STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 465, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, Complainant, vs. HANDCRAFT COMPANY, INC., Respondent.	Case II No. 14404 Ce-1337 Decision No. 10300

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Kenneth R. Loebel, appearing on behalf of the Complainant.
Mr. Preston E. Hiestand, President, Handcraft Company, Inc., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union 465, Allied Industrial Workers of America, AFL-CIO having on January 29, 1971 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Handcraft Company, Inc. had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Marvin L. Schurke, 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 pursuant to notice issued by the Examiner on February 12, 1971, hearing on said complaint having been held at Green Lake, Wisconsin, on March 2, 1971 before the Examiner; and the Examiner having considered the evidence, 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 Local Union 465, Allied Industrial Workers of America, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal office at 3815 North Teutonia Avenue, Milwaukee, Wisconsin.

2. That Handcraft Company, Inc., hereinafter referred to as the Respondent, is a corporation engaged in the manufacture of casual footwear and maintains plants and its principal office at Princeton, Wisconsin; and that the Respondent is engaged in a business affecting interstate commerce within the meaning of the Labor-Management Relations Act.

3. That among its products, the Respondent manufactures "golf socks"; and that such golf socks are designated by style numbers including, among others, style numbers 33, 35 and 88.

4. That at all times pertinent hereto, the Respondent has recognized the Complainant as the exclusive bargaining representative of certain

of its employes; that during an unspecified period prior to July 8, 1968, the Complainant and the Respondent engaged in negotiations for a collective bargaining agreement; that during the course of such negotiations the Complainant submitted to the Respondent a list of incentive rates which were either unsatisfactory to the Complainant or regarding which the Complainant lacked information; that among the items so listed where the Complainant lacked information were "Golf Sock Rates"; that subsequently, during the course of negotiations, the Respondent provided the Complainant with information regarding golf sock rates, on the basis of which the Complainant acquiesced in the incentive rates then established by the Respondent; that all such listed incentive rates not acquiesced in by the Complainant were reserved by the Complainant for further negotiations; and that all issues other than such remaining disputed incentive rates were resolved and on July 8, 1968 the Complainant and the Respondent entered into a collective bargaining agreement which remains in effect to and including midnight, May 31, 1971.

5. That the collective bargaining agreement in effect between the parties contains provisions for a multi-step procedure for the settlement of disputes arising within the collective bargaining agreement; and that such procedure provides, as a final step, for final and binding arbitration.

6. That the collective bargaining agreement in effect between the parties contains the following provisions, among others, for the establishment and maintenance of an incentive system of payment of compensation for employes in the collective bargaining unit:

"ARTICLE III - HOURS, OVERTIME PAY, AND WAGES

. . .

Section 3.12 - Incentive Standards. Notwithstanding any incentive system used by the Company in establishing or maintaining an incentive standard, said incentive standard shall be established so that an average employee working at an average day work pace under normal conditions will produce at a rate of 100% of standard which will yield him incentive base rate, and that he will receive 1% increase in pay for every 1% of increased performance above standard.

It is hereby agreed that before any grievance related to whether an incentive standard is proper is submitted to arbitration, the Union will have its timestudy representative from the Allied Industrial Workers' Industrial Engineering Department study the standard or standards grieved and meet with a Company representative and discuss his findings. It is understood that this will be accomplished within not more than seven (7) days after the Union timestudy representative gives the Company notice of his request to study the standard or standards in dispute.

Section 3.13 No piecework or incentive rates shall be voided without prior written notice, on a form provided by the Company, given to the steward of the department. Said notice is to contain the reason for voiding the established rate.

Section 3.14 Piecework or incentive rates shall be revised as necessary to reflect changes in methods, product, equipment, materials, design, quality requirements, services provided, layout of work areas, machine speeds and feeds, or other production conditions so that the physical effort required to perform operations shall be accurately measured at all times.

. . ."

7. That on September 9, 1968, the Respondent posted a notice stating that new incentive rates were assigned to certain operations on specific styles, to wit: Style Nos. 102 and 201 (sewing soles on "Shaggy") and Style No. 1000 (skiving felt boot); that such new incentive rates were lower than the incentive rates theretofore in effect for the same operations on such styles; that the incentive rates for such styles and operations had previously been acquiesced in by the Complainant and were not included in the list of disputed incentive rates discussed by the parties during negotiations for the collective bargaining agreement; that the Respondent proceeded to implement the rates specified in its notice of September 9, 1968; and that the establishment and implementation of new incentive rates for such operations was not accompanied by any change of production technique or practice.

