JUDICIAL ARBITRATION UNDER AAA ARBITRATION RULES

Pursuant to the 10/16/19 *Settlement of Litigation & Effects Bargaining Agreement* between GM and UAW and the FRCP 41(a) *Voluntary Stipulation of Dismissal with Prejudice* of Case No. 19-cv-00420 (*UAW v. GM*), United States District Court, Northern District Of Ohio, Eastern Division. [As filed and approved by Judge Benita Y. Pearson--4:19-cv-00420-BYP Doc. #37, 12/05/19].

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In the Matter of an Arbitration Between

INTERNATIONAL UNION, UNITED AUTO, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW)

- and -

GENERAL MOTORS LLC (GM)

PHASE II-REMEDY: ELIGIBILITY/COMPONENTS

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Dana Edward Eischen, Impartial Arbitrator

APPEARANCES

For the UAW: BREDHOFF & KAISER, P.L.L.C.
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For GM: OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
By: Scott R. McLaughlin, Esq.
Mami Kato, Esq.

PROLOGUE

This arbitration arose out of the Court-approved October 16, 2019 *Settlement of Litigation & Effects Bargaining Agreement* ("Settlement Agreement") between International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW ("UAW" or "Union") and General Motors, LLC ("GM" or "Company"), collectively, "the Parties". That Settlement Agreement resolved nearly all of the issues litigated in *UAW v. GM* United States District Court, Northern District Of Ohio, Eastern Division (Case No. 19-cv-004200) except for two (2) unresolved issues submitted to final and binding arbitration.

The Parties designated me to hear and decide, under AAA Voluntary Arbitration Rules, the unresolved issues described in §3(c) of their Settlement Agreement. [Case No. 19-cv-00420 (*UAW v. GM*), United States District Court, Northern District Of Ohio, Eastern Division]:

> (i) "[W]hether any UAW member actively employed at an Unallocated Plant as of 11/26/18 who chose to accept employment at another GM facility in lieu of layoff from the Unallocated Plant is entitled to MSR [mutually satisfactory retirement] benefits arising out of the loss of his/her position at the Unallocated Plant".
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> (ii) "[W]hether employees [who?] lost wages between 11/26/18 and 9/14/19 who continued employment with GM should be made whole".

Among other things, that Agreement expressly preserved all defenses in such arbitration, including the Company's threshold jurisdictional/subject matter substantive arbitrability objections. Thereafter, the Parties agreed to bifurcate these arbityration proceedings, with substantive arbitrability and merits of the submitted issues to be determined by a Phase I-Arbitrability/Merits decision. Presentation of evidence and advocacy on the issue of potential "make-whole" compensatory remediation, if any, was reserved for this Phase II-Remedy arbitration.

The submitted §3(c)(i) issue queried whether employees who accepted "forced" juniority transfers to different GM plants, in lieu of remaining laid off in "L-34" (without benefits) from their home plant communities, are entitled to retirement benefits under the GM Supplemental Pension Plan Agreement and the GM Hourly-Rate Employees' Pension Plan Agreement. The Phase I Award dismissed that "MSR benefits entitlement" issue for lack of substantive arbitrability under USWA v. Warrior & Gulf Navigation Co. and AT&T Technologies, Inc. v. CWA decisional standards.

The crux of the submitted §3(c)(ii) issue, which I found arbitrable, was UAW's claim that GM breached the October 25, 2015 Document 13 Letter, which limited the Company's managerial discretion to "close, idle, ... partially or wholly sell, spin-off, split-off, consolidate or otherwise dispose" of the three involved plants during the term of the 2015 GM/UAW National Agreement. Turning to the merits, the Phase I Award answered that question in the affirmative; finding persuasively proven violations of the applicable Document 13 Letter by GM's premature idling of the Lordstown, Ohio plant on March 8, 2019, the White Marsh, Maryland (Baltimore) Plant on May 03, 2019 and the Warren, Michigan plant August 1, 2019.

The Phase I Award remanded to the Parties for further evidentiary development, discussion and possible resolution whether, or to what extent, compensatory "make-whole" remediation for those proven Document 13 violations is warranted in individual cases; while retaining arbitral jurisdiction and authority to award such remediation, if necessary, in Phase II of these bifurcated proceedings. Prior to invoking my retained jurisdiction to hear and decide the unresolved "make-whole" disputes in this iniotial Phase II-Remedy arbitration, the Parties commendably resolved many of the difficult issues of remedy eligibility and remedy composition presented by this large complex case.

PROCEEDINGS

Prior to June 7 and 8, 2023 virtual Phase II-Remedy arbitration hearings recorded and transcribed by Veritext on the Zoom platform, the Parties submitted and exchanged Phase II arbitration witness lists, exhibits, stipulations, mutually agreed hearing rules and prehearing briefs. Each of the Parties was represented by legal counsel in those remote hearings and equally afforded full and fair opportunities to present oral advocacy and evidence in support of their countervailing positions; including direct and cross-examined testimony of sworn witnesses, as well as factual and demonstrative documentation. Following receipt of the hearing transcripts, the evidentiary record was closed with a round of post-hearing briefs and reply briefs, a process which was completed on August 7, 2023.

UAW/GM ARBITRATION: SUMMARY OF DISPUTES (JX-9)[1]

I. Eligibility[2]

The Parties dispute the eligibility of the following groups (some employees fall within multiple categories in dispute):

1. 84 individuals who worked on either the second or third shifts at the Unallocated Plants as of November 26, 2018.
2. 119 individuals who declined one or more voluntary offers to transfer before accepting subsequent offers to transfer. [This consists of 78 individuals who declined a voluntary offer prior to going on layoff and 41 individuals who declined a voluntary offer after being on layoff].
3. 5 individuals who declined involuntary offers to transfer and had "L-34" periods of layoff, prior to accepting subsequent offers to transfer.
4. 53 individuals who have separated from employment as of July 4, 2022.
5. 110 individuals who experienced temporary periods of layoff during the relevant period at the plants to which they transferred.
6. 2 individuals from Lordstown, and 33 employees from Warren, who were laid off shortly before production ceased at their plants.

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[1] See Attachment A

[2] The UAW has identified 797 individuals that it believes to be eligible for a remedy. GM does not seek to exclude 487 of those 797 individuals that the Union has identified.

II. Components of a Remedy[3]

The Parties agree that overtime wages should be accounted for in a make-whole remedy, but disagree as to the method for determining remediable unpaid overtime. The Parties also dispute whether the following components should be included in a remedy:

1. 74% of straight wages that would have been earned, at the rate of eight hours per weekday, for each day of layoff that falls on a weekday, for 56 employees who did not receive Supplemental Unemployment Benefits ("SUB")

2. Pension credit (for pension eligible employees)

3. "Progression" credit under the "Memorandum of Understanding UAW-GM Wage & Benefit Agreement for Employees In-Progression" (JX-2 at PDF page 288)

4. Vacation accrual credit under ¶ 192 of National Agreement (JX-2 at PDF page 166)

5. Weeks Worked credit under Document 146 (JX-2 at PDF Page 678)

6. COBRA premium reimbursement

7. $11,000 ratification lump sum bonus under Document 92 of 2019 National Agreement (UX-46) for employees who did not receive it

8. Interest

9. Retained arbitral jurisdiction (pursuant to the UAW's proposal)

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[3] There is no dispute as to the inclusion of the following six (6) components of a remedy for all eligible employees: Straight time wages (reduced to 26%); 2019 profit sharing payments; 4% performance bonus for employees who were employed as of October 7, 2019; $1,000 performance bonus for employees who were active or in a temporary layoff status as of May 15, 2019; 401(k) 6.4% contribution (for those eligible); and, 401(k) $1 per hour contribution (for those eligible).

