AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Tribunal
Case No. 01-20-0009-9824
James S. Cooper, Arbitrator

In the Matter of Arbitration between:	)	
DIANNE'S FINE DESSERTS, INC., Employer	)	
and	)	**OPINION AND AWARD**
UNITED FOOD AND COMMERCIAL WORKERS, INT'L UNION, LOCAL 1445, Union	)	
	)	**401(k) Match Grievance**

Introduction

The United Food and Commercial Workers International Union, Local 1445, ("Union") and Dianne's Fine Desserts, Inc. ("Employer" or "Company") are parties to a collective bargaining agreement ("Agreement") dated October 23, 2017 which provides in Article 24, Section 7 for final and binding arbitration of grievances as defined in Article 24, Section of 1.[1] On December 9, 2020 the Union, represented by attorney Alfred Gordon, and the Employer, represented by attorneys Christopher Kenney and Michelle De Oliveria, presented this case via videoconference. The parties filed post-hearing final argument via Briefs, Reply Briefs and Sur-reply Briefs on or about January 29, 2021.

Issues

The parties agreed that following issue is submitted for resolution:

[1] Article 24 provides in relevant part:

Section 1: "A grievance is defined as any dispute between the Company and the Union ... involving an alleged violation of the terms of this agreement or an alleged failure to comply with agreement, or a dispute as its interpretation or application..."

* * *

Section 7: "The arbitrator's decision shall be final and binding on the Employer, Union and employees and shall be in accordance with the terms of this agreement."

1. Whether the Company violated Article 18 of the Agreement[2] when the Company notified the Union on June 9, 2020 that the Company would suspend making contributions to the 401(k) Plan effective August 1, 2020?

2. If so, what shall be the remedy?

Facts

There are no disputed facts. As the name suggests, the Company manufactures food products at its plant in Newburyport, Massachusetts. The Company, like the rest of the world, got hit with the Covid virus and due to business retraction the Company closed the plant on April 2, 2019. The plant reopened in phases approximately three weeks later while providing employees with the required personal protective equipment and otherwise sanitizing the plant so that production could resume. There was great uncertainty at the time of reopening, April 18th and thereafter. Because of the shortage of supplies, the limited amount of product that could be produced and the absence of what had been continuous orders for product, the Company decided to suspend the Company's match to of the employees' contribution to the existing 401(k) plan. The Company notified the Union via e-mail from Human Resources Director, Susan Sweeney, to the Union's President Fernando Lemus:

> As you are … so well aware, we are living and working in such unprecedented times. On one hand we are slowly opening and working towards our new normal. On the other hand we are dealing with the reality it may be quite some time before we are back to the company we once were.
>
> Given the financial challenges we are facing, we are exercising our rights under ARTICLE 18 of the current CBA:
>
> "If the Company chooses to change Section 401(k) plans, it will provide the Union with reasonable notice."

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[2] Article 18 (*) provides:

> 401(K) Plan: The Company agrees to maintain the 401(K) plan for all employees with the opportunity to participate **at their 90th** day of employment. The plan allows the employee to save up to the IRS limit of their pay, and to provide **a 100% of the first 1% and 50% of the next 5%** Company match of each employee's contribution, up to a cap equivalent to 6% of the employee's gross annual pay; employees are **100% vested when they complete 2 years of continuous service** from the first day of enrollment. The Company shall maintain the 401(K) plan, subject to the terms, conditions, and provisions of such plan. If the Company chooses to change Section 401(K) plans it will provide the Union with reasonable prior notice.

(*) Bold print contained in Agreement.

> Therefore effective 8/1/2020 we will be suspending the Co0mpany match to the employee contributions to the 401(k) plan.
>
> Participants of the plan will be notified of the suspension on or by July 1.
> Please let me know if you have questions regarding the above planned action.

The Union disagreed with the Company's interpretation of Article 18 and the current grievance followed. At the arbitration hearing, the Union presented the contract language as the basis for its claim. The Company defended its actions on the basis of the language, the bargaining history of Article 18 along with the Company's past practice. The bargaining history of Article 18 and evidence of past practice follow.

History of Article 18 Language

The Company had a pre-existing 401(k) retirement plan when the Union negotiated its first Agreement in 2007 where the Union proposed:

> The Company agrees to continue with the 401(k) plan with the opportunity to save up to 15% of their weekly pay and for a 100% Company match of the employee's contribution up to a cap equivalent to 6% of the employee's gross annual pay: 100% vested from the 1st day of enrollment. The Company shall maintain the 401(k) plan, subject to the terms, conditions and provisions of such plan. If the Company chooses to change section 401(k) plans it will provide the Union with reasonable prior notice and the opportunity to negotiate such changes.