8. That on September 9, 1968, a grievance was filed and was processed by the Complainant through certain steps of the grievance procedure specified in the collective bargaining agreement; and that, at the request of the parties, the Federal Mediation and Conciliation Service appointed John F. Sembower as an impartial arbitrator to hear and determine the dispute existing between the parties on the issues raised by the grievance protesting the change of incentive rates on Styles 102, 201 and 1000.

9. That, pursuant to notice and agreement, hearings were held on April 9, 1969 and April 30, 1969 before the Arbitrator, relative only to the arbitrability of the dispute; that at such hearings and in post-hearing brief the Respondent contended that the grievance was not ripe for arbitration on the merits unless and until the Complainant's time study man made a time study of the jobs in question, pursuant to the second paragraph of Section 3.12 of the collective bargaining agreement; that at such hearings the Complainant contended (a) that the Respondent had not set any standard to be measured, and (b) that the provisions of the second paragraph of Section 3.12 of the collective bargaining agreement, insofar as it requires a time study to be made by the Complainant as a condition precedent to arbitration, related only to "new" jobs.

10. That on September 4, 1969, Arbitrator John F. Sembower issued an Interim Award, wherein he ruled that the grievance was arbitrable and directed the parties to proceed to hearing on the merits of the grievance; and that with respect to the issue of the applicability of Section 3.12 of the collective bargaining agreement, the Arbitrator ruled that under such contract provision, in this particular instance and under the facts involved, a review of the time study procedures used in rerating the jobs was not a condition precedent to arbitration on the merits.

exchanged offers and counteroffers for the settlement of the grievance protesting the change of incentive rates on Style Nos. 102, 201 and 1000, and that such negotiations did not result in a settlement of such grievance.

12. That, pursuant to the terms of the Interim Award, a further hearing was conducted on December 15, 1969 before the Arbitrator relative to the merits of the grievance protesting the change of incentive rates on Style Nos. 102, 201 and 1000; that at such hearing and in post-hearing brief the Respondent contended the contract in no place stipulates that the Respondent must get approval from the Complainant before any rates set by the Respondent can be put in effect, but merely provides a grievance procedure in case the Complainant or an employe does not feel that the rate is correct; that at such hearing the Complainant contended that nothing in the language of the Management Rights clause of the collective bargaining agreement gives the Respondent the right to unilaterally change an established incentive rate, that the methods of performing the jobs were not changed in any way or manner and the only reason the incentive rates were cut was that the employes working on the jobs were making too much money in the estimation of the Respondent and that a company cannot unilaterally change an incentive rate simply for monetary reasons in the absence of a change in methods of operation or where a new job is established.

13. That on August 7, 1970, the Respondent delivered to the Complainant a written notice stating that new incentive rates were assigned, effective August 10, 1970, to certain operations on specific styles, to wit: Style Nos. 33, 35 and 88; that such new incentive rates were lower than the incentive rates theretofore in effect for the same operations on such styles; that the Respondent proceeded to implement the rates specified in its notice of August 7, 1970; and that the establishment and implementation, on August 10, 1970, of new incentive rates for such operations was not accompanied by any change of production technique or practice.

14. That on August 12, 1970, a grievance, designated as Grievance Number 7, was filed and processed by the Complainant through certain steps of the grievance procedure specified in the collective bargaining agreement; that during the processing of Grievance Number 7 the Respondent asserted that the previously established rates for Style Nos. 33, 35 and 88 were "too loose"; that during the processing of Grievance Number 7 the Complainant and the Respondent discussed the similarity between the action taken by the Respondent regarding Style Nos. 33, 35 and 88 and the action taken by the Respondent regarding Style Nos. 102, 201 and 1000, which latter action was then the subject of arbitration proceedings pending before Arbitrator John F. Sembower; and that the parties were unable to resolve the dispute regarding Grievance Number 7 and suspended processing of Grievance Number 7 pending receipt of the Award of Arbitrator John F. Sembower.

15. That on October 9, 1970, Arbitrator John F. Sembower signed and dated an Arbitration Award on the merits of the grievance protesting the change of incentive rates on Style Nos. 102, 201 and 1000; that on October 12, 1970, Arbitrator John F. Sembower mailed copies of such Arbitration Award to each of the parties, together with a joint statement for services rendered and expenses advanced; and that in such Arbitration Award the Arbitrator made the following ruling:

> "The only provision in this agreement which provides for revision of incentive rates is Sec. 3.14, and it says such may be applicable if there are, 'changes in

methods, product, equipment, material, design, quality requirements, services provided, lay out of work area, machine speeds and skives, or other production conditions.' And manifestly none of these applies to the current situations. Accordingly, the Arbitrator has no choice but to sustain the grievances herein.

AWARD

Grievances are sustained. The operations and rates referred to in this arbitration were not used in 1969 and have not been used so far in 1970. Therefore, the Grievants shall be compensated as follows: [following was a recitation of the stipulated amounts due to the grievants in that case]."

16. That prior to November 4, 1970, the Respondent delivered to the Complainant a written notice stating that new incentive rates were assigned, effective November 4, 1970, to certain operations on specific styles, to wit: Style Nos. 33, 35 and 88; that such new incentive rates were lower than the incentive rates theretofore in effect for the same operations on such styles; that the Respondent proceeded to implement the rates as specified in its written notice; that the establishment and implementation, on November 4, 1970, of new incentive rates for such operations was accompanied by a change of a pulley resulting in a change of the machine speed of the machine used in such operations; and that such change of the machine speed made a material change in the production practices on such styles.

17. That on November 4, 1970, a grievance, designated as Grievance Number 8, was filed and processed by the Complainant through certain steps of the grievance procedure specified in the collective bargaining agreement; that at all times during the processing of Grievance Number 8 the Complainant has failed or refused to have its time study man make a time study of the incentive rates implemented on Style Nos. 33, 35 and 88 on November 4, 1970; and that the Complainant has failed or refused to proceed to final and binding arbitration on Grievance Number 8.

18. That on November 4, 1970, the Respondent had failed or refused to comply with the Award of Arbitrator John F. Sembower; that by letters directed to the Respondent by the Complainant and its attorneys, the Complainant demanded that the Respondent comply with such Award; that, subsequently, the Respondent complied with the terms of such award, by payment to the grievants therein of such amounts of money as were designated in such Award; that by the same correspondence the Complainant and its attorneys further demanded that the Respondent accept and apply the Award of Arbitrator John F. Sembower made regarding Style Nos. 102, 201 and 1000 as a binding precedent on the issues presented by Grievance Number 7 regarding Style Nos. 33, 35 and 88; and that the Respondent refused and continues to refuse to accept and apply the Award of Arbitrator John F. Sembower as a final and binding determination of the issues in dispute regarding Style Nos. 33, 35 and 88.

19. That the individual grievants named in Grievance Number 7 are not the same as the individual grievants named in the Award of Arbitrator John F. Sembower; that the style numbers affected by Grievance Number 7 are not the same as the style numbers affected by the Award of Arbitrator John F. Sembower; that, however, the disputed action taken by the Respondent and the issues raised by Grievance Number 7 regarding

Style Nos. 33, 35 and 88 are identical in all material respects, during the period from August 10, 1970 through and including November 3, 1970, to the facts and issues before Arbitrator John F. Sembower regarding the change of incentive rates on Style Nos. 102, 201 and 1000; and that the failure or refusal of the Respondent to accept and apply such Arbitration Award as a final and binding determination of and precedent on the issues in dispute regarding Style Nos. 33, 35 and 88 during the period from August 10, 1970 through and including November 3, 1970 was a violation of its agreement to accept the award of an arbitrator made pursuant to the collective bargaining agreement as a final and binding determination and interpretation of the collective bargaining agreement on the issues presented.

20. That the disputed action taken by the Respondent and the issues raised by Grievance Number 8 regarding Style Nos. 33, 35 and 88 are materially different, on and after November 4, 1970, from the facts and issues before Arbitrator John F. Sembower regarding the change of incentive rates on Style Nos. 102, 201 and 1000 and, further, that such facts and issues on and after November 4, 1970 are materially different from the facts and issues regarding Style Nos. 33, 35 and 88 during the period from August 10, 1970 through and including November 3, 1970; that the Award of Arbitrator John F. Sembower was not and does not purport to be a final and binding determination of the issues raised by Grievance Number 8; and that the failure or refusal of the Respondent to accept and apply such Arbitration Award as a final and binding determination and precedent on its actions on and after November 4, 1970 was not a violation of the collective bargaining agreement.

21. That the issues raised by Grievance Number 8 regarding Style Nos. 33, 35 and 88 for the period on and after November 4, 1970 appear to constitute a dispute within the meaning of the grievance procedure contained in the collective bargaining agreement; and that the Respondent has neither failed nor refused to proceed to arbitration on such dispute.

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

CONCLUSIONS OF LAW

1. That Handcraft Company, Inc., by its failure or refusal to accept and apply the Arbitration Award issued by John F. Sembower as a final and binding determination of the dispute existing between the parties as to the issues submitted to the Arbitrator, and by its failure or refusal to rescind the change of incentive rates made on Style Nos. 33, 35 and 88 effective during the period from August 10, 1970, through and including November 3, 1970, has committed and is committing unfair labor practices within the meaning of Section 111.06 (1)(f) and (g) of the Wisconsin Employment Peace Act.

2. That inasmuch as the aforesaid Grievance Number 8 arose under and during the term of a collective bargaining agreement which provides for the submission of such disputes to final and binding arbitration, and inasmuch as the issues raised by Grievance Number 8 have not been determined by arbitration under such collective bargaining agreement, and Handcraft Company has neither failed or refused to submit such Grievance Number 8 to final and binding arbitration, Handcraft Company has not committed an unfair labor practice within the meaning of Section 111.06 (1)(f) and (g) of the Wisconsin Employment Peace Act with respect to events occurring on and after November 4, 1970.

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 Handcraft Company, Inc., its officers and agents, shall immediately

1. Cease and desist from refusing to accept and apply the Arbitration Award issued by John F. Sembower as a final and binding determination of the issues submitted to the Arbitrator.

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

   (a) Make all employes who worked on Style Nos. 33, 35 and 88 during the period from August 10, 1970 through and including November 3, 1970 whole for all monetary benefits lost by them as a result of the unilateral change of incentive rates implemented on August 10, 1970, by payment to them of the sum of money equal to the difference between the amount they would have received in the absence of a change of the incentive rate and the amount they actually received for incentive earnings during such period.

   (b) Notify the Wisconsin Employment Relations Commission in writing within twenty [20] days of the receipt of a copy of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the Complaint filed in the instant matter, insofar as it relates to changes of incentive rates on Styles 33, 35 and 88 implemented on or after November 4, 1970, be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 24th day of May, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 465, ALLIED INDUSTRIAL WORKERS OF AMERICA, AFL-CIO, Complainant, vs. HANDCRAFT COMPANY, INC., Respondent.	Case II No. 14404 Ce-1337 Decision No. 10300

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings and Preliminary Motion

On January 29, 1970 the Union filed a complaint with the Commission alleging that Handcraft Company, Inc. had committed unfair labor practices within the meaning of Section 111.06(1)(f) and (g) of the Wisconsin Statutes by refusing to abide by the Award of an arbitrator made pursuant to an arbitration provision contained in a collective bargaining agreement existing between the parties, notwithstanding its agreement to do so. The Respondent did not file a written answer. Hearing was held in said matter on March 2, 1971, in Green Lake, Wisconsin at which time Complainant called Marshal Mercier, an Industrial Engineer employed by the Wisconsin State AFL-CIO, William J. Salamone, its Business Representative, Bertha Roehl, Local Union President and Regina Sauerbreit, one of the aggrieved employes, as witnesses, and the Respondent called its controller, Ervin W. Golz as a witness. Hearing was closed on the same date. Final briefs were submitted on March 15, 1971.

At the opening of the hearing the Company moved that the charges filed by the Union be dismissed. The basis for such motion was a series of proceedings before the National Labor Relations Board which occurred during a period of time shortly preceding the Hearing in this matter. On January 4, 1971, the Complainant herein filed unfair labor practice charges with the NLRB, Case 30-CA-1466. On February 11, the NLRB refused to issue a complaint on those unfair labor practice charges. On February 17, 1971, the Union notified the NLRB that it was appealing the ruling, and that notice was acknowledged by the NLRB on February 25, 1971.

In response to the Motion, counsel for the Complainant stated that the charges filed with the NLRB concerned a refusal by the Respondent herein to turn over certain information to the Union which the Union contended it was entitled to. The Complainant asserted that it was processing the instant complaint before the Wisconsin Employment Relations Commission based on a contract violation under Section 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act, and recognized that the Wisconsin Employment Relations Commission was without jurisdiction to rule on the refusal to bargain charges brought by the Union before the

NLRB under Section 8(a)(5) of the Labor-Management Relations Act. The Complainant further asserted that the remedy sought in proceedings before this Commission was based on the jurisdiction of the Commission under Section 301 of the Labor-Management Relations Act.

The Respondent's Motion to dismiss was denied and the parties were directed to proceed with presentation of evidence. The Examiner determined that the issues in the instant proceeding were different from the issues being pursued by the Union before the NLRB. Further, it was determined that the information which the Union was seeking in proceedings before the NLRB was not needed as a necessary part of the record in the instant proceeding unless it were to be determined that the Wisconsin Employment Relations Commission should determine the underlying grievances on the merits rather than on an enforcement of an agreement to arbitrate or an arbitration Award. In view of the Findings of Fact and Conclusions of Law which the Examiner has made on the whole record, it will not be necessary to take evidence in this proceeding on the merits of the dispute covered by Grievance Number 8 for the period on and after November 4, 1970.

Positions of the Parties

The Company takes the position that it has complied in every way with the Award of the Arbitrator and that at no time did the Company agree that this Arbitration Award would govern their future conduct with respect to establishing new rates, voiding rates or any other operation. The Company also contends that there is absolutely no similarity between the previous arbitration and the present grievance, pointing specifically to the fact that the operations covered by the Arbitrator's Award were no longer in existence at the time of the Arbitration hearing or thereafter at the time of the Arbitration Award, whereas the operations presently in dispute are on-going operations. During the course of the hearing, the Company also introduced evidence to show that the operations in the present dispute had not been agreed to during negotiations leading to the current collective bargaining agreement whereas the operations before the Arbitrator had been agreed upon during the last contract negotiations.

It is the position of the Union that the Company has attempted to frustrate the intent of the arbitration process and the ability of the Union to police its contract. The complaint filed in the instant proceeding contains no mention of the date November 4, 1970 nor does it contain any suggestion that there may be distinctions between Company actions affecting Style Nos. 33, 35 and 88 during two or more periods after the initial change of rates. The Union introduced into evidence the Arbitration Awards issued in the previous arbitration proceeding. They also introduced into evidence the statement submitted by the Arbitrator to the parties and the letter from the Arbitrator to the parties wherein Mr. Sembower stated:

> "As I endeavored to point out to the parties during this prolonged matter, it would have been far more economical if they had combined the arbitrability and merits questions in a single presentation, which I think might have been accomplished in one day's hearing. However, it is the absolute right of the parties to insist upon a disposition of the arbitrability question before the merits are reached, and therefore this has been an orderly proceeding which has been presented in the proper fashion. I regret, however, that the costs are somewhat more than I like to see in an arbitration between parties of somewhat limited means. I have endeavored to hold down the costs as much as

possible for a three-day hearing involving two separate and distinct awards." 1/

The Complainant urges that the Arbitration Award should be taken as res judicata on the issues presented to the Arbitrator in conformity with the decisions of the Commission beginning with Wisconsin Telephone Company, Decision No. 4471 and followed by Pure Milk Association, Decision No. 6584. In post hearing brief the Complainant urges that it is clear that the action taken on November 4, 1970 was done as a subterfuge to circumvent the Award of the Arbitrator, that in making its changes on November 4, 1970, the Respondent based its change on rates which had been implemented wrongfully during a period from August 10, 1970 through November 3, 1970 and that under these circumstances the Commission should apply the rationale of Mews Redi-Mix Corporation, Decision No. 6683, and determine the entire matter on the merits of the grievances.

Res Judicata Effect of the Arbitration Award

In Wisconsin Telephone Company, Decision No. 4471, 2/ this Commission ruled that the Arbitration Award rendered in the case of the discharge of one employe was conclusive upon the Union and res judicata as to the issue presented and as to all relief sought in a second grievance, when the issue and relief sought in a second grievance were identical in all respects to the issue and relief sought in the initial grievance. In that case the separate grievances occurred within a short time of one another under the same collective bargaining agreement. In Pure Milk Association, Decision No. 6584, 3/ the Commission ruled that the same rationale applied to enforcement of an Arbitration Award following the expiration of the collective bargaining agreement under which the Award was rendered, when successor collective bargaining agreements contained language identical to that interpreted by the Arbitrator. This entire line of cases and applicable Federal court rulings were reviewed fully in Wisconsin Gas Company, Decision No. 8118, 4/ where it was found that although the parties, general fact situations and the contract language were substantially identical, the exact facts in dispute were not identical so that the Arbitration Award issued in the first of a series of cases did not determinatively govern following grievances.

A review of the record made in the instant proceeding indicates that certain identities are present here for consideration of enforcement of the Arbitration Award as res judicata under the cases cited. There is no dispute that the parties are identical and that the same collective bargaining agreement has been in effect throughout the period involved. The grievants involved in the first case are not the same individuals as the grievants involved in the present dispute. However, this disidentity was not found to be significant in Wisconsin Telephone, supra, and no evidence was adduced in the instant proceeding which would require deviation from the rule that the Union and the Employer are the actual parties to the collective bargaining agreement, and that the identity of those parties is sufficient.

1/ Exhibit No. 7.

2/ Wisconsin Telephone Company (4471), 3/57; affirmed Milwaukee Co. Cir. Ct., 4/58; Reversed on other grounds, Wis. Sup. Ct. 2/59.

3/ Pure Milk Association (6584), 12/63; affirmed Dane Co. Cir. Ct. 10/64; remanded for further hearing 2/65; supplemental order of W.E.R.C. (6584-B) 12/65.

4/ Wisconsin Gas Company (H.E. Dec.) (8118-C) 11/67 and (8118-E) 3/68, affirmed W.E.R.C. (8118-F) 4/68.

With respect to the facts and issues involved, substantial identities can be found. The evidence of the Union witnesses introduced to contradict evidence of distinctions between the cases is persuasive to the conclusion that the incentive rates on all of the operations in dispute in both the instant case and the Arbitration had been acquiesced in by the Union at the rates in effect as of the time the current collective bargaining agreement was signed. It is clear that the specific styles involved in the instant proceeding are not the same as the styles which were involved in the arbitration proceedings, and the Company has attempted to raise a further distinction by the fact that the styles in dispute in the initial proceeding were discontinued sometime thereafter, while the styles presently in dispute are an important part of the on-going production of the Company. It would appear that the significant fact is that all of the styles, both in this proceeding and in the arbitration proceeding, were in operation at the time the Company unilaterally changed the incentive rates on those styles, and that all of such styles remained in production for some period following the change of incentive rates.

The Company has disputed the finding by the Arbitrator that a time study pursuant to Section 3.12 of the collective bargaining agreement was unnecessary on the particular facts presented to the Arbitrator. The Arbitrator noted that the applicable clauses of this contract did not shift from the management to the Union the function of time study of jobs and setting rates, and further that it would be specious to suggest that all the Company needs to do is to postulate a rate and that by doing so it shifts to the Union the job of time study and rate determination. Again in the instant proceeding the Union has refused to make any time study of the incentive rates in question. The record clearly indicates that the action taken by the Company on August 10, 1970 was not accompanied by any change of the productive process, and in this respect the action taken by the Company here is identical to the action taken by the Company in the case before the Arbitrator. The Company has made no persuasive argument as to why the Interim Award of the Arbitrator should not be a binding determination on this issue in a fact situation which is identical in all respects, except perhaps as to the individual employes and styles affected, for the period August 10, 1970 through and including November 3, 1970. There is, however, a substantial change of the facts and issues during the period beginning November 4, 1970. On that date the Company did make an actual change in the productive process. Nothing in the Award of Arbitrator Sembower suggests that the Company made a change in the productive process at any time during those proceedings. Since there was no issue involving a change of the productive process before the Arbitrator, the issue of whether the Union was required by Section 3.12 of the contract to make a time study as a condition precedent to arbitration, in a case where the Company did make an actual change of the productive process, has neither been heard nor determined under this collective bargaining agreement by an arbitrator, and with respect to that portion of this record on and after November 4, 1970, the Award of Arbitrator Sembower cannot be determinative on the issue.

The issue concerning the contractual requirement that the Union make a time study of a job as a condition precedent to arbitration has been treated by the parties heretofore as an arbitrable issue within the collective bargaining agreement, going to procedural arbitrability. In John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 83 S. Ct. 909, 11 L.Ed.2d 898 (1964) the United States Supreme Court declared as Federal labor policy that, "Once it is determined...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." The Examiner has found that the dispute between these parties, as to the issues raised by Grievance Number 8, appears to be an arbitrable subject and that those issues are not determined by the Award of Arbitrator John Sembower. However, in conformity with the policy declared by the Supreme Court, no findings of fact or conclusions of law are made herein concerning procedural arbitrability and nothing herein should be taken by the parties or by an Arbitrator as a determination of the procedural issue or as a suggestion of how the Arbitrator should rule on the procedural issue.

