STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE 1406, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant, vs. RESEARCH PRODUCTS CORPORATION, Respondent.	Case V No. 14496 Ce-1347 Decision No. 10223-A

Appearances:

Gratz & Shneidman, Attorneys at Law, by Mr. Robert E. Gratz, and, Mr. Vernon Zitlow, Business Representative, appearing on behalf of the Complainant.

Melli, Shiels, Walker & Pease, Attorneys at Law, by Mr. Joseph Melli, and Ela, Christianson, Ela, Esch, Hart & Clark, Attorneys at Law, by Mr. Edmund Hart, appearing on behalf of 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 appointed George R. Fleischli, 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 hearing on said complaint having been held at Madison, Wisconsin, on June 8 and July 16, 1971, before the Examiner; and the Examiner having considered the arguments, evidence and briefs 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 1406, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 2021 Atwood Avenue, Madison, Wisconsin, and represents for the purposes of collective bargaining certain employes of Research Products Corporation, Madison, Wisconsin.

2. That Research Products Corporation, hereinafter referred to as the Respondent, is a corporation having manufacturing plants located in Poynette and Madison, Wisconsin, and is engaged in a business affecting interstate commerce within the meaning of the National Labor Relations Act as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board.

2. That at all times relevant herein, the Complainant and Respondent have been parties to a collective bargaining agreement which, among its several provisions, contains the following which are material herein:

"ARTICLE II--Management Rights

Section 1. The Management of the plant and the direction of the working forces and the operation of the plant, including hiring, transferring, promoting, demoting, and retirement of employees, the suspension, discharge for just cause, or otherwise disciplining of employees, and the enforcement of reasonable plant rules as posted are the exclusive rights of Management. In addition, the Company has the exclusive duty and right to manage the business, direct the working forces, determine the location of plants, the methods, processes and means of manufacturing, schedule work and production, and select the sources of materials and services; provided, however, that in the exercise of such rights the Management shall follow the provisions of this Agreement and shall not discriminate against any employee or applicant for employment because of his membership in or lawful activity on behalf of the Union, nor on account of age, race color, creed, nationality, or sex.

Section 2. The Company's exercise of the foregoing rights shall be limited only by the express provisions of this Contract, and the Company has all the rights which it had at common law, except those expressly bargained away in this agreement.

Section 3. The exercise by the Company of any of the foregoing rights, and the right to sub-contract any work which in the opinion of the Company is necessary, shall not be reviewable by grievance or arbitration except in the case such right is so exercised as to violate any expressed provision of this Contract.

. . .

ARTICLE VII--Seniority

Section 1. The length of service of the employees separate and independent for Madison and Poynette plants, shall determine the seniority status of the employees.

Section 2. Length of service shall be computed in years, months, and days from the date of last hire. Time lost because of sickness in excess of three (3) years shall be deducted from the length of service record.

. . .

Section 4. In the event it is necessary to reduce the working forces and lay off employees, the employee with the least seniority shall be laid off first, except this shall not apply to maintenance employees. Deviations from seniority in laying off may be made in cases where skills may be lost and a long period of training would be involved, by agreement with the Union.

. . .

Section 5. In increasing working forces, employees shall be recalled in order of Seniority providing the recalled employee is qualified and capable of performing the work available. Employees recalled shall be notified in person, or by telegram, or registered letter, at their last known address, and shall be given five (5) days in which to return to work. Upon written request by any such employee during such five (5) day period, an additional five (5) days will be granted to return to work.

. . .

ARTICLE XII

Grievance Procedure and Arbitration

Section 1. For the purpose of this Agreement, the term 'grievance' shall mean any dispute between the Company and the Union, or between the Company and any of its employees concerning the meaning, interpretation, or application of any provisions of this Agreement, or concerning the reasonableness of any shop rules. If any such dispute arises, there shall be no suspension of work but said dispute shall be treated as a grievance and shall be settled according to the following procedure:

. . .

Section 4. In the event that a satisfactory adjustment cannot be reached between the parties by the procedures outlined above, then within five (5) working days after the meetings held under the provisions of Section 2, Step 3, the said grievance matter may be submitted to arbitration by the Union or the Company, in which case the arbitration will be conducted as provided in Section 5 hereof.

Section 5. . . . The arbitrator shall have no power to add to, subtract from, or modify any of the terms or conditions of this Agreement, nor shall he substitute his discretion for that of the Company or the Union where such discretion has been retained by the Company or the Union, nor shall the arbitrator have any right to adjust, change, or modify the rates of pay as set forth in Schedule 'A' attached to and made a part of this Agreement. The decision of the arbitrator shall be final and binding, and the decision shall be complied with by both parties within a reasonable time.

. . ."

4. That in the latter part of March 1970 the Respondent experienced a reduction in the amount of work available in the filter assembly and spot welding classifications at its Madison plant which classifications were staffed by women having considerable seniority; that the Respondent discussed the situation

with the Complainant and asked the Complainant to agree to allow the Respondent to lay off 11 women working in those classifications in accordance with their seniority in those classifications and not in accordance with their seniority at the Madison plant; that the Complainant refused to agree with the Respondent's proposal regarding the 11 female employes; that several weeks thereafter, on May 12, 1970, the Respondent laid off 29 employes at its Madison plant including the 11 female employes that it had unsuccessfully sought to lay off in March and the 18 employes in the Madison plant who had less seniority all of whom were male; that on or about May 25, 1970 the Respondent recalled the 18 laid off male employes to work in the same classifications that said male employes had worked in prior to their lay off on May 12, 1970; that between May 28, and June 3, 1970 the Respondent hired 9 new employes, all of them male, to work in the classifications to which the 18 male employes had been recalled and in 2 additional classifications staffed by male employes; that on June 4, 1970 the Respondent recalled 4 of the 11 laid off female employes to work in the same classifications that said female employes were working in prior to being laid off on May 12, 1970 and 3 of said female employes began working; that between June 4 and June 15 the Respondent hired 8 new employes, all of them male, to work in the classifications to which the 18 male employes had been recalled and in 2 additional classifications staffed by male employes; that between June 24 and June 30, 1970 the Respondent recalled the one female employe who had refused recall on June 4, 1970 and the remaining 7 laid off female employes to work in the same classifications that said female employes were working in prior to being laid off on May 12, 1970 and 5 of said female employes returned to work.

5. That on June 10, 1970 the Complainant filed a written grievance (grievance No. 18) alleging that Respondent violated the seniority article and the sex discrimination provisions of the agreement when it recalled the 18 male employes ahead of the more senior female employes on May 25, 1970; that on June 10, 1970 the Complainant filed a second written grievance (grievance No. 19) alleging that the Respondent violated the seniority article of the agreement when it hired new employes before it had recalled all of the 11 female employes who were on lay off; that pursuant to Article XII of said collective bargaining agreement the parties submitted the two unresolved grievances to Arbitrator H. Herman Rauch for a final and binding decision; that on February 17, 1971 Arbitrator Rauch entered a decision on said grievances, with accompanying opinion, which decision reads as follows:

> "DECISION: 1) Grievance #1 (re-numbered #18) denied.
>
> 2) Grievance #2 (re-numbered #19) allowed; provided that any dispute which the parties may have regarding the sum due to the individual laid off employee, will -- upon the request of either party -- be resolved as part of this proceeding."

6. That the Respondent refused to implement that part of the decision of Arbitrator Rauch which allowed Grievance #19 and on or about March 12, 1971, filed a petition for reconsideration with Arbitrator Rauch on that portion of his decision allowing Grievance #19; that on March 18, 1971, Arbitrator Rauch denied the Respondent's petition for reconsideration; that since March 18, 1971, the Respondent has refused and continues to refuse to comply with that portion of Arbitrator Rauch's decision which allows Grievance #19.

CONCLUSIONS OF LAW

1. That the decision of Arbitrator Rauch in Grievance #19, which was entered on February 17, 1971, is based upon his interpretation and application of the terms of the collective bargaining agreement existing between the Complainant and Respondent, which interpretation and application was within Arbitrator Rauch's authority under Article XII of said agreement.

2. That Research Products Corporation by its refusal to comply with the decision of Arbitrator Rauch allowing Grievance #19 within a reasonable time has violated and is violating Article XII of the collective bargaining agreement existing between the Complainant and the Respondent, and has committed and is committing unfair labor practices within the meaning of Section 111.06(1)(f) and Section 111.06(1)(g) of the Wisconsin Statutes.

ORDER

IT IS ORDERED that Research Products Corporation, its officers and agents shall immediately:

(1) Cease and desist from refusing to comply with the decision of Arbitrator H. Herman Rauch dated February 17, 1971, in Grievance #19.

(2) Take the following affirmative action which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Comply with the decision of Arbitrator H. Herman Rauch dated February 17, 1971, allowing Grievance #19, by paying a sum of money equal to the back pay due and owing to the individuals on behalf of whom said grievance was filed in accordance with said decision.

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

Dated at Madison, Wisconsin, this day of December, 1971.

By _____
George R. Fleischli, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE 1406, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	
Complainant,	Case V No. 14496 Ce-1347 Decision No. 10223-A
vs.	
RESEARCH PRODUCTS CORPORATION,	
Respondent.	

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that the Respondent's failure to comply with Arbitrator Rauch's decision in grievance #19 within a reasonable time violates the Respondent's agreement to accept as final and binding the decision of an arbitrator appointed under Article XII of the collective bargaining agreement. Such a violation would constitute a violation of a collective bargaining agreement within the meaning of Section 111.06(1)(f) and a refusal to accept as conclusive the final determination of a tribunal having jurisdiction over an issue in controversy within the meaning of Section 111.06(1)(g).

The Respondent admits that it has refused and continues to refuse to implement the award in question and alleges, as an affirmative defense, that the Arbitrator exceeded his authority under the agreement and that, therefore, the award is unenforceable.

THE APPLICABILITY OF FEDERAL LAW

At the hearing the parties stipulated that the Respondent is engaged in a business affecting interstate commerce within the meaning of the National Labor Relations Act and subject to the jurisdiction of the National Labor Relations Board for the purposes of administering the provisions of that Act. On the basis of these jurisdictional facts, it is clear that the Wisconsin Employment Relations Commission, sitting as a "Section 301" tribunal,1/ is bound to apply substantive law which is consistent with the federal law established by the federal courts pursuant to Section 301. In discussing the application of federal law in suits brought in state tribunals the United States Supreme Court has said,

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1/ Labor-Management Relations Act, Section 301, 61 STAT. 156 (1947), 29 U.S.C. 185 (1958). The United States Supreme Court held in Dowd Box v. Courtney, 368 U.S. 502 (1962) that state tribunals have concurrent jurisdiction with the federal courts for purposes of enforcing collective bargaining agreements. In Tecumseh Products Company v. WERB, 23 Wis. 2d. 118 (1963) the Wisconsin Supreme Court held that the Wisconsin Employment Relations Commission is a competent state tribunal for purposes of enforcing collective bargaining agreements between unions and employers in commerce.

"Federal interpretation of the federal law will govern, not state law...but state law, if compatible with the purpose of Section 301, may be resorted to in order to find the rule that will best effectuate the federal policy...any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights." 2/

COMPATIBILITY OF FEDERAL AND STATE LAW

Section 298.10 of the Wisconsin Statutes sets out the following grounds as being sufficient to warrant the vacation of an arbitration award by the courts of Wisconsin:

(a) Where the award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. 3/

The Commission has expressed its intent to apply the above rules in cases where a party to an agreement to arbitrate is seeking enforcement of an arbitration award. 4/ None of these rules appears to be contrary to or incompatible with the rules applied by federal courts in such cases. It is inconceivable that the federal courts would require the enforcement of a labor arbitration award in a case where any of the first three of these rules would apply. 5/ The fourth rule, which seems to most closely fit the Respondent's argument, appears to be compatible with the reviewing standard articulated by Judge Hastie in the Honold case after a careful review of the cases in this area. That standard reads as follows:

2/ Textile Workers Union v. Lincoln Mills, 353 U.S. 448, at 457 (1957).

