IN THE MATTER OF THE ARBITRATION)
)
Between)
)
ARCELORMITTAL USA)
INDIANA HARBOR)
)
and)
)
UNITED STEELWORKERS,)
LOCAL 1010)

OPINION AND AWARD

RONALD F. TALARICO, ESQ.
ARBITRATOR

Grievance No.: PW-2020-0009

Case 116

GRIEVANT

Group Grievance

ISSUE

Sub-Pay

VIDEO HEARINGS

September 25, 2020
November 2, 2020

POST-HEARING BRIEFS

Received by January 7, 2021

APPEARANCES

For the Employer
Richard L. Samson, Esq.
Norma Manjarrez, Esq.
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For the Union
Michael Milsap, Director
United Steelworkers
District 7

ADMINISTRATIVE

The undersigned Arbitrator, Ronald F. Talarico, Esq., was mutually selected by the parties to hear and determine the issues herein. Evidentiary hearings were held on September 25, 2020 and November 2, 2020 via Video Conference, at which time the parties were afforded a full and complete opportunity to introduce any evidence they deemed appropriate in support of their respective positions and in rebuttal to the position of the other, to examine and cross examine witnesses and to make such arguments that they so desired. Post-hearing briefs were received from both parties by January 7, 2021 at which time the record was closed. No jurisdictional issues were raised.

PERTINENT CONTRACT PROVISIONS

Article Eight - Earnings Security:

Section B. Supplemental Unemployment Benefits

1. **Eligibility**

   An Employee shall be eligible for a weekly supplemental unemployment benefit (Weekly Benefit) for any week begin on or after the Effective Date, if s/he:

   a. **has completed two (2) years of Continuous Service prior to his/her seeking weekly benefits;**

   b. **is and remains an Employee within the meaning of the Agreement;**

   c. **does not receive sickness and accident benefits under an agreement between the Company and the Union;**

   d. **is not in the military service, including training encampments;**

   e. **is eligible, applies for state unemployment benefits for the week and takes all reasonable steps to receive such benefits; provided, however, that this requirement will not apply if s/he has exhausted state unemployment benefits, receives other compensation in an amount that disqualifies him/her for state unemployment benefits, has insufficient employment to be covered by the state system, fails to qualify for state unemployment benefits because of a waiting week, is unable to work by reason of disability, or is participating in a federal training program; and**

   f. **either**

(1) is on layoff for any week in which, because of lack of work, s/he does not work at all for the Company;

...

2. Amount and Duration of Benefits

a. Weekly Benefits are equal to:

(1) forty (40) multiplied by the Employee's Base Rate of Pay; and

(2) the applicable percentage shown in the following table:

Supplemental Unemployment Benefit Percentage

Continuous Service	Duration of Benefits, in Weeks		
	1 to 26	27 to 52	53 to 104
2 but less than 10	60%	40%	0%
10 but less than 20	70%	50%	25%
20 and over	80%	60%	40%

b. Notwithstanding the above table, the duration of Weekly Benefits payable to an Employee who becomes disabled while on layoff and is not physically able to return to work shall be limited to fifty-two (52) weeks beginning with the week the Employee is recalled to work.

c. The amount of a Weekly Benefit may be offset only by the amount of state unemployment benefits, Trade Adjustment Allowance and any Excess Other Compensation, but in no event will the total Weekly Benefit be less than $250.00 per week for the Duration of Benefits.

d. Excess Other Compensation means any weekly earnings from an employer other than the Company in excess of the amount that would reduce the Employee's state unemployment benefit to zero. The amount to be offset shall be $1 for each $2 of Excess Other Compensation.

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Appendix A – Wages:

Labor Grade	Job(s)
1	Utility Person

2	**Service Technician** **Plant Transportation Specialist**
3	**Operating Technician**
4	**Maintenance Technician – Mechanical Maintenance** **Technician – Electrical**
5	**Senior Operating Technician**

Labor Grade	9-02-2018	9-01-2019	8-30-2020	9-05-2021
1	$ 21.27	$ 22.01	$ 22.78	$ 23.47
2	$ 23.29	$ 24.10	$ 24.94	$ 25.69
3	$ 25.60	$ 26.50	$ 27.43	$ 28.25
4	$ 26.95	$ 27.89	$ 28.87	$ 29.73
5	$ 28.62	$ 29.62	$ 30.66	$ 31.58

BACKGROUND

The Employer in ArcelorMittal USA, and its Indiana Harbor plant facilities ("Company"). The Union, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union and USW Local 1011 ("Union"), is the sole and exclusive representative for collective bargaining for the employees at the Indiana Harbor West Plant. The Company and the Union have been parties to a series of collective bargaining agreements over the years, the most recent of which is effective through 2022 ("BLA").

