STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS & DAIRY EMPLOYEES UNION LOCAL NO. 563, Complainant, vs. PIERCE MANUFACTURING INC., Respondent.	Case XIV No. 13589 Ce-1294 Decision No. 9549-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. John S. Williamson, Jr., appearing on behalf of Complainant.
Mr. C. J. Clarkson, Plant Manager, Pierce Manufacturing Inc., appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed John T. Coughlin, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on such complaint having been held at Appleton, Wisconsin, on April 7, 1970, before the Examiner, and the Examiner having considered the evidence, arguments and briefs of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That General Drivers & Dairy Employees Union Local No. 563, hereinafter referred to as Complainant Union, is a labor organization with its offices located at 1366 Appleton Road, Menasha, Wisconsin.

2. That Pierce Manufacturing, Inc., hereinafter referred to as Respondent, is a corporation having its principal place of business at 315 South Pierce Avenue, Menasha, Wisconsin.

3. That effective July 1, 1967, Complainant and Respondent entered into a collective bargaining agreement setting forth the basic working conditions covering employes in the employ of Respondent; that said agreement was to continue in full force and effect until June 30, 1969.

4. That the above mentioned collective bargaining agreement contained the following pertinent language:

"ARTICLE 15 - GRIEVANCE PROCEDURE

Step 1: An employee having a grievance shall take the matter up with the supervisor and the shop steward within three (3) work days following the occurrence causing the grievance or the discovery of the matter causing the grievance.

Step 2: If a satisfactory settlement is not reached the grievance shall be presented by the steward to the shop superintendent who shall within five (5) work days of the filing of the grievance in step 1 meet with the employee and the shop steward.

Step 3: If no settlement is reached with the shop superintendent the grievance shall be reduced to writing and within ten (10) work days of the step two meeting, a meeting shall then be held between the employee, shop committee, a representative of Local 563, the general manager's committee and a representative of the Wisconsin Employment Relations Board who shall act as a mediator.

Step 4: If no agreement is reached within five (5) work days of step three either party shall be permitted full economic or legal recourse in support of its position.

Failure by either party to comply with the time limits established in steps one, two and three will result in the forfeiture of the grievance by the party that fails to comply with the time limits. The presence of the grievant(s) shall not be mandatory in step two or three of the grievance procedure."

"ARTICLE 16 - DISCHARGE

An employee shall not be discharged or suspended without just cause. A discharge or suspension must be preceded by one (1) written warning notice to the employee for the same offense with a copy to the Union except in case of drunkenness, dishonesty and other flagrant violations. The warning notice herein provided shall not remain in effect for a period of more than six (6) months from date of issuance. When an employee is discharged the basis for the discharge shall be set forth in the discharge letter to the employee with a copy to the Union."

. . .

"ARTICLE 45 - TERMS AND NOTICE OF CHANGE OF (sic) TERMINATION

This Agreement shall continue in full force and effect from July 1, 1967 until the expiration date of June 30, 1969 and thereafter shall be automatically renewed from year to year unless notice in writing shall be given by either party to the other of a desire to change the Agreement or to terminate the Agreement at least sixty (60) days prior to June 30, 1969 or sixty (60) days prior to a subsequent applicable expiration

date after automatic renewal. If the parties do not reach an agreement with respect to such proposed changes, or a new Agreement, in the event termination notice has been given prior to said expiration date, then this Agreement shall terminate on its expiration date. The parties may, however, by mutual consent, extend this Agreement for a specific period of time to allow further negotiations."

5. That on January 16, 1969, Joe Heid, an employe working in Respondent's "mounting" department, was given a warning notice which stated "Smoking in the washroom - next time will be a two day lay off."

6. That during the middle of June 1969, Respondent met with Complainant Union to discuss proposals concerning a new contract; that at this meeting the Union offered to continue the contract on a day-to-day basis if a new contract was not agreed to prior to the termination of the then existing contract on June 30, 1969; that the Respondent did not clearly and unequivocally accept the Union's offer to continue the contract and that therefore there was no contract in existence by virtue of the conversations that took place at the aforementioned meeting.

7. That on June 30, 1969, the contract between Respondent and Complainant terminated.

8. That on December 2, 1969, the aforesaid Joe Heid was given a notice of disciplinary action which stated, "Three day suspension effective 12/3/69 without pay. For violation of Company rule #10. Smoking during working hours. Next time will be dismissed."

9. That during the period from the date of the termination of the collective bargaining agreement, namely, June 30, 1969, to December 2, 1969, the date that Joe Heid received the above noted three day suspension, the Employer continued to make welfare payments to its employes, to make pension payments on their behalf, to pay the employes their contractually provided for wages, and on two occasions it followed the contractually provided for grievance procedure and Respondent continued to make dues check offs; that none of the aforementioned activities by Respondent amounted to an acceptance by conduct of the Union's offer to continue the contract that expired on June 30, 1969 on a day-to-day basis.

10. That on February 5, 1970, Complainant Union struck the Respondent.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That there was no contract in existence from June 30, 1969, the date of the termination of the contract between the parties, and December 2, 1969, the date that Joe Heid was given a three day suspension for smoking and therefore there being no contract in existence Respondent did not violate Section 111.06(f) of the Wisconsin Statutes.

NOW, THEREFORE, it is

ORDERED

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 12th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
John T. Coughlin, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS & DAIRY EMPLOYEES UNION LOCAL NO. 563, Complainant, vs. PIERCE MANUFACTURING INC., Respondent.	Case XIV No. 13589 Ce-1294 Decision No. 9549-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The complaint in the instant matter was filed on March 10, 1970. After the close of the hearing and the issuance of the transcript, Respondent filed a post hearing brief. The brief was received on July 22, 1970.

PLEADINGS

The Complainant alleges that Respondent violated Section 111.06(f) of the Wisconsin Statutes by breaching its collective bargaining agreement with the Union in that it gave one Joe Heid a three day suspension on December 2, 1969, without having given him a prior operative warning notice as provided for in Article 16 of the collective bargaining agreement allegedly in effect at that time. Respondent denied that it had committed the unfair labor practice complained of by the Union.

UNION'S POSITION

The Union contends that the collective bargaining agreement that terminated on June 30, 1969, was continued on a day-to-day basis. It bases this conclusion on two premises. First, that the Employer, by its Comptroller, Stadtmueller, agreed to the continuation of the contract as evidenced by Schlieve's testimony that Stadtmueller "recognized that we were going to adhere to it until we got a successor". Secondarily, that the Employer by its actions continued the contract on a day-to-day basis, namely, by continuing to make welfare payments to its employes, by making pension payments on their behalf, by paying its employes their contractually provided for wages, by following on two occasions the contractually provided for grievance procedure and by continuing to provide for a dues check off and that said dues check off would be illegal if there were not a contract in existence.

The Union then argues that being as the contract was in existence at the time of Heid's three day suspension on December 2, 1969, that the Respondent violated said contract by suspending Heid without a prior

warning. The Union stresses the fact that Article 16 states that, "A discharge or suspension must be preceded by one (1) written warning notice to the employee for the same offense with a copy to the Union except in case of drunkenness, dishonesty and other flagrant violations. The warning notice herein provided shall not remain in effect for a period of more than six (6) months from date of issuance." (emphasis supplied)

The Union acknowledges that Heid received a warning notice for smoking on January 16, 1969, but insists that this was the only warning that he received prior to his receiving a three day suspension on December 2, 1969, and that because this warning was given more than six months prior to said suspension it is according to Article 16 of the contract inoperative. The Union vehemently denies the Employer's allegations that Heid received a warning for smoking on June 12, 1969, and that therefore no other warning was necessary to validly suspend Heid on December 2, 1969. In summation the Union argues the following:

(1) That there was a contract in existence on December 2, 1969, the date of Heid's suspension.
(2) That the only warning notice Heid received prior to that suspension was on January 16, 1969.
(3) That by the terms of Article 16 the January 16, 1969 warning notice was inoperative.
(4) That Heid did not receive a warning notice for smoking on June 12, 1969.
(5) That the Employer violated Article 16 of the contract by suspending Heid without a prior warning notice being in existence at the time of his suspension.

EMPLOYER'S POSITION

The Employer contends that there was no collective bargaining agreement in existence at the time Heid was given a three day suspension. It argues that the statement attributed to Stadtmueller concerning continuation of the contract was not binding because it has not been clearly established. It further contends that the fact that it continued many of the working conditions as they existed under the expired contract is not probative of the fact that the contract was continued on a day-to-day basis. In addition, the Respondent refutes Complainant's allegations that it acknowledged the existence of a collective bargaining agreement when it followed the contractually provided for grievance procedure on two occasions for it avers that to do otherwise would have been a violation of Section 8(a)(5) of the National Labor Relations Act. Respondent rejects the Union's contention that the dues check off could not have been maintained unless the contract was in effect by arguing that Section 302 of the National Labor Relations Act does not require an agreement with the Union in order for there to be a check off. Furthermore, Respondent notes that Article 45 of the collective bargaining agreement states that, the parties may, however, by mutual consent, extend this agreement for a specific period to allow further negotiations. The Respondent contends that even assuming arguendo that the contract was extended on a day-to-day basis that such extension was not for a specific period and therefore would not conform to the aforementioned terms of the collective bargaining agreement.

The Respondent also argues that if this action is not a National Labor Relations Act Section 301 action then this matter would come under the exclusive jurisdiction of the National Labor Relations Board.

