STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS SHIELDS AND INDEPENDENT UNION OF THE EMPLOYEES OF THE MILWAUKEE ATHLETIC CLUB, Complainants, vs. MILWAUKEE ATHLETIC CLUB, Respondent.	Case VII No. 14601 Ce-1354 Decision No. 10292-A

Appearances:
Goldberg, Previant & Uelmen, by Mr. Thomas Krukowski, Attorney, and Mr. Richard Parker, Law Student, Appearing on behalf of the Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, by Mr. Patrick Ryan, Attorney, 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 John T. Coughlin, 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 Milwaukee, Wisconsin, on July 28, 1971, 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 Thomas Shields, referred to hereinafter as the Complainant, is an individual residing at 2813 East Belleview Place, Milwaukee, Wisconsin.

2. That Independent Union of the Employees of the Milwaukee Athletic Club, hereinafter referred to as Complainant Union, or Union, is a labor organization and maintains its principal office at 758 North Broadway, Milwaukee, Wisconsin.

3. That Milwaukee Athletic Club, hereinafter referred to as Respondent, is a non-stock, non-profit Wisconsin corporation and is engaged primarily in the social and recreational welfare of its membership.

4. That at all times material herein, the Respondent has recognized the Union as the exclusive bargaining representative of its employes, except employes in the Engineering Department; that

in said relationship, the Respondent and the Union have been, at all times material herein, parties to a collective bargaining agreement covering the wages, hours and conditions of employment of the aforesaid employes, which agreement became effective October 15, 1969, and was effective at all times material herein.

5. That at all times material herein, the Complainant was an employe of Respondent and a member of the collective bargaining unit covered by the aforementioned collective bargaining agreement.

6. That the aforesaid collective bargaining agreement contains the following relevant provisions:

"Section IV

Grievance Procedure

The Club agrees to meet with duly accredited officers and committees of the Union upon grievance matters pertaining to the meaning or application of this contract. Grievances shall be dealt with first through the head of the department, and in case of failure to resolve the grievance within five (5) working days thereafter, then the grievance shall within the next succeeding three (3) working days be put in writing and promptly submitted to the Club Manager or, in his absence, the Comptroller. If the matter is not satisfactorily adjusted at this level within seven (7) days from the time that it is presented to the Manager or Comptroller, then the party wishing to carry the matter further shall promptly present the matter to the Wisconsin Employment Relations Board as an unfair labor practice for violating the terms of a collective bargaining agreement pursuant to the provisions of Section 111.06 of the Wisconsin Statutes, and this shall be the sole and final remedy of the aggrieved party. Failure to comply with the time limitations shall cause the grievance to be deemed satisfactorily settled.

. . .

Section XIV

Seniority

14.01 Seniority is defined as the length of time that an employee has worked for the Club, including sick leave, but excluding breaks in service, unexcused absences, and time away on any leave of absence.

14.02 Lay offs, because of lack of work, and recall will be in accordance with the straight seniority rule by departments or noninterchangeable groups within departments, provided the employee or employees who remain by reason of greater seniority are capable of properly doing the work.

. . ."

7. That Complainant Shields was hired to work in Respondent's Food Preparation Department and that he commenced work on March 30, 1970.

8. That on August 29, 1970, Complainant Shields was terminated by Respondent in order "to cut back on the payroll."

9. That on October 16, 1970, Steve Skipchak began work in Respondent's Food Preparation Department.

10. That on October 21, 1970, Complainant Shields filed a written grievance with Respondent's Club Manager, Gerhard Hammer, wherein he alleged that under the terms of Section IV of the collective bargaining agreement he was entitled to be called back to work before Respondent hired a new employe, namely Steve Skipchak; that the Union's Grievance Committee voted to support Complainant Shields' grievance; that the Union was originally not a party to the instant complaint due to financial insufficiency but that said Union was joined as a co-complainant at the hearing; that there is no evidence that the aforesaid Union failed to fairly represent Complainant Shields or that its conduct toward Shields was in any way arbitrary, discriminatory or in bad faith.

11. That on October 30, 1970, the aforementioned Hammer, in writing, denied Complainant's grievance; that the parties stipulated that all steps of the contractual grievance procedure, up to and including the denial of the grievance by Respondent's Club Manager, were fully exhausted with respect to said Respondent's refusal to return Complainant Shields to work on October 30, 1970, and that Complainant Union and Respondent were unable to settle the dispute during the aforementioned steps; that there was no evidence of bad faith, fraud, or collusion by the Union and Respondent regarding Complainant Shields.

12. That on April 21, 1971, Complainant Shields filed an unfair labor practice with the Wisconsin Employment Relations Commission; that the filing of a unfair labor practice complaint nearly six months after the final step in the contractually provided for grievance procedure does not constitute a "promptly" presentation of the matter to the Wisconsin Employment Relations Commission as required by Section IV of the collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. That the grievance filed by Complainant Shields failed to comply with the contractually provided time limitations set forth in Section IV of the contract, and therefore, by virtue of the language found in the aforesaid section, the grievance is "deemed satisfactorily settled".

