STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 73, AFL-CIO, Complainant, vs. LIEDTKE VLIET SUPER, INC., Respondent.	Case III No. 13886 Ce-1307 Decision No. 9717-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Mr. Willis B. Perebee, Attorney at Law, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized Howard S. Bellman, a member of the Commission's staff, to act as an Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act, and a hearing having been held at Milwaukee, Wisconsin, on July 21, 1970, before the Examiner; and the Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 73, AFL-CIO, referred to herein as the Complainant, is a labor organization with offices at 3510 West St. Paul Street, Milwaukee, Wisconsin.

2. That Liedtke Vliet Super, Inc., referred to herein as the Respondent, is a corporation engaged in the operation of a super market at 1316 West Vliet Street, Milwaukee, Wisconsin.

3. That on June 23, 1969, Robert B. Moberly, a duly authorized Examiner of the Wisconsin Employment Relations Commission made and issued Findings of Fact, Conclusions of Law and an Order with regard to a complaint of unfair labor practices under the Wisconsin Employment Peace Act filed by the instant Complainant against the instant Respondent [Decision No. 8685-B]; and that said Findings of Fact, Conclusions of Law and Order were affirmed by the Wisconsin Employment Relations Commission on July 17, 1969, there having been no petition for review filed in the matter; that, inter alia, Examiner Moberly, in the aforesaid Findings of Fact, Conclusions of Law and Order, concluded that the Respondent was,

"bound by the arbitration provision of the collective bargaining agreement previously executed by Complainant and Melburn Finke; that therefore Respondent, by refusing to

proceed to arbitration upon request of Complainant with respect to Respondent's obligations, if any, under said collective bargaining agreement, has violated the arbitration provision of said agreement. . . .",

and ordered that Respondent "immediately proceed to arbitration. . . with respect to the claims of Complainant that Respondent has violated said collective bargaining agreement."

4. That pursuant to the aforesaid Order of Examiner Koberly, as affirmed by the Wisconsin Employment Relations Commission, the Complainant and Respondent submitted their dispute for final and binding arbitration to an Arbitration Board which issued its decision and award in the matter on January 23, 1970; that said award included the conclusion that the Respondent had "failed to make required contributions for some of his full time employees in the meat department during the period of his operations under a valid collective bargaining agreement" and ordered inter alia, that the Respondent

> ". . . within thirty (30) days following the date of this award. . . comply fully with the provisions of. . . the Agreement. . . and shall make the required contributions to the Health and Welfare and Pension Funds for each of the employees in the meat department of Liedtke Vliet Super, Inc. for all the weeks in which they worked an average of twenty-four or more hours, calculated as prescribed in the Agreement, for the period beginning on January 15, 1968 and ending on February 8, 1969. . . ."

5. That since January 23, 1970, the Respondent has failed and refused to comply with or to otherwise recognize and accept as conclusive the aforesaid final and binding arbitration award of that date.

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

CONCLUSIONS OF LAW

1. That inasmuch as the instant complaint of unfair labor practices alleges that the Respondent has failed to accept as conclusive the final determination of arbitrators whose jurisdiction was based upon a collective bargaining agreement entered by Complainant and Respondent, which award ordered certain payments of money by Respondent into certain Funds, Complainant is a proper party in interest in this proceeding and said Funds are not necessary parties in this proceeding.

2. That by failing and refusing to comply with the aforesaid arbitrators' order, the Respondent is, and has been, committing unfair labor practices within the meaning of Sections 111.06(1)(f) and (g), Wisconsin Statutes.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the Respondent, Liedtke Vliet Super, Inc., its officers and agents, immediately cease and desist from refusing to recognize and accept as conclusive, the award issued by the Board of Arbitration on January 23, 1970 with respect to payments due and owing Health and Welfare and Pension Funds.

IT IS FURTHER ORDERED that Respondent, Liedtke Vliet Super, Inc., its officers and agents, immediately take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Comply with the January 23, 1970 award of the aforesaid Board of Arbitration by immediately making all payments due and owing to the aforesaid Health and Welfare and Pension Funds as ordered by said award.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from receipt of a copy of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 5th day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 73, AFL-CIO,	:	
Complainant,	:	
vs.	:	Case III No. 13866 Ce-1307
LIEDTKE VLIET SUPER, INC.,	:	Decision No. 9717-A
Respondent.	:	

MEMORANDUM ATTACHED TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 23, 1969 Examiner Robert B. Noberly, of this agency issued Findings of Fact, Conclusions of Law and an Order in a proceeding involving the parties to the instant matter. [Decision No. 8685-B] The instant Complainant was also the Complainant therein. No petition for review was filed with regard to that decision, which was subsequently affirmed by the Commission, and no appeal of the Commission's affirmance has been taken. [Decision No. 8685-C]

Attached to Examiner Noberly's decision was a memorandum from which the following is quoted.