Respondent also contends that even assuming arguendo that there was a contract in existence at the time of Heid's suspension, that step 3 of the grievance procedure has not been fulfilled and that therefore all the contractual requirements have not been exhausted. Finally, again assuming arguendo that a contract was in existence at the time of Heid's suspension, Respondent argues that its conduct would not have violated the terms of the agreement because it has shown by a preponderance of the credible evidence that Heid did receive a warning notice on June 12, 1969, thereby satisfying the contract provision stated in Article 16 requiring a prior warning notice within six months.

DISCUSSION

The threshold issue present in the instant case is whether there existed a collective bargaining agreement on December 2, 1969, the date the Respondent suspended Heid for three days. If the contract was in existence at that time then an operative warning notice would be a prerequisite to said suspension in accordance with Article 16 of the contract. If, however, there was no contract in existence on December 2, 1969, then there would be no necessity for Heid to have received a warning notice during the six months prior to his suspension. The burden is clearly on the Union to establish that the contract that expired on June 30, 1969 was in fact extended on a day-to-day basis and that said contract was in existence on December 2, 1969. 1/

As noted previously, the Union initially contended that the contract was extended by virtue of the statements made to it by Stadtmueller during a negotiating meeting held in mid-June of 1969. Present at this meeting in addition to Stadtmueller were the Union's Business Agent, Curtin, and its Secretary-Treasurer, Schlieve. Because of the importance of this question concerning the oral extension of the contract a careful examination of the testimony concerning the June meeting is in order. Schlieve under direct examination by his attorney testified as follows:

> "By Mr. Williamson
>
> Q Now, what, if anything, did the Company say and what, if anything, did you say concerning the possible continued application of this contract beyond June 30, 1969?
>
> A Well, Mr. Stadtmueller expressed the concern that the proximity of the date to the expiration of the contract--
>
> . . .
>
> A He expressed concern to Mr. Curtin and myself that they were receiving our proposal and just prior to the expiration of the contract and he expressed this concern--he said to me, 'You know we're not going to be able to get an agreement before the old one expires and we're certainly in no position to have a work

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1/ 111.07(3) of the Wisconsin Statutes; Browning v. Fox, 1920, 230 N.Y. 535, 130 N.E. 883

stoppage or strike,' and I assured him at that point that we weren't intending to have a work stoppage or strike, that it was our intention to work out a mutually agreeable contract without a work stoppage and that we would continue to work under a day to day extension of the old agreement with respect to its provisions--namely, wages, hours, conditions, pension plan, health and welfare contributions and all of the rest. He felt relieved at this point and felt that--

Q (Interrupting) Let me interrupt you. When you say 'felt', would you tell what he said?

A He said that he was glad that we came in with this type of attitude at the bargaining table because the Company economically was going to have a problem meeting our demands and certainly by knowing that they could continue production that they would be in a better position to ultimately resolve the contract." 2/

At a later point in the direct examination of Schlieve the following testimony was given concerning what took place at the June 1969 meeting.

"By Mr. Williamson

Q Let me ask you, at any time prior to February 5th, did any representative from the Company say to you that the agreement that was reached prior to June 30th, that this contract would be continued on a day-to-day basis was over with--kaput?

A No, sir. There was never any discussion other than the one I had with Mr. Stadtmueller at the outset where he recognized that we were going to adhere to it until we got a successor." 3/

The Union is arguing that an oral extension of the expired contract was entered into by Respondent because of the aforementioned statements of Stadtmueller. Thus, in compliance with contract law an agreement to extend the contract must contain an offer by the Union and an acceptance by Respondent. Schlieve at the June meeting referred to above made a clear and unequivocal offer to extend the old agreement "with respect to its provisions--namely, wages, hours, conditions, pension plan, health and welfare contributions and all of the rest." The critical question then becomes whether there was a similar type of acceptance by Respondent.

The Restatement of Contracts, section 58 at page 65 states that, "Acceptance must be unequivocal in order to create a contract." Then in its comment it states that, "An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent." (emphasis supplied) By way of illustration the Restatement cites two examples:

2/ Pages 7-8, Transcript.

3/ Page 10, Transcript.

(1) A sends an order for goods to B. B replies that the order will receive his attention. There is no contract. (2) A writes to B offering to sell a piece of land. B replies, "I shall meet you with the money in a few days and be ready to arrange particulars." There is no contract. 4/

When this standard of clear and unequivocal acceptance is applied to that which Schlieve testified that Stadtmueller said to him, the Examiner finds that there was no such acceptance. The only testimony directly attributed to Stadtmueller relating to even a possible acceptance of Schlieve's offer to extend the contract were Stadtmueller's statements that, "You know we're not going to be able to get an agreement before the old one expires and we're certainly in no position to have a work stoppage or strike" and "that he (Stadtmueller) was glad that we came in with this type of attitude at the bargaining table because the Company economically was going to have a problem meeting our demands and certainly by knowing that they could continue production that they would be in a better position to ultimately resolve the contract."

