the Company ceases the improper practice.

The grievance was appropriately processed and remains unresolved. The Parties stipulate that the matter is properly before this Arbitrator for Opinion and Award. The Parties also stipulate that the Arbitrator may retain jurisdiction in the event a remedy is ordered for the purposes of interpreting that remedy.

RELEVANT PROVISIONS OF THE AGREEMENT

PREAMBLE

.02 This Agreement is intended to constitute the basic agreement between the parties, and it is agreed that no prior understanding nor agreement affecting the application or interpretation of this basic agreement shall be operative unless it has been reduced to writing, is not in conflict nor inconsistent with the term of this basic agreement and is continued in effect for the term of this basic agreement by separate written agreement between the Company and the Union.

1.01 This Agreement becomes effective at 12:01 A.M. on February 1, 1998 and shall remain in effect until 11:59 P.M., January 31, 2002, and from year to year thereafter unless sixty (60) days' written notice is given prior to any yearly expiration date by either of the parties to this Agreement.

8.01 Membership in any organization shall not affect the status of employees with respect to benefits derived or to be derived by any or all employees from any employee benefit plan.

* * *

10.02 Arbitration

10.021 When the Workmen's Committee on behalf of the complainant or complainants and the Company fail to agree on any matter pertaining to the application or interpretation

of this Agreement, other than the demotion for incompetence of an employee who is exempt from the provisions of the Fair Labor Standards Act, and all other provided means of reaching an Agreement have failed, the complaint or controversy may be settled by arbitration, provided written notice of intention to submit the complaint or controversy to arbitration is received by the Company within sixty (60) calendar days of the Company's final position as provided for in the fourth step of the grievance procedure.

OTHER PROVISIONS

SHELL BENEFITS AGREEMENT

(signed on June 26, 2002)

"The Shell benefit plans are described in the attached document entitled 'Dimensions' which contain Summary Plan Descriptions of such plans, which govern their content and administration. The Shell benefits plans will become effective and applicable on January 1, 2003 for employees represented by the Union and shall be in lieu of all qualified benefit, health and welfare plans previously provided by Equilon and Motiva. The Alliance Company/OCAWIU Master Agreement Benefits dated August 21, 1998 is therefore cancelled effective January 1, 2003."

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

This grievance is arbitrable. Any doubts as to arbitrability are to be resolved in favor of arbitration. The presumption of arbitrability applies to retiree benefit disputes if the parties' collective bargaining agreement provides for such benefits and the dispute is not specifically excluded from arbitration. The language of the Parties' side agreements is incorporated into their collective bargaining agreement, and references to retiree medical benefits qualify as "written provisions" that mandate arbitration. The Parties have negotiated retiree medical benefits since at least 1993, and have arbitrated related disputes. The present dispute concerns not only retirees, but also present employees who must understand all contractual provisions concerning their employment and compensation.

While retirees have been found not to be "employees" for purposes of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*), the Fifth Circuit Court of Appeals allowed the Machinists Lodge 2121 to represent Goodrich Corporation retirees because they had given

the union express authorization to do so. (***Machinists Lodge 2121 v. Goodrich Corp.***, 410 F.3d 204, *cert. denied*, 126 S. Ct. 647 [2005]). In the instant grievance, some retirees have authorized the Union to represent them. However, unlike the ***Goodrich*** case, this grievance affects all current employees as well. Additionally, this grievance is about how the Company is calculating and apportioning medical benefit premiums, and not about individual claims. Thus, the instant grievance is arbitrable.

The Company has failed to adhere to contractual provisions related to retiree medical benefits. The Company repeatedly has committed to contributing 100% of the Company subsidy for retirees with 30 years of service, yet admits that it does not do so for post-65 retirees. The Company unilaterally determined that it would not follow the 80/20% split of medical premium costs for post-65 retirees, and its action eviscerates the Parties' agreements. While retirees who have not yet attained age 65 and who have at least 30 years of service appear to be receiving 100% of the Company subsidy, they and other Union members are concerned that their post-65 medical benefits are being eroded. This dispute relates to the Parties' collective bargaining agreement.