"The complaint of unfair labor practices in this matter was filed with the Commission on September 10, 1968, and the Answer was filed on September 30, 1968. After one postponement, the matter initially came on for hearing before the Examiner on October 9, 1968. Prior to the opening of the hearing, the parties agreed upon a settlement of the case and Complainant subsequently requested to withdraw its complaint in the matter. Accordingly, the complaint was dismissed by the Examiner on October 14, 1968.

The parties proved unable to complete their settlement arrangements and the Complainant, without objection from the Respondent, requested that the matter be reopened and brought on for hearing at the first mutually convenient date. On December 3, 1968, the Commission issued an Order setting aside the Order of Dismissal previously issued by the Examiner and further ordered reinstatement of its initial order appointing the undersigned as Examiner. The matter was again brought on for hearing on January 7, 1969, at which time both parties had full opportunity to present evidence and arguments in the matter. Final briefs were filed February 17, 1969.

The complaint alleged that on March 20, 1967, Complainant and Melburn Finke entered into a collective bargaining agreement effective from October 2, 1966 until February 8, 1969, covering

employes at a super market owned and operated by Melburn Finke at 1316 West Vliet Street, Milwaukee, Wisconsin. The complaint further stated that in January of 1968 Respondent took over the super market and became the successor of Melburn Finke, and thereby became bound to the collective bargaining agreement executed previously by Complainant and Finke.

The complaint further alleged that Respondent has failed to comply with said collective bargaining agreement by failing to make health and welfare contributions and pension contributions on behalf of all meat cutter employes, but that Respondent has made such contributions on behalf of a portion of the meat cutter employes. At the hearing, the complaint was amended to further allege that the Employer failed to pay a 5¢ per hour increase to the employes in question, due to commence June 30, 1968, until sometime in October 1968. Finally, the complaint alleged that Respondent has failed upon request to submit the alleged violations of the collective bargaining agreement to arbitration and that by these and other acts Respondent has engaged in conduct violative of Section 111.06(1)(f), Wisconsin Statutes, which provides that it is an unfair labor practice for an employer to violate the terms of a collective bargaining agreement. The relief requested is that Respondent be found to be the successor of Melburn Finke and, as his successor, bound to the collective bargaining agreement executed by Complainant and Finke. It is further requested that Respondent be ordered to pay pension contributions, health and welfare contributions and wage benefits as provided by the collective bargaining agreement.

Respondent does not deny that it declined to proceed to arbitration under the collective bargaining agreement previously executed by Complainant and Finke, and the basic facts of the case are not in dispute."

The Moberly Memorandum proceeds, after the above-quoted statements, to set forth in detail the alleged facts, the parties' legal arguments and the Examiner's rationale for his Findings of Fact, Conclusions of Law and Order. Said Conclusions and Order included the following.

"That Respondent, Liedtke Vliet Super, Inc., is the successor to the business previously operated by Vliet Super Market, Inc., as a super market at 1316 West Vliet Street, Milwaukee, Wisconsin, and is bound by the arbitration provision of the collective bargaining agreement previously executed by Complainant and Melburn Finke; that therefore Respondent, by refusing to proceed to arbitration upon request of Complainant with respect to Respondent's obligations, if any, under said collective bargaining agreement, has violated the arbitration provision of said agreement; and that, accordingly, Respondent has committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Respondent, Liedtke Vliet Super, Inc., Milwaukee, Wisconsin, immediately proceed to arbitration under Article XIV of the collective bargaining agreement previously

executed by Complainant and Melburn Finke with respect to the claims of Complainant that Respondent has violated said collective bargaining agreement."

On October 13, 1969 the parties, pursuant to the aforesaid decisions, submitted the pertinent dispute to final and binding arbitration by a Board of Arbitration chaired by Maurice O. Graff. The Board's award, issued on January 23, 1970, by its own terms, determined the following issues.

"1. Is this dispute arbitrable under the procedural requirements of the collective bargaining agreement. . .
2. If so, what Health and Welfare and Pension contributions, if any, is the employer obligated to make under the collective agreement. . ."

As in the case of the Examiner's Memorandum referred to above, the decision of the arbitrators set forth comprehensively the facts alleged and found, the arguments propounded and the bases for the acceptance of certain allegations and contentions, and rejection of others. The determination made was as follows.