These statements by Schlieve as to what Stadtmueller said in no way constitute a clear and unequivocal oral acceptance of Schlieve's offer to extend the contract. This Commission has ruled that, "When an oral agreement is clearly established, it may be enforced in the same manner and to the same extent that a written agreement might be." (emphasis supplied) 5/ In addition, Schlieve's testimony that Stadtmueller had agreed to the extension of the contract, which testimony reads as follows: "There was never any discussion other than the one I had with Mr. Stadtmueller at the outset where he recognized that we were going to adhere to it until we got a successor" (emphasis supplied) is nothing more than a characterization of the testimony quoted above that was directly attributed to Stadtmueller. The immediately above quoted characterization does not constitute a clear and unequivocal acceptance by Respondent. The fact that Schlieve testified that Stadtmueller "recognized" the contractual situation described above does not constitute a clear and unequivocal acceptance of the Union's offer to extend the contract. In addition, it is unclear which parties were included in that part of the testimony quoted immediately above that stated that, "we were going to adhere to it." Did the "we" mean that Stadtmueller, according to Schlieve, was indicating that the Union was going to adhere to the contract or that both the Union and the Employer were going to adhere to it? At best, due to the ambiguities noted above, even if Stadtmueller did in fact state that, "he recognized that we were going to adhere to it until we got a successor", such a statement would amount to nothing more than an inference and would not constitute an acceptance of the Union's offer to continue the contract in light of the standards set forth above.

Secondarily, as noted previously, the Union contends that the contract existed on a day-to-day basis because of the following actions by Respondent regarding its employes: (1) It made welfare payments on behalf of its employes; (2) It made pension payments on their behalf;

4/ See also Williston on Contracts which states at Section 72, page 207 that an acceptance must be positive and unambiguous.

5/ Kauffman's Lunch Co., Dec. No. 1632, 5/48; aff. Milw. Co. Cir. Ct., 7/48

(3) It continued to pay its employes the contractually provided for wages; (4) On two occasions it followed the grievance procedure as set forth in the contract; (5) It continued to check off Union dues. Specifically, the Union argues that it would be illegal for Respondent to continue checking off Union dues without a contract being in existence.

The Examiner finds the arguments noted previously to be inappropriate. The Court in Independent Union v. Procter & Gamble, U.S. Court of Appeals, Second Circuit (New York), 51 LRRM 2752, 2753, 2754 (1962), stated after the contract in that case had been expired that, "The fact that the Employer chose thereafter not to change many of the working conditions which had prevailed under the expired agreement does not tend in any way to establish that that agreement was, or was considered to be, and was treated as, still effective. It is perfectly natural and entirely customary that, in the short hiatus which is expected to occur between the expiration of one collective bargaining agreement and the negotiation of the next, no great change will be made in the existing conditions. Sometimes, as here, a part of the hiatus is covered by an agreed-upon extension of the terms of the expiring agreement. Where no such extension is negotiated, or where the period of extension has also expired, there is no ground whatever for considering that the agreement still governs the relationship of the parties."

In addition, the Court in Food Handlers v. Arkansas Poultry Co-op., U.S. District Court, Western District of Arkansas, 49 LRRM 2415, 2419 (1961), noted that although the parties had settled minor grievances and continued check off of dues after the expiration of the contract that, ". . .there is no indication that these acts were done in reliance on any existing agreement, but rather were carried on as a routine and customary practice. . ." In like manner the Examiner finds that the aforementioned actions by the Respondent do not establish the existence of a contract during the period in question.

Specifically, as to the Union's argument that to continue to check off Union dues would be illegal if a contract were not in existence, this Commission in Tiran Industrial Towels, Inc., Dec. No. 7438, 1/66 stated that the existence of a check off did not establish that the collective bargaining agreement was in existence and that ". . .the Employer could continue such check off of dues without being contractually obligated to do so." Finally, the only agreement that must be in existence in order for there to be a Union dues check off under Section 302(c) (4) of the National Labor Relations Act is that between the Employer and the individual employe, not between the Employer and the Union.

Therefore, based upon the above and foregoing the Examiner concludes that no collective bargaining agreement was in existence from the time the old contract expired, namely, June 30, 1969, to December 2, 1969, the date Heid received a three day suspension, and therefore the Employer

did not breach the terms of a collective bargaining agreement and consequently did not violate Section 111.06(f) of the Wisconsin Statutes. 6/

Dated at Madison, Wisconsin, this 19th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner

6/ Because the question of a possible extension of the contract on a day-to-day basis was the threshold issue in the instant case, the Examiner finds it unnecessary to rule on the other contentions raised by the Complainant and the Respondent being as they are rendered moot by the finding that there was no contract in existence during the time in question.