The Company counter-proposed the following:

> The Company agrees to maintain the 401(k) plan for all employees with the opportunity to participate from the first day of employment. The plan allows the employee with the opportunity to save up to 20% of their weekly pay, and to provide a 50% Company match of each employee's contribution up to a cap equivalent to 6% of the employee's gross annual pay: employees are 100% vested when they complete 3 years of continuous service from the 1st day of enrollment. The Company shall maintain the 401(k) plan, subject to the terms, conditions and provisions of such plan. If the Company chooses to change section 401(k) plans it will provide the Union with reasonable prior notice..

The Union accepted the Company's proposal and this language remained in every contract almost intact with a few changes. In the negotiations for the 2014 to 2017 Agreement, the parties modified the amount an employee could save from "up to 20% of their weekly pay" to "up to the IRS limit of their pay."

During the term of the 2014 to 2017 Agreement, the Employer's Director of Human Resources notified the Union on October 22, 2015 that she wanted to meet with the Union to

discuss the Company's 401(k) plan. Thereafter Sweeney met with the Union's representatives including Lemus and explained that having employees fully vested from their first day of enrollment was an administrative headache because some people left after only a short time with the Employer and so they left with very small amounts vested in their 401(k) accounts. These small amounts had to be accounted for and kept on the books for years. Sweeney sought to change the 401(k) eligibility to being vested after their 90th day of employment. Lemus testified that he was unsure if the employees would agree to that and that he would let her know about the Company's request. Sweeney urged Lemus to take it to a vote. About a month later Sweeney followed up with Lemus and urged him via e-mail to "allow the employees/members an opportunity to vote on this matter."

Lemus spoke to the Union's stewards and they agreed to this modification of the Agreement. Their rational was that new employees were on a 60-day probationary period and there was significant turnover among new employees. Lemus also explained that there had been good will established with the Company over modifications in the sick leave provisions of the Agreement because of the new Massachusetts paid sick leave law and he wanted to reciprocate. Lemus informed Sweeny that the Union agreed with the Company's request. Thereafter Sweeney prepared a Memo of Understanding which modified Article 18 which the Union and the Company signed on January 1, 2016 as follows:

> The Company agrees to maintain the 401(k) plan for all employees with the opportunity to participate upon completion of 90 days of continuous employment. The plan allows the employee with the opportunity to save up to the IRS limit of their of their pay and to provide a 50% Company match of each employee's contribution up to a cap equivalent to 6% of the employee's gross annual pay; employees are 100% vested when they complete 3 years from the 1st day of enrollment. The Company shall maintain the 401(k) plan, subject to the terms, conditions and provisions of such plan. If the Company chooses to change section 401(k) plans it will provide the Union with reasonable prior notice.

During the negotiations for the 2017 to 2020 Agreement the parties agreed to an enhancement of the Company's 401(k) match by increasing it to 100% of the first 1% and 50% of the next 5% of the employee's contribution (see footnote 2).

Union's Argument

The Union argues that the language of Article 18 is specific and crystal clear. The arbitrator must enforce the language precisely as written. Further the Union argues that the Company has never unilaterally changed the terms of Article 18 and the mid-term negotiation in 2015 over restricting

eligibility for participation in the 401(k) plan unequivocally demonstrated that any change in its terms had to be negotiated, including the Company's match.

Company's Arguments

The Company's arguments are as follows:

- The Union failed to present evidence as to its interpretation of Article 18 of the Agreement;
- The Union's 2007 proposed language that the Company "agreed to … and provide for.. a Company match" was rejected and replaced with language that 'allows" the Company to provide the match. This discretion with respect to the 401(k) plan includes the right to eliminate the match.
- Because the last sentence of Article 18 fails to specify "plan administrators" or "plan providers" the Company has the unfettered right to "change" the plan by eliminating the Company match. The Union's 2007 proposal sought the right to negotiate over "changes" in the Plan; but if it such were the case, the Union would have sought the right to negotiate over the "change" not "changes," thus indicating that with the abandonment of the Union's initial proposal, it left the Company with the unilateral right to make any "changes" in the 401(k) including ceasing the Employer's match.
- A more logical interpretation of the language is "[i]f the Company chooses to change **[the]** Section 401(k) Plan**[],** it will provide the Union with reasonable prior notice."
- The cases cited by the Union are inapposite because the contract clauses involved had significantly different provisions and protections to an employee benefit of health insurance.
- With respect to the January 1, 2016 Memo of Understanding, the Company argues that there was no give and take; there was no consideration provided to the Union; there was no vote taken by the employees; it was simply a unilateral decision made by the Company that the Union simply agreed with.
- The Company argues that its interpretation of the subject language is reasonable and cites for support of its position *In re Spirit Airlines and Association of Flight Attendants,* 2007 WL 83190128; System Board of Adjustment (Gil Vernon, Chairman, Dave Burgett, Company Member, Carmen Linn, Union Member). There the arbitrator, dealing with the Company's failure to match a 401(k) contribution, found the following language "The

