STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS & DAIRY EMPLOYEES UNION, LOCAL 563, Complainant, vs. PIERCE MANUFACTURING, INC., Respondent.	Case XVI No. 14250 Ce-1332 Decision No. 10046-B

ORDER DENYING MOTIONS TO DISMISS AND DENYING, IN PART, AND GRANTING IN PART, MOTION TO QUASH SUBPOENA

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission by General Drivers & Dairy Employees Union, Local 563, on November 25, 1970, wherein it alleged that Pierce Manufacturing, Inc., had violated the terms of a collective bargaining agreement and thereby committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act; and the Commission having appointed the undersigned as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the matter; and an answer having been filed by the Respondent on December 8, 1970; and a motion to dismiss the complaint filed by the Respondent on December 22, 1970, and supplemented on December 23, 1970, having been denied by the Examiner by an Order issued on December 24, 1970 (Dec. No. 10046-A); and hearings having been conducted in the matter on January 13 and 28, 1971, at which latter hearing further motions to dismiss the complaint and a motion to quash a subpoena issued in the matter were made by the Respondent, which motions were denied in part and granted in part, by the Examiner at a further hearing conducted on August 15, 1972; and during the period between the aforesaid hearings conducted on January 28, 1971 and August 15, 1972, the matter having been held in abeyance pending various determinations in other proceedings involving the same parties before the Commission and before the National Labor Relations Board; and at the aforesaid hearing conducted on August 15, 1972, the Respondent having made further motions to dismiss the complaint on the grounds that (1) the Complainant was not a proper party in interest and (2) the complaint fails to state a cause of action in that it alleges, in effect, that the occurrence of certain events subsequent to the expiration of the pertinent collective bargaining agreement required certain conduct by the Respondent under the terms of said agreement, and another motion to quash a subpoena; and the Examiner having considered the matter, and being satisfied that such motions to dismiss the complaint should be denied, and that such motion to quash should be granted, in part, and, denied, in part:

NOW, THEREFORE, it is

ORDERED

That the aforesaid motions to dismiss the complaint at this time be, and the same hereby are, denied;

IT IS FURTHER ORDERED that the subpoena issued by the Examiner on August 15, 1972 requiring Franz Stadtmueller, on behalf of the Respondent, to produce certain records of the Respondent at a hearing to be conducted on October 16, 1972, which hearing was postponed, and which subpoena was continued to, November 6, 1972, is quashed to the extent that it requires production of records disclosing the names and dates of hire of employes of the Respondent hired after the expiration of the pertinent collective bargaining agreement.

Dated at Madison, Wisconsin, this 30th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTIONS TO DISMISS AND DENYING, IN PART,
AND GRANTING IN PART, MOTION TO QUASH SUBPOENA

The essential allegation of the instant complaint is that the Respondent violated the vacation provisions of a collective bargaining agreement with the Complainant, which agreement expired on June 30, 1969. The complaint was filed on November 25, 1970 and the Complainant was decertified by the National Labor Relations Board as the bargaining agent for the Respondent's employes on January 20, 1972.

At the session of the hearing in this matter which was conducted on August 15, 1972, the Respondent moved for the dismissal of the complaint on the basis that, in view of the decertification of the Complainant, the Complainant was not a proper party in interest. This motion is denied on the grounds that the Complainant was a party to the labor contract which this action seeks to enforce; it was not decertified at the time the complaint was filed; and the Complainant does not seek by this action to regain bargaining representative status.

At the same hearing session the Respondent also moved for dismissal on the basis that "in each instance an event which was a condition precedent to entitlement (to certain vacation benefits claimed by the complaint) would have occurred after June 30, 1969."

The vacation provision in question, in pertinent part, reads as follows:

"ARTICLE 27 - VACATIONS

Employees shall be granted vacation on the basis of continuous service with the Company as follows:

Completed one (1) year	-One (1) week paid vacation
Completed three (3) years	-Two (2) weeks paid vacation
Completed ten (10) years	-Three (3) weeks paid vacation
Completed fifteen (15) years	-Four (4) weeks paid vacation

A week's vacation pay shall be forty (40) hours at employees straight time hourly rate, and will be paid on the last pay day prior to the vacation. Vacation eligibility will be based on the calendar year and upon the date of employment. An employee will be eligible for vacation anytime after his first anniversary date of employment to the end of that calendar year.

An employee having completed the service requirements for, and having received, a one, two, three or four week vacation during any calendar year shall be eligible for such vacation on January 1 of the year following the completion of such service. To be eligible for a vacation, an employee must have worked at least twelve hundred (1200) hours in the previous calendar year.

. . ."

According to the Complainant's most recent argument, contained in its brief filed on September 21, 1972, the complaint "seeks vacation pay for certain categories of employes that was earned by reason of work performed in calendar year 1969, though payable later." The brief continues, "Specifically the complaint seeks one week or the additional weeks' vacation pay due to employees whose first, tenth or fifteenth years' employment anniversary fell in 1970."

The Complainant reasons that probably many of the employes in question worked the requisite 1200 hours prior to the contract's June 30, 1969 expiration, and thereby became eligible for their first, second, third or fourth week of vacation when they passed their anniversary dates during 1970, by operation of "continuous service" through such anniversary date. This argument, the Complainant urges, is not defeated by the fact that many of these employes engaged in a strike, authorized by the Complainant, which began on February 5, 1970, or by the fact that no collective bargaining agreement ever succeeded the aforesaid expired contract.

It is contended by the Complainant that those who worked 1200 hours or more prior to the contract's expiration earned compensation in the form of vacation benefits, the realization of which was simply deferred to the next year, and that having so earned such benefits neither the strike nor the expiration of the agreement could divest the employes of them. The continuous service to a date in the next year was, in the Complainant's view, merely a condition upon the enjoyment of the benefits.

According to its brief "the respondent did not give continuous service credit for time on strike" and, "an employee who passed his anniversary date prior to the strike received the continuous service credit, and an employee who returned to work and made up the time lost in terms of continuous service also received the continuous service credit", but, "others did not."

The Respondent argues that even if the contract had not expired, it could have properly deducted strike time from "continuous service", and that an employe, to be eligible for vacation benefits enjoyment "had to have continuous service through his anniversary date." It contends that, for examples, if an employe quit or was discharged, he could not have subsequently realized his vacation benefits.

The Respondent urges that following the contract's expiration it was free to discharge employes for any reason not violative of statutes and that an employe so discharged would have had no right to the vacation benefits in issue. Likewise, it is contended, after the contract's termination the Company could have changed its vacation policy so as to deprive the employes of future vacations. In summary, the Respondent asserts that "each employee, even if he worked 1200 hours before June 30, 1969, had a vested right to only so much vacation as did not depend on an event occurring after the contract expired."

The Examiner accepts the Complainant's argument, and rejects the contentions of the Respondent, upon the authority of Schneider v. Electric Auto-Lite Co., (CA6, 79 LRRM 2825, 1972) and upon the bases referred to therein. The Respondent's position requires an unwarranted forfeiture of accrued earnings.

It is further noted, however, that the employes in question, whose various anniversary dates must have fallen between February 5 and

December 31, 1970 must have been, to have met the continuous service condition of the vacation provision, employes of the Respondent continually until at least such anniversary date, by an appropriate definition of such status. This must be proven, and may be, inasmuch as the Complainant has not as yet rested its case.

Finally, also at the hearing session of August 15, 1972, the Examiner stated that he would issue a subpoena in this matter ordering the Respondent to produce certain records pertinent to vacation eligibility. A certain amount of data in the control of the Respondent is necessary for the issues herein, as they pertain to particular employes, to be stated precisely. It was contemplated by the Examiner, and stated to counsel for the parties that after receiving such data, the Complainant would be ordered to particularize its allegations in the form of an amended complaint.

The details of such subpoena were stated at the hearing, and it was apparently served shortly thereafter upon a representative of the Company. Although the Respondent made no formal motion to quash the subpoena in whole, or in part, at the hearing, by a letter of August 28, 1972, it moved to quash on the grounds that the subpoena "constitutes an attempt at discovery in order to plead" and "that the request for the names and dates of hire of employees hired between the date the contract expired and January 1, 1970 must on any theory be immaterial."

The Examiner rejects the first ground of the motion to quash. It is the intent of the subpoena to refine the issues and the evidence in this proceeding and not to allow for their expansion or for the initiation of a new or unrelated allegation. Section 111.07(2)(a) provides that "any . . . complaint may be amended in the discretion of the board at any time prior to the issuance of a final offer based thereon," and that the Respondent in such a situation must be given an opportunity to file an answer and have a hearing on such an amended complaint. At Section 111.07(2)(b) the WERC is provided with the right to issue subpoenas in unfair labor practices proceedings.

The instant exercise of this subpoena power is intended to provide a basis for such an amended complaint.

As to the second ground for the motion to quash, such motion is granted. The Examiner does not, at this time, see any relevance in the data requested involving persons employed after the labor contract expired.

The Respondent's brief also suggests that inasmuch as the labor contract in question expired on June 30, 1969 and the complaint was filed on November 25, 1970, the complaint should be dismissed upon the basis of the one-year statute of limitations at Section 111.07(14), of the Act. This suggestion is rejected because the theory of the complaint is that certain employes were denied contractual vacation benefits to which they became entitled during 1970. Of course, this statute of limitations does preclude any conclusion that a contract violation occurred more than one year prior to the filing of the complaint.

It should also be noted that the record is not entirely clear that the Complainant accepts the Respondent's assertion [as indicated by Joint Exhibit #1] that all vacation benefits, other than those discussed above were properly paid. This too should be clarified, as

should be the particular case of one Dale Schmidt which has been segregated throughout this matter.

Dated at Madison, Wisconsin, this 30th day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Howard S. Bellman
Howard S. Bellman, Examiner