The Union filed the grievance at issue in this case, PW-2020-0009, alleging the Company violated certain provisions of the BLA when it offset laid-off bargaining unit members' weekly Supplemental Unemployment Benefit with their Federal Pandemic Unemployment Compensation program payment. The Company denied the grievance at each step of the grievance procedure and the Union demanded arbitration.

The relevant factual record can be summarized as follows.

It is undisputed that as the COVID-19 Pandemic was spreading across the country, the Company saw a rapid and drastic decline in customer demand for its products. This decline in customer demand put severe economic pressure on the Company. This led to the Company's need to lay off bargaining unit workers. The parties were unable to agree on the "layoff minimization

plan" ("LMP") pursuant to the terms of the BLA, so the Company implemented its final LMP on April 17, 2020. The number of employees laid off pursuant to the LMP has fluctuated between twenty and one hundred employees.

Article 8 (B) of the BLA provides for a Supplemental Unemployment Benefit ("SUB") for eligible laid-off bargaining unit workers. There are several elements of eligibility, but once an employee is deemed eligible the SUB pay is based on the employee's base rate of pay multiplied by a percentage determined by the employee's years of service and the duration of benefits, multiplied by forty hours. Offsets are then deducted as dictated by Article 8 (B)(2)(c). The BLA provides for offsets for state unemployment benefits, trade adjustment allowance, and "excess other compensation." Excess other compensation refers to "any weekly earnings from an employer other than the Company in excess of the amount that would reduce the employee's state unemployment benefit to zero."

In March of 2020 Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act which, among other things, created the Federal Pandemic Unemployment Compensation program (FPUC). The FPUC provided an additional $600 per week to individuals who are collecting regular UC, including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX), PEUC, PUA, Extended Benefits (EB), Short Time Compensation (STC), Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), and payments under the Self Employment Assistance (SEA) program. The FPUC benefit was available for weeks of unemployment beginning after the date on which the applicable state entered into an agreement with the U.S. Department of Labor and ending with weeks of unemployment ending on or before July 31, 2020, capped at approximately four months of benefits. The FPUC did not alter the basic structure for each state's unemployment compensation benefits, which varied state to state both in terms of amount and length of time of the state benefits. Each state distributed the FPUC monies alongside its unemployment compensation benefits, with no reduction on state unemployment compensation benefit entitlement due to the FPUC monies.

The CARES Act also extended the duration of state unemployment benefits for thirteen weeks. That separate provision of the CARES Act is known as Pandemic Emergency Unemployment Compensation ("PEUC").

The Company applied the FPUC (as well as the 13-week extension of benefits) to calculate its offsets to the SUB under Article 8 (B). If, after all offsets were applied, an employee was entitled to greater than zero but less than $250 in weekly benefits, then the Company supplemented that employee's unemployment benefits with a $250 SUB payment. If, after all offsets were applied, an employee's weekly benefit amount fell to a number at or below zero, the Company did not pay a SUB payment. The Company's position was that if, after offsets were applied, an employee's weekly benefit amount fell to a number at or below zero, the employee had received the entire SUB benefit to which they were entitled under the BLA.

The Union grieved the Company's decision to utilize the FPUC to offset SUB payments, citing the Company's action as a violation of Article 8 (B) of the BLA. The parties processed the grievance to arbitration before the undersigned. The sole issue before me is whether the FPUC monies constitute "state unemployment benefits" as that term is used in the BLA for purposes of offsetting the weekly benefit.

ISSUE

Whether the Company violated Article 8 (B)(2)(c) by offsetting the $600 of Federal Pandemic Unemployment Compensation monies in calculating the weekly benefit? If so, what should be the appropriate remedy?

POSITION OF THE UNION

The Arbitrator should sustain the Union's grievance. State unemployment benefits are funded by the employers in each state through taxes. The cost for the administration of the state unemployment program is the responsibility of the Federal Government but the funding for state unemployment benefits is the responsibilities of the states. The state's unemployment office determines the eligibility requirements for weekly unemployment benefits. Not all states have the same rules and not all states have the same weekly benefits. The unemployment office is who determines the amount of the weekly benefit.

In Indiana the maximum weekly benefit is $390, in Illinois it is $470, in Ohio it is $480, Minnesota is $740 and Pennsylvania is $573. In Pennsylvania the benefit is paid biweekly instead of weekly as in Indiana and Illinois. In Pennsylvania there is also an automatic adjustment to the biweekly benefit when the balance in the unemployment compensation Trust Fund is low. This

reduction does not apply to other benefits that are funded by the federal government, such as the FPUC. When the state receives the federal money, they may deposit the money in their UC Trust Fund but it is tracked separately and cannot be used for the purpose of providing weekly state unemployment benefits.

