STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1107, LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, Complainant, vs. HAMILTON & SONS CANNING COMPANY, Respondent.	Case II No. 14627 Ce-1357 Decision No. 10315-A

Appearances:

Mr. Michael McMahon, International Representative, appearing on behalf of the Complainant.

Mr. Franklin C. Clements, Executive Vice-President, 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 Statutes; and hearing on said complaint having been held at New London, Wisconsin, on June 10, 1971, before the Examiner; and the Examiner having considered the arguments and evidence 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 1107, Laborers International Union of North America, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its offices in New London, Wisconsin, and represents for purposes of collective bargaining certain employes of Hamilton & Sons Canning Company, New London, Wisconsin.

2. That Hamilton & Sons Canning Company, hereinafter referred to as the Respondent, is an employer having a manufacturing facility and office in New London, Wisconsin.

3. That prior to June 1, 1969, the Complainant and Respondent were parties to a collective bargaining agreement which was negotiated in 1937 and amended from time to time thereafter; that at various times prior to September 26, 1969, representatives of the Complainant met with Adolph Hamilton, then President of the Respondent, for the purpose of negotiating a new collective bargaining agreement; that substantial agreement was reached on the language to be contained in the new collective bargaining agreement and the terms of the new agreement were typed by Kay Feathers, a Secretary in the Respondent's office; that representatives of the Complainant met with Adolph Hamilton on September 26, 1970, for the purpose of signing the new agreement; that

prior to signing the new agreement certain changes were made in said agreement with the knowledge and concurrence of Adolph Hamilton; that said changes were made by Judy Fields, the Complainant's Secretary, and were accomplished by writing in certain additional words and deleting certain other words; that after said changes had been made in the typed agreement, the agreement was signed by Adolph Hamilton.

4. That the agreement, which was signed by Adolph Hamilton on September 26, 1969, contains the following provisions which are relevant herein:

"ARTICLE III
GRIEVANCE PROCEDURE

A Grievance shall be processed as follows:

1. The grievance shall be presented to and discussed with the employee's supervisor, by the employee, and steward if requested.

2. If a satisfactory settlement does not result from such discussion, the grievance shall be discussed with management.

3. If not settled satisfactorily in Step 2, the grievance shall be referred to management and the international representative of the Union affected and the employee involved.

[4. If not settled in Step 3, case shall be referred to WERC for mediation and arbitration.]

Should the Employer wish to meet with the employee, stewards or committeemen during regular working hours, all time spent by the employee, steward or committee shall be paid for by the Employer at the affected employee's regular rate of pay."

. . .

"ARTICLE V
SENIORITY AND JOB RIGHTS

. . .

In laying off employees because of reduction in force, the employees shortest in length of service, shall be laid off first.

In re-employing employees (sic) having the greatest length of service shall be called back first."

. . .

"ARTICLE X
HOLIDAY PAY

Each employee covered by this agreement shall receive holiday pay for the following:

Christmas
New Years Day

Good Friday
Memorial Day
July 4
Labor Day
Thanksgiving Day
Day after Thanksgiving (would become effective year 1970.)

An employee become (sic) eligible when he becomes a member of the Union.

When no work is performed on any of these holidays or the days celebrated for them, each employee is to receive pay equal to eight (8) hours at the employee's straight time hourly rate, plus any Bonus differential.

Men will be based on 10 Hour day."

. . .

"ARTICLE XV
TERMS OF THE AGREEMENT

The term of this Agreement shall be for three years dating from June 1, 1969 to June 1, 1972. The parties hereto, within sixty (60) days prior to ~~April~~ June 1, 196972, shall begin negotiations with each other for the purpose of considering the adviseability of an extension or renewal of this Agreement upon the same terms herein contained or upon other terms as the parties may mutually agree upon.

~~No Strike or Lockout shall be called without the party calling the same first giving two (2) working days' notice in writing to the other party.~~

This agreement constitutes the entire agreement between the parties and no time during the life of this agreement shall either party have any obligation to negotiate or bargain with the other party with respect to any matters not covered by this agreement and as to extent herein provided.

It is recognized by the parties to this Agreement that all terms or provisions of the agreement shall conform with Federal and State Laws.

It is further recognized by the parties that in the event any State or Federal Law creates a dispute concerning hours of work, working conditions or wages, the parties shall meet to mutually reach a solution."

