STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 800, UNITED FURNITURE WORKERS OF AMERICA, Complainant, vs. PLYMOUTH PLASTICS, DIVISION OF AMETEK, INC., Respondent.	Case II No. 13871 Ce-1308 Decision No. 9720-A

Appearances:

Meyers & Rothstein, Attorneys at Law, by Mr. David B. Rothstein, for the Complainant.

Federer, Grote, Hesslink, Rohde and Neuses, Attorneys at Law, by Mr. Robert L. Rohde, 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 Herman Torosian, a member of the Commission's staff, to act as an 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 Sheboygan, Wisconsin, on August 26, 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 800, United Furniture Workers of America, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having offices at 1104 Wisconsin Avenue, Sheboygan, Wisconsin.

2. That Plymouth Plastics, Division of Ametek, Inc., hereinafter referred to as the Respondent, is a corporation located at 502 Indiana Avenue, Sheboygan, Wisconsin, with manufacturing facilities located at Plymouth, Wisconsin.

3. That at all times material herein the Complainant has been the exclusive bargaining representative of certain employes of the Respondent; that in said relationship the Complainant and Respondent were signators to a collective bargaining agreement with an effective term from February 5, 1968, to February 1, 1971.

4. That said agreement contained among its provisions the following material herein:

"ARTICLE VIII

SENIORITY

. . .

(5) Any employee shall forfeit all seniority for the following reasons:

1. If he is laid off and not re-employed within one (1) year from the date of the lay-off.

2. If he leaves the Company of his own volition.

3. If, having been laid off, he is recalled for work and fails to report within seventy-two (72) hours unless prevented from doing so through illness.

4. If he is discharged for cause and not subsequently reinstated as provided under Article XII."

. . .

"ARTICLE XII

GRIEVANCE PROCEDURE

The Grievance Committee shall consist of the shop-chairman and two members elected by the employees or a total of three people that are present employees of the Company.

The Business Agent or the President of the Local Union shall have the right to visit the Company for the purpose of assisting in the adjustment of grievances and in general to see that the Agreement is being adhered to. Before entering the plant he shall first announce himself to the authorized representative of the Company.

Should grievances arise between the Company and the Union, an earnest effort shall be made to settle such differences promptly in the following manner.

(a) Between the employee or employees concerned, the Steward of the Department and the Foreman of the Department. The employee shall receive an answer by the end of the next shift worked.

(b) If not settled in step (a) the matter shall be submitted in writing, signed by the employee and presented by a Union Steward to the Foreman in triplicate (one copy for the Foreman, one copy for the Shop-Chairman and one copy to be sent by the Steward to the Union Office). The Foreman will give a written answer to the grievance within three (3) working days of the presentation of the written grievance. If not adjusted the grievance shall be taken up within five (5) working days, after the Foreman's answer, between the Grievance Committee, and the Business Agent of the Local, the Plant Manager and three other management personnel.

(c) Any grievance protesting disciplinary action and not settled in step (a) shall be submitted in writing signed by the employee and presented by a Union Steward to the Foreman

in triplicate (same as (b)) within three (3) working days of the date of the disciplinary action or the matter will be considered resolved, and not subject to further grievance procedure. The procedure is the same as in (b).

(d) If after following the procedure set forth in sections (b) or (c) the grievance is not resolved within five (5) working days the grievance may be referred by either party to an outside arbitrator for disposition. When notice of decision to arbitrate has been given, by certified mail, the parties shall meet within five (5) days in an attempt to agree on an arbitrator. If the parties fail to agree upon an arbitrator either party may request the Wisconsin Employment Relations Board to submit a list of five (5) arbitrators from which the Company and the Union will each eliminate two names, leaving one name as the arbitrator.

It is further agreed between the parties that if the notice of intent to arbitrate any matter, is not given within five (5) working days after step (b) or (c) the matter will be considered resolved, and not subject to further grievance procedure.

The decision of the arbitrator shall be made in writing and shall be final, conclusive and binding upon the Company and the Union.

The arbitrator shall be bound at all times by this Agreement.

It is further understood that the fees and expenses of any arbitrator selected under this section shall be borne equally by the parties to this Agreement.

It is hereby agreed by the Company and the Union that the time limits in the grievance procedure can be amended, suspended and modified by mutual consent of the parties to this contract."

. . .

"ARTICLE XIX

DURATION -- RENEWAL OF AGREEMENT

. . .

Section 2. The parties acknowledge that, during the negotiations which resulted in this agreement, each had the unlimited right and opportunity to make demands and proposals with respect to all proper subjects of collective bargaining, and that all such subjects have been discussed and negotiated upon, and the agreements contained in this contract were arrived at after the free exercise of such rights and opportunities. Therefore, the Company and the Union, for the life of this agreement, each voluntarily and unqualifiedly waives the right and each agrees that the other shall not be obligated to bargain collectively with respect to any subject or matter not specifically referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this agreement.

Unless specifically otherwise provided herein with respect to specific rights all rights accruing under this agreement shall expire on its termination date."

5. That nowhere in the above mentioned collective bargaining agreement nor in any previous collective bargaining agreements is reference made to a mandatory retirement age for the employes, nor at any time during the negotiations of said agreement was the subject of mandatory retirement discussed by the parties; that on April 8, 1968, a policy requiring that all employes retire upon reaching age 65 was adopted effective April 1, 1968.

6. That employe Walter G. Stark, pursuant to said policy, was required to retire on December 8, 1969; that Stark filed a grievance dated December 8, 1969, concerning his mandatory retirement which the Employer denied relying on its mandatory retirement policy adopted in April 1968; that the parties exchanged letters and held meetings concerning said grievance; that the last of said meetings was held on April 3, 1970, and concluded without a settlement by the parties of the Stark grievance; that in regard to said meeting Harold E. Kober, Business Agent of Complainant Labor Organization, on April 7, 1970, sent a letter to Ralph J. Lutz, Personnel Director and Plant Manager of Respondent, informing Lutz as follows:

> "This letter is to inform you that of this date I have been unable to confer with our legal staff concerning the above matter and also discuss with them our meeting that was held last Friday on this matter.
>
> It is the understanding of the committee and the Local that this matter will be held open and as soon as I am able to confer with our legal staff I will inform you what the Union's position will (sic) as far as any further action is concerned.
>
> Thanking you for your cooperation in this matter."

that on April 11, 1970, a letter was sent to Lutz over the signature of Kober requesting that the Walter Stark arbitration be submitted to an arbitrator pursuant to the grievance procedure of the collective bargaining agreement; that on April 24, 1970, the following letter was sent by Respondent to Kober over the signature of Ralph Lutz informing Complainant of its refusal to proceed to arbitration:

> "We have received your April 11, 1970, letter and note that your attempt to arbitrate this issue is tardy. The contract does not permit arbitration.
>
> Furthermore, the issues in the alleged grievance are not under the terms of the contract, arbitrable. Please note articles XIX, Section 2, XXI and XII of the existing agreement between the Union and the Company.
>
> Please feel free to write or call on us if additional information is needed."

that since said letter Respondent has refused and continues to refuse to proceed to arbitration in accordance with the provisions of Article XII, supra, alleging that said procedure is not applicable to the grievance of Walter Stark and that, also, the Union's request for arbitration in the matter was not timely filed.

7. That the dispute between the Complainant and the Respondent with respect to the mandatory retirement of Walter G. Stark and with respect to the procedural defense raised by the Respondent for its

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refusal to proceed to arbitration therein, concerns the interpretation and application of the terms of the collective bargaining agreement existing between the Complainant and the Respondent.

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

CONCLUSIONS OF LAW

1. That the dispute between Plymouth Plastics, Division of Ametek, Inc., and Local 800, United Furniture Workers of America, AFL-CIO, concerning the grievance of Walter G. Stark, wherein he claimed the mandatory retirement policy of the Employer violated the collective bargaining agreement, arises out of a claim which on its face is covered by the terms of the collective bargaining agreement which existed between them.

2. That Plymouth Plastics, Division of Ametek, Inc., by its refusal to proceed to arbitration in the matter of the grievance of Walter G. Stark, wherein he claimed that the mandatory retirement policy of the Employer violated the collective bargaining agreement, has violated and is violating the terms of the collective bargaining agreement which existed between it and Local 800, United Furniture Workers of America, AFL-CIO, and by such refusal has committed and is committing 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 Plymouth Plastics, Division of Ametek, Inc., its officers and agents shall immediately:

1. Cease and desist from refusing to submit the grievance concerning Walter G. Stark to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and Local 800, United Furniture Workers of America, AFL-CIO, with respect to the grievance of Walter G. Stark and his claim therein that the mandatory retirement policy of the Employer violated the terms of the collective bargaining agreement.

b. Notify Local 800, United Furniture Workers of America, AFL-CIO that it will proceed to such arbitration on said grievance and the issues concerning same.

c. Participate with Local 800, United Furniture Workers of America, AFL-CIO in the selection of the arbitrator to hear said grievance and the issues concerning same.

d. Participate in the arbitration proceeding before the arbitrator so selected, on the grievance, and the issues concerning same.