Federal benefits like the Trade Adjustment Allowance ("TAA") and the CARES Act have eligibility requirements, a benefit amount, and an aim or goal for the benefit that is set by the federal government. Similarly, the TAA and CARES Act are both fully funded by the federal government. The states administer the benefits, but even the administration occurs under the stature and/or regulations set by the federal government. FEMA is another example of a federal program that is funded by the federal government. After the FPUC expired President Trump signed an executive order allowing the states to use FEMA to pay additional unemployment benefits if the state had any FEMA funds left.

The Union's witness, Mr. Wentworth, has a long history and impressive credentials working with state unemployment insurance. He knows how both the state and federal systems work. Wentworth worked with both the Connecticut Department of Labor, was the Chief Counsel to the Labor Commissioner and currently works with the National Employment Law Project. Wentworth's testimony made clear that the Union's position is the correct position: FPUC is not a state unemployment benefit. When Wentworth was cross examined by the Company the Company's advocate asked whether, if the UC Trust Fund was low on funds and could not meet its obligations, the state could receive federal monies. Wentworth testified that the state has three options: (1) it can lower the weekly benefit (which Michigan does), (2) stop paying the benefit, or (3) borrow money from the federal government – which the state would then have to pay back. Wentworth's testimony is credible and undisputed. The Company had plenty of time to rebut his testimony and they either chose not to or were not able to.

When the federal government enacts a supplement to state unemployment benefits such as TAA, Emergency Unemployment Compensation, or the CARES Act, the federal government determines the eligibility requirements, the amount of the supplement, and the number of weeks the supplement is paid. It is important to keep in mind that each of these programs are supplements to state unemployment because it is federal money and federal regulations that govern the supplement. The federal government has no authority to increase state unemployment benefits

because that is the responsibility of the states. Do not be fooled by the Company's attempt to characterize the FPUC as an increase to state unemployment benefits.

Although the states may deposit the federal funding for the FPUC into the UC Trust Fund they are tracked separately. The Company is claiming that because all of the funds go into the same fund the benefit is somehow converted to a state unemployment benefit is just another attempt to confuse the issue. Federal and state are not the same.

When the parties bargained the weekly supplemental unemployment benefit ("SUB"), they wanted to make it as simple as possible and give a greater consideration to employees with more seniority. The parties recognized that the wages of the employee are not the same, unemployment benefits vary from state to state, and the number of weeks varies from state to state. The parties simply agreed that each employee's weekly SUB would be calculated using 40 hours multiplied by the employee's base rate of pay, based on the employee's years of service to pay a percentage of their base pay. Employees with more seniority get a higher percentage of their base rate of pay and a longer benefit.

The Employer pays taxes for the state unemployment, so it is logical that the parties agreed to deduct the amount of state employment benefits from the employee's weekly SUB. The parties did not specify how many weeks the offset could be made because each state provides the state unemployment benefit for a different number of weeks. Michigan, for example, is twenty weeks while most other states are twenty-six weeks.

The parties agreed to a minimum weekly SUB payment of $250.00 for any week that an employee is entitled to a SUB payment. This minimum payment is expressly provided for in Article 8 (B)(2)(c).

The Company implied that the Union challenge the Company's decision to offset the SUB payment by the $600 FPUC money but did not challenge the extended unemployment which provided for an additional 13 weeks. It bears noting that no employee had received the additional 13 weeks at the time of the hearing so that issue was not in dispute. However, the Union would argue that the extended 13 weeks of unemployment is also covered by the grievance. The grievance is clear in that it states that the Company is in violation of Article 8, Section B of the BLA by not paying laid off employee supplemental benefits as required. As relief in the grievance, the Union sought the Company to make all employees whole for any lost earnings and trailing benefits.

This case is a contract interpretation case wherein the language and meaning of Article 8 (B)(2)(c) are clear. The Company is able to offset an employee's weekly SUB payment using the employee's state unemployment benefit, TAA and other excess compensation. The parties specifically defined other excess compensation because the phrasing was broad and unspecific, unlike state unemployment compensation or TAA.

The Company is asking the Arbitrator to rule that when the parties bargained the SUB offsets the parties intended "state unemployment benefit" to cover any unknown type of benefit paid through the state unemployment office no matter what it is. If the Arbitrator were to rule in this manner, the impact of such a ruling could open pandora's box. The Union submits that if the parties had intended to cover any benefit which is paid through the state unemployment office they would've phrased state unemployment benefits differently. It bears noting that if the parties had agreed to "state unemployment benefits and nay other unemployment compensation" the parties would not have had a need to add the Trade Adjustment Allowance (the federal program administered through state unemployment but funded by the federal government).

At the arbitration hearing the Company did not base their argument on the language of the BLA. Instead, they argued past practice, intent and "windfall" because the language does not support their position. The Company is asking the Arbitrator to add Federal Pandemic Unemployment Compensation to the list of offsets, which would exceed the Arbitrator's authority under the BLA. In order to successfully argue past practice and intent the Company must argue and prove that the language is ambiguous when it clearly is not. The only argument the Company had left was to claim that because the state has the federal funds and are processing the benefits that the FPUC is converted to a state unemployment benefit.