The evidence adduced by the Union at the Hearing in this matter clearly delineates two separate and distinct sets of facts involving separate grievances, issues and periods of time within the overall period of time pertinent to the instant case. The distinctions developed by the parties at the Hearing and in post hearing briefs indicate that separate and distinct remedies are also appropriate. Throughout the proceedings before Arbitrator John Sembower, the ultimate issue on the merits of the grievance to be decided by the Arbitrator was whether the Company could unilaterally implement a reduced incentive rate on a particular job with no accompanying change of the productive process connected with that particular job. On August 10, 1970 the Company implemented a change in the incentive rates on Style Nos. 33, 35 and 88 which was not accompanied by any change in the productive process on those styles. Grievance Number 7 was filed and the issue raised by that grievance is identical to the issue raised before the Arbitrator in the previous case. The Award of the Arbitrator was received subsequently and put the Company on notice of the Arbitrator's final and binding determination of the issue.

In support of its refusal to apply the Award of the Arbitrator to Grievance Number 7, the Company urges that it had never agreed with the Union to give prospective application to the Award of Arbitrator Sembower, regardless of what that Award might have been. The record reveals that during attempts to settle the grievance submitted to arbitration and during grievance meetings on Grievance Number 7, the Union sought to settle the grievances with the understanding that the settlement would be a binding precedent on future action, and the Company, while making offers of settlement at least with respect to the case eventually decided by the Arbitrator, refused to agree to any settlement which included prospective determination of the issue. It is apparent that the parties did not reach a specific agreement during the processing of the grievances to give the Arbitration Award issued in the first case prospective effect. However, underlying all of the grievances and the arbitration in this record is a collective bargaining agreement which establishes the grievance and arbitration procedure and the agreement of the parties therein to make arbitration awards final and binding. There is no limitation in the agreement on the term "final and binding", the parties have already agreed in their collective bargaining agreement to make arbitration final and binding, their agreement is enforceable, and there was no need for the parties to agree again to what is already in evidence as their agreement. The facts, issues and all relief sought in Grievance Number 7, covering the period from August 10, 1970 through and including November 3, 1970 are identical in all material respects to the facts, issues and relief sought in the case submitted to Arbitrator Sembower. The Company is prevented by its agreement to make arbitration a final and binding process from re-arbitrating its noncompliance with the collective bargaining agreement.

On November 4, 1970 the Company again changed the incentive rates on Style Nos. 33, 35 and 88, but on this occasion a new issue was interjected into the dispute. The evidence introduced by the Union indicates both that a change of the sewing machine speed was implemented and that the increase in the speed of the sewing machine forced the employes to make changes in their work pace. There was also testimony to the effect that the change of the sewing machine speed caused the employes to work harder at their jobs and introduced additional safety risk into the jobs in question. These facts are indications that the issue underlying Grievance Number 8 filed to protest the November 4, 1970 change of incentive rates is quite different from the issue in both the Sembower arbitration and Grievance Number 7. The Union has failed to prove the facts and issues are identical so as to warrant the enforcement of the Sembower Award as res judicata on Grievance Number 8 for the period on and after November 4, 1970.

Jurisdiction - Where Contract Provides for Final Disposition of Grievances

It is clear by a long line of decisions that this Commission has consistently refused to assert its jurisdiction to decide complaints that one party has violated the terms of a collective bargaining agreement where the Agreement provides for a final disposition of such questions. 5/ This policy is consistent with the body of law which has been applied in the federal courts under Section 301 of the Labor-Management Relations Act. 6/ Complainant urges that even though it may be the established policy of the Commission to refuse to assert its jurisdiction to determine the alleged contract violations where the agreement provides, as does this one, for the final disposition of such questions, the Commission ought to assert its jurisdiction in this case. The Complainant bases its argument on Levi Mews d/b/a Mews Redi-Mix Corporation (6684) 3/64. In that case the Respondent wholly refused the efforts of the Complainant to utilize the arbitration procedure. The Respondent did not base its action on the contention that the matter was not arbitrable, but unreasonably refused without justification to resort to the procedure which he had contractually bound himself to follow. The instant case is distinguished by the fact that the Respondent has not refused to proceed to arbitration. In support of its position the Complainant urges that the action taken by the Respondent herein on November 4, 1970 was done as a subterfuge to circumvent the Award of Arbitrator Sembower and that the Respondent has frustrated the Union from obtaining compliance with the contract and the Arbitration Awards by refusing to give the Union information as to how the rates implemented on November 4, 1970 were determined. As part of its evidence in this proceeding, the Complainant introduced a statement of charges rendered by Arbitrator Sembower which totaled $1,367.13 exclusive of the fees of attorneys and court reporters. From this the Union urges that the Complainant is attempting to make arbitration an expensive process and thereby frustrate the attempts of the Union to police its contract.