Multiple agreements have addressed retiree medical insurance and premium cost sharing. In March of 1989, the Parties entered into an agreement whereby the Shell Hospital-Surgical-Medical Plan ("HSM") would be available to bargaining unit employees and employees who retired after that date. Retirees received the same flat fee Company contribution as did active employees.

On June 30, 1993 the Company advised the Union that it would begin applying a variable Company premium contribution for employees who retired on or after January 1, 1994. On July 18, 1995, following arbitration of the Union's grievance of that change, the Parties entered into an Agreement whereby employees who retired with 30 or more years of service were to receive a Company subsidy of 100%, while those with fewer years of service at retirement received a lesser percentage contributed by the Company. The Agreement continues in effect and does not distinguish between retirees who are, or are not, eligible for Medicare (i.e., age 65 or older).

On February 3, 1996, the Parties entered into an Agreement that, in part, established the Company's contribution to the monthly premium for the HSM Program as 80%, and also established a minimum monthly contribution to an HMO. The Union understood the 1996 Agreement implicitly applied to retirees because the 1995 Agreement granted 100% Company subsidy of premium to retirees with a minimum of 30 years of

service, and because the 1996 Agreement reaffirmed the 1995 Post-Retirement Medical Premium Contribution.

On July 3, 1997 the Parties entered into an Agreement whereby the Company established four (4) different tiers of medical coverage, although retirees were limited to the original two tiers. The Company reaffirmed that it would contribute 80% of the HSM premium for all tiers. The 1997 Agreement also introduced an enhanced option with lower deductibles, and the Company agreed its contribution thereto would be the same as to the HSM option.

The Shell Benefits Agreement ("SBA") went into effect on January 1, 2003. The SBA confirmed the Parties' understandings concerning employee benefit plans, including medical benefits, for Shell and Motiva employees. The "Dimensions" booklet more fully described the plans, and it also, in part, stated that the Company would contribute to retired employees' medical benefits based on accredited years of service at the time of retirement. The Dimensions booklet included a table of the Company's contribution schedule that had appeared in an earlier agreement which applied to "all Company medical plan options" and also noted that retirees with more than 30 years of service were entitled to 100% of the Company's full subsidy, which usually was 80% of the cost of the premium. No differentiation was made between Medicare-eligible retirees and other retirees in the SBA, or in any of the other agreements described above.

The Parties have stipulated to two (2) prior arbitration Awards from the mid-1990s, issued by Arbitrator Diane Dunham Massey. The first Award, dated March 24, 1995, dealt with the Company's authority to adopt the premium cost sharing contribution schedule (the 80/20% schedule). That Award noted (at p. 3) that, "(h)istorically, retirees ... had received the same Company contribution amount as employees." The arbitrator ruled in favor of the Company based on Preamble .02's requirements. The first Award led the Union to enter into the July 18, 1995 letter agreement concerning the variable Company contribution toward retiree medical benefits. The second prior Award, dated June 1, 1995, basically recognized an agreement as to premium sharing and found that the terms "medical plan" and "premium" had consistent meanings that the Parties had applied over a long time period.

The Company admits that post-65 retirees' premiums are based on financial considerations, and that it sometimes has used a 50%/50% premium split rather than the 80%/20% these retirees were expecting. The Company asserts that "% of Company subsidy" for post-65 retirees is something different than what is provided to employees and

pre-65 retirees. The Company never advised the Union that it planned to treat post-65 retirees differently in this manner, and its examples of contributions associated with the HSM plan implied that post-65 retiree medical programs – which are included in the trust that includes Shell HSM and Enhanced HSM – would be tied together with the other programs. The Company misrepresented its method of calculating medical premiums for its post-65 retirees, and its undisclosed interpretation renders the Parties' July 18, 1995 letter agreement meaningless. The Company's misrepresentation is demonstrated by its response to the Union's inquiry about retiree medical premiums:

> "Per your request, attached are the Post 65 employee rates for the Shell Complementary Plan and Ochsner. Please note, the rates listed are employee contributions for those with 30 or more years of service. Retirees with 30 or more years of accredited service are entitled to 100% of the full company subsidy, which is generally 80% of the premium cost.

Additionally, the employee contribution reflected in the chart included with the above response showed that retirees in the "Over 65" programs were paying more than 20% of the total premium cost. The Company's actions eviscerate the Parties' 1995 agreement, and should not be allowed.

After the instant grievance was filed, the Parties negotiated a new Agreement and a new schedule for retiree medical benefits. However, there is a gap of January 1, 2003 to January 1, 2006. The grievance should be sustained. Post-65 retirees from 2003 through the present should be made whole by being reimbursed for any amount overpaid in medical premiums, and all persons hired before January 1, 2006 (other than those excluded under the terms of the July 18, 1995 letter agreement) should hereafter have their medical premiums calculated under the 80/20% rule.

POSITION OF THE COMPANY

The Company makes the following arguments and contentions in support of its position:

The Company participated in the arbitration but does not concede that the underlying grievance is arbitrable under the Parties' Articles of Agreement. The Union made clear that this grievance concerns only post-65 (Medicare-eligible) retirees and that it relates only to the time period of January 1, 2003 through January 1, 2006. Retirees are not employees; retirees are no longer members of the bargaining unit and their complaints

are not subject to the grievance and arbitration procedure established in the Articles of Agreement. While unions may represent retirees in arbitration under limited conditions, none of those conditions is present in this case. The retiree benefits at issue in this grievance are not included in the Articles of Agreement. If retirees are concerned about calculation of medical premiums, they should contact the Plan Administrator in accordance with the Plan and the provisions of ERISA.

The Union did not present proof, such as representation authorization forms, that Medicare-eligible retirees had authorized the Union to represent them in this matter. The Union's witnesses were not similarly situated to the retirees the Union purported to represent because neither of the witnesses is a Medicare-eligible retiree, and neither was dissatisfied with the Company subsidy for the medical plans in which they were enrolled.

The Union bears the burden of proving that the Company violated a specific written agreement, as Preamble .02 of the Articles of Agreement prevents the Union from relying on "past practice" to establish a breach of contract. Nothing in the Articles of Agreement pertains to medical benefits, premiums for medical benefits or the Company subsidy for medical benefits for retirees. Retirees aged 65 or older are Medicare-eligible and are not covered by the HSM, enhanced HSM or HMO plans offered to active employees and pre-65 retirees. Medicare is expected to be post-65 retirees' primary coverage, but they can enroll in a Company-funded Medicare supplement option or various Medicare HMO plans that offer different coverage, and have different premiums, than the plans available for active employees and pre-65 retirees. The Company's subsidy for self-funded Medicare plans is a flat dollar amount, not a percentage. It is established each year, and is subject to the service factor.

The Union concedes that it has the burden of proof to establish that the Company violated an agreement that had been reduced to writing and signed by both Parties. However, neither the Articles of Agreement, nor any of the letter agreements signed by the Parties and introduced into evidence reveals any Company commitment to pay a percentage of Medicare-eligible retirees' medical premiums. None of the 32 exhibits (23 Joint, 9 Union) admitted into evidence contains any provision addressing the Company subsidy for Medicare complementary and supplemental plans. The grievance should be denied.

OPINION

THE FACTS

Most of the evidence is not disputed and is largely a document trail. It indicates as follows:

It must be noted, at the outset, that this grievance concerns medical insurance premiums payable by post-65 (i.e., Medicare-eligible) retirees and that it covers the limited time period of January 1, 2003, the date on which the Shell Benefits Agreement became effective, through January 1, 2006, the effective date of a new Agreement between the Parties.