Both the FPUC and TAA are federal unemployment benefits which are paid by the federal government but processed through the state unemployment office. The Company also argued that the Union allowed the $25 supplement to the state unemployment benefits in 2009 to be used in the offset. Even if the Union was aware that the Company offset using that supplement, the clear meaning of the language rules. Past practice cannot be established by an isolated incident.

The Company is being greedy and wants the benefit that the federal government was providing to the citizens of the USA for being impacted or harmed by the COVID-19 pandemic – nothing more, nothing less. Clearly state and federal are not the same thing. This is not ambiguous language. If the parties wanted to offset all federal unemployment compensation they would have

said as much. The FPUC is not a state unemployment benefit. The Union's grievance must be sustained and all of the affected employees must be made whole.

POSITION OF THE COMPANY

The Union has the burden of proving all the elements of its case by a preponderance of the evidence. Based on the evidence herein, it is clear that the Union has not carried its burden in this case.

This case centers around the meaning of the words "state unemployment benefit." The Company contends that since the benefit at issue here (the $600 FPUC supplement) flows through the State of Indiana unemployment compensation system, the offset language of Article 8 (B) clearly applies. The Union apparently argues that the language is sufficiently ambiguous that resort to extrinsic evidence concerning the source of the funding (which was the focal point of Mr. Wentworth's testimony) is necessary to resolve the interpretation of the language at issue. However, if such extrinsic evidence may be evaluated the evidence undoubtedly supports the Company's position.

The Company's application of the $600 FPUC under the CARES Act as an offset to the weekly benefit received by eligible employees while on layoff is permitted by the BLA and is consistent with the language, the intent of the parties, and the practice of the parties during the 2009-201 economic downturn. The FPUC is a federally funded benefit administered by the states pursuant to voluntary agreements entered into between each state and the U.S. Department of Labor. It is an extension of the joint federal-state unemployment insurance program established by Congress through the Social Security Act of 1935. The application of the FPUC benefit as an offset is also consistent with the intent of Article 8 (B). The intent is to supplement unemployment benefits while employees are on layoff; the intent of Article 8(B) is not to put an employee on layoff in a better position than an employee who was working during that time.

The Union's assertions are irreconcilable with the basic underpinnings of the unemployment compensation system. The Union's central theme is that the FPUC is a federal benefit and therefore not a "state" unemployment benefit. The reality is that the federal government is only a source of funding for the benefit. The idea that the source of the funding alone determines whether the benefit is a state employment benefit as that term is used in the BLA does not hold water. Since its inception, federal funding has been a critical part of the unemployment insurance

system and the parties have never before distinguished or proportioned what is attributable to federal versus state sources of funding.

Even if one were to credit the Union's theory of the case, a different result cannot be reached since under the CARES Act, a state must voluntarily agree to participate in the program. Such a voluntary undertaking naturally confers the title of "state" benefit. Moreover, not only must the state first agree to the FPUC, the state also determines eligibility for the underlying benefit to which the $600 FPUC attaches. The state also administers the benefit and distributes the payment. The Union's witness did not dispute this.

The Union's position is inherently inconsistent since the only challenge made here by the Union is to the use of the FPUC's $600 as an offset but not to the offset of the PEUC's extension monies despite the fact that the supplement and the extension are products of the same federal action. The Union's position is also contrary to the practice of the parties. The FPUC is no different from the supplemental unemployment benefits funded by the federal government during the 2009-2010 economic downturn, which were used by the Company to offset weekly SUB benefits with no objection by the Union.

Lastly, the Union challenges any possibility for zero SUB but accepts the application of the calculations under the weekly benefit matrix under Article 8 (B)(2)(a)(2) which explicitly call for a zero-unemployment benefit percentage. When an employee's weekly benefit after offsets equals a number at or below zero, the employee has received the entirety of the percentage of base rate of pay and no further benefit is due. If, however, after all offsets are applied an employee is entitled to greater than zero but less than $250 in weekly benefits, the Company would supplement that individual's unemployment benefits with a $250 SUB payment. The Company's application of FPUC to the calculation of SUB is consistent with the language and intent of the BLA as well as the past practice of the parties.

The $600 FPUC supplement is a proper offset to the weekly benefit because it is a state unemployment benefit under Article 8(B)(2)(c). The FPUC is an extension of the joint federal-state unemployment insurance program, funded by the federal government and administered by the states. Congress established the joint federal-state unemployment insurance program with the purpose of "assisting the States in the administration of their unemployment compensation laws." Since its inception the unemployment insurance program has been a federal-state program in which states set their own eligibility rules and benefits levels, and tax wages to maintain a trust fund to

pay those benefits. Each state administers a separate UI program, but all states follow the same guidelines established by federal law.