"For the reasons indicated the majority of the Arbitration Board concludes that within thirty (30) days following the date of this award the employer shall comply fully with the provisions of Articles XVII and XXII of the Agreement which has been identified in this proceeding as Joint Exhibit #1 and shall make the required contributions to the Health and Welfare and Pension funds for each of the employees in the meat department of Liedtke Vliet Super, Inc. for all of the weeks in which they worked an average of twenty-four (24) or more hours, calculated as prescribed in the Agreement, for the period beginning on January 15, 1968 and ending on February 8, 1969, this being the period of time during which Liedtke Vliet Super, Inc. was the responsible employer of such employees under the collective bargaining agreement then in effect.

It is awarded further that the employer, Liedtke Vliet Super, Inc. shall, on or before February 15, 1970 provide to the officers of Local #73 of the Union a report of its compliance with this award, including names of employees and amounts of the contributions made in their behalf to each of the two funds and for each of the months included in the prescribed period, as provided herein."

The complaint in the instant matter was filed on June 4, 1970. The Respondent filed a motion to dismiss the complaint on June 18, 1970 and an answer on June 22, 1970. On the latter date the Examiner, by letter, advised the parties that no ruling would be made on the aforesaid motion prior to the hearing already scheduled on the complaint, and denied the Respondent's request for oral argument on the motion. Hearing was held on July 21, 1970 and final arguments were received in the form of post-hearing briefs on August 4 and 6, 1970.

The complaint alleges that the Respondent has committed unfair labor practices under the Wisconsin Employment Peace Act by failing to comply with the aforesaid Arbitration Award.

The Respondent does not deny that it has failed to comply with the arbitration award, nor does it contend that said award is not within the intention of Section 111.06(1)(f) or (g) of the Wisconsin Employment Peace Act. Neither does the Respondent contend that the arbitration award is defective according to the standards of Section 298, Wisconsin Statutes or according to the case law as developed under Section 301 of the Federal Labor-Management Relations Act.

Once again, "the basic facts of the case are not in dispute". As stated above, on October 9, 1968 a hearing was scheduled before Examiner Moberly and prior to opening said hearing, the parties apparently believed they had settled their dispute. The term of this settlement, as understood by counsel for the Respondent, was reflected in a letter from him to counsel for Complainant, bearing that date. Inter alia, that letter stated that certain payments would be made by the Respondent to the Health and Welfare and Pension Funds.

By a letter dated October 11, 1968, counsel for the Complainant replied to the above letter. He transmitted therewith "trust agreement" forms to be executed by the Respondent and explained that,

> "In order to permit the Funds to accept the money which we have agreed shall be paid, it is necessary that these agreements be signed and that four copies of each be returned to us. They are simply extra protections required by the Internal Revenue and Section 302, in regard to the manner in which contributions can be made to Trust Funds, in some of whose Trustees are union representatives."

As recited by Examiner Moberly in his above-quoted Memorandum, the "settlement" failed to take effect. This is explained by the Respondent in its motion to dismiss the instant complaint. Therein the Respondent states,

> "That since the execution by Respondent of such agreements with the Health and Welfare Fund and the Pension Fund would not have been in conformance with the settlement terms, the Respondent declined to do so and the settlement agreement was never fully consummated."

Thus, the first complaint of unfair labor practices was reinstated; Examiner Moberly's decision issued; and the arbitration proceeding was held.

Now, Respondent contends in its motion to dismiss, answer, oral argument and brief that (1) inasmuch as the arbitrators' order requires payments to the Funds, the Funds are indispensable parties herein and the Complainant is not a proper party in interest and (2) that absent the Funds as parties herein, or their records being otherwise made available to the Respondent, the arbitration award is unenforceable because the Funds may be unlawfully structured or operated, and therefore payments into them might be unlawful under Sec. 302 of the Federal Labor-Management Relations Act which covers jointly-administered trust funds established by unions and employers for the benefit of employes.