The historical context of the grievance spans about a decade. In the mid-1990s the Shell family of companies, including Shell Oil Company and Shell Chemical LP, started reorganizing. In 1998, Shell Oil Company, Texaco, Inc. and Saudi Refining, Inc. (referred to as "the Alliance") entered into an alliance and formed new companies, the primary of which were Equilon Enterprises LLC and Motiva Enterprises LLC. These so-called "Alliance Companies" were formed for the purpose of downstream operations such as refining, transportation and marketing petroleum products. Motiva Enterprises LLC, a joint venture owned in equal shares by Shell Oil Company and Saudi Refining, Inc., owns and operates the Norco Refinery[3].

From April 1999 through 2002, the Alliance Companies offered benefits that differed from those offered by Shell to its employees. In 2002, however, Shell became the majority owner of the Alliance companies because Chevron acquired Texaco, Inc. and Texaco had to divest itself of ownership in the Alliance. At that point, Shell began negotiating with the various unions who represented Alliance Company employees so that such employees could obtain the same benefits offered to Shell employees. Those negotiations led to the Shell Benefits Agreement signed on June 26, 2002. As of January 1, 2003, employees at the Norco East Site Refinery and the Norco East and Norco West Site chemical operations were offered identical benefits, which were calculated according to the Shell Benefit Plans.

The Shell Benefits Agreement provided, in part, that:

"The Shell benefit plans are described in the attached document entitled

[3] The Norco Manufacturing Complex has an East Site Plant, which is a refinery and chemical operation, and a West Site chemical plant. Prior to July 1, 1998, both chemical operations were owned and operated by Shell Chemical L.P.

'Dimensions' which contain Summary Plan Descriptions of such plans, which govern their content and administration. The Shell benefits plans will become effective and applicable on January 1, 2003 for employees represented by the Union and shall be in lieu of all qualified benefit, health and welfare plans previously provided by Equilon and Motiva. The Alliance Company/OCAWIU Master Agreement Benefits dated August 21, 1998 is therefore cancelled effective January 1, 2003."

The evidence presented during the Hearing explained the evolution and differences in the medical plans offered to active employees and retirees[4], as well as the manner in which the premiums for each plan are calculated. Prior to 1989, the Union had a hospitalization policy to which the Company contributed. In March of 1989, however, the Company and the Union agreed that the Shell Hospital-Surgical-Medical ("HSM") plan would be made available to bargaining unit employees and that:

> "employees who retired after May 1, 1989, would be covered by HSM and any HMO that they would have been eligible to participate in immediately prior to retirement, or any future HMO available to those who (we)re eligible to participate in HSM."

Thereafter, the Company contributed the same flat dollar amount to retirees' medical plans as it did for active employees. In 1993, however, the Company notified the Union that, rather than contribute a flat dollar amount, it would apply a variable contribution rate based on years of service at retirement. The Union grieved but the arbitrator[5] ruled in favor of the Company, determining that prior understandings were required to be in writing, and that there was no prior written agreement(s) referring to a Company contribution toward retirees' medical premiums. Thereafter, a letter agreement dated July 18, 1995, the Parties purported to confirm understandings reached in recent negotiations with regard to resolving

> "All issues between the parties relating to the Company's implementation of a schedule of variable service based Company contributions to medical premiums for employees who retired or who will retire with less than 10 years' service after February 1, 1994.
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> * * *
>
> Post-Retirement Medical Premium Contributions
>
> As stated in the July letter to all employees regarding the changes to post-retirement medical premium contributions, future company premium contributions will be based on service at the time of retirement. This

[4] Including retirees who were not yet 65 and those who were at least 65 and, therefore, Medicare-eligible.
[5] Diane Dunham Massey.

revision will not apply to individuals who have already retired or to individuals who are eligible to retire with an immediate pension on or before February 1, 1994."

The Company Premium Contribution Schedule contained in the July 18, 1995 letter agreement "applies to all Company provided medical plans and establishes the percent of the full company contribution that will apply based on accredited service at retirement." It indicates that individuals with 30 or more full years of service at retirement with immediate pension eligibility will be entitled to 100% of the Company Premium Contribution which, the evidence indicated, generally was 80% of the total premium.