5/ River Falls Coop Creamery (2311) 1/50; Hurlburt Co. (4121) 12/55; Pierce Auto Body Works (6635) 2/64; American Motors Corp. (7488) 2/66; Allen Bradley Co. (7659) 7/66; Rodman Industries (9650-A) 9/70.

6/ Cf. Drake Bakeries Inc. v. Local 50 American Bakery & Confectionary Workers 50 LRRM 2440 (U.S. Sup. Ct. 1962).

The Complainant is presently seeking the information it claims to need through proceedings before the NLRB. However, it is probable that the same information could also be made available to the Union under subpoena from the Arbitrator in any arbitration proceedings brought by the Union under the grievance procedure for the period on and after November 4, 1970. On the question of burden of expense to the Complainant, it cannot be denied that the Sembower arbitration was a costly procedure for both parties. However the potential for expense and the hardships connected therewith are present in every case where one of the parties to a contract is compelled to seek enforcement of the contract through arbitration or judicial or administrative enforcement of the agreement to arbitrate. Any attempt to identify cases of exceptional hardship would require consideration of the merits of the dispute, which is contrary to the agreement of the parties to leave such questions for the Arbitrator.

The alleged unreasonableness of the Respondent falls far short of that present in the Levi Mews case. To consider whether the incentive rates implemented on November 4, 1970 were based on the rates in effect from August 10, 1970 through November 3, 1970 or on some other rate or standard would require the Examiner and this Commission to go into the merits of Grievance Number 8 and therefore to invade the jurisdiction of the Arbitrator. While the facts here have established a violation of the Company's agreement to make arbitration final and binding on issues submitted, with respect to the period from August 10, 1970 through November 3, 1970, the facts present here are not such that they would justify a departure from the well established and sound policy of refusing to consider the merits where there is a provision for arbitration in the agreement, nor do they justify an extension of the Levi Mews exception to that policy.

Remedies

The order attached hereto requires the Respondent to cease and desist from refusing to accept and apply the Arbitration Award issued by John F. Sembower as a final and binding determination of the issues submitted to the Arbitrator. As regards the period from August 10, 1970 through November 3, 1970 and any future changes of incentive rates which are not accompanied by a change in the productive process, the Sembower Award is res judicata until such time as the parties agree to change their collective bargaining agreement with respect to changes of incentive rates. The contract under which the Arbitration Award was rendered expires on May 31, 1971, but it has been the previous decision of the Commission and the courts in Pure Milk Association (6584) 12/65 that an Arbitration Award will survive the expiration of the contract under which it was rendered, so long as successor agreements do not change the underlying issue or the underlying contractual agreement on which res judicata is based. As to the period from August 10, 1970 through November 3, 1970, the only remaining procedure will be a determination and payment of the amount of money to which the grievants are entitled. Evidence was not taken in this proceeding regarding the specific amounts involved and it is therefore left to the parties to determine the amounts which are payable to settle all claims under Grievance Number 7. Should the parties be unable to bilaterally determine the amounts payable, pursuant to this Order, the Commission will, upon request by either party, reopen hearing in this matter to take evidence on the amount so payable.

Arbitration is the preferred process for the settlement of disputes where the parties have agreed in their collective bargaining agreement

to submit disputes to arbitration. 7/ The dispute with respect to the period on and after November 4, 1970 has not been shown to be proper for application of res judicata, and the parties are left to pursue settlement of their dispute in conformity with the grievance and arbitration procedures set forth in their agreement. The question remains as to whether the order issued herewith should require the parties to proceed to arbitration on this dispute. No order to arbitrate has been included, in that to do so at this time would be premature. The parties have not completed the processing of the grievances under their collective bargaining agreement, having stopped short of proceeding to arbitration. The parties by their own action have left open the option to reconsider their positions and to settle. Unlike procedures which are common in the courts under Section 301 of the Labor-Management Relations Act, it has been the practice of this Commission to dismiss complaints demanding relief under Section 111.06 (1)(f) where it was found that the complaint was prematurely filed and that arbitration is available to the parties under their contract. The dismissal of the instant complaint with respect to the period on and after November 4, 1970 is based on the finding that there has been, to date, no refusal by the Respondent to proceed to arbitration, and this dismissal would not prejudice the right of the Union to file a new complaint at some future time should the Employer then refuse to proceed to arbitration on Grievance Number 8.

Dated at Madison, Wisconsin, this 24th day of May, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

7/ Seaman-Andwall (5910) 1/62.