The federal government funds state unemployment programs. This federal funding for the administration of unemployment insurance benefits and the distribution of unemployment insurance benefits through state agencies are so closely intertwined that they cannot be divorced from one another. The Union's position rests entirely on the idea that the FPUC is not a state unemployment benefit because it is federally funded but the funding cannot be detached from the administration of unemployment insurance benefits without the system falling apart. The federal government is responsible for funding the administration of the unemployment system in the states. The federal payroll tax known as the Federal Unemployment Tax Act ("FUTA") funds the costs of administering unemployment programs, loans to states to sustain unemployment insurance trust funds, and one-half of extended unemployment benefits.

The Union's witness admitted that the administration of unemployment benefits is a critical component of the unemployment insurance system and the delivery of benefits thereunder. Because the funding for the administration of state unemployment insurance benefits impacts the dollars available to run the necessary technologies for processing of claims, federal funding has a direct benefit on whether claimants get their benefits in a timely manner or at all. Federal funding for the administration of state unemployment insurance exceeds millions of dollars. In 2019, the U.S. Department of Labor distributed over 30 million dollars to the State of Indiana as a base funding amount for the operation of is UI program, with additional funds allocated each quarter for actual unemployment insurance claims above the base.

States borrow from the federal government to fund their unemployment insurance trust fund when their funds are depleted. Trust fund loans to states from the federal government exceed tends of millions of dollars. As of December 18, 2020, Indiana had drawn over 35 million dollars and has an outstanding advance balance of more than 117 million dollars. During the 2009 -2010 economic downturn, many states had to borrow heavily from the federal government to meet the demand for benefits. Throughout the pandemic federal dollars have bolstered inadequate state unemployment compensation. Federal funding of state unemployment benefits is not new. It is an intrinsic part of the overall program of supplying the benefit, a part that cannot be segregated from the unemployment program which Article 8(B) refers to as an offset from SUB. To read it any differently would require the Arbitrator to take on the hopeless task of trying to determine what

part of a benefit came from purely state taxes and what came from federal dollars. Such an exercise in futility clearly was not the intent of the parties when crafting the offset language in the BLA.

The CARES Act is simply an extension of the joint federal-state Unemployment Insurance Program which the BLA contemplates is a state employment benefit. The CARES Act provides for an expansion of state unemployment benefits which are administered by state unemployment agencies. The FPUC is only available after a state voluntarily enters into an agreement with the U.S. Department of Labor. The claimant receives FPUC from the state, not the federal government. States may also extend unemployment benefits to individuals who have exhausted their rights to regular state unemployment compensation by up to 13 weeks under the PEUC program.

The FPUC is administered by state unemployment agencies. The Union's own witness said that "the state determines eligibility for a core benefit to which the $600 attaches." From March 27th to July 25th, the basic rule was if you were eligible for any form of unemployment, even if it was only a dollar, the federal PUC, the $600 attached to whatever that payment was. The CARES Act provides for a weekly $600 FPUC benefit on top of regular unemployment insurance benefits and a PEUC extension as determined under state law but they are both considered regular compensation under the act. The FPUC and PEUC operate in tandem with the fundamental eligibility requirements of the federal-state unemployment insurance program, making these benefits no different than any other aspect of the unemployment insurance program. The source of funds used is an entirely irrelevant consideration for purposes of the Article 8 (B) "state" employment offset.

The Company's application of the FPUC is consistent with the offsetting of FAC and EUC benefits in 2009-2010. In 2009-2010 there was a weekly increase in unemployment compensation under the American Recovery and Reinvestment Act of 2009. The Federal Additional Compensation ("FAC") program provided a $25 weekly increase in unemployment compensation for eligible workers. This extra benefit was fully federally funded. States began to make these extra payments on March 1, 2009. The FAC program also extended the Emergency Unemployment Compensation ("EUC") which provided up to 20 weeks of federally funded benefits to eligible unemployed workers who had collected their designated state unemployment benefits. Much like the FPUC and PEUC, the FAC program, including the EUC extension, required the execution of an agreement between the states and U.S. Department of Labor and payment of the supplement

through federal funding. Receipt of the benefit was contingent on first being determined eligible for unemployment benefits under the applicable state's criteria.

In 2009 the Company included the $25 weekly increase in unemployment compensation to the weekly amount ($390/week in Indiana), and accordingly offset SUB benefits by a total of $415/week. The Union did not challenge or grieve the Company's decision to use the $25 unemployment supplement or the extension of unemployment duration period during the 2009-2010 economic downturn.

The Union's position is internally inconsistent and highlights the fallibility of its argument. The Union's sole theory in support of its grievance is that the Company could not deduct the FPUC's $600 dollar supplement from the SUB payment as a "state unemployment benefit." As the grievance and the Union's opening statement make clear, the only issue here revolves around the FPUC benefit. The Union's pursuit of the question to the Indiana Department of Workforce Development, was centered exclusively around the $600 FPUC benefit. It is, thus, uncontested that the Company's deduction of the $390 unemployment compensation benefit paid by the State of Indiana as part of the 13-week extension of such benefits made possible by the PEUC is not an issue. However, the source of that benefit is also the CARES Act, or in other words, the extension benefit exists only through federal funding. The Union cannot walk back this inconsistency. It simply could not be reasonably claimed now that the $390 could not be used as an offset to SUB. The underlying record, including the Union's grievance and the agreed upon second step minutes, recognizes this.

After the weekly benefit and offsets are calculated, Article 8 (B) provides, alternatively, for a zero SUB payment, a flat $250 SUB payment, or a $250+ SUB payment. The SUB benefit is an amount to which an employee is entitled only when some weekly benefit is due. The BLA does not limit the amount by which the weekly benefit may be offset. The parties understood the numbers were subject to change; otherwise, the parties could have set a specific number or ceiling for each offset category. This is in keeping with the intent of Article 8 (B) which is to supplement employment benefits while employees are on layoff. If no weekly benefit is due because the amount received from the sate in unemployment benefits exceeds the maximum weekly benefit allowed under Article 8 (B), ten employees cannot expect the windfall to which the Union purports the employee is entitled. Moreover, the language in the BLA contemplates he possibility of a zero SUB payment. For example, in the base rate percentage matrix, the employee with 2 but less than

10 years to continuous service who is laid off for more than 52 weeks has always landed at a zero SUB payment.

The Company had never before encountered a situation where an unemployment stimulus would be so large that it would reduce the weekly benefit amount under Article 8(B) to an amount at or below zero. In Indiana, the SUB offset for state unemployment benefits amounted to $990/week ($390 original state unemployment benefit + $600 expanded FUPC benefit. In some instances, the $990/week unemployment compensation benefit paid by the state offset SUB to a number at or below zero. In those circumstances, and consistent with the intent of the BLA's SUB provision, the Company did not pay SUB.

The Union's assertions prejudice employees who remained working during the Layoff Minimization Plan period. Several hypotheticals illustrate this point. The Union's application of SUB is prejudicial to employees who were not laid off and is simply incongruous with efforts to keep bargaining unit members employed during a time when economic security within the country's workforce was in such a fragile state.

The Union asserts that by the Company's actions "members have suffered losses and earnings, earning and monies that Congress intended to go to the laid off workers" and that, somehow, because the Company used the $600 FPUC as n offset that the benefit "did not go to the laid off citizen." Surely, the Union does not suggest that the Company collected the $600 FPUC from employees on layoff so what the Union presumably is suggesting here is that laid off employees should be receiving a premium benefit. That right, however, is nowhere in the BLA.

The Company's application of the $600 FPUC as an offset to the weekly benefit received by eligible employees while on layoff is permitted by the BLA, consistent with the language of Article 8(B), the intent of the parties, and the practice of the parties during the 2009-2010 economic downturn. The Company correctly did not pay SUB when an employee's weekly benefit after offsets equaled a number at or below zero because the employee had received the entirety of the percentage of base rate of pay and no further benefit was due. For these and all the other reasons, the Arbitrator should find that the Company did not violate the BLA in any way and should deny the Union's grievance.

FINDINGS AND DISCUSSION

The essential underlying facts in the within grievance are not in dispute and the issue is a straight-forward matter of contract interpretation. The rule primarily to be observed in the construction of written agreements is that the interpreter must, if possible, ascertain and give effect to the mutual intent of the parties. The collective bargaining agreement should be construed, not narrowly and technically, but broadly so as to accomplish its evident aims. In determining the intent of the parties, inquiry is made as to what the language meant to the parties when the agreement was written. It is this meaning that governs, not the meaning that can possibly be read into the language.

The entire controversy before me is wrapped up in whether the Federal Pandemic Unemployment Compensation ("FPUC") benefit fits within the meaning of "state unemployment benefits" as that term is used in Article 8 (B)(2) of the parties' BLA:

> **c. The amount of a Weekly Benefit may be offset only by the amount of state unemployment benefits, Trade Adjustment Allowance and any Excess Other Compensation, but in no event will the total Weekly Benefit be less than $250.00 per week for the Duration of Benefits.**

The parties agree that the FPUC monies do not fall within the Trade Adjustment Allowance or Excess Other Compensation. The phrase "Excess Other Compensation" is actually defined in the BLA and refers to monies paid by another employer. Therefore, the issue is limited solely to whether the Union met its burden to prove that the FPUC should not be considered a "state unemployment benefit".

If, as per the Company's position, the FPUC falls within the contractual meaning of "state unemployment benefits", then the Company would be allowed to offset the weekly benefit by the full amount of state unemployment and FPUC, subject to the limitation that "in no event will the total weekly benefit be less than $250.00 per week for the duration of benefits." Accordingly, even under the Company's interpretation, it would be a violation of the BLA for the Company to pay less than $250.00 for a weekly benefit to an employee.

If, as per the Union's position, the FPUC does not fall within the contractual meaning of "state unemployment benefits", the parties' BLA does not permit any offset for those monies in calculating the SUB. Employees would therefore be entitled to the weekly SUB benefit without any offset for FPUC benefits.

Although it may be stating the obvious, a plain reading of Article 8 (B)(2)c reveals that the parties chose to define the first category of offsets as ***state*** unemployment benefits. The decision to identify an offset based on "state unemployment benefits" must be considered as a deliberate choice of the parties when they bargained for the SUB. The parties could have used the term "unemployment benefits", which might have compelled a different outcome in this case, but they chose to specify "state unemployment benefits." The use of this term must be given effect, especially since the parties created a separate exclusion for a particular federal supplemental unemployment benefit, the Trade Adjustment Assistance program. That program was established to provide aid to workers who lose their jobs or whose hours of work and wages are reduced as a result of increased imports, and the parties agreed that payments under the TAA would be used as an offset in calculating the SUB. The parties included the TAA (a federally-funded supplemental unemployment benefit) as a separate category of offset – separate and apart from the state unemployment benefits – precisely because the parties recognized that federal programs do not fall within the term "state unemployment benefits" in Article 8.

Although it is true that the state unemployment compensation programs administer payment of the FPUC to their eligible claimants, in that the money flows through the state unemployment program, that fact alone does not resolve the inquiry of whether those payments fall under the contractual definition for "state unemployment benefits" in Article 8. The federal statute, and not the individual state unemployment statutes, provides for eligibility for FPUC. An individual must first be eligible for regular UC, including Unemployment Compensation for Federal Employees (UCFE) and Unemployment Compensation for Ex-Servicemembers (UCX), PEUC, PUA, Extended Benefits (EB), Short Time Compensation (STC), Trade Readjustment Allowances (TRA), Disaster Unemployment Assistance (DUA), or the Self Employment Assistance (SEA) program, to be eligible for FPUC. In fact, an individual will still be eligible for FPUC under certain conditions even when they are no longer eligible for state unemployment compensation benefits. These facts support the conclusion that the offset for "state unemployment benefits" does not encompass the federal FPUC benefits.

As the parties pointed out in their respective presentations, each state administers its own unemployment benefits under its own statute. There is no uniformity between the states about the amount of the benefit, the rules for eligibility, or the duration of benefits. Those features are dictated by each state's laws on the subject. By contrast, the FPUC is a federally-created program

of supplemental benefits that applies regardless of any differences or limitations arising from one state to the next.

The Company relies on two central facts to argue that the Federal Pandemic Unemployment Compensation benefits fall within the definition of "state unemployment benefits" in Article 8. The Company points to the fact that the benefits are paid through the state unemployment benefits agencies, and the Company argues that the role of the federal government is to provide the funding only, so that the benefits should be regarded as state benefits. Although these facts do lean in support of the Company's position, these facts are not dispositive. The fact is that the federal government created this benefit and also determined the eligibility rules and the size and duration of benefit payments. The federal government did much more than simply provide the funding; the federal government created the benefit and dictated how, how much, how long, and to whom the benefit would be paid. Those central undisputed facts tip the balance in favor of reading the contractual definition for "state unemployment benefits" in Article 8 as *not* encompassing the FPUC benefits. Moreover, although the parties did not allude to the extension of the FPUC (with a $300/week benefit) through March 2021, this analysis would apply equally to that renewal of the FPUC benefit.

Were I to accept the Company's position on this Grievance, the outcome would be for the Company to gain the benefit of the FPUC payments. The FPUC was put in place by the CARES Act and has the primary goal of alleviating the financial strain of the pandemic on workers. The mere fact that the benefit might result in providing more income to the laid-off workers than employees who remained at work does not compel a different outcome. My understanding of the FPUC payments is that they were intended to provide far more financial relief to workers than traditional state unemployment benefits, expressly because of the unique and compelling circumstances surrounding the pandemic, and without regard to the possibility that some employees might receive more in combined unemployment relief than they would be working. An interpretation of Article 8 that transfers that federal benefit from the employee to the Company simply because the payments pass through the state unemployment agencies seems like a complete windfall to the Company, and one that was never sought in bargaining.

The Company also argues that the term "state unemployment benefits" has been interpreted in the past by these parties to include a supplemental federal unemployment payment that was administered through the state unemployment agencies. The Company points out that in 2009-

2010, there was a weekly increase in unemployment compensation under the American Recovery and Reinvestment Act of 2009. The Federal Additional Compensation ("FAC") program provided a $25 weekly increase in unemployment compensation for eligible workers. This extra benefit was fully federally funded. States began to make these extra payments on March 1, 2009. The FAC program also extended the Emergency Unemployment Compensation ("EUC"), which provided up to 20 weeks of federally funded benefits to eligible unemployed workers who had collected their designated state unemployment benefits. Much like the FPUC and PEUC, the FAC program, including the EUC extension, required the execution of an agreement between the states and U.S. Department of Labor and payment of the supplement through federal funding. Receipt of the supplemental benefit was contingent on first being determined eligible for unemployment benefits under the applicable state's criteria.

The Company described how in 2009 the $25 weekly increase in unemployment compensation was added to the weekly state unemployment benefit amount ($390/week in Indiana), which prompted the Company to offset SUB benefits by a total of $415/week. The Company argues that the Union did not challenge or grieve the Company's decision to use the $25 unemployment supplement or the extension of unemployment duration period during the 2009-2010 economic downturn, and in the absence of any protest by the Union this Arbitrator should accept that interpretation as binding in the present circumstances.

I am not persuaded that the 2009 situation compels the conclusion that the Union accepted the Company's interpretation. First, there is no record evidence that the issue even came up in 2009. It is quite possible that employees did not understand or realize that the calculation of the SUB benefit was altered by the receipt of an additional $25 per week. I cannot accept the proposition that the earlier situation established a controlling interpretation for Article 8 when it is not at all clear that anyone was even aware of what had taken place.

Second, and perhaps most important, the 2009 benefit was tailored to be a supplemental part of existing state benefits. An employee had to be eligible under his/her state's eligibility rules for regular unemployment, at which the employee would then be eligible for the increased amount. The FPUC benefit is quite different, not just in the size of the benefit, but also in that the benefit extends even to persons not deemed eligible under individual state laws. The federal government determined eligibility, and the states then administered that determination. That distinction seems

very important in considering whether the current federal payment should be considered a "state unemployment benefit".

After finding that the contractual term "state unemployment benefits" does not encompass the CARES Act FPUC benefits, it is clear that there is no other authority to be found in the BLA that would allow the Company the ability to treat the FPUC benefit as an offset in calculating the SUB.

At the hearing, the Union represented that, as of that date, none of its members had begun receiving the thirteen weeks of additional PEUC benefits under the 2021 renewal of that program. Accordingly, the issue of whether the Company would be entitled to take an offset for the PEUC benefits paid under the 13-week extension does not appear to be ripe at this stage. However, in the event that the Company would assert a right to take an offset of those PEUC benefits under the "state unemployment benefits" category in calculating the SUB benefits, the reasoning set forth above would apply equally to that situation. Put simply, those additional thirteen weeks of PEUC benefits would not fall under the "state employment benefits" offset language in Article 8 (B)(2)(c).

The Company asserts a second issue. As I understand the Company's characterization of that issue, the Company poses the question of whether a weekly benefit payment of zero is permissible given the language of Article 8(B)(2)(c) which says that payments, after taking account of the offsets, must be a minimum of $250. The Company argues that if they prevail on the first issue of treating the FPUC benefit as an offset, then they still foresee circumstances where eligible employees would receive a payment of zero under Article 8 (B)(2)(c). The table set forth in Article 8(B) provides for a Supplemental Unemployment Benefit of "0%" for employees with two years but less than 10 years of experience for 53 through 104 weeks of unemployment. The Company relies on this provision in the table to suggest that the BLA contemplates a zero SUB payment even though subparagraph (c) provides for a minimum $250 payment. I do not accept the Company's suggested reading. I interpret that provision in the table to mean that the employee in that category of length of service is not eligible for any benefit after the 52nd week. However, that is not the same as saying a minimum SUB payment to an eligible employee can be zero.

When an employee is eligible for any payment, subparagraph (c) mandates that that payment must be at least $250. To the extent that the Company is pointing to that provision of the table when they suggest that there is a scenario where employees would receive a SUB payment

of zero, what the Company is really saying is that employees with 2 to 10 years of experience are still receiving a weekly SUB payment of zero after their 52nd week. That does not compel the conclusion that there are any other circumstances where an eligible employee would receive a weekly SUB payment of zero. To the extent that the Company is suggesting that there are other situations where an employee is entitled to some percentage and would nevertheless receive a zero payment, I disagree. The table does not establish a minimum payment, the table establishes an initial entitlement. The express language of Article 8(B)(2)(c) makes clear that once an employee is entitled to any payment, the minimum payment is $250 – not zero.

Accordingly, for all of the above reasons, the grievance must therefore be sustained.

AWARD

The grievance is sustained. Consistent with the above findings the Company must make whole all affected employees where it improperly offset the FPUC benefits in calculating the SUB and also calculated any SUB payments at zero.

Jurisdiction shall be retained in order to ensure compliance with this Award.

Date: Feb. 1, 2021
Pittsburgh, PA

Ronald F. Talarico, Esq.
Arbitrator