By letter agreement dated February 3, 1996, the Company agreed, in part, that:

"Effective February 1, 1996, and for the term of the Articles of Agreement, the Company's contribution towards premiums for the HSM option of the Shell Medical Plan for active employees will be based on an employer contribution rate of 80% of the premium and an employee contribution rate of 20% of the premium."

Active employees enrolled in other plans, such as the HMO plans, were to receive 80% of the premium, subject to a minimum and maximum[6] amount. The Company states that this Agreement remains in effect. The Union contends that it understood this 1996 letter agreement to implicitly apply to retirees because the July 18, 1995 letter agreement indicated that retirees with at least 30 years of service would receive 100% of the Company Premium Contribution.

Then, in a letter agreement dated July 3, 1997, the Parties agreed that, effective January 1, 1998, the Company could establish four (4) tiers of coverage under Company sponsored medical and dental plans:

- Employee only
- Employee plus child(ren)
- Employee plus spouse
- Employee plus family
-

The July 3, 1997 letter agreement also notes that it:

"is in addition to the agreement reached by the parties with respect to the Medical Plan Contributions in the 1996 negotiations settlement agreement dated February 3, 1996."

[6] The maximum amount was based on the amount contributed by the Company for employees enrolled in the HSM Plan.

It also lists an "Additional Detail" as follows:

> 1) It is understood that current and future retirees will be able to participate in any Company sponsored plan only at the "employee" or "employee plus family" tier * * *

By letter agreement dated January 31, 2002, the Parties[7] agreed to the following regarding Medical Plan Contributions:

> "The Company renews and extends its current commitments that the Company's contributions toward premiums for the HSM Option of the Shell Medical Plan and approved alternate company sponsored medical plans for active employees will be based on an employer contribution rate of 80% of the premium and an employee contribution rate of 20%."

Benefits were further described in the "Dimensions" booklets[8] which advised retired employees that:

> "Post retirement contributions made by the Company are based on your years of service at the time you retire. (See Retirement on page 39 for a summary of requirements for retiree eligibility to participate in the plan[9].) The following contribution schedule applies to all Company medical plan options and establishes the percentage of the full Company contribution for the medical plan option in which you're enrolled that applies, based on *accredited service* at retirement."

The contribution schedule included in the "Dimensions" booklets is the same table (Company Premium Contribution Schedule) from the 1995 letter agreement.

Retirees who are not yet 65 years old and, thus, not Medicare-eligible participate in the same plans as do active employees subject to a service factor by which retirees with 30 or more years of service get a Company contribution of 100%; this means that the Company pays the same 80% of the medical premium as it does with active employees. However, the premium percentage is adjusted downward for retirees with less than 30 years of service. Medicare-eligible retirees are expected to have Medicare as their primary medical insurance, although the Company offers a Company-funded Medicare supplement option and various Medicare HMO plans.

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[7] Motiva and the Union agreed to a Medical Plan Contribution worded almost identically, but based on premiums for the Alliance Medical Plan and the Alliance Company/OCAWIU Master Agreement Benefits dated August 21, 1998.

[8] Those for Shell and Motiva employees contain the same provisions relating to the Company contribution.

[9] This page was not included in the exhibits.

In late 2003, at least two (2) Medicare-eligible retirees[10] contacted the Union concerning rising costs of their medical insurance premiums. The Union, in turn, contacted the Norco Plant's Human Resources Manager, who referred the issue to the Shell Benefits department. The information provided to the Union in response to its inquiry did not indicate the Company's contribution or the total premium being paid by retirees, although the Union was advised that the medical plan contribution rates for "post-65" retirees with at least 30 years of service "represented 100% of the full company subsidy, which is generally 80% of the premium cost." The Union attempted to get additional information and was informed that the premiums charged to retirees were correct. When the Union asked for the Company's contribution to retiree medical insurance premiums, the Shell Benefits department did not respond, and the Union did not acquire that information until months later when it made a formal request.

THE ARGUMENTS

Presumption of Arbitrability

There is a strong presumption of arbitrability in labor disputes when the underlying collective bargaining agreement contains an arbitration clause. ***United Steelworkers of America v. Mead Corp., Fine Paper Div.***, 21 F.3d 128, 131 (6th Cir. 1994). The arbitration clause in the Parties' Articles of Agreement provides as follows:

> 10.03 Arbitration
>
> 10.021 When the Workmen's Committee on behalf of the complainant or complainants and the Company fail to agree on **any matter pertaining to the application or interpretation of this Agreement,** other than the demotion for incompetence of an employee who is exempt from the provisions of the Fair Labor Standards Act, and all other provided means of reaching an Agreement have failed, the complaint or controversy may be settled by arbitration, provided written notice of intention to submit the complaint or controversy to arbitration is received by the Company within sixty (60) calendar days of the Company's final position as provided for in the fourth step of the grievance procedure. (Emphasis added).

The highlighted language of Section 10.021 of the Articles of Agreement broadens the scope of the Parties' arbitration clause and, generally, would strengthen the presumption of arbitrability. As the United States Supreme Court stated in ***United Steelworkers of***

[10] The evidence indicated that one of these retirees had at least 30 years of service, and the other had about 26 years.

America v. Warrior & Gulf Nav. Co., 363 U..S. 574, 4 L.Ed. 2d 1409, 80 S. Ct. 1347 (1960)21 F.3d 128, 131 (6th Cir. 1994),

> "An order to arbitrate the particular grievance should not be denied unless it may be said with 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." (at 582-583).

However, the presumption of arbitrability is tempered in the instant grievance by the fact that the Union purports to represent not only bargaining unit members, but also retirees concerned about the Company's contribution toward Medicare-eligible retirees' medical insurance premiums.

Union Representation of Retirees

As both Parties aptly note, retirees generally cannot be represented by a union. This is so because retirees, having left the work force, are no longer "employees" for the purposes of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 et seq. ***Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.***, 404 U.S. 157, 92 S. Ct. 383, 30 L.Ed.2d 341 (1971). Therefore, arbitrators are cautioned:

> "Thus, absent a clear and unmistakable inclusion of retirees under the grievance procedure, (retirees) are not covered by the grievance procedure and their benefits, as retirees, are not subject to arbitration." Elkouri & Elkouri, How Arbitration Works (6th Ed. 2003) at p. 208.

Nevertheless, unions have been allowed to represent retirees in the grievance procedure if the underlying arbitration clause is sufficiently broad to include retirees and their complaints; or when the underlying collective bargaining agreement demonstrates that the retirees have a cognizable claim against their former employer and the retirees have expressly authorized the union to represent them[11]. The apparent broadness of the Parties' arbitration clause quote above is curtailed, in the opinion of this Arbitrator, by Article 10 of the Articles of Agreement, entitled "Handling of Complaints", which states in pertinent part that:

[11] In ***Machinists Lodge 2121 v. Goodrich Corp.***, 410 F.3d 204 (5th Cir.), cert. denied, 126 S.Ct. 647 (2005), the Fifth Circuit held that the Union was authorized to represent 52 retirees who had expressly authorized it to do so. The Union in the instant grievance undoubtedly was authorized to represent the two (2) retirees who testified during the Hearing, but neither was yet Medicare-eligible and both were satisfied with the Company contribution to their medical insurance premiums.