Thus, Respondent contends in its motion to dismiss,

> "That since the Arbitration award provided that payments be made to the Health and Welfare Fund and the Pension Fund rather than to Complainant herein, and since the question whether such payments would or would not be in violation of Sec. 302 LMRA can only be resolved by documents, agreements and other material in the possession of the Health and Welfare Fund and the Pension Fund, it is apparent that the Complainant herein is not a party in interest as provided in Sec. 111.07, Wisconsin Statutes, but instead that the Health and Welfare Fund and the Pension Fund are the real parties in interest."

and in its answer that,

> ". . .subsequent to the date of the Arbitration Award . . .[Respondent] requested of the Health and Welfare Fund and the Pension Fund permission to examine the files and records in their possession relative to. . . ., Respondent's predecessor employers, in order that that Respondent might be assured that the making of such payments would not be in violation of Sec. 302(c)(5) of the Federal Labor-Management Relations Act of 1947 as amended, Respondents further alleges that it received no response to such requests and has, therefore, withheld compliance with the Award of the Arbitration."

and in its brief that, "the real issue in this matter is not whether the Respondent must comply with the arbitration award, but instead, whether the two trust funds and the Respondent are in a position to respectively accept and make payments under Sec. 302(c)(5) of the Labor-Management Relations Act." and "were it not for Sec. 302(c)(5) being in the picture, there would, of course, be no reason for Respondent to withhold conformance with the award."

The Respondent's arguments are rejected by the Examiner on the following grounds. The Complainant may enforce its collective bargaining agreement with the Respondent without being joined as a complainant by any other third party which may be the beneficiary or recipient of money or other benefits pursuant to such enforcement. Thus, when a labor organization sues to gain compliance with wage provisions of a labor agreement, no employe need join in the complaint nor may any employe settle such a dispute without such settlement being accepted by the labor organization that represents him. Likewise, funds which receive money by operation of a labor contract need not be parties to a union's action to gain compliance with the provisions of the contract which require such payments. [H. Froebel and Son, Decision No. 7804, 11/66.]

Further, it is not an adequate defense to noncompliance with the arbitration award herein that the Funds to which payments have been ordered may be illegally operated. It is not necessary herein to pass upon the legality of said funds because there is no actual contention, not to mention evidence, that there is any illegality in their operation or structure, but only speculation that such might be the case. It is noted in this regard that even such speculation was apparently not raised before Examiner Moberly, the Commission or the arbitrators in the prior proceedings, although the Respondent raised many other issues; and that no substantial effort in conjunction with this or any of the prior proceedings by way of subpoena, or any formal discovery procedure was made to determine if there was any such evidence. Of course, subpoena and

discovery procedures were available as provided by the Wisconsin Employment Peace Act in the prior unfair labor practice case, and Sec. 298 Wisconsin Statutes, provides for arbitrators' subpoenas. Furthermore, it is not at all extraordinary for an arbitrator to rule upon a contention based on a statute.

The Respondent in attempting to avoid the arbitrators' order on the ground that it may require an illegal act is presenting a defense to an apparent contractual obligation which it otherwise admits. This defense must be proven by a clear and satisfactory preponderance of the evidence, not merely stated as a possibility. No case cited to the Examiner holds that payment to a fund required by an arbitration award is illegal unless the party making the payment is satisfied that there is no illegality in the operations of the fund.

The Respondent argues that it has raised more than a suspicion of illegality because it has shown that it had been the Complainant's position that the payments to the funds in issue required execution of the aforesaid "trust agreements". [After the issuance of the arbitrators' award the Complainant modified its position in this regard stating that in view of that award such trust agreements were no longer required under Section 302.] At the hearing, counsel for the Respondent stated ". . .as far as we know, the Health and Welfare and Pension Funds are still in no position to properly receive money under an arbitration award, because of the provisions of Section 302, any more than they claim they were unable to receive the payments under a settlement agreement." Thus, it would seem that Respondent now, to some extent, accepts the Complainant's earlier assertion of the necessity of the "trust agreements", although it rejected it when it was made, and now rejects the Complainant's assertion that the agreements are no longer necessary. Further, the Respondent now refuses to execute the agreements because it has not examined the Funds for illegality although it refused to execute them before on the ground they were not part of the "settlement".

Particularly in view of the lack of effort by the Respondent to achieve such an examination of the Funds, and it is noted that such Funds are subject by law to considerable regulation and disclosure requirements, the Respondent's position is not persuasive. It lacks not only proof of illegality, as concluded above, but also convincing evidence of any sincere concern in that regard.

What is indicated by the Respondent's posture herein is a strategy of delay comprised, in part, of purposeful artificial "legalistic" technicality and cynical utilization of the unfortunate slowness of legal processes. This attitude was apparently also indicated to the prior Examiner and the arbitrators who found Respondent's witnesses to be incredible and feigning ignorance in order to avoid recognized obligations; as well as that Respondent had been dilatory in the grievance procedure, the arbitration procedure, and in complying with the Commission's aforementioned decision.

Dated at Madison, Wisconsin, this 5th day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner