STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE NO. 2071, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant, vs. WISCONSIN PORCELAIN COMPANY, Respondent.	Case XV No. 14476 Ce-1345 Decision No. 10215-A

Appearances:
Mr. Allen Johns, Special Representative, for the Union.
Mr. L. J. Stohl and Mr. A. A. Stohl, for the Employer.

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 make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.06 of the Employment Peace Act, and a hearing on such complaint having been held at Madison, Wisconsin, April 19, 1971, before the Examiner, and the Examiner having considered the evidence and arguments 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 Lodge No. 2071, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 50 West Oakton Street, Des Plaines, Illinois.

2. That Wisconsin Porcelain Company, hereinafter referred to as the Respondent, is a corporation located at 120 Lincoln Street, Sun Prairie, Wisconsin, with manufacturing facilities located in Sun Prairie, 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 are signators to a collective bargaining agreement with an effective term from October 1, 1969, to September 30, 1972.

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

"ARTICLE XVII
Seniority

. . .

17.16 In the event that there is an opening in an old job classification due to a termination or a new job is created it shall be the policy of the Company to post such job opening on the bulletin boards for a period of three (3) days, a copy shall be given to the Shop Chairman, and the most senior employee who bids for such opening within these three (3) days, posting period shall be granted the opportunity of accepting this job, providing the employee has the knowledge, ability and physical fitness to perform the work."

. . .

"ARTICLE XIX
Complaints and Grievance Procedure

19.1 Any complaint shall first be registered with the foreman by the employee personally or with the Shop Chairman on an oral basis. If no satisfactory settlement is reached within one day, the following grievance procedure shall be followed:

For the purpose of this Agreement, the term 'grievance' means any dispute between the Company and the Union, or between the Company and any employee concerning the effect, interpretation, application, claim or breach or violation of this agreement.

19.2 Any such grievance shall be settled in accordance with the following grievance procedure:

Step 1. The aggrieved employee shall present his grievance, either personally or with the Shop Chairman, directly with the Supervisor, who shall render his decision within one (1) working day.

Step 2. Grievance not satisfactorily adjusted in Step 1 shall be presented to the Shop Committee who shall investigate, present and discuss such grievance with the authorized representative of the Company within two (2) working days. The Company representative shall give his answer within three (3) working days. Business representatives and/or international representatives may be present at this meeting.

Any alleged contract violation where no specific employee is aggrieved may be presented directly at this step. Such grievance must be in writing.

Step 3. In the event the grievance or dispute is not settled in the manner outlined above, then such grievance or dispute may be submitted to arbitration in the manner hereinafter provided.

19.3 Either party to this agreement shall be permitted to call employee witnesses at each and every step of the grievance procedure. The Company, on demand, will produce production and payroll records for the purpose of substantiating the contentions or claims of the parties, well in advance of the formal proceedings of the grievance procedure.

19.4 The Company will pay members of the Shop Committee, and aggrieved employees at their regular hourly rate, or average hourly earning, whichever is greater, for time spent in processing grievances in accordance with the provisions of this agreement, but not to exceed one (1) hour for each grievance. Anytime consumed in excess of such hour shall be borne equally by the parties."

"ARTICLE XX
Arbitration

20.1 In the event that any dispute or controversy may not be settled under the foregoing grievance procedure, the matter shall be referred to an Arbitration Board consisting of three members, one appointed by the Company, one by the Union, the Company and Union jointly to appoint the third member.

If unable to agree on a third part, he shall be selected from a list of not less than nine names provided by the Federal Mediation and Conciliation Service, by the parties alternately striking names from said list, the moving party shall strike the first name, the last remaining name to become the third member of the panel.

. . .

20.3 Within ten working days after a request has been made to submit a case to arbitration, the parties will meet for the purpose of preparing and signing a submission to arbitrate...."

"ARTICLE XXI
Strike and Lockout

. . .

21.2 During the period of this agreement, there shall be no stoppage of work, strike, sitdown, slowdown, picketing, sympathy strike, boycott or any other form of interference with the business or operations of the Company or its customers or its suppliers for any reason whatsoever unless the Company is refusing to submit a dispute for arbitration as required by Article XX of this agreement, or is refusing to comply with the award of the arbitrator. Any employee engaging in a violation of this section may be disciplined by the Company and such discipline may take the form of layoff or discharge; provided that the question whether an employee violated this section shall be subject to the grievance and arbitration procedure; and provided further that any discipline to be imposed for violation of this section shall be announced to the employee within seven working days of the termination of the work stoppage."

5. That in December 1970, employe Harold Gerstad retired from Wisconsin Porcelain Company; that a grievance arose concerning the job vacated by Gerstad and his replacement; that in regard to said grievance, Donald Haige, Shop Committee Chairman, had a meeting with L. J. Stohl, Representative of Wisconsin Porcelain Company, on January 12, 1971, at which time Haige requested that Gerstad's vacated job be posted; and that Stohl responded that said job need not be posted and that there was no opening in that department.

6. That subsequently on January 22, 1971, a written grievance was filed by Haige and Allen Johns, Special Representative of Complainant Labor Organization, alleging that, "the Company violated the Agreement, Section 17.16, by filling the job opening created by the retirement of Erick Gerstad,1/ without posting this opening"; that subsequently on January 29, 1971, L. J. Stohl filed the following written answer to said grievance: "In as much as there is not an opening in the Clay Dept. classification, there is not a job opening at the present time. As soon as conditions warrant, and additional personal is required in the clay classification, then the job will be posted in accordance with Article 17.16."

7. That by letter dated February 10, 1971, Complainant, over the signature of Allen Johns, advised Respondent that it wished to submit the January 22, 1971, written grievance to arbitration under Article XX of the agreement and further requested a meeting within ten working days after the date of said request as required by Section 20.3 of the agreement for the purpose of further processing said grievance to arbitration.

8. That a meeting was held on February 23, 1971, attended by Haige, Johns and the Shop Committee for the Union and by L. J. Stohl and Joe Gaffney for the Employer; that at said meeting both a verbal request to proceed to arbitration and a letter dated February 23, 1971, addressed to the Federal Mediation and Conciliation Service requesting a panel of arbitrators, was presented to the Company for signature; that a few days thereafter Allen Johns was notified by A. A. Stohl that the Company had decided not to submit the joint request dated February 23, 1971, for a panel of arbitrators which was presented to Respondent at the February 23 meeting, and further stated that the Employer would not submit the grievance to arbitration; and that Johns then told A. A. Stohl that he would have to take whatever steps necessary to arbitrate said grievance.

9. That Respondent has refused and continues to refuse to proceed to arbitration in accordance with the provisions of Article XIX and XX, supra, alleging that the collective bargaining agreement does not obligate the Employer to proceed to final and binding arbitration.

CONCLUSIONS OF LAW

1. That pursuant to the provisions of the collective bargaining agreement existing between Lodge No. 2071, International Association of Machinists and Aerospace Workers, AFL-CIO and Wisconsin Porcelain Company either party may, if they so desire, request and proceed to final and binding arbitration of unsettled grievances.

1/ This is the same employe the parties referred to as Harry Gerstad at the hearing.

2. That Wisconsin Porcelain Company, by its refusal to proceed to arbitration in the matter of the grievance filed by the Union wherein it is claimed that the Employer violated the collective bargaining agreement by not posting the vacated job of an employe who retired, has violated and is violating the terms of the collective bargaining agreement which existed between it and Lodge No. 2071, International Association of Machinists and Aerospace Workers, 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 Wisconsin Porcelain Company, its officers and agents shall immediately:

1. Cease and desist from refusing to submit to arbitration the grievance alleging a violation of the job posting provision in regard to a job vacated due to an employe's retirement.

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 Lodge No. 2071, International Association of Machinists and Aerospace Workers, AFL-CIO with respect to the grievance concerning posting of a job vacated by the retirement of one of its employes.

   b. Notify Lodge No. 2071, International Association of Machinists and Aerospace Workers, AFL-CIO that it will proceed to such arbitration on said grievance and the issues concerning same.

   c. Participate with Lodge No. 2071, International Association of Machinists and Aerospace Workers, 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 18th day of May, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE NO. 2071, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant, vs. WISCONSIN PORCELAIN COMPANY, Respondent.	Case XV No. 14476 Ce-1345 Decision No. 10215-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union has alleged that the Employer has committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act by refusing to proceed to arbitration on a grievance filed on January 22, 1971, in violation of Article XIX and XX of the collective bargaining agreement. The Employer does not deny refusing to proceed to arbitration on the January 22 written grievance but denies violating the collective bargaining agreement claiming that the agreement does not provide for "compulsory" arbitration but rather provides for "permissive" arbitration. Respondent argues that the parties must mutually agree to submit a grievance to arbitration and that one of the parties, by requesting, does not obligate the other party to proceed to arbitration.

The facts and material provisions of the collective bargaining agreement are recited in the findings. The Employer points out that the word arbitration is used in three provisions of the collective bargaining agreement, Article XIX, Article XX and Article XXI. In interpreting the parties' obligation in regard to arbitration and the meaning of "arbitration" as used in Articles XX and XXI, the Employer argues that the Examiner must first look at the requirements of Article XIX, 19.2, Step 3. Said provision states "in the event the grievance or dispute is not settled in the manner outlined above, then such grievance or dispute may be submitted to arbitration in the manner hereinafter provided." The Employer contends that the word "may" in Step 3 does not require the Employer to arbitrate and that if such a requisite had been intended by the parties they would have used the word "shall." In other words it is the Employer's contention that both parties to the dispute must agree to proceed to arbitration before there is a binding obligation or commitment to arbitrate a grievance. Once both parties agree to proceed to arbitration then they must proceed under the provisions of Article XX of the agreement which makes arbitration obligatory. In interpreting Article XXI, 21.2, wherein it is stated that during the period of the agreement there will be no stoppage of work, strike, etc. or other form of interference with the business or operations of the Company unless "the Company refuses to submit a dispute for arbitration as required by Article XX of this agreement or is refusing to comply with the award of the arbitrator," the Employer claims that said language must be interpreted in light of the language of Article XIX,

19.2, Step 3 of the agreement which initially makes arbitration permissive rather than compulsory. The Employer reasons that if they once decide to proceed to arbitration then Article XXI, 21.2 allows the Union to strike if the Company then refuses to submit a dispute for arbitration.

The Examiner cannot agree with the Employer's interpretation of Article XIX, 19.2, Step 3 of the agreement. If the word "shall" is required to provide for compulsory arbitration as argued by the Employer, then the Union would have to arbitrate every unsettled grievance even if the Union would rather drop said grievance rather than proceed to arbitration. For instance, in some cases it is quite possible that the Union, although dissatisfied with the Employer's disposition of a grievance in Step 2 of the grievance procedure, for some reason or other might choose to drop the grievance rather than arbitrate the matter. The use of the word "shall", however, would require the Union to arbitrate every grievance reaching Step 3 of the grievance procedure and would preclude the Union from dropping the grievance. Such a requirement would not be conducive to a stable collective bargaining relationship between the Employer and the Union.2/

Whats more it becomes clear the parties intended obligatory language for compulsory arbitration when reading Article XX, 20.3 of the agreement. Said provision provides that, "Within ten working days after a request has been made to submit a case to arbitration, the parties will meet for the purpose of preparing and signing a submission to arbitrate."

Said language requires the parties to meet for the purpose of "preparing and signing a submission to arbitrate" after "a request has been made to submit a case to arbitration." Said language does not state nor can it be reasonably implied that such a request must be mutual but instead anticipates said action to be taken upon the request of one of the parties.

For the foregoing reasons the undersigned concludes that pursuant to Articles XIX and XX either party may, if it so desires, request and proceed to final and binding arbitration of unsettled grievances.

Dated at Madison, Wisconsin, this 28th day of May, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Examiner

2/ See also, Dickten and Masch Manufacturing Company, Decision No. 4529, 5/57, and Deaton Truck Line v. Local 612, Teamsters, CA5, 1962, 51 LRRM 2552.