10.01 Submission of Complaints

All complaints arising out of the application or interpretation of this Agreement shall be handled as follows:

* * *

First – The employee(s) concerned and/or his departmental steward (or his designated alternate) on his behalf shall discuss the complaint with the employee's foreman * * *

Retirees are not named, or referred to, as persons authorized to submit complaints or invoke arbitration under the Articles of Agreement. Thus, the undersigned has not been able to discern a "clear and unmistakable inclusion of retirees" sufficient to render this grievance subject to arbitration on behalf of retirees. Moreover, the evidence did not establish that the Union had been expressly authorized by post-65 retirees to represent them in the instant grievance. Under the circumstances, and given the judicially-imposed limitations on arbitration of retiree issues, this Arbitrator concludes that this grievance is not subject to arbitration on behalf of retirees.

Active Employees' Interest

Nevertheless, the Union initiated this grievance on behalf of "all employees and retired employees." The Union asserts that this grievance is about how the Company is calculating and apportioning medical benefit premiums, and not about individual claims by retirees. As the Union notes, its current employees are entitled to understand and rely on contractual provisions concerning their employment and compensation, including their retirement benefits. There is no apparent impediment to the Union representing its current employees, as opposed to retirees, in this grievance. Therefore, the merits of this matter must be examined.

The Parties' Written Agreements

The Company contends that neither the Articles of Agreement nor any of the Parties' letter agreements supplementing it and which related to medical insurance coverage and premium costs address Medicare-eligible retiree premiums or the Company subsidy for those retirees. Nevertheless, the Parties' July 18, 1995 letter agreement apparently was negotiated in response to Arbitrator Massey's first Award,

and purports to "confirm understandings reached in our recent negotiations." The July 18, 1995 letter agreement states, in relevant part, as follows:

> 1. This Agreement resolves all issues between the parties relating to the Company's implementation of variable service based Company contributions to medical premiums for employees who retired or will retire with less than 30 years' service after February 1, 1994.
>
> * * *
>
> POST-RETIREMENT MEDICAL PREMIUM CONTRIBUTIONS
>
> As stated in the July letter to all employees regarding the changes to post-retirement medical premium contributions, future company premium contributions will be based on service at the time of retirement. This revision will not apply to individuals who have already retired or to individuals who are eligible to retire with an immediate pension on or before February 1, 1994."
>
> Company Premium Contribution Schedule
> Effective 2/1/94
>
> The following contribution schedule applies to all Company provided medical plans and establishes the percent of the full company contribution that will apply based on accredited service at retirement.

Full Years of Service at Retirement with Immediate Pension Eligibility	Company Premium Contribution (% of Company Subsidy[12])
30 and over[13]	100

> * * *

Inasmuch as the Company Premium Contribution Schedule refers to "Full Years of Service at Retirement" the undersigned concludes that it included retirees[14] and employees who were going to retire. While neither this letter agreement nor any of the

[12] The evidence demonstrated that such subsidy is generally 80% of the total premium.

[13] The Company's subsidy, according to this Schedule, decreases 5% for every year of service less than 30, until age 25 (which reflects a 75% Company Subsidy); retirees with 10 to 24 years of service were to receive a 70% subsidy; employees with less than 10 years' service received "no medical contribution by Company."

[14] The Company asserts that it would not have negotiated benefits for current retirees with the Union, as the Union was not the retirees' proper representative. While this contention is persuasive, particularly in light of the issue of Union representation of retirees, this representation would have been important to existing employees who were contemplating retirement.

other written agreements submitted into evidence specifically obligates the Company to pay the same premium percentage for pre- and post-65 retirees, there is no writing among the exhibits that carves out post-65 retirees or otherwise alerts the Union that post-65 retirees would be treated differently with regard to the Company contribution for medical premiums established in the July 18, 1995 letter agreement. Thus, this Arbitrator concludes that this letter agreement created a presumption that the Company's contributions to pre- and post-65 retirees' medical premiums would be calculated in the same manner.

Moreover, none of the Parties' subsequent agreements effective through December 31, 2002 vary the Company contribution percentages for retirees – pre- or post-65 -- set forth in the Parties' July 18, 1995 letter agreement, although premium adjustments to Company sponsored medical plans and other plans in which employees voluntarily participated were approved in the Alliance Company/OCAWIU Master Agreement Benefits of August 21, 1998. The Shell Benefits Agreement, signed by the Parties on June 26, 2002 and effective and applicable as of January 1, 2003, cancelled the Alliance Company/OCAWIU master Agreement Benefits and further stated that it

> "shall be in lieu of all qualified benefit, health and welfare plans previously provided by Equilon and Motiva."

and provided as follows concerning Post-Retirement Medical Transition:

> Former Texaco and Star Enterprise employees who were eligible for the Texaco/Star Retiree Medical transition coverage in the alliance, will be eligible for retiree medical upon retirement. The applicable company contribution for this retiree medical coverage will be based on the Texaco or Star Enterprise retiree medical subsidy schedule as of April 1, 1999.
>
> Employees who, as of January 1, 2003 meet the eligibility requirements for the Alliance Companies Retiree Medical coverage (i.e., at least age 50, with 10 years of service, and whose age and service equals 70 points or more) will be eligible for post-retirement coverage upon retirement. The applicable Company premium contribution for this post-retirement medical coverage will Be based upon the alliance retiree medical subsidy schedule in effect as of December 31, 2002.
>
> Employees who retired from the Alliance Companies prior to January 1, 2003, will continue to receive company premium contributions in accordance with the alliance retiree medical subsidy in effect at the time of their retirement.

While such language does not specifically address post-65 retirees, neither does it address

modification of the Company premium contribution schedule in the July 18, 1995 letter agreement.

Moreover, the "Dimensions" booklets advised that post-retirement contributions made by the Company would be based on "your years of service at the time you retire" and repeated the Company Premium Contribution Schedule made a part of the Parties' July 18, 1995 letter agreement. Below the chart printed in the Dimensions booklets is the following highlighted information:

> Retirees with more than 30 years of accredited service are entitled to 100% of the full Company subsidy, which is generally 80% of the premium cost.

This schedule, which "applies to all Company medical plan options" does not differentiate between Medicare-eligible retirees and other retirees. All of these circumstances indicate that the Parties' July 18, 1995 letter agreement provided for definite percentages of the Company's contribution toward medical premiums of post-65 retirees. The evidence indicated that such contributions have not consistently complied with that agreement.

REMEDY

Although a remedy for retirees may be appropriate[15], this Arbitrator has no jurisdiction to order a remedy on their behalf and, therefore, will not do so. The Arbitrator has the discretion to fashion an appropriate remedy as to the Union's active employees, however, but there was no clear[16] showing of how the Company's adjustments to contributions for post-retirement medical treatment for Medicare-eligible retirees between January 1, 2003 and January 1, 2006 affected active employees, as opposed to the affected retirees, or how affected active employees, if any, can be made whole. Therefore, the undersigned will retain jurisdiction to allow the Parties to mutually agree to an appropriate remedy for active employees represented by the Union affected by the Company's adjustments to contributions for post-retirement medical treatment for Medicare-eligible retirees between January 1, 2003 and January 1, 2006.

For the reasons herein set forth:

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[15] Nothing stated in this Award is intended, nor should it be construed, as a reflection of the merits of any potential litigation brought under ERISA or other causes of action that might be urged by affected retirees.

[16] As recognized by the Company's counsel, the retiree/active employee dichotomy contributes to a "tricky claim" if not an outright conundrum.

AWARD

The grievance is not arbitrable as to retirees. However, the grievance is arbitrable, and sustained, as to active employees represented by the Union. The Company violated the Articles of Agreement by adjusting its contributions for post-retirement medical treatment for Medicare-eligible retirees between January 1, 2003 and January 1, 2006. The Arbitrator will retain jurisdiction to allow the Parties to mutually agree to an appropriate remedy for active employees affected by the Company's adjustments to contributions for post-retirement medical treatment for Medicare-eligible retirees between January 1, 2003 and January 1, 2006.

Signed this 29th day
of December, 2006 in
Houston, Texas

Lynne M. Gomez
Arbitrator