...established... that the City knowingly and willfully violated plaintiff's constitutional rights and in so doing breached its duties under Hudson. To enforce the indemnification clause *under the facts and circumstances of this [Firefighter] case* would clearly violate the public policies enunciated in *Hudson*. The court held as a matter of law that [indemnification clause] of the [Firefighters] collective bargaining agreement is void and unenforceable. (Underline supplied)

Here the facts and circumstances are different including that the City has not been denied or even made a claim for indemnification.

The City argues that several sections or provisions of the fair share provisions may not conform to law so the City has a right to invoke Article 36.02 to declare fair share fee deductions invalid and unenforceable. That argument is not valid.

The Parties agreed on how a determination of illegality may be made and the consequence. Section 3.10 provides:

> If any court of last resort determines any provision of this Article is illegal that provision alone shall be void. Invalidation of any provision... does not invalidate the remaining provisions.

That specific provision is significantly different from Section 36.02. The Parties agreed on the way a provision may be determine illegal, and the consequence. The provisions in Section 3.10, not Section 36.02 must be used for determination about legality. Furthermore under the language of Section 3.10, the obligation in Section 3.06 to deduct would survive a court declaration of invalidity for Section 3.12.

In this matter no court of last resort has determined that any of the Article III provisions is illegal. Therefore the City may not refuse to deduct fair share fees.

If the City truly questions whether the fair share fee provisions are legal, the proper action is under Section 3.11, which retains the City's right to seek judicial review of the fair share provisions. The City exposed itself by discontinuing without seeking judicial review.

The only condition precedent the Arbitrator finds for the City's obligation to deduct fair share fee payments is found in Section 3.08. That section requires the Union to use the fair share amounts for what it states they are to be used for. Here Representative Otten testified that OC8 indeed was using the funds as stated in Appendix F of the Labor Agreement.

It is important to note that in this case the City has not lost any funds as a result of proceedings brought against the City over the fair share fee provisions.

The Arbitrator finds the City has not clearly and convincingly shown that the Union did not fulfill its contractual obligation in respect to fair share fees or that the City had any other valid excuse for its failure to deduct as promised in Section 3.06 of the Agreement.

AWARD

The grievance is sustained. The City is directed to resume deduction of fair share fees forthwith and to reimburse the Union for fair share fee payments not provided in the Union after the City unilaterally ceased fair share fee deductions.

PILLSBURY CO. —

Decision of Arbitrator

In re PILLSBURY COMPANY [Springfield, Ill.] and AMERICAN FEDERATION OF GRAIN MILLERS, LOCAL 24, FMCS File No. 91/27173, January 14, 1993

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

SEVERANCE PAY

— Eligibility after resignation — Operations shutdown — Contract language ▸123.06 ▸123.20

Employer properly denied severance pay to employees who resigned after company announced that it would be closing its grocery line, despite contention that grievants' eligibility for severance pay was triggered by announcement, where nationwide collective-bargaining agreement clearly states that employees who resign are not eligible for severance pay. Contract provides that employees "who are permanently laid off due to lack of work" are eligible for severance pay, and grievants were still being scheduled for work when they resigned; company never agreed to union's proposal for early severance pay to employees who left before actual plant closing; transitional agreement that parties signed after company sold its plant did make change in severance-pay eligibility that union wanted, but it went into effect after date of this grievance and grievants' resignations and is specifically limited to employees who continued to work in flour mill that company leased back after sale.

ARBITRABILITY

— Eligibility for severance pay — Constructive layoff — Continuing violation ▸93.4663 ▸94.09 ▸94.162 ▸123.01

Grievance challenging employer's denial of severance pay to employees who resigned

after announcement of operations shutdown is arbitrable, despite employer's claim that grievances should have been filed within seven days of grievants' resignations, where union's argument that company's action initiated constructive layoffs that triggered severance-pay eligibility at any time within two years requires ruling on merits, and each day that company refuses to pay severance pay can be viewed as continuing violation.

Appearances: For the employer — John Nordlund; Herb Albert, former industrial relations director; Tom Degiovanni, former dry mix department manager; Kelvin Woods, former plant manager; Michael Larson, employee relations manager. For the union — Patrick O'Hara, attorney; Herbert Holste, local president.

RESIGNATION

The Issue(s)

STALLWORTH, Arbitrator: — The Parties presented the following issue(s) to the Arbitrator:

1. Is the dispute arbitrable?
2. Did the Employer violate the collective bargaining agreement when it failed to pay severance pay to the Grievants?
3. If so, what shall the remedy be?

Relevant Contract and Closing Agreement Provisions

Master Agreement

SECTION IV
SENIORITY

36. Layoffs

...

a. The interpretation of the above paragraph means that a reduction in force or a layoff shall be any day on which an Employee is not scheduled to work.

SECTION VI
SEVERANCE PAY

53. Employees who have completed three (3) or more years of continuous service with the COMPANY and who are thereafter permanently laid off due to lack of work caused by management action in initiating any of the following changes, shall be eligible for severance pay:

a. Technological improvements in facilities or equipment.

b. Changes in methods of production, processing, shipping, receiving, materials handling or distribution, etc.

c. Permanent closing of a plant, department or part of a department or other permanent reductions in the total plant working force.

54. Employees shall not be eligible for severance pay 1) if they are eligible for normal retirement or disability retirement benefits under the provisions of the Retirement Plan of the Pillsbury Company and the American Federation of Grain Millers, (AFL-CIO, CLC), (2) in the event of discharge for just cause or resignation, (3) in the event of death, or (4) in the event the Employee is offered and accepts employment elsewhere with The Pillsbury Company.

55. "Permanently laid off" as used in this SECTION VI is defined as a layoff resulting from the application of a, b, or c of Paragraph 53 above . . . Layoffs will be in accordance with Section IV of this Master Agreement. However, the Employee (i.e. Employee A) displaced as a result of the elimination of the Employee's regular job and who is also eligible for severance pay may have the option of accepting the layoff and receiving severance pay or exercising seniority under the provisions of the applicable Supplemental Agreement to claim another job. If the Employee chooses to exercise seniority to claim another job, and displaces another eligible Employee (i.e. Employee B) with a higher, the same or next lower classified hourly rate, then Employee B shall have the option of accepting the layoff and receiving severance pay or exercising seniority under the provisions of the applicable Supplemental Agreement to claim another job.

Closing Agreement Provisions

This Closing Agreement as agreed to by the American Federation of Grain Millers on behalf of its members who are employees of The Pillsbury Company at its Springfield, Illinois and Terre Haute, Indiana facilities, sets forth exceptions to Sections V, VI, XI, and XII of the 1990-1993 Master Agreement. The parties agree that these exceptions pertain only to those employees permanently laid off as a result of the Company announcement on January 18, 1990.

Severance Pay Section VI

* Employees permanently laid off due to lack of work will receive 1 weeks pay for full years of service 1 through 20.
* Employees permanently laid off due to lack of work will receive 2 weeks pay for full years of service in excess of 20.
* The three year minimum qualification for severance eligibility is waived.
* Severance will be calculated using the higher rate of:
  —classified rate at the time of permanent layoff due to lack of work
  —classified rate on January 18, 1990
* Employees who are permanently laid off due to lack of work, and elect normal retirement under the provisions of the contract, will not be disqualified from receiving severance pay.

Background

The facts giving rise to this case are largely undisputed. The Company manufactures and distributes a variety of food products. It operated a facility in Springfield, Illinois, which had three operations: a grocery line, a flour mill, and food service. The Grievants were all employed by the Company at this Springfield location.

The Company has a Master Agreement with the American Federation of Grain Millers Union. Supplemental local agreements are negotiated with local unions at various locations. Such an agreement existed in this case as well.

On January 18, 1990, the Company announced to its Springfield employees that at least the grocery line would be permanently closed at that location. According to the Company, the work was to be moved to its Murfreesboro, Tennessee plant, in an effort to reduce costs and to improve customer service.

The evidence indicates that the Company did not give at that time a specific date on which the grocery line would be closed, although employees were told that it would be approximately eighteen (18) months in the future. In addition, the Company did not answer definitively whether jobs in the other operations of the plant would be eliminated as well.

The Employer and the International Union entered into contract negotiations soon after this January, 1990 announcement, which resulted in a new Master Agreement in April, 1990. The evidence indicates that during these contract negotiations, the Union proposed that all employees on the Springfield payroll on January 18 be eligible for severance pay regardless of whether they quit or were laid off. The Parties did not reach agreement on amending or changing the Master Agreement. The Company took the position that under the Master Agreement, only those employees who actually were laid off by the Company were eligible for severance, and not those who resigned in the face of the Company's announcement.

The evidence further indicates that the local Union continued to discuss the issue with the Company. Severance is addressed in a "Closing Agreement," between the Company and the Local, which, like the new Master Agreement, is also dated April 1, 1990. The Closing Agreement waives the three-year tenure period for eligibility for severance pay, but otherwise leaves the conditions for collecting severance pay intact.

On April 27, 1991, the Company began closing down the grocery line, at first taking volunteers to be laid off. On May 16, 1991, the Union filed a grievance on behalf of a group of employees who had resigned from the Company prior to the first layoffs, and who did not receive severance. At the arbitration hearing, the Parties stipulated that the Grievants had resigned on various dates ranging from January 26, 1990 through April 30, 1991.

In January, 1991, the Company announced the probable sale of its Springfield plant to the Cargill Company, subject to the approval of the Federal Trade Commission. On August 1, 1991, Cargill did take over the operations of the Springfield plant. The Company leased back one part of the flour mill from Cargill for a time, and entered into an agreement with the Union specifically agreeing to pay severance to employees who worked at the C mill for the Company after the sale, but quit or resigned before they were ultimately laid off.

The Parties were unable to resolve the dispute raised by the grievance in this case and it proceeded to arbitration. It is within this factual context that the instant dispute arises.

The Union's Position

The Union argues first that the issue was raised in a timely manner and is arbitrable. According to the Union, if the Grievants were laid off, as the Union contends, then they were entitled to recall rights for twenty-four months under Section VI of the Agreement. Therefore, the Union argues, the Grievants were entitled to seek severance at any time prior to the expiration of the two-year recall period.

In addition, the Union argues that the Company itself created an unclear and amorphous situation by announcing the plant closure but not giving a date for the action. This confusion created by the Company should not be held against the Union, the Union argues.

The Union further contests the Company's position that the grievance is moot because of an earlier-filed grievance. According to the Union, the earlier grievance sought payment of severance while employees were looking for other jobs, not for those who accepted new jobs following the Company's announcement. The Union suggests that this factual difference distinguishes the two grievances.

In regards to the merits of the case, the Union argues first that this case cannot be decided on the basis of other arbitration decisions because of the unique language and extraordinary circumstances which occurred in this case. The Union points to the language of the Agreement which states that an employee is eligible for severance pay when he or she is laid off due to a "lack of work caused by management action *in initiating* . . . a permanent closing of a plant" etc. (emphasis added). The Union places particular emphasis on the phrase "in initiating," and argues that the January 18th announcement that the plant would close constitutes

management action initiating a permanent closing of the plant.

According to the Union, employees are generally disqualified from severance pay because of some willful act that justifies disqualification, i.e. willfully causing one's discharge for just cause or voluntarily resigning. Here, the Union argues, the employees did not voluntarily resign, but rather were constructively terminated or laid off.

The Union argues further that the purposes for severance pay advanced by the Employer are narrow and self-serving. The Union argues that there are broad purposes for severance pay, such as indemnification for the loss of seniority, compensation for retraining and maintenance of good will with the employees and the community, which go beyond the purposes advanced by the Company. According to the Union, severance is an earned entitlement, and the Company has manipulated the circumstances in this case to deprive employees of that entitlement.

The Union also argues that the Company has used eligibility for severance pay as a sword to retain the number of skilled employees the Company would need to continue operating the plant until it was phased out completely. The Union contends that there is no authority for the Company requiring employees to choose between taking a new job opportunity or remaining at the plant to collect their severance pay. At the very least, the Union urges, the Company should have provided employees with a firm date as to when their jobs would be eliminated. In addition, the Union urges that the Company encouraged and even pressured the employees to take new jobs and thereby give up their severance pay, by providing an aggressive job placement service.

For all of the above reasons the Union argues that the instant grievance should be sustained, as well as the relief sought.

The Company's Position

The Company argues that the instant grievance should be denied, for a variety of reasons. First, the Company argues that the dispute is inarbitrable. According to the Company, the grievance was filed in an untimely manner, because it was not filed within seven days of any of the Grievant's resignations. Based on this fact alone, the Company contends, the grievance should be dismissed.

The Company further argues that the Union's abandonment of an earlier grievance dated March 21, 1990. According to the Company, the earlier grievance involved the same issue as the current grievance, the Company's failure to pay severance to employees who quit prior to layoff, and was abandoned at the fourth step. This abandonment of the earlier grievance bars the Union from proceeding on this grievance, the Company urges.

As for the merits of the case, the Company contends that the Union has failed to carry its burden of proof to demonstrate that the contract has been violated. According to the Company, in order for the Union to prevail it must overcome clear and unambiguous contract language which expressly excludes from eligibility for severance pay those employees who quit prior to layoff.

The Company notes that the Union did not present any witnesses who participated in various contract negotiations sessions at the local or national level over the severance pay issue. From this fact, the Company urges, the only inference that can be drawn is that their testimony would have been adverse to the Union's case. This inference is supported by statements made by two representatives of the Local Union, the Company urges, which are documented in several Company exhibits.

According to the Company, the position of the Grievants does not fit the clear language of the eligibility for severance portions of the labor agreement. The Grievants could not be considered "laid off" at the time the dispute arose because they were still being scheduled for work.

Even if the language were ambiguous, the Company urges, the bargaining history of the Parties makes clear that both Parties understood that if an employee quit, he was ineligible for severance pay. The bargaining history is clear from the Union proposals which were rejected, and the testimony that numerous discussions over the issue occurred, which did not result in mutual agreement.

The Company also contends that the various agreements, other than the Master Agreement, did not modify the Master Agreement's requirements for eligibility to receive severance pay. For example, the Closing Agreement, while modifying some of the language regarding the severance pay, did not modify this basic provision that the employee has to be laid off before he or she is eligible. The Company argues that the rest of the agreements do not address the issue of severance pay eligibility, and, in certain cases, have not been cited by the Union as support for its position during the negotiations and grievance procedure.

The only agreement which does touch on early severance pay eligibility is the Temporary Operating Agreement, the Company contends. However, that Agreement does not change the result in this case because it only applied to employees working at the C mill after July 31, 1991, the Company notes. All of the Grievants had left the employ of the Company by that time.

The Company urges further that arbitral authority unanimously supports its position. In addition, the Company argues that the Union cannot prevail on the basis of equity, because if equity is considered by the Arbitrator, the balance must be struck in the Company's favor. Its early announcement of the layoffs, and its efforts to help employees find new jobs should be viewed as positive rather than negative, the Company urges.

For all of the above reasons the Company urges that the grievance should be denied.

Opinion

This is a case involving the eligibility of the Grievance to receive severance pay. The Parties have submitted the following issues for resolution:

1. Is the dispute arbitrable?
2. Did the Employer violate the collective bargaining agreement when it failed to pay severance pay to the Grievants?
3. If so, what shall the remedy be?

The Arbitrator has considered the testimony, other evidence and arguments put forth by the Parties and concludes that the dispute is arbitrable, but that the Employer did not violate the collective bargaining agreement when it failed to pay severance pay to the Grievants. The Arbitrator's findings, conclusions and reasoning are set forth below.

Arbitrability: The Company contends that the dispute is inarbitrable because it was not filed in a timely manner and because the Union dropped an earlier filed grievance over the same dispute. The Master Agreement requires that a grievance be filed within seven (7) days of the date the alleged violation of the Agreement occurred. The Company takes the position that the alleged violation occurred in this case on the dates on which the Grievants resigned, to which the Parties have stipulated. These dates range from January, 1990 until about twelve days prior to the filing of this grievance.

The Union argues that the Grievants were, in effect, constructively laid off by the Company's actions, and as such, they had recall rights for up to two years after the dates of their constructive layoffs. Therefore, their eligibility for severance pay could arise any time within that period, the Union asserts. In addition, the Company's own actions rendered the Grievants' employment status and situation so murky that the resulting confusion should not be held against the Union, the Union argues.

The Union's grievance depends, to a large extent, on its characterization of the Company's actions in January, 1990 as initiating the resignations or constructive layoffs which the Union argues triggered severance pay eligibility. In order to finally resolve this issue, the Arbitrator would have to decide the merits of this case, i.e. whether the Company's actions constituted a "constructive layoff." Because this argument is not totally without merit, and requires a ruling on the merits, the Arbitrator concludes that it would not be reasonable to dismiss the case as inarbitrable at the outset without an examination of the substance of the dispute.

Furthermore, the Arbitrator concludes that there may be some basis for viewing this as a case involving a continuing violation. The Company's failure to pay the severance pay could be viewed as a new occurrence on each day the Company continues to refuse to pay the amount.

In regards to the fact that the Union filed a similar grievance several months after the January, 1990 announcement, and did not pursue that grievance all the way to arbitration, the Union has argued that there are some facts distinguishing that grievance from this one. The full facts of the earlier grievance were not developed at the arbitration hearing and therefore the Arbitrator cannot conclude that the grievances were identical. Generally, if there is a significant question about whether a dispute is arbitrable, Arbitrators will err on the side of arbitrability rather than nonarbitrability. The Arbitrator concludes that there is a significant question in this case, and therefore will not dismiss the dispute as inarbitrable, either on the grounds of timeliness or on some other grounds.

The Merits of the Dispute: The substance of this dispute involves the issue of whether the Grievants are entitled to severance pay, under the circumstances which gave rise to this dispute. The relationship between the Parties in this case is covered by several agreements, the most important of which is the Master Agreement, which is a nationwide contract between the Company and the International Union. That Agreement states in relevant part,

53. Employees who have completed three (3) or more years of continuous service with the COMPANY and who are thereafter permanently laid off due to lack of work caused by management action in initiating any of the following changes, shall be eligible for severance pay:

* * *

c. Permanent closing of a plant, department or part of a department or other permanent reductions in the total plant working force.

(Master Agreement, Paragraph 53).

The next section of the Master Agreement explicitly states that employees are not eligible for severance pay if they resign or are terminated for just cause.

The Company argues that the plain language of the Master Agreement supports its position. Another section of the Agreement also defines being laid off as that which occurs when an employee is not scheduled for work. There is no dispute in this case that when the Grievants left the employ of the Company they were still being scheduled for work.

The Union concedes that, on its face, this language appears to support the view that employees who resign from their jobs are not eligible for severance pay. However, the Union contends that the language of the section also makes special reference to actions *initiated by the Company* as the catalyst for severance pay eligibility. Here, the Union contends, the Grievants would not have resigned their jobs at Pillsbury voluntarily if the Company had not announced that those jobs were in jeopardy. Therefore, the Company *initiated* the actions which led to the resignations of the Grievants, the Union argues.

The Arbitrator concludes, however, that the plain language of the Master Agreement still requires that employees be laid off before they are considered eligible for severance pay. Even though the section does refer to actions initiated by the Company, these words modify the basic description of employees who are eligible for severance, i.e., employees "who are permanently laid off due to lack of work." At the time each Grievant resigned from his position at Pillsbury there is no indication that he was permanently laid off due to lack of work. The plant was still operating and there was still work for the Grievants to do. Therefore, the Grievants do not meet the eligibility criteria established by the plain language of the Master Agreement.

The Union has the burden of proof in this case. In order for the Union to circumvent the plain meaning of the contract language the Union would have to show that the bargaining history between the Parties demonstrated that the language was intended to mean something other than it appears to on its face.

As the Company notes, the Union did not present any witnesses from the Union side who had attended contract negotiations where the issue was raised of "early severance pay," i.e. severance for employees who did not stay long enough after the January, 1990 announcement to be laid off. There was undisputed testimony that the issue was raised in national contract negotiations as well as in ongoing local discussions. There also was evidence that the Local Union had made formal proposals during the negotiations over the national contract that employees at Springfield be permitted to collect severance pay if they left before the actual plant closing. The record indicates that these proposals were denied.

The Company also presented testimony that the issue was raised in local negotiations over a period of time, and that the Company considered the proposal, but could not get the concessions it wanted from the Union in return for the early severance pay. Therefore, according to the Company's evidence, no agreement was reached to pay employees early severance, before they were actually laid off.

In light of this undisputed evidence, the Arbitrator concludes that it has not been established that the Parties agreed to some other understanding of the labor agreement with regard to severance pay eligibility than is reflected in the words of the Agreement itself.

The Union suggests, however, that it was not trying to modify the Agreement, because it always contended that the Master Agreement itself supported its view. The Union suggests that its negotiations were merely intended to clarify the existing language or to get the Company to live up to its obligations under that Agreement.

The Company has presented some evidence that several Union officials acknowledged, in other settings, that employees who left before they were actually laid off were *not* entitled to severance pay. The Arbitrator has examined this evidence and concludes that it offers little support to the Company's position. There is no way to ascertain whether the newspaper report is accurate, and it is not entirely clear whether, in either case, the Union representative was saying that the Agreement did not permit early severance, or simply that the Company was not respecting its obligation to pay such severance. However, the

evidence of the negotiating sessions over this issue suggest that the Union was trying to persuade the Company to adopt its position, rather than that there was a mutual understanding between the Parties. There certainly is not enough evidence of mutual agreement that the language in the Master Agreement meant something different from what it says, i.e. that it means that employees are eligible for severance pay at any time after the January, 1990 announcement.

Nor is there support for the Union's position from the other agreements entered into by the Parties. The Union acknowledged that the Supplemental Agreement of Local No. 24 does not address severance pay. The Closing Agreement for the Springfield plant does address severance pay issues, and does eliminate the eligibility requirement of three years' minimum service before severance can be collected. However, it did not change and actually reinforces the requirement that severance be paid only to employees who are "permanently laid off due to lack of work."

The Transitional Agreement, signed with the Local after the Springfield facility was purchased by Cargill, Inc., did make the change in eligibility for severance which the Union seeks in this case. However, that Agreement went into effect after the date of this grievance and the resignations of the Grievants. In addition, the Agreement is specifically limited only to the employees who continued to work for Pillsbury after July 31, 1991, in the C flour mill it leased back from Cargill after the sale of the Springfield plant. The fact that the Parties specifically included this language in this Transitional Agreement suggests that they needed to do so as an exception to the contrary language in the Master Agreement.

Both Parties have cited certain arbitration cases in support of their respective positions. The Arbitrator concurs with the Union that none of these cases are very helpful, because the outcomes in these cases is so dependent upon the individual facts and circumstances, and the contract language in each case.

The Union suggests that the Company's actions in this case were fundamentally unfair. According to the Union, none of the Grievants would have left their jobs had it not been for the Company's announcement that they would be eliminated at some indeterminate point in the future. The Union contends that severance pay is an earned right, and that it is intended to compensate employees for a broad panoply of problems which arise when they are displaced from their jobs. In addition, the Union argues that, having earned their severance pay, employees should not be made to choose between waiting until the plant actually does close or seeking and taking a job earlier and thereby forfeiting their severance pay for some kind of job security.

The Arbitrator understands the Union's concern in this regard. The employees in this case did have to make a difficult choice. However, the requirement that an employee must be laid off in order to collect severance was not unilaterally imposed by the Company. It was agreed to by both Parties in contract negotiations and incorporated into their collective bargaining agreement. Therefore, the Parties agreed to the terms of that eligibility, and the Arbitrator is powerless to alter the terms of their Agreement.

The Union also has suggested that the Company, by making the announcement of the layoff so early, and by offering job placement services, pushed the Grievants into resigning so that they would not be able to collect their severance pay. However, the Arbitrator concludes that there was not sufficient evidence at the arbitration hearing to reach this conclusion.

Therefore, on the basis of all the evidence before him, the Arbitrator concludes that the instant grievance shall be denied.

AWARD

The grievance is denied.

WICHITA EAGLE —

Decision of Arbitrator

In re WICHITA [Kan.] EAGLE AND BEACON PUBLISHING COMPANY, INC. and WICHITA GRAPHIC COMMUNICATIONS UNION, LOCAL 147-C, FMCS File No. 92/17512, January 8, 1993

Arbitrator: John C. Shearer, selected by parties through procedures of the Federal Mediation and Conciliation Service

PROMOTIONS

— Joint committee's authority — Seniority — Completion of correspondence course ▸119.121 ▸111.10 ▸93.70 ▸119.124

Company improperly promoted apprentice who failed to complete pressman corre-