3/ Section 298.10(1)(a)(b)(c) and (d) of the Wisconsin Statutes.

4/ H. Froebel & Sons, (7804) 11/66. The application of these four rules is in addition to other rules applied by the Commission in cases seeking enforcement of arbitration awards. E.g. the Commission will not enforce an arbitration award where the arbitration tribunal is "arrayed in common interest" against one of the parties to the dispute. Harker Heating and Sheet Metal Inc., et al, (6704) 4/64.

5/ Cf. the cases cited by the court in Honold Manufacturing Company v. Fletcher, 70 LRRM 2368, at p. 2371 n.27 (3d Cir. 1969).

"Accordingly we hold that a labor arbitrator's award does 'draw its essence from a collective bargaining agreement' if the interpretation can in any rational way be derived from the agreement viewed in light of its language, its context, and any other indicia of the parties intentions; only where there is a manifest disregard of the agreement, totally unsupported by principals of contract construction and the law of the shop may a reviewing court disturb his award." 6/

APPLICATION OF SECTION 298.10(1)(d) AND THE FEDERAL STANDARD FOR REVIEW TO THE FACTS IN THIS CASE

Arbitrators are the final judges of the meaning and applications of a labor agreement and, as such, they must be allowed wide latitude by reviewing tribunals who may or may not agree with their rationale or the conclusions that they reach in a given case. So long as it can be said that the arbitrator's decision represents his interpretation of the agreement the courts should not engage in a "plenary review" of the merits of the interpretation of the contract which has been made by the arbitrator. 7/

The Respondent's central argument in this case is that the Arbitrator's decision in grievance #19 exceeds the limits placed on his authority by Section 5 of Article XII which states that the arbitrator should not substitute his discretion for that of the company in matters where the Company has retained discretion. In order to reach that conclusion one must first accept the Respondent's argument that Article II gives management the discretion to be the final judge of whether or not an employe is "qualified and capable" when calling back laid off employes pursuant to Section 5 of Article VII in spite of the exception contained in Section 3 of Article II. In addition, it is necessary to conclude that the arbitrator adopted the Respondent's interpretation of the agreement in his decision in grievance #18.

As the Examiner reads the Arbitrator's opinion it appears to be based on an interpretation of the agreement which is quite different than the interpretation now urged by the Respondent. The Respondent contends that the Arbitrator accepted management's view, which would hold that the decision by management regarding whether or not a laid off employe had the requisite qualifications and capabilities on recall was a "discretion retained by the Company" and essentially unreviewable by the Arbitrator. On the contrary, the Arbitrator appears to have concluded that the question of whether or not an employe has the requisite qualifications and capabilities on recall does not deal with a "discretion retained by the company" but is a question arising under the contract which is reviewable by an arbitrator just as any other question regarding the application or interpretation of a provision of the agreement.

In grievance #18 the Arbitrator appears to have put the burden on the Complainant to produce sufficient evidence to prevail on its claim

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6/ Ibid, at p. 2371

7/ Enterprise Wheel and Car Corporation, 363 U.S. 593, 46 LRRM 2423, at 2425 (1960).

that the Employer had violated the call back provision by recalling less senior employes who had previously performed work in the positions to which they were recalled. In grievance #19 the Arbitrator appears to have put the burden on the Respondent to establish that it had sufficient evidence that the remaining laid off employes lacked the requisite qualifications and capabilities when the Respondent chose to hire new employes rather than call back the laid off employes. In other words the Arbitrator appears to have interpreted and applied the "qualification and capability" provision of the agreement by reviewing the decisions of management in the two different factual situations and coming to opposite conclusions based on the obvious distinction between those two factual situations. 8/

The Respondent cites and relies on the case of Truck Drivers Local 784 v. Ulry-Talbert, 9/ in support of its argument regarding the limitations placed on the Arbitrator's authority in this case. There is a significant difference between the contract language present in that case and the contract language present in this case. In the Ulry-Talbert case, the arbitration clause specifically denied the arbitrator the authority to do what he attempted to do. Here, the Arbitrator was only prohibited from exercising his judgment regarding "qualifications and capabilities" under Article VII if Article II is interpreted in such a way as to reserve the sole discretion to make that judgment to the Company. Arbitrator Rauch did not so interpret Article II.