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

Dated at Madison, Wisconsin, this 16th day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian
Herman Torosian, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 800, UNITED FURNITURE WORKERS OF AMERICA, Complainant, vs. PLYMOUTH PLASTICS, DIVISION OF AMETECK, INC., Respondent.	Case II No. 13871 Ce-1308 Decision No. 9720-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 5, 1970, Complainant filed a complaint with the Commissio alleging that Plymouth Plastics, Division of Ametek, Inc., had committed an unfair labor practice within the meaning of Section 111.0 (1)(f) of the Wisconsin Statutes by refusing to proceed to arbitration in violation of Article XII, on the grievance filed on behalf of Walte G. Stark. Said grievance pertains to a mandatory retirement policy adopted by the Employer requiring its employes to retire at age 65. I its answer filed on July 7, 1970, the Respondent asserts two affirmati defenses which, in summary, are as follows: (1) that the issue raised in the grievance is not arbitrable under the terms of the collective bargaining agreement, and (2) that the Walter Stark grievance was not timely processed pursuant to the grievance procedure of the collective bargaining agreement. Hearing was held in said matter on August 26, 1970, in Sheboygan, Wisconsin. Final briefs in said matter were received by the Examiner on October 5, 1970.

On December 8, 1969, Stark was required to retire pursuant to a mandatory retirement policy adopted by the Respondent on April 8, 1968, effective April 1, 1968, requiring its employes to retire at age 65. A grievance was filed by Stark on December 8, 1969, objecting to said action by the Employer. Thereafter the parties corresponded and in fact met several times in processing said grievance through the grievance procedure. The final meeting concerning the Stark grievance was held on April 3, 1970. It seems the parties are in disagreement as to the status of the grievance upon conclusion of the April 3 meeting, and as to the Employer's position in regard to said grievance.

The Union claims that one of the issues discussed at the April 3 meeting was whether there was still a grievance isasmuch as the grievan Walter Stark, had died. In that regard, Kober, who attended the meetin testified the Employer took the position that they wanted to research that he informed the Employer he wanted to contact the International

Respondent claims that it made it known to the Union in the April 3 meeting that its position was that which was stated in a letter sent to the Union on February 3, 1970, wherein the Employer took the position that the Walter Stark grievance was not an arbitrable grievance under the collective bargaining agreement. It is Respondent's contention that when Kober was informed of said position Kober then stated that if that was all that could be discussed, he was leaving. Respondent denies the April 3 meeting was adjourned to allow Complainant an opportunity to obtain legal advice as claimed by Complainant.

Subsequent to the April 3 meeting Kober, by letter dated April 7, 1970, notified Lutz that as of that date he (Kober) had been unable to confer with the Union's legal staff concerning Stark's grievance. Kober further stated that "it is the understanding of the committee and the Local that this matter will be held open and as soon as I am able to confer with our legal staff I will inform you what the Union's position will (sic) as far as any further action is concerned".

Following said letter, Kober by letter dated April 11, 1970, informed Lutz of the Union's desire to take Stark's grievance to arbitration. Also enclosed with said letter was a copy of a letter sent by Kober to the Chairman of the Wisconsin Employment Relations Commission wherein a request for a list of five arbitrators was made. Thereafter, another letter was sent by Kober to Lutz dated April 22, 1970, requesting a meeting to discuss certain grievances and also the selection of an arbitrator for the Stark grievance. Lutz responded to said letter, by a letter dated April 24, 1970, wherein Lutz acknowledged receipt of Kober's April 11 letter. Lutz in his letter took the position that the Union's attempt to arbitrate the Stark grievance was tardy. Lutz futher claimed that the issue involved was not an arbitrable issue under the terms of the collective bargaining agreement.

It is Respondent's position that Walter Stark's retirement did not constitute an act contrary to the terms of the existing collective bargaining agreement, and, therefore, the Employer's conduct in that regard is not subject to the grievance procedure. Respondent argues the fundamental principles of the law of employer and employe as modified by the National Labor Relations Act do not abrogate the basic relationship between the employer and employe, except to the extent that such relationship is modified by legislation or by some specific contract between the employer and the employe. One common law right, the Respondent contends, that continues to exist unless modified by legislation or by the contract is the right of the employer to select a mandatory retirement age for his employes. The common law right of the employer to select his employes and to terminate their employment at will when he believes policy demands mandatory retirement, continues to exist except to the extent that it may be modified by the bargaining contract with the Union.

In support of its position Respondent relies on Article XIX, Section 2. The last sentence of the first paragraph, Respondent argues, is significant in that the parties have mutually agreed that neither shall be obligated to bargain collectively with respect to any subject or matter not specifically referred to in the collective bargaining agreement. Respondent claims the subject matter here, i.e., mandatory retirement, is not specifically covered by the agreement, and therefore, the Employer has the right under Article XIX, Section 2, to establish a mandatory retirement age policy without having said action subject to the grievance procedure.

Respondent relies on the John Wiley and Sons, Inc. v. Livingston, 376 U.S. 543, (1964) 55 LRRM 2769, case wherein the U.S. Supreme Court stated that the "demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable, because it can be seen in advance that no award to the Union could receive judicial sanction". In this case, Respondent argues, the evidence supports its position that the subject matter of this dispute is non-arbitrable, "because it can be seen in advance that no award to the Union could receive judicial sanction".