Company shall match up to five (5%) percent of the Flight Attendant's salary on a monthly basis," as not requiring such a contribution and denied the Union's grievance. In that case the arbitrator found that the Flight Attendant's had negotiated language with respect to other benefits that the Company "shall not diminish" those benefits. The Union in this case had full opportunity to negotiate such protection against diminishment of benefits. It did not. Moreover the arbitrator wrote a paragraph fully applicable to the current grievance:

> There is also the notion that there would be no purpose to agree to a 401(k) provision if the match was discretionary. However, 401(k) provisions are still a meaningful benefit, without a match, because it activates the opportunity, under the tax code, for an employee to shelter earnings from current income tax. So, this is one of a number of reasons that explain why the Union might agree to a 401(k) even without a mandatory matching contribution.

Discussion

Despite the valiant, thoughtful and creative efforts of the Company's attorneys, this case turns completely on the plain meaning of the contractual language and is fully supported by the Company's action to modify Article 18 in 2015. The Union negotiated a compulsory match if and when the employee wanted to contribute to a 401(k) program. Thus the provision "[t]he plan allows the employee to save up to the IRS limit of their pay, and to provide... a Company match...." The discretion was clearly on the employee and to encourage employee participation, the Company agreed to the percentage match. This was certainly a well thought out bargain on the Union side and the Company side. It encouraged employees to think about retirement and to contribute to such. The United State tax code was designed to provide this inducement as a national policy. The Company is correct that this tax policy would be beneficial to the employee even without the Company match, but the Company was also using this match as a means of retention of employees, admittedly an issue for the Company.

The Company's real focus is on the last sentence of this article, but a fair reading of that provision must lead to the conclusion that the reference to "plans" was meant to specify the particular type or nature of the 401(k) plan. There are lots of different types of 401(k) plans available and it is the selection of which plan the Company wants to employ that is not negotiable with the Union. Thus, in the 2007 negotiation, the Union sought to have direct input on which plan the Company could offer employees. The Company must have shuddered at such a thought and offered the Union "reasonable notice" lieu of the ability to partake in such decision making, particularly since the Company many very

well offer the same plan to its supervisors and managers and would not want the Union's input on a plan covering those employees.

The 2015 mid-term bargaining history, although unnecessary to interpret clear language, fully supports the conclusion that a modification of specific term of Article 18 required Union agreement. The fact that the Union got no economic *quid pro quo,* for its agreement to modify the eligibility requirement does not mean there was no negotiation. As the Union President explained, the Union's good will on relieving an admitted Company headache was, in the coin of the labor relations realm, consideration for this agreement. That the bargaining unit did not vote on the Company's proposal did not render the Company's action a fictious exercise camouflaging the Company's unilateral right to make the change. It demonstrated a very reasonable back and forth, a negotiation between partners, over a term and condition of employment; which is precisely what the Company was obligated to do in the current instance.

The Company's citation to *Spirit Airlines* misses the mark. A careful reading of that decision shows that despite the use of the word "shall" match, that match was subject to what all of the other (except the pilots) got for a match. Furthermore during negotiations the Flight Attendants withdrew language which would have required the airline "not to diminish" the match; language which the Flight Attendants attained with respect to certain other benefits. While no case is ever on all fours, the *Spirit Airlines* decision is not persuasive given the unequivocal language of Article 18 and the parties clear intent.

Award

For these reasons the following is hereby awarded:

1. The Company violated Article 18 of the Agreement when the Company notified the Union on June 9, 2020 that the Company would suspend making contributions to the 401(k) Plan effective August 1, 2020.

2. The Company shall reinstate the Company match and shall retroactively match employee contributions made on or after August 1, 2020 and thereafter until the match is reinstated.

Date: February 13, 2021

James S. Cooper