By its argument the Respondent is inviting the Commission to review the "correctness" of the Arbitrator's interpretation and application of the contract in direct violation of the Supreme Court's mandate in the Enterprise Wheel case. 10/ Although the temptation to do so might be great, the courts and this Commission must resist such temptation lest the Respondent be given "two bites at the apple". It is sufficient to say that Arbitrator Rauch's award is based upon an interpretation and application of the contract terms which is clearly not in excess of his authority, which includes the power to make such an interpretation.

Section 298.10(1)(d) of the Wisconsin Statutes and the standard for review set out in Enterprise Wheel, 11/ and elaborated on in Honold, 12/ clearly do not contemplate the situation presented by this case. It is only when an arbitrator goes outside the contract in order to "dispense his own brand of industrial justice" or when he "manifests an infidelity" to the requirement that his award draw its essence from the collective bargaining agreement that the courts should refuse to enforce an award. 13/ The facts in this case clearly support the conclusion that the Arbitrator's decision was based on his interpretation of the agreement and that the Respondent's argument goes to the "correctness" of that interpretation. The parties bargained for and got an agreement to accept the Arbitrator's view of such matters and it is not up to the courts or this Commission to substitute their judgment for that of the Arbitrator's.

8/ This result which is described as "rough justice" by the Respondent in its brief is supported in part and is certainly not at odds with the suggestion of one recognized authority in the field of arbitration. Fleming, The Labor Arbitration Process (University of Illinois Press: Urbana) 1965, at pp. 72 and 73.

9/ 330 F. 2d 562, 55 LRRM 2979 (8th Cir. 1964).

10/ Supra Note 7.

11/ Id.

12/ Supra Note 6.

13/ United Steel Workers of America of Enterprise Wheel and Car Corporation, 363 U.S. 593 at 597, 46 LRRM 2423, at 2425 (1960).

ADMISSIBILITY OF CERTAIN EVIDENCE

At the hearing the Respondent offered into evidence a typewritten copy of the proceedings before the Arbitrator along with a number of the exhibits presented to the Arbitrator. The Complainant objected to the admission of said documents on the claim that they were irrelevant in a proceeding for the enforcement of the award. The Examiner reserved ruling on the Complainant's objection.

The Examiner is satisfied that the documents offered are relevant and admissible in a proceeding for enforcement. Such documents constitute a part of the record of the proceedings in arbitration and should be considered to the extent appropriate by the reviewing authorities who enforce arbitration awards under Section 301 or similar state legislation. The Complainant's objection regarding the materiality of such documents goes to the question of the extent of the review of arbitration proceedings and not to the admissibility of such documents.

REMEDY

At the hearing the Complainant asked the Commission to order the Respondent to pay interest at the legal rate since the Respondent has refused to comply with the arbitrators decision within a "reasonable time" as required by Section 5 of Article XII, and has committed an unfair labor practice by its refusal to do so. The National Labor Relations Board has an established formula for the computation of back pay which includes interest. 14/ To date, the Commission has not seen fit to establish such a formula or to require the payment of interest because of the administrative difficulties attendant upon the enforcement of such a rule. The Examiner deems it inappropriate to order the payment of interest in this case without a clear direction to do so from the Commission even though an order for the payment of interest might otherwise be appropriate in this case and is within the power of the Commission as part of its general power to remedy unfair labor practices under Section 111.07(4) of the Wisconsin Statutes.

Based on the above and foregoing the Examiner concludes that the Respondent has violated Section 111.06(1)(f) and Section 111.06(1)(g) of the Wisconsin Statutes by its refusal to comply with the decision of Arbitrator Rauch and orders the Respondent to cease and desist from refusing to comply with said award and to pay the 11 female employes the back pay due and owing them pursuant to said award.

Dated at Madison, Wisconsin, this 17th day of December, 1971.

By George R. Fleischli
George R. Fleischli, Examiner

14/ F. W. Woolworth Company, 90 NLRB 298 and Isis Plumbing and Heating, 138 NLRB 716.