[Handwritten words appear in brackets]
~~Deleted words are lined through~~

5. That prior to the execution of the current collective bargaining agreement and thereafter until on or about December 25, 1970, the Respondent's employes were paid holiday pay on the holidays enumerated in Article X of the agreement regardless of whether or not they were on layoff during the period of time that the holiday occurred; that on or about December 25, 1970, the Respondent refused to pay and continues to refuse to pay holiday pay to employes who are on layoff during the period of time in which an enumerated holiday occurs; that thereafter

the Complainant filed a grievance on behalf of 13 employes alleging that the Respondent had violated the agreement by refusing to pay said employes holiday pay because said employes were on layoff at the time the holidays occurred; that the Respondent denied said grievance and denied that it was obligated to comply with any of the provisions of the agreement which were handwritten including the agreement to go to arbitration; that the Complainant and Respondent agreed at the hearing that if it should be determined that the Respondent is obligated by the provisions of the agreement which are handwritten that the Complainant and the Respondent would waive the arbitration provision of the agreement in this case and ask the Commission to decide the question of whether or not the Respondent had violated the agreement by refusing to pay the 13 grievants holiday pay for holidays that occurred during a period of time when they were on layoff.

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

CONCLUSIONS OF LAW

1. That the Respondent is bound by all the provisions of the collective bargaining agreement existing between it and the Complainant including those which are handwritten and that therefore its refusal to proceed to arbitration on the grievance presented constitutes a violation of Step 4 of Article III of said agreement and constitutes an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

2. That, by refusing to pay the 13 grievants holiday pay for those holidays which occurred during a period of time when said grievants were on layoff, the Respondent has violated and is violating Article X of the collective bargaining agreement existing between it and the Complainant and has committed and is committing an unfair labor practice within the meaning of 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

IT IS ORDERED that Hamilton & Sons Canning Company, its officers and agents shall immediately:

1. Cease and desist from refusing to pay its employes who are covered by Article X of the collective bargaining agreement holiday pay for holidays enumerated therein which occur during a period of time when said employes are on layoff.

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

   a. Pay the 13 grievants all holiday pay due and owing for holidays which occurred during the period of time when said grievants were on layoff prior to the date of this Order.

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 8th day of December, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that the Respondent has refused to pay holiday pay to 13 employes who were on layoff at the time that the holidays occurred and that such conduct violates the collective bargaining agreement existing between the Complainant and Respondent. The Complainant further contends that the Respondent has refused to arbitrate a grievance filed on behalf of said employes. The Respondent contends that the collective bargaining agreement referred to by the Complainant contains certain handwritten portions, including the provision calling for arbitration, which are not properly part of the agreement. The Respondent further contends that it is not obligated to pay the 13 grievants the holiday pay in question since the grievants were on layoff at the time that the holidays occurred.

Validity of the Handwritten Portions of the Agreement

The evidence presented by the Complainant at the hearing clearly established that all copies of the agreement, which had been typed prior to September 26, 1969, were changed with the knowledge and concurrence of Mr. Adolph Hamilton before he signed the agreement. The Company produced no evidence which would contradict the Complainant's evidence in this regard. Even so, the Respondent argues that the Union ought not be allowed to rely on handwritten portions which are not initialed by the individuals signing the agreement.

Although the Examiner agrees that the practice of drafting agreements in the manner that was employed in this case is certainly not desirable in that it gives rise to suspicion and conjecture regarding the authenticity of the handwritten portions, there is no rule of law which invalidates any portion of agreements so drafted.

The Respondent contends that Mr. Adolph Hamilton, who died shortly after signing the agreement, may not have fully understood the terms of the agreement he was signing. The Respondent failed to substantiate this allegation with any evidence that Adolph Hamilton was not in complete control of his mental faculties or was subjected to undue pressure at the time of the signing of the agreement. On the other

hand, the Union presented evidence, which was unrebuted, that Adolph Hamilton was pleased with the new agreement and was not subjected to any pressure before he signed it. Without any evidence to substantiate the Respondent's contention the Examiner must conclude that no improper advantage was taken of Adolph Hamilton and that the agreement is valid in all respects.

The Examiner therefore concludes that Step 4 of Article III is part of the collective bargaining agreement and that the Respondent violated that provision when it refused to proceed to arbitration. 1/

Agreement to Waive Arbitration Requirement

At the hearing the Respondent asked that even if Step 4 of Article III was found to be part of the agreement that the question of holiday pay be decided by the Commission without the necessity of a further proceeding before an arbitrator appointed pursuant to Step 4 of Article III. The Complainant joined with the Respondent in this request.

The Commission will not normally assert its jurisdiction under Section 111.06(1)(f) of the Wisconsin Statutes to decide the merits of an alleged contract violation where the agreement provides for binding arbitration of such disputes. 2/ In this case the parties agreed, for the purpose of avoiding the necessity of an additional hearing, that the Commission should decide the merits of the holiday pay dispute even if the Commission decided that the agreement provides for arbitration of such disputes. Under the circumstances present in this case it is appropriate for the Commission to assert its jurisdiction to decide the merits of the holiday pay dispute since the parties have, by agreement, substituted the Commission's procedures in place of arbitration for purposes of deciding this case.

Holiday Pay

The Complainant argues that Article X provides that the Respondent will pay its employes holiday pay even while on layoff. Two witnesses testified on behalf of the Complainant to the effect that the Company had for a number of years, prior to and subsequent to the execution of the current collective bargaining agreement, engaged in the practice of paying its employes holiday pay for holidays that occurred during periods of time that its employes were on layoff. The Respondent's only witness refused to contradict that testimony. Although the wording of Article X does not specifically refer to layoffs the language

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1/ It is significant that the second paragraph of Article XV, which refers to strikes during the term of the agreement, was deleted when Step 4 was inserted in Article III. A no strike agreement is the usual quid pro quo for binding arbitration and will be inferred where the agreement is silent. Teamsters v. Lucas Flour 369 US 95, 49 LRRM 2717 (1962).

2/ Rodman Industries, Inc., (9650-A and 9650-B) 9/70 and 11/70. See also cases cited therein.

employed is clearly susceptible to the interpretation placed on it by the Complainant. It states that each eligible employe shall receive the holiday pay and indicates that holiday pay shall be paid at straight time rates "when no work is performed" on the holiday in question. Because of the seasonal nature of the Respondent's business it is customary for no work to be performed on certain holidays such as Christmas and New Years.

The Respondent contends that the grievants are not "employes" when they are on layoff. This arguement is contrary to the usual rule that such individuals are considered to be employes. 3/ Although the agreement does not define the term "employe" it does have a provision establishing seniority and job rights which refers to individuals on layoff as employes. Obviously a laid off employe who refuses to respond to a recall or finds permanent employment elsewhere during the period of his layoff would cease to be an employe. However, there is no contention that any of the 13 grievants herein refused to respond to recall or had found permanent employment elsewhere. The Respondent made an offer of proof that one of the grievants engaged in part-time self-employment during the period of her layoff; however, said grievant was working at the time of the hearing, having responded to a recall.

The Respondent argues that the payment of holiday pay to employes who are on layoff is highly unusual and contrary to the customary practice in industry. The Examiner must agree that such a provision is not common in collective bargaining agreements within his knowledge. Even so, there is nothing to preclude an employer from agreeing to such a practice which is apparently what happened in this case. The uniqueness of the practice is certainly not enough to offset the Complainant's argument concerning the intended meaning of Article X which is clearly supported by a continuous and well-established past practice. If the Respondent now finds that the practice is undesirable it should seek a modification of the language contained in Article X during the upcoming negotiations.

Remedy

In light of the fact that the Respondent's only reason for refusing to proceed to arbitration was a desire to test the validity of the arbitration provision of the agreement, the Examiner does not deem it necessary to enter a remedial order with regard to that isolated violation in order to effectuate the policies of the Wisconsin Employment Peace Act. In effect the parties have agreed that the Commission should issue a decision in the nature of a declaratory ruling on the validity of the arbitration provision and there is no indication that the Respondent will not abide by the decision of the Commission in that regard in the future.

Dated at Madison, Wisconsin, this 8th day of December, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

3/ Armour Leather Co. (9) 8/39; American Printers and Lithographers Inc. 174 NLRB 177, 70 LRRM 1414 (1969); Cf. Generac Corp. (7211) 7/65 where individuals on approved leaves of absence were held to be employes.