2. That due to the fact that the grievance involving the failure of Respondent to call back to work Complainant Shields was satisfactorily settled in compliance with the language contained in Section IV of the collective bargaining agreement, that there was no evidence of conduct towards Complainant Shields by the Union which was arbitrary, discriminatory or in bad faith and the total absence of arbitrary action, fraud or collusion by Respondent and the Union relating to said Shields, the Examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission for the purpose of determining whether Respondent breached its

collective bargaining agreement thereby violating Section 111.06 (1)(f) of the Wisconsin Statutes.

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

ORDER

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 26th day of April, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin
John T. Coughlin, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A hearing was held in the above entitled matter on July 28, 1971. During the course of the hearing Complainant Thomas Shields moved that the Independent Union of the Employees of Milwaukee Athletic Club be made a co-complainant. The Respondent did not object to the aforesaid motion and the Examiner allowed same. Post-hearing briefs were filed by Complainant Shields and by the Respondent, which briefs were received on November 23, 1971.

DISCUSSION OF JURISDICTION

Complainant Shields argues that the dispute which arose when Skipchak was hired on October 16, 1970, which resulted in a grievance being filed by Complainant Shields over Respondent's failure to recall him, has not been settled. Complainant Shields contends that the last sentence of Section IV which states that "Failure to comply with the time limitations shall cause the grievance to be deemed satisfactorily settled" does not apply to the grievance at issue. He argues that the use of the word "limitations" means "to fix or appoint definitely; sitting a point or a line in time or space". The Complainant contends that when the words "time limitations" are thus strictly construed they could not relate to the use of the word "promptly" in the clause found in Section IV which states that the aggrieved party "shall promptly present the matter to the Wisconsin Employment Relations Board . . . pursuant to the provisions of Section 111.06 of the Wisconsin Statutes" in that "promptly" does not "fix or appoint definitely". Alternatively, the Complainant argues that the use of the word "promptly" can only be linked with the last sentence of Section IV relating to "time limitations" if "promptly" is interpreted to refer to the existing and definite one year statutory time limitation set forth in Section 111.06 of the Wisconsin Statutes.

Respondent argues that the last sentence of Section IV provides for a penalty for a failure to comply with the time limitations of that section and that Complainant did not comply with said time limitations concerning the instant grievance and that the grievance must be "deemed satisfactorily settled" by virtue of the very words utilized in the contract itself. It contends that the use of the descriptive term "promptly" as a condition to the aggrieved party proceeding to the Wisconsin Employment Relations Commission implies a limitation on an otherwise existing right. It notes that Section 111.07(14) of the Wisconsin Statutes provides that a party must proceed before this Commission within one year of the complained of unfair labor practice. It further stresses that if Section 111.07(14) were meant to govern, that there would have been no need to contractually place any time limitation, whether specific or descriptive, upon the right to proceed before this Commission. It notes that the dictionary definition of "promptly" is "ready; quickly; immediately; without delay". It argues that Complainant Shields by waiting a period of approximately six months before he filed the instant complaint with this Commission did not comply with Section IV of the contract in that six months is in no way "promptly".

The threshold issue before the Examiner is whether Complainant Shields has failed to comply with the language expressed in Section IV of the collective bargaining agreement which states that "Failure to comply with the time limitations shall cause the grievance to be deemed satisfactorily settled". While the Examiner is cognizant of the lexicographic skill demonstrated by both counsel in this case, he believes that such a punctilious approach to labor relations is sterile in its results. This fact of labor relations life was noted by the U.S. Supreme Court in NLRB v. Rockaway News Supply Co., 345 US 71, 75 where it stated that "substantive rights and duties in the field of labor management do not depend on verbal ritual reminiscent of medieval property law".

While it is true that the word "promptly" as used in the second to the last sentence of Section IV of the contract does not precisely establish a definite point in time, such a lack of precision is no excuse to ignore that the parties did utilize said word. The Examiner is disinclined to find that the ordinary connotation of the word "promptly" means six months when elsewhere in Section IV of the contract time limitations are expressed in terms of a few days, not exceeding seven. Therefore, the Examiner is constrained to conclude that the grievance in question was settled in that it failed to comply with the time limitations expressed in Section IV of the contract. Consequently, being as the grievance in question has been finally disposed of in accordance with the contractually provided grievance procedure, the Examiner will not exercise his jurisdiction to determine the merits of said grievance. American Motors Corp. (7283) 9/65 (Aff. Dane Co. Cir. Ct. 6/67); American Motors Corp. (8385) 2/68; F. Dohmen Co. (8419-A) 8/68 (H.E. Dec.) (Aff. WERC 9/68).

Finally, the Examiner wants to make it pellucidly clear that his refusal to reach the merits of the grievance at issue is based entirely and wholly on Complainant Shields' failure to comply with the contractually provided for time limitations set forth in Section IV of the contract. In addition, it should be carefully noted that although Complainants' failure to comply with the contractually provided for time limitations did effect his rights under said contract, this failure in no way effected or diminished his independent statutory right to file a charge with the Commission within one year of the commission of an unfair labor practice as provided for in Section 111.07(14) of the Wisconsin Statutes.

Dated at Madison, Wisconsin, this 26th day of April, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By John T. Coughlin, Examiner