Thus, the Respondent concludes, as a matter of law, the policy it established was validly established and was, and is not now, subject to arbitration, because the contract between the parties specifically excluded from arbitration matters not contained in the contract.

The question to be answered by the Examiner is whether the grievance of Walter Stark is arbitrable under Article XII.

It is well established federal law, now, that arbitration provisions in collective bargaining agreements will be given their fullest meaning and that the function of the courts in cases seeking to enforce arbitration provisions in agreements is to ascertain whether the party seeking arbitration is making a claim, which on its face is governed by the collective bargaining agreement. 1/

The Wisconsin Employment Relations Commission adopted said federal law as the policy of the Commission in the Seaman-Andwall Corporation case, 2/ and has consistently applied said policy in numerous cases since that time. 3/

The issue, therefore, more narrowly defined is as follows: Is the Complainant making a claim which on its face is governed by the collective bargaining agreement?

In this regard it is noted that Article XII of the agreement provides for a three step grievance procedure with final and binding arbitration as the final step of the procedure. The agreement does not contain a specific definition of a grievance, but only states in Article XII that, "should grievances arise between the Company and the Union, an earnest effort shall be made to settle such differences promptly . . ." and that "the arbitrator shall be bound at all times by this Agreement".

The Complainant in the instant case claims the Company violated Article VIII, Section 3(5) of the seniority provision of the collective bargaining agreement by requiring the Grievant Walter Stark to retire at age 65. It is argued that, pursuant to the agreement, seniority is only forfeited by an employe for the following reasons:

1/ Steelworkers v American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

2/ Decision No. 5910, 1/62.

3/ See cases in Sec. 1573.1.3 in Digest of Decisions, WERC.

"1. If he is laid off and not re-employed within one (1) year from the date of the lay-off.

2. If he leaves the Company of his own volition.

3. If, having been laid off, he is recalled for work and fails to report within seventy-two (72) hours unless prevented from doing so through illness.

4. If he is discharged for cause and not subsequently reinstated as provided under Article XII."

Nowhere, it is contended, is reference made to the termination of seniority by mandatory retirement. For said reason, the Union argues, the Employer's unilateral action in adopting a mandatory retirement policy is in violation of the above mentioned seniority provision.

Contrariwise, as discussed in detail earlier, the Employer relying on Article XIX and management rights, argues that it has the right to unilaterally establish a mandatory retirement policy since the parties did not specifically cover said subject in the collective bargaining agreement.

It is the opinion of the Examiner that the Complainant's claim that a mandatory retirement policy is contrary to Article VIII, Section 3(5); that the Respondent's defense that the subject matter of mandatory retirement was not covered by the agreement material herein and that therefore Article XIX of said agreement allowed the Employer the right to establish a mandatory retirement policy without violating the collective bargaining agreement or subjecting such action to the grievance procedure, in itself requires "an interpretation and application" of Article XII and Article XIX of the collective bargaining agreement.

Also, the Examiner is not in agreement with Respondent's claim that it is apparent in advance that no arbitration award to the Union could receive judicial sanction. For said reasons the Examiner concludes that Complainant's claim, as stated above, is one which on its face is governed by the collective bargaining agreement and therefore arbitrable.

In the alternative Respondent claims it has not breached the collective bargaining agreement by refusing to proceed to arbitration in that the Union's request for arbitration was not timely. Respondent argues that after the April 3, 1970, meeting concerning Stark's grievance the Union took no action until April 11, 1970. It is Respondent's contention that the Union's request for arbitration made on said date was not timely under Article XII (d) which states "that if the notice of intent to arbitrate any matter, is not given within five (5) working days after Step (b) or (c) the matter will be considered resolved, and not subject to further grievance procedures". Therefore, it is Respondent's position that any issue relating to Walter Stark was resolved when the Complainant failed to take action within the five (5) work days from the meeting of April 3, 1970, and because of said tardiness there is now no issue subject to arbitration.

In this regard the U.S. Supreme Court in John Wiley case, supra, declared the following:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

In that case, the Supreme Court left for the arbitrator's determination questions involving compliances with the collective bargaining agreement's procedural prerequisites to arbitration including time limits on the grievance procedure. It is also the well established policy of the Wisconsin Employment Relations Commission that procedural defenses to arbitration are for the determination of the arbitration tribunal. 4/

Based on the above, the Examiner concludes the issue as to whether the Union has complied with the grievance procedure in processing Stark's grievance concerns itself with the interpretation and application of the collective bargaining agreement, and therefore that issue is subject to arbitration under said agreement as well as the ultimate decision as to whether or not the subject matter involved herein is arbitrable.

Dated at Madison, Wisconsin, this 16th day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMM.

By Herman Torosian
Herman Torosian, Examiner