POSITIONS OF THE PARTIES

The following summaries have been edited from the respective post-hearing briefs:

UAW

The UAW's position in this arbitration is simple and conventional: the 797 employees who lost wages as a result of GM's breach should be made whole for the wages, benefits, and all contractual entitlements they would have received but for GM's breach. The remedy the UAW seeks is designed, to the extent reasonably possible, to do just that.

Accordingly, UAW urges the following should be adopted in full as the remedy in this matter:

I. Eligibility

In addition to the 487 undisputedly eligible individuals, the following groups disputed by GM should be included as eligible for the "make-whole" remedy (some individuals fall within more than one group):

- 84 individuals who were assigned to the second or third shifts at one of the Unallocated Plants as of November 26, 2018.
- 119 individuals who declined one or more voluntary offers to transfer before accepting subsequent offers to transfer. This group consists of 78 individuals who declined voluntary offers prior to going on layoff and 41 individuals who declined voluntary offers after being on layoff.
- 5 individuals who declined involuntary offers to transfer, and had "L34" periods of layoff, prior to accepting subsequent offers to transfer.
- 53 individuals who separated from employment after the ratification of the new national agreement on October 28, 2019, and before July 4 (sic), 2022.
- 110 individuals who experienced temporary periods of layoff at the plants to which they transferred prior to September 14, 2019.
- 2 individuals from Lordstown, and 33 individuals from Warren, who were laid off shortly before production ceased at their plants.

II. Components of a Make-Whole Remedy

In addition to the agreed-upon components, the make-whole remedy should include the following components, all of which GM disputes:

- 100% of straight wages that would have been earned, at the rate of eight hours per weekday, for each day of layoff that falls on a weekday, for 56 employees who did not receive Supplemental Unemployment Benefits ("SUB").
- Overtime wages that would have been earned during the periods of layoff. The UAW proposes that projected overtime compensation be calculated on an individual basis based on weekly averages of overtime hours derived from 2018 payroll data.
- Progression credit toward pay raises and benefits.
- Vacation accrual credit.

- Weeks worked credit under Document 146.
- COBRA premium reimbursement.
- $11,000 ratification lump sum bonus for employees who were impacted by the breach and who have not received the bonus.
- GM should pay interest in conjunction with the monetary remedies. Interest on the non-401(k) components of the make-whole remedy should be calculated using a method that produces a result equivalent to that from the U.S. Office of Personnel Management's Backpay Interest Calculator. Interest for the 401(k) plan contributions should be calculated pursuant to I.R.S. Revenue Procedure 2019-19.

III. Retained Jurisdiction and Process Following an Award

To resolve any disputes that may arise regarding the parties' calculations or determinations following an award, the Arbitrator should retain jurisdiction for a period of at least 120 days following an award. The UAW further proposes that the following process shall be prescribed to implement the award:

- In the first 30 days, the parties should confer to reach agreement about any calculations and determinations that must be completed following an award. In the event that any disputes cannot be resolved, they should be presented to the Arbitrator for determination.
- Each individual shall have 60 days from receipt of payment to raise a dispute about the amount received. If the parties cannot resolve the dispute, it shall be raised to the arbitrator within 30 days of the dispute having been communicated to both parties.
- Any individual who did not receive a payment may come forward to make a claim at any time prior to the date the arbitrator relinquishes jurisdiction. If the parties cannot resolve the dispute, it shall be raised to the arbitrator within 30 days of the dispute having been communicated to both parties.
- The arbitrator may extend the period of his jurisdiction by mutual agreement or for good cause shown by either party.

General Motors

Since the Union claims "make whole" damages based on the Arbitrator's finding that GM violated Doc. 13, the best way to determine those damages is to determine what the employees would have been paid without a violation of Doc. 13. The Arbitrator (and the Parties) should analyze the Union's damages claims based on a hypothetical scenario – where GM did not end production at the Lordstown, Ohio, White Marsh, Maryland (Baltimore), and Warren, Michigan plants until September 14, 2019, the date of the expiration of the 2015 National Agreement and thus in compliance with Doc. 13.

Market-driven volume decline severely affected the production at these three plants and GM ended production on March 8, 2019, at Lordstown, May 3, 2019, at Baltimore, and August 1, 2019, at Warren. However, that slowed production would have continued in those three plants, and even worsened, through September 14, 2019. Accordingly, GM would have continued to reduce

personnel and overtime to address the reduced production schedules and would have reduced or eliminated shifts, consistent with its contractual rights.

GM's positions on the remaining disputed issues submitted in the Joint Summary of Disputes are described below:

1. Certain Classes of Employees Should Be Excluded from the Phase II Award Because:

(A) Their damages are speculative at best and fail to meet the requisite certainty standard for: (1) damages attributed to employees on the second or the third shift; and (2) damages associated with layoffs from the transfer plants;

(B) They failed to mitigate their damages (employees who declined voluntary and involuntary transfer offers); and

(C) Their damages claims fall outside of the Arbitrator's Phase I Award.

2. The Union's Unpaid Overtime Calculation Does Not Contain Established Economic Loss or Proper Make-Whole Remedy and Should Be Rejected Because:

(A) The Union's overtime calculation ignores the facts that (1) most employees earned more overtime wages in a partial 2019[4] than a complete 2018; and (2) GM actually paid more in overtime in the aggregate in 2019 than it would have in Universe Two, meaning most employees have already been made whole for any lost overtime; and

(B) The Union's calculation did not account for these facts to determine which employees still needed to be made truly whole for any unpaid overtime and which employees earned more in 2019 and thus are not entitled to any additional overtime wages as a make-whole remedy.

3. The Phase II Award Should Not Include Additional Components that the Union Seeks Because:

(A) Employees who did not receive SUB never applied for it per GM's SUB Plan;

(B) Any interest, much less 17.901% interest, represents a punitive result, which is not supported by the record evidence or applicable arbitral history or precedent;

[4] The 2019 payroll spreadsheet used by the Parties in the Phase II arbitration provided weekly payroll information through September 15, 2019. (DX-20).

(C) $11,000 Ratification Bonus is a negotiated term in Doc. 92 of the 2019 National Agreement. The Union excluded employees on indefinite layoff from Doc. 92, and it is inappropriately trying to amend Doc. 92 by this arbitration;

(D) The Parties agreed under the 2015 National Agreement that determination about pension credit is not within the Umpire's (and the Arbitrator's) authority; and

(E) The Union presents no evidence, calculation, or established economic loss for the vacation, weeks worked, and progression credits and COBRA premium reimbursements it seeks.

4. The Union's Request for the Arbitrator to Retain Jurisdiction Should Be Rejected Because:

(A) It is improper to allow the Union an additional 120 days to change its damages calculations; and

(B) Doing so could improperly expand the pool of eligible employees by allowing its members to challenge the calculations and assumptions that the Union presented in this Phase II arbitration.

DISCUSSION

I. DISPUTED REMEDY AWARD ELIGIBILITY (Some Employees Fall Within Multiple Categories In Dispute)

84 Individuals Who Worked On Either The Second Or Third Shifts At The Unallocated Plants, As Of November 26, 2018.

2 Individuals From Lordstown/33 Employees From Warren, Who Were Laid Off Shortly Before Production Ceased At Their Plants

Dispute: UAW asserts make-whole remediation eligibility of 84 identified individuals, who were laid off from their second/third shifts "shortly before" GM idled their respective plants prematurely, in violation of Doc.13. GM points out that it exercised its undisputed contractual right to reduce Lordstown to one shift in June 2018 and that, even if it had waited until September 14, 2019 to idle those plants, it would have done the same at the Baltimore and Warren plants well before the Doc. 13 violation dates identified in the Phase I Award. The Union also contends that 33 employees from Warren and two employees from Lordstown should be made whole for layoffs "shortly before" the respective Doc. 13 violation dates at those two plants. GM maintains that eligibility of these 35 individuals is not only speculative but unsupported by the express terms of the Phase I Award.

Analysis: The case record shows GM reduced Lordstown to just one assembly shift in June 2018 but retained certain skilled trade and maintenance employees on second and third shifts after that date. Baltimore ran three shifts right up to May 3, 2019, when it prematurely ceased production and Warren also continued to operate two shifts right up to August 1, 2019, when it prematurely ceased production. Just as with the employees who suffered post-transfer layoffs at their "new" plants, *supra*, the UAW made a *prima facie* demonstration that these layoffs of 83 identified second and third shift individuals prior to September 14, 2019 are persuasively linked to the respective plant idle dates that the Phase I Award identified as Doc.13 violations.

As for Warren, GM operated the second shift until it prematurely ceased plant production on August 1, 2019. UAW persuasively established the implausibility of speculation by GM that it would have cut the second shift at the Warren plant on or before that date. If, *arguendo,* GM had actually tried to end the second shift at Warren earlier, a condition precedent was initiation and completion of a lengthy CBA-required process of notice to and engagement with the UAW in discussions around the order of such layoffs, retirement packages, and transfers, among other topics. It is highly unlikely that mandatory process could have been completed in the mere 6-week period between August 1 and September 14, 2019. Regarding White March (Baltimore), the only hard record evidence about the Company's actual intended layoff plan is the August 2018 "Wall Review"--a confidential business plan GM shared with the Union three months before November 2019--wherein the Company projected the referenced second and third shift employees at White March would retain their jobs and shifts up to and through the September 14, 2019 expiration of the 2015 National Agreement. *See* UX-8; s*ee also* Tr. at 48:11-14, 50:18-51:9.

In short, the Company was unable to effectively rebut the well-established legal presumption that business operations at the respective prematurely idled plants would have continued as usual until September 14, 2019, but for the proven Doc. 13 violations. *See* 1621 Route 22 W. Operating Co., 371 NLRB No. 86 (Mar. 24, 2022): "[A]bsent persuasive countervailing evidence, making employees whole requires assuming that they would have worked the same number of hours but for the Respondent's [unlawful acts]." *See also* Boland Marine & Mfg. Co.*,* 280 NLRB 454, 461 (1986)*, aff'd*, 851 F.2d 1420 (5th Cir. 1988) (holding that a "respondent in a backpay proceeding has the burden of demonstrating that unlawfully discharged employees would have been terminated for economic reasons"); NLRB v. Charley Toppino & Sons, Inc., 358 F.2d 94 (5th Cir. 1966) (finding that limited evidence of declining operations was insufficient to show an employee's job no longer would be needed).[5]

In addition to that, GM's assertion that all 84 of these particularly identified second and third shift individual would have been the employees laid off in a "Universe 2 scenario" is not persuasively established. Authoritative precedent, *supra*, also requires that a persuasive showing of ineligibility must be made as to each individual Claimant.

[5] The cited decisions arose in the context of violations of the NLRA, but the underlying make-whole principles are as applicable in this contract violation layoff case as in a regulatory or statutory violation case.

See Boland Marine & Mfg. Co.*, op. cit.* In that connection, a senior employee laid off from those shifts had CBA bump rights to displace junior employee from first shift positions; setting off a "waterfall" of related bumping. Even if the Company had complied with Doc. 13, the available record evidence does not support speculation that that these particular 84 identified second or third shift individuals would have been the ones ultimately laid off due to the Doc.13 violations. The foregoing "business as usual" presumption, interpretive principles and authoritative are equally applicable to those situations.

Finally, the July 6, 2022 Phase I Merits Award determined that the Company violated Doc. 13 by idling the Lordstown plant on March 08, 2019 and the White March (Maryland) plant on May 03, 2019. The case record indisputably establishes that GM laid off the 2 identified Lordstown Claimants "a few weeks before" and laid off the 33 identified White March "just three (3) days" before those contract-violating plant idling dates. GM did not refute effectively UAW's assertion that the work performed by the few second and third shift employees remaining at the Lordstown Complex as of the March 19, 2019 idle date (primarily maintenance, skilled trade and paint specialists) directly supported the work of Lordstown's first shift production operation, which was idled in violation of Doc. 13. Therefore, because those particular layoff also were proximately caused by the Doc. 13 violations, the 2 identified Lordstown individuals and 33 identified White March (Maryland) individuals who were laid off "shortly before production ceased at their plants" also are eligible for applicable Phase II make-whole remediation.

Conclusion: 84 individuals who worked on either the second or third shifts at the unallocated plants as of November 26, 2018 are eligible for applicable Phase II Award make-whole remediation. 2 individuals from Lordstown and 33 employees from Warren, who were laid off shortly before production ceased at their plants, are eligible for applicable Phase II Award make-whole remediation.

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53 Individuals Who Have Separated From Employment
[As Of July 6, 2022]

Dispute: Under the Settlement Agreement, the Parties agreed, among other things to afford individuals who had been laid off from the Unallocated Plants a right of election between: (1) Give up CBA seniority and continued employment with the Company in return for accepting the benefits of a “Special Attrition Program” (“SAP”); or, (2) Retain and exercise CBA seniority to continue employment with the Company and arbitrate 'whether employees [who] lost wages between 11/26/18 and 9/14/19 who continue employment with the company should be made whole.”

The case record shows that hundreds of employees who were laid off from one of the prematurely idled plants took the option of exercising their existing 2015 National Agreement plant seniority-based rights to transfer to a different GM plant and continue their employment with the Company. Thereafter, between the October 28, 2019 effective date of the Settlement Agreement and the July 6, 2023 effective date of my Phase I Decision, 53 of those individuals separated from GM's employment for various reasons. including retirement due to illness.

UAW asserts and GM opposes the eligibility of each such individual to claim Phase II make-whole remedial damages. The Union maintains the employees in question "continue[d] employment", within the meaning of the Settlement Agreement and the Phase I Award by continuing to work after the time that they could have left GM under the Special Attrition Program (SAP)". GM counters that because of the present tense "continue", employees who were not employed by GM on the issuance date of the Phase I Award must be excluded from the Phase II Award.

Analysis: In short, this eligibility dispute turns on the meaning of the Settlement Agreement phrase "continue employment with the company", *supra*. Each of the Parties proposes a colorably reasonable but mutually contradictory interpretation of that disputed verbiage and its bargaining history. When considered in context, both the words and bargaining history of the disputed phrase are amenable to more than one reasonable interpretation. Contract wording is considered ambiguous "when plausible contentions can be made for conflicting interpretations." *See* Armstrong Rubber Co., 17 LA 741 (Gorder, 1952); Schnuck Markets, Inc., 107 LA 739, at 743 (Cipolla,1996). In this circumstance, arbitrators and courts properly turn to the well-known common law tranche of semantic, syntactic or contextual "Canons of Construction" for interpretive guidance.

Context is everything in the interpretation of a written contract. The "Whole-Text Canon", a cardinal contextual maxim for determining the correct meaning of disputable legal language, calls upon the interpreter to consider the entire text of the document in view of its structure, physical location and logical relation of its various parts. A natural derivative of that rule is the "Presumption Against Ineffectiveness", which counsels that interpretation should further, not obstruct, hinder or obviate, the manifest purpose of disputed contractual text. That subsidiary canon follows ineluctably from the facts that "(1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness". *See* Scalia and Garner, Reading Law: The Interpretation of Legal Texts, p. 143. (Thompson/West, 2012).

A primary purpose of the Settlement Agreement was to provide distinctly different alternative avenues of recovery for employees adversely impacted by GM's "unallocation" of production at the three plants: 1) "Bird-in-hand" SAP benefits for individuals who elected to relinquish their contractual seniority and separate permanently from continued employment by the company; and, 2) "Roll-the-dice" potential recovery of monetary damages in arbitration for individuals who elected to decline that SAP and exercised their CBA sonority rights to continue employment by the company at a different GM plant.

The Union's interpretation is more reasonably in accord with the meaning of the Settlement Agreement phrase "continue employment" because it comports with the maxim that a textually permissible interpretation that furthers rather than obstructs or quashes the purpose of a legal document should be favored. The interpretation urged by GM would have me create and impose upon 53 identified employees, who elected to accept the uncertainties of arbitral remediation, in lieu of the certainty of guaranteed targeted SAP benefits, an unwritten mid-2022 use-by/expiration date. Nothing in the language of the 2019 Settlement Agreement evinces such an arbitrary forfeiture date for

proffered, accepted and vested eligibility to claim retroactive arbitral remediation for the proven violation of their contractual rights. Indeed, it was only happenstance and the unexpected exigencies of scheduling and concluding Phase I of these bifurcated arbitration proceedings during the Covid pandemic that caused the Phase I award to be issued in early July 2022 rather than an earlier date.

Conclusion: The 53 identified individuals (as of July 6, 2022), who elected to retain seniority and continue employment with the Company but thereafter separated from employment with the Company, are eligible for appropriate Phase II make-whole remediation.

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110 Individuals Who Experienced Temporary Periods Of Layoff During The Relevant Period At The Plants To Which They Transferred

Dispute: UAW contends that employees transferred a "new plant" due to layoff at their "home plant", who then experienced a post-transfer new-plant layoff, suffered a non-speculative injury, *viz.*, "GM's breach of Document 13 forced employees to transfer to other plants to continue their employment, and these employees 'lost wages' due to the layoff at their transfer plants". GM counters that the employees who experienced such post-transfer layoffs may have actually experienced a "windfall" by earning more wages at their new plants than they would have earned at their home plants, if GM had not breached Document 13. The Union responds that it is "not asking for the weeks [employees] worked to be double paid… [The UAW is simply] asking for them to receive the lost wages that they missed out on due to the layoff at the transfer plant." (*See*, UAW Post-Hearing Brief at p. 27, quoting June 7 Tr., 118:13-20).

Analysis: The following language of Appendix A, ¶ 56, ¶57 and ¶59 in the 2015 National Agreement is dispositive of this particular post-transfer layoff eligibility dispute. (Emphasis added):

Appendix A
Memorandum Of Understanding Employee Placement

> It is recognized that the hiring of new employees in one location while there is a surplus of seniority employees in other locations is not in the best interest of the parties. Therefore, the parties will provide eligible seniority laid-off and active seniority employees an opportunity to relocate to UAW-GM facilities outside of their area, **with particular emphasis on placing employees from closed or idled facilities..** . . **When selecting employees for placement**, the **longest unbroken GM seniority date** will be used **for production job offers**. **For skilled trades job offers, the longest unbroken seniority date in the skilled trades classification** will be used. . . **When employed**, such employees will acquire **seniority in the plant where hired in accordance with Paragraphs (56) and (57) of the National Agreement.**
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> **(56)** Employees shall be regarded as temporary employees until their names have been placed on the seniority list. . . .

(57) Employees who are placed in permanent jobs at other GM facilities under the provisions of the Memorandum of Understanding Employee Placement will establish seniority at the secondary plant on the day they start at the secondary plant. . . .in accordance with the Application of Corporate Seniority Section of [Appendix A].[*See* Par. (73a),(107),(108),(135)] [*See* Par. (137)(b),(157),(170)(a)-(b)].

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(59) Seniority shall be by non-interchangeable occupational groups within departments, group of departments or plant-wide, as may be negotiated locally in each plant and reduced to writing. . . . **When changes in methods, products or policies would otherwise require the permanent laying off of employees, the seniority of the displaced employees shall become plant-wide and they shall be transferred out of the group in line with their seniority** to work they are capable of doing, as comparable to the work they have been doing as may be available, at the rate for the job to which they have been transferred.. . . [*See* Par. (68),(69),(134),(138)(a),(220)] [*See* App. K,III(C)15] [*See* Doc. 70] [*See* CSA #9].

Under those 2015 National Agreement provisions, the employees laid off due to GM's premature idling of their "home plants", in violation of Doc. 13, transferred **out to** their new plants on the priority basis of each individual's accumulated home plant seniority. But, each of those individuals then transferred **into** the new plant with **zero** usable plant seniority as of the first day of new plant employment. Thus, the subsequent plant juniority-based temporary layoffs that these employees experienced are directly attributable to the diminishment of their applicable plant seniority proximately caused by the Company's Doc. 13 violations at their former home plants. It necessarily follows that these individuals should be made whole for periods of post-transfer appropriately attributable to their new plant temporary layoffs.

Conclusion: The individuals who experienced temporary periods of layoff during the relevant period at the plants to which they transferred are eligible for appropriate Phase II Award make-whole remediation.

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119 Individuals [78 Prior To Layoff/41 After Layoff] Who Declined One Or More Vol. Offers To Transfer, Before Accepting Subsequent Offers To Transfer

5 Individuals Who Declined Invol. Offers To Transfer And Had "L34" Periods Of Layoff, Prior To Accepting Subsequent Offers To Transfer

Dispute: Among the employees for whom the UAW seeks a make-whole remedy are 78 individuals who declined a voluntary transfer offer prior to layoff, 41 individuals who declined a voluntary transfer offer after layoff and 5 individuals who declined involuntary transfer offers and went to "L-34" (no-benefit) status, prior to accepting subsequent offers to transfer. GM opposes all of those claims on grounds that the Company "is not responsible for wage loss caused by the choice these employees made for themselves".

GM asserts these individuals should be deemed ineligible for a remedy or have periods of eligibility reduced for "failure to mitigate their damages" and/or because they "gamed the system". UAW responds that the individuals should not be penalized for exercising rights granted to them by the 2015 National Agreement and/or the related October 2019 Settlement Agreement. The Union also points out that mitigation does not necessarily include uprooting a family to take a take a job offer at new plants hundreds of miles away from the prematurely idled home plants.

Analysis: UAW correctly points out that the exercise by these laid off employees of rights granted them by Appendix A of the 2015 National Agreement and/or applicable provisions of the Settlement Agreement does not justify declaring them ineligible for otherwise appropriate make-whole remediation due to GM's Doc. 13 violation.

Further, absent an express contractual obligation, arbitrators and courts have consistently recognized that declining to relocate or live apart from family for new employment opportunities in distant geographical areas does not constitute failure of a wrongfully displaced employee to mitigate contract violation damages. *See* Coe Mfg. Co. & United Steelworkers of Am. Loc. 12833, 115 BNA La 625, 626-27 (Lalka, 2001); s*ee also* NLRB v. KSM Indus., Inc., 682 F.3d 537, 547 (7th Cir., 2012); Jackson v. Wheatley Sch. Dist. No. 28 of St. Francis Cnty., Ark., 489 F.2d 608, 610 (8th Cir., 1973) (explaining that the "duty to mitigate damages [does not] include an obligation to live apart from her spouse . . . [or outside] the community where the family lived"); Minshall v. McGraw Hill Broad. Co., 323 F.3d 1273, 1287 (10th Cir., 2003).

In my considered opinion, the Union's position concerning make-whole remedy eligibility of those above-described individuals is persuasive and the Company's objections are misplaced.

Conclusions: The identified individuals who declined a voluntary transfer offer, prior to the referenced layoffs, are eligible for applicable Phase II Award make-whole remediation.

The identified individuals who declined a voluntary transfer offer, after the referenced layoffs, are eligible for applicable Phase II Award make-whole remediation.

The identified individuals who declined involuntary transfer offers and went to "L-34" status, prior to accepting subsequent offers to transfer, are eligible for applicable Phase II Award make-whole remediation.

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II. DISPUTED REMEDY AWARD COMPONENTS

Overtime Calculations

Dispute: The Parties agree that lost overtime wages should be accounted for in the Phase II remedy award but disagree as to the appropriate method for determining such unpaid overtime. The UAW proposes a conventional accounting approach, based 2019 overtime upon **individual average overtime hours that employees worked in 2018**, *i.e., "2018 avg. weekly overtime hours x # of Saturdays during layoff x wage rate x 1.5".* (*See* June 7 Tr. 207:1-20). By way of contrast, GM suggests a **lump sum plant-wide computation**, based upon purported "accelerated 2019 production schedules" in anticipation of the plant idling Doc. 13 violation dates, **capped whenever 2019 plant-wide overtime totals exceeded 2018 plant-wide overtime totals**. (*See* DX-22, at pp. 6-7). (Emphasis added).

Analysis: The UAW's overtime calculation methodology is based upon 2018 payroll data, the last complete year that was largely unaffected by GM's "unallocation plans". It accounts for significant variations in each individual employee's overtime earnings, which varies dramatically by person, as those data clearly show. *See* UX-57 (UAW Master Remedy Spreadsheet) at Column P (Average Overtime Hours Worked). That conventional methodology is consistent with accepted methods for calculating lost overtime earnings in backpay cases. *See* USWA, AFL-CIO-CLC, Loc. 190-A & Ga. Pac. Co., LA Supp. 113716 (Poole 1997):

> *...It is well established throughout industry that overtime is an individual right not a group right. In determining whether there is a right to overtime one looks to the number of hours an individual has worked not to what the group has done. This practice is embodied in the Federal statutes governing overtime, it is universally embodied [in] collective bargaining agreement[s] and it is the standard practice of the work place....*

See also NLRB Case-Handling Manual, Part 3: Compliance Proceedings, 10548.2 (describing the use of averages of past overtime data to determine "lost" overtime).

It generally is accepted that an employer seeking to diminish a "make-whole" remedy must "make a showing as to each Claimant" that the individual's work would not have continued as usual. Thus, it is insufficient for GM merely to assert that claimants as a whole "probably" would have been laid off for reasons other than the proven violations. *See* Boland Marine & Mfg. Co., 280 NLRB 454, 461 (1986), *aff'd*, 851 F.2d 1420 (5th Cir. 1988). Further, GM's suggested plant-wide lump sum overtime payment not only ignores individual employee/plant shift differences. The evidentiary record contains neither sufficient objective data nor credible witness testimony to support GM's speculative "accelerated production/aggregate overtime" remedy calculations. Finally, speculative, violation-ignoring overtime computations run counter to the above referenced "business as usual" presumption that, absent compelling evidence to the contrary, business operations at the "unallocated plants" would have continued with employees working the same number of hours but for the proven Doc. 13 violations. *See, e.g.*, 1621 Route 22 W. Operating Co., 371 NLRB No. 86 (Mar. 24, 2022), *et al, op cit.*

Conclusion: Make-whole overtime wages must be calculated, on an individual employee basis, in the conventional manner proposed by the UAW.

* * * * * *

74% of Straight Wages For 56 Claimants Who Did Not Make Timely Applications for Supplemental Unemployment Benefits

Dispute: Pursuant to the Supplemental Agreement (Exhibit D) of the 2015 National Agreement, GM provides Supplemental Unemployment Benefits ("SUB") to employees with at least one year of seniority who experience qualifying layoff, **provided** that they first timely apply for SUB apply for and unemployment compensation available from their resident State. The evidentiary record shows that all but 56 of the employees laid off in this case, applied for and received such Supplemental Employment Benefits ("SUB") and available state unemployment benefits in 2019; thus replacing 74% of the straight wages they lost due to their periods of layoff. *See* DX-21 (SUB Information). On that basis, the Parties are in agreement that, rather than rather than 100% of those lost wages, those particular Claimants shall be awarded "straight time wages (reduced to 26%)".

Nonetheless, the UAW urges me to award 56 identified individuals who, for no evident reason, inexplicably failed to timely apply for SUB, an additional 74% (*i.e.*, 100%) of straight time wages they lost during their periods of layoff in 2019.[6] For its part, GM responds that those employees should not be retroactively rewarded for unexcused and unexplained failure to adhere to the SUB Plan's procedural requirements.

Analysis: UAW urges that the Phase II Remedy Award should replace SUB benefits and State unemployment benefits inexplicably unclaimed by some employees, simply because GM would have paid those disputed benefits if these employees had timely applied for them. That claim is not justified in this case record. Make-whole remediation is not intended to reward unexplained failure to take known and necessary steps required to claim available unemployment benefits that would have mitigated or ameliorated recoverable damages. *See* Manchester Plastics, 110 LA 169, 180-181 (Knott, 1997). *See also* GM/UAW Umpire Gabriel Alexander: Decisions #E-284 (December 3, 1948) and #E-296 (January 21, 1949).

Conclusion: GM shall not be held accountable for the unexplained failures of these Claimants to timely comply with the contractual requirements for obtaining their known and available SUB benefit that would have mitigated or ameliorated recoverable straight wages they lost due to their periods of layoff.

[6] The SUB Agreement language allows certain extensions of the 60-day SUB filing requirement but UAW concedes that the case record contains no evidence at all as to the "reasons or motivations why [some] people didn't ask for [SUB]". *See* Phase II Tr., Vol. I, 123-125.

* * * * * *

Pension Credit For Pension Eligible Employees
(JX-2, p. 163, ¶ 224)

Vacation Accrual Credit
(JX-2, p. 142, ¶ 192)

Credit Under "The Memorandum Of Understanding UAW-GM Wage & Benefit Agreement For Employees In-Progression"
(JX-2, pp. 264-269)

Dispute: Under ¶ 224 of the 2015 Pension Plan incorporated into the National Agreement, employees are entitled to credited service toward their pension benefits on the "basis of total hours compensated" during a calendar year, up to a 1,700-hour maximum per year. The "Memorandum of Understanding UAW-GM Wage & Benefit Agreement for Employees in Progression" establishes when employees hired after 2007 are eligible for raises and other benefits. Under ¶ 192 of the 2015 National Agreement, "vacation entitlement is earned in the year prior."

UAW maintains that "affected employees are entitled to all contractual credits and other entitlements that they would have received had they not been laid off in breach of Document 13". GM's rejoinder is that Phase II make-whole recovery of any lost CBA contractual benefit, including pension benefit credits, is barred by the Phase I Award. A*rguendo*, the Company maintains that the Union failed to make a *prima facie* showing that any eligible employee actually suffered such proximately-caused remediable damage.

Analysis:. It generally is accepted that a make-whole remedy should compensate employees for lost retirement benefits, including service credit toward pension benefits. *See, e.g.*, Emp. & [Redacted], BNA LA Supp. 151408 (Boulanger, 2009); NLRB Case-Handling Manual, Part 3: Compliance Proceedings, 10544.3 ([Wrongfully displaced mployees] "should generally be made whole for lost contributions to pension funds or retirement plans. When the employer made contributions to a pension fund, retroactive contributions and appropriate credit should be obtained from the respondent"*)*. The Phase I Award did eschew arbitral jurisdiction to determine the "MSR Entitlement Issue", in deference to the preemptive authority of the Pension Plan Administrator, Board of Administration and Pension Committees to resolve such disputes. However, "exclusion of pension disputes [here, the MSR dispute] from the scope of arbitration does not mean that an arbitrator is unable to order the Company to implement a make-whole remedy that may include pension benefits." *See* Westinghouse Elec. Corp. & Int'l Ass'n of Machinists & Aerospace Workers, Loc. 322, BNA LA Supp. 106167 (Bogue, 1994).

It is undisputed that eligible Claimants are entitled to be made-whole for proximately lost straight and overtime wages under the Phase I Award. Each of the above-referenced disputed contractual compensation accrual or credit entitlements are based upon the individual adversely-affected employee's lost hours, weeks, pay periods or months of earned wages in service with GM. A preponderance of case record evidence

supports UAW's claim that employees eligible for make-whole remediation, would have earned those time-in-service measured credits and accruals in tandem with their start time and overtime compensation.

Moreover, the case record also demonstrate that the time-in service data necessary to calculate "make-whole" pension, vacation and progression credit/accrual entitlements for each individual eligible employee are readily available in the Company's records. Any uncertainty in this regard should be resolved in favor of the employees who suffered as a result of an employer's breach. *See, e.g.*, Akers Motor Lines, 51 BNA LA at 964 ("Since the Company's wrong created the uncertainty, and since only it has the evidentiary means by which the uncertainty may be resolvable, it is the Company's burden to disentangle the consequences for which it is chargeable from those from which it is immune."); Int'l Longshore & Warehouse Union (Pac. Crane Maint. Co., Inc.), 370 NLRB No. 104 (Mar. 31, 2021) ("Another well-established principle is that, where there are uncertainties or ambiguities, doubts should be resolved in favor of the wronged party rather than the wrongdoer.") (citations omitted).

Conclusions: Pension credit for pension-eligible Claimants (JX-2 p. 163, ⁋ 224) must be included in the Phase II "make-whole" remedy. Vacation accrual credit (JX-2 p. 142, ⁋ 192) must be included in the Phase II "make-whole" remedy. Credit under "The Memorandum Of Understanding UAW-GM Wage & Benefit Agreement For Employees In-Progression" (JX-2, pp. 264-269) for eligible Claimants must be included in the Phase II "make-whole" remedy.

* * * * * *

COBRA Premium Reimbursement
(29 U.S.C. §§ 1161 et seq)
Weeks Worked Credit Under Document 146
(JX-2, p.654)

Dispute: The Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") gives former employees certain rights to continue employer-provided health benefits for a period of time following separation, at the former employees' expense. Under the terms of CBA a Document 146, an employee who returns to a "non-skilled job", after spending time in an apprentice program or temporary salaried position, is credited for wage progression purposes for such time. The positions of the Parties with respect to the Union's plea to include such benefits in the Phase II Award are essentially the same as for the disputed vacation and progression claims, *supra*.

Analysis: The UAW asserts such losses "might have occurred" but frankly concedes that it has no idea whether any eligible Claimant paid any premiums to continue GM health care benefits or came under Document 146 apprenticeship/salaried position coverage the during the "unallocation" layoff periods. GM correctly points out that the Union failed to carry its *prima facie* burden of persuasion for these speculative "make-whole" damage remediation claims.

Conclusion: COBRA premium reimbursement under 29 U.S.C. §§ 1161 *et seq* and "Weeks Worked" credit under Document 146 shall not be included in the Phase II "make-whole" remedy.

* * * * * *

2019 National Agreement $11,000 Lump Sum Ratification Bonus (Document 92)

Dispute: The 2019 National Agreement dated October 16, 2019 became effective following October 28, 2019 ratification by the UAW membership. Document 92 of that 2019 CBA calls for lump sum ratification bonuses ($11,000 for permanent employees/$4,500 for temporary employees), payable in the second pay period following the Company's receipt of written notification from UAW of that membership ratification.

UAW urges Phase II Award payment of the 2019 ratification bonuses to "a number of employees laid off from the unallocated plants. . . who were in the process of transferring plants at the time of UAW went on strike in September 2019 and had not completed their transfer as of October 16, 2019". GM points out that the **"on permanent layoff"** status of those laid off employees who had not yet transferred to another plant not included in the Document 92 class, status or category eligibility list. The Company also maintains that the ratification bonus cannot properly be considered a Settlement Agreement claim for 2015 National Agreement "lost wages" because it is a product of the 2019 National Agreement.

Analysis: 2019 National Agreement Document 92 expressly provides that employees eligible for the ratification bonuses are individuals whose status with the Company on the ratification/effective date is one of the following: **Active with seniority**; On **temporary layoff**; On pre-retirement leave; Members otherwise eligible with retirements processed for an effective date of Nov. 1, 2019; On FMLA leave (Doc. 125); On one of the following leaves of absence, which has not exceeded 90 days as of the effective date of the Agreement: Informal (Paragraph 103), Formal (Paragraph 104), Sickness and Accident (Paragraphs 106/108), Military (Paragraphs 112 or 218a), Educational (Paragraph 113).

The UAW failed to prove that the employees for whom it now seeks payment 2019 National Agreement ratification bonuses were, as of the effective date in any of the expressly listed Doc. 92 eligibility categories. There may be unknown equitable reasons supporting the Union's position. But, as stated in the Phase I Opinion, it would be an abuse of my arbitral authority to ignore, in the service of equity, or rewrite, under the guise of interpretation, express language in Document 92, a contractually binding document drafted by equally experienced, knowledgeable and sophisticated bargainers.

Conclusion: Claimants who were not in an expressly listed Document 92 ratification bonus eligibility status/category on the effective date of the 2019 National Agreement document are not retroactively entitled to the 2019 lump sum ratification bonuses. ("*Inclusio unius est exclusio alterius*").

* * * * * *

Interest on Awarded Damages

Dispute: The Parties are in sharp disagreement as to whether any interest at all is a necessary component of an eligible Claimant's make-whole remedy. A*rguendo,* they also dispute how any applicable interest rate should properly be calculated and applied. For its part, the UAW posits that remediation for the "time value" of the lost remuneration is essential and proposes that "interest owed on the 401(k) plan contributions should be calculated pursuant to I.R.S. Revenue Procedure 2019-19"; and, for "non-401(k) components of the make-whole remedy" a "modified OPM calculator" flat interest rate of 17.901%. GM responds that interest was never contemplated by the Parties under the Settlement Agreement or by National Agreement language and past practice. A*rguendo*, the Company asserts that arbitral authority holds "no interest should be awarded absent egregious contract violation or bad faith conduct by the Employer". Accordingly, GM maintains that the Union's request to impose any interest at all should be denied, "let alone the "exorbitant" 17.6% interest rate" suggested by the Union.

Analysis: Interest is always awarded as a component of damages in backpay cases before the NLRB. *See* NLRB Case Handling Manual, Part 3: Compliance Proceedings, 10566 and often awarded when claimed under many state statutes. However, there is no hard and fast authoritative rule that interest as a necessary component of make-whole compensable damages in labor-management arbitration remedial awards. Indeed, the same stark difference of opinion regarding that fundamental question is apparent in the decisions of a cadre of respected arbiters of labor-management disputes. Thus, each of the Parties cites colorable arbitral authority to support countervailing positions regarding whether interest should or should not be included in fashioning make-whole remediation for GM's proven Doc. 13 violations in this case.

East Lake Fire & Rescue, Inc. and Clearwater Fire Fighters, I.A.F.F. Local 1158, (Abrams) 2001 BNA LA Supp. 108506, cited by GM, succinctly summarizes what may fairly be described as the traditional treatment of remedial interest in labor-management arbitration cases:

> "*...I]nterest on back wages is the norm under federal and state law, but it is certainly not the norm in labor arbitration in the absence of a contract provision authorizing interest. Arbitrators have reserved the awarding of interest for those rare and unusual cases where a contract violation was found to be deliberate and egregious and a penalty is in order."*

See also Newark Paperboard Products of Atlanta, Texas, and The Newark Group, 2002 BNA LA Supp. 109990 (Eisenmenger, 2002).

That abstemious view of remedial interest on recoverable compensation is rejected in a plethora of arbitration decisions cited by the UAW. Hollander & Company, 64 LA 816, 821 (Edelman, 2002) is particularly instructive:

> *..."Interest is rarely ordered because it is almost never asked for; so it has not become part of the usual procedure in back pay awards. There is enough precedent to do so, but even more important, there is justification for so doing.... The grievants were improperly deprived of funds they would have used to their benefit during the period of their layoff while the employer had use of those funds".*

See also Kaiser Permanente Medical Care Program & United Nurses Ass'n of Cal. 89 LA 841, 845 (Alleyne, 1987) ("... [I]n the absence of a rational reason for not awarding interest on back pay, it should be awarded, at least on request..."); County of San Joaquin & Individual Grievant 130 LA 697, 709 (Bogue, 2012); Wackenhut Corp. & Int'l Union, Sec., Police & Fire Pros. of Am., Loc. 403, (Kravit, 2008) 124 LA 1345, 1351; Nationwide Parking Servs. & Int'l Bhd. of Teamsters Loc. 961, 2004 LA Supp. 100984 (Difalco, 2004) (. . The Arbitrator has inherent authority to award interest under the circumstances of this case which authority derives from his contractual responsibility to make rulings on claimed violations of the contract and if a violation is found, to fashion if necessary a complete make whole remedy. ") [quoting Hollander & Co., 64 LA 816, 821, *supra*].

Given the facts and circumstances presented by the evidentiary record of the instant case, Union Loc. [Redacted] & [Redacted] Schools, 2023 BNA 139 (Greenberg 2023) and Employer & Federation of Teachers., Loc. [Redacted], (Kerner, 2009) BNA LA Supp. 150699 are two other on-point and particularly apt reported decisions:

> *. . .("[I]n "situations where periods of backpay are lengthy, and when the amounts of backpay may be substantial, it has become common for arbitrators and other adjudicators to award interest to a successful grievant. This recognizes the 'time value of money', i.e., that a dollar 'in hand' today has greater value than the promise of a dollar at some future date, because a current dollar can be put to use . . .[whereas] the purchasing power of a dollar tends to decline over time... In the instant case, the award of interest is not punitive, but merely compensatory. It is in the nature of a common law damage award and such is not prohibited by the contract, arbitral authority or external law. Indeed, there is substantial authority among arbitrators to award interest in cases where it is necessary to effect a make-whole remedy for the injured parties. . . .The award of interest by both the National Labor Relations Board and Arbitrators in dispute resolution goes back to at least 1962. [citing Oscar Joseph Stores Inc., 41 LA 569 (1963); Allied Chemical Corp., 47 LA 686 (1966). . .*
>
> * * * * *
>
> *['T]he issue as to interest is simply recognition that modern interest rates and inflation have made assessment of interest a necessary part of a "make whole' award']..... [T]he backpay award which must be ordered would not be complete without recognition that the passage of time has also created a claim for interest on back pay amounts. . ."*

Conclusions: An award of requested interest is necessary and appropriate. That said, I am not persuaded that UAW's suggested "simplified equivalent of the OPM calculator" is the correct way to calculate the appropriate rates of interest on the "non-401(k)" components of remedial damages to which each Claimant is entitled in this case.

The Federal LMRA §301 breach of contract action, out of which this judicially-referred arbitration arose, was filed in the US District Court for the Northern District of Ohio, Eastern Division. But the October 16, 2019 Settlement Agreement, which establishes my arbitral jurisdiction and authority in this matter, was negotiated and consummated by the Parties in the State of Michigan. Therefore, interest on the "non-401-k" compensatory damages payable under the Phase II Remedy Award shall be calculated in accordance with Mich. Comp. Laws ("MCL") § 600.6013 (7), (8) statutory rates for pre/post money judgments, of which I take arbitral notice, as follows:

> FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987 ....:
>
> Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.[7]

* * * * * *

Retained Jurisdiction

Dispute: This seminal Phase II Remedial Award addresses and resolves only those specific remedy eligibility/component disputes submitted by the Parties in Attachment A. Complex and time-consuming work remains to be done to determine, calculate and finalize payment of appropriate liquidated remediation for each individual eligible Claimant. Therefore, commendable continued comity and cooperation of Counsel notwithstanding, it is almost inevitable that other unresolved disputes will arise, which will require my issuance of Supplemental Phase II Remedy Award(s) to insure the correct interpretation and implementation of this seminal Phase II Remedial Award.

The Parties concur generally that I should retain arbitral jurisdiction for that purpose. However, they disagree over the appropriate scope and duration of my reserved remedial jurisdiction. The Union goes on to urge Phase II Award imposition and supervision of "a process to handle any disputes that individual employees may wish to raise based on discrepancies between the data that the parties have relied on for their calculations and what may have occurred in real life terms for the employees in question." (UAW's Pre-Hearing Brief, p. 26). GM responds: "[A]s a practical matter, GM does not oppose the Arbitrator retaining jurisdiction for the limited purpose of resolving discrepancies in damages calculations (and the underlying data thereto) that the Parties each submitted into the record." (GM's Post-Hearing Brief, p. 26). The Company adamantly opposes any extension of limited retained jurisdiction and authority that would invite to individuals other than those identified in Attachment A to independently raise and appeal to binding arbitration, *sua sponte*, any additional or *de novo* purported remedial damages claims.

[7] *See* ww.courts.michigan.gov/siteassets/courtadministration/resources/interest.pdf.

Analysis: It is widely accepted that an arbitrator may properly retain jurisdiction to resolve remedial problems that may arise in complying with the award." *See* Kagel, *Practice and Procedure*, in The Common Law Of The Workplace: The Views Of Arbitrators (St. Antoine ed., BNA Books 2d ed., 2005). The sophisticated labor-management practitioners involved in this case clearly understand that retention of arbitral jurisdiction to resolve inchoate eligibility and calculation disputes is particularly appropriate when the remedial award tasks the disputants with computing individual make-whole remedies for hundreds of eligible employees. Hill, *Remedies in Arbitration*, in The Common Law Of The Workplace , *op cit.*; *see also*, SBC Advanced Sols., Inc. v. Commc'ns Workers of Am., Dist. 6, 44 F. Supp. 3d 914, 925 (E.D. Mo. 2014), aff'd, 794 F.3d 1020 (8th Cir. 2015).

As the court in Engis Corp. v. Engis Ltd., 800 F. Supp. 627, 632 (N.D. Ill. 1992) astutely observed, failure to retain remedial arbitral jurisdiction in this context would "needlessly undermine the arbitration process by requiring either perpetual judicial intervention or the selection of additional arbitrators to resolve future enforcement disputes." The necessary corollary to that principle is that an arbitrator cannot properly create a never-ending sinecure, by unilaterally imposing remedial jurisdiction and authority over disputes other than those submitted for determination in the award subject to interpretation and implementation. *See,* NAA/AAA/FMCS Code Of Professional Responsibility for Arbitrators ff Labor-Management Disputes, § 6.E. POST HEARING CONDUCT:

> E. Retaining Remedial Jurisdiction*:*
>
> > 1. An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy.
> >
> > > a. Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise.
> >
> > 2. The retention of remedial jurisdiction is limited to the question of remedy and does not extend to any other parts of the award. . .

Conclusion: It is necessary and appropriate that my arbitral jurisdiction of this case be retained for a period of 120 days, for the sole purpose of resolving questions over the interpretation, application or implementation of this seminal Phase II Remedial Award.

ATTACHMENT A (JX-9)

UAW/GM Arbitration: Summary of Disputes

The UAW has identified 797 individuals that it believes to be eligible for a remedy. GM does not seek to exclude 487 of the 797 individuals that the Union has identified.

I. Eligibility

The parties dispute the eligibility of the following groups (some employees fall within multiple categories in dispute):

1. 84 individuals who worked on either the second or third shifts at the Unallocated Plants as of November 26, 2018.

2. 119 individuals who declined one or more voluntary offers to transfer before accepting subsequent offers to transfer. This consists of 78 individuals who declined a voluntary offer prior to going on layoff and 41 individuals who declined a voluntary offer after being on layoff.

3. 5 individuals who declined involuntary offers to transfer, and had "L34" periods of layoff, prior to accepting subsequent offers to transfer.

4. 53 individuals who have separated from employment as of July [6], 2022.

5. 110 individuals who experienced temporary periods of layoff during the relevant period at the plants to which they transferred.

6. 2 individuals from Lordstown, and 33 employees from Warren, who were laid off shortly before production ceased at their plants.

II. Components of a Remedy

There is no dispute as to the inclusion of the following components of a remedy for all eligible employees:

1. Straight time wages (reduced to 26%)

2. 2019 profit sharing payments

3. 4% performance bonus for employees who were employed as of October 7, 2019

4. $1,000 performance bonus for employees who were active or in a temporary layoff status as of May 15, 2019

5. 401(k) 6.4% contribution (for those eligible)

6. 401(k) $1 per hour contribution (for those eligible)

The parties agree that overtime wages should be accounted for in a remedy but disagree as to the method for determining unpaid overtime.

The parties dispute whether the following components should be included in a remedy:

1. 74% of straight wages that would have been earned, at the rate of eight hours per weekday, for each day of layoff that falls on a weekday, for 56 employees who did not receive Supplemental Unemployment Benefits ("SUB")
2. Pension credit (for pension eligible employees)
3. "Progression" credit under the "Memorandum of Understanding UAW-GM Wage & Benefit Agreement for Employees In-Progression" (JX-2 at PDF page 288)
4. Vacation accrual credit under ¶ 192 of National Agreement (JX-2 at PDF page 166)
5. Weeks Worked credit under Document 146 (JX-2 at PDF Page 678)
6. COBRA premium reimbursement
7. $11,000 ratification lump sum bonus under Document 92 of 2019 National Agreement (UX-46) for employees who did not receive it
8. Interest
9. Retained jurisdiction (pursuant to the UAW's proposal.

PHASE II REMEDY AWARD

A. ELIGIBILITY

The following individuals (some of whom fall within multiple categories listed in Attachment A) are eligible for applicable Phase II make-whole remediation under the terms of the July 6, 2022 Phase I Award:

1. 487 identified individuals whom GM did not seek to exclude.

2. 84 individuals who worked on either the second or third shifts at the Unallocated Plants as of November 26, 2018.

3. 119 individuals who declined one or more voluntary offers to transfer before accepting subsequent offers to transfer. [This consists of 78 individuals who declined a voluntary offer prior to going on layoff and 41 individuals who declined a voluntary offer after being on layoff].

4. 5 individuals who declined involuntary offers to transfer, and had "L34" periods of layoff, prior to accepting subsequent offers to transfer.

4. 53 individuals who have separated from employment [as of July 6, 2022].

6. 110 individuals who experienced temporary periods of layoff during the relevant period at the plants to which they transferred.

7. 2 individuals from Lordstown, and 33 employees from Warren, who were laid off shortly before production ceased at their plants.

****
****

B. REMEDY COMPONENTS

The make-whole remedy for each individual eligible Claimant shall include the following components:

1. Straight time wages (reduced to 26%).

2. 4% performance bonus for employees who were employed as of October 7, 2019.

3. $1,000 performance bonus for employees who were active or in a temporary layoff status as of May 15, 2019.

4. 401(k) 6.4% contribution (for those eligible).

5. 401(k) $1 per hour contribution (for those eligible).

6. Pension credit (for pension eligible employees).

7. Progression credit under the "Memorandum of Understanding UAW-GM Wage & Benefit Agreement for Employees In-Progression" (JX-2 at PDF page 288).

8. Vacation accrual credit under ¶ 192 of National Agreement (JX-2 at PDF page 166).

9. Weeks Worked credit under Document 146 (JX-2 at PDF Page 678).

10. Interest is awarded on the monetary components of the make-whole remedy for each eligible employee, calculated as follows:

    a) Interest on the "401(k) plan contributions component" of the make-whole damages shall be calculated in accordance with I.R.S. Revenue Procedure 2019-19.

    b) Interest on the "non-401-k" component of the applicable make-whole damages shall be calculated in accordance with Mich. Comp. Laws ("MCL") §600.6013 (7), (8) statutory rates for pre/post money judgments, of which I take arbitral notice, as follows:

    FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987....:

    Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section.

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****

C. REMEDY REMAND/RETAINED JURISDICTION

1) Calculation and finalization of applicable make-whole remediation for each eligible individual Claimant, in accordance with this Phase II Remedy Award, is remanded to the Parties for further discussion and potential finalization.

2) For the sole purpose of resolving questions over the interpretation, application or implementation of this seminal Phase II Remedial Award, arbitral jurisdiction and authority is retained for a period of 120 days following its issuance date.

3) During that 120-day period, that Phase II remedial jurisdiction may be invoked by the Parties jointly or, with written notice to the other, individually.

4) The scope and duration of that retained Phase II Remedial Award jurisdiction and authority may be modified or extended by mutual agreement of the Parties.

Dana E. Eischen

S/Dana Edward Eischen

On this 13th day of September 2023, I, DANA E. EISCHEN, do hereby affirm and certify, upon my oath as Arbitrator and pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I executed and issued the foregoing instrument, which is my seminal Phase II Remedial Award, pursuant to my July 6, 2022 Phase I Merits Award and the 10/16/19 *Settlement of Litigation & Effects Bargaining Agreement* between GM and UAW in Case No. 19-cv-00420 (*UAW v. GM*), USDC, Northern District Of Ohio, Eastern Division.