STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED TRANSIT UNION, DIVISION 998,		
Complainant,		Case I No. 14977 Ce-1370
vs.		Decision No. 10551-A
MILWAUKEE & SUBURBAN TRANSPORT CORP.,		
Respondent.		

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas P. Krukowski, appearing on behalf of the Complainant.
Quarles, Herriott, Clemons, Teschner & Noelke, Attorneys at Law, by Mr. George K. Whyte, Jr., 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 Milwaukee, Wisconsin, on November 9, 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 Amalgamated Transit Union, Division 998, hereinafter referred to as the Complainant, is a labor organization having its principal office at Milwaukee, Wisconsin.

2. That Milwaukee & Suburban Transport Corporation, hereinafter referred to as the Respondent, is an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes, having its principal place of business at 200 North Jefferson Street, Milwaukee, Wisconsin.

3. That the Complainant is the exclusive bargaining representative of certain employes of the Respondent, and that the Complainant and Respondent are parties to a collective bargaining agreement effective from April 1, 1970 until April 1, 1972, which contains the following provisions relevant herein:

"ARTICLE VI -- METHOD OF ARBITRATION

. . .

6.05 The Company and the Association agree that the decision of the majority of such board shall be binding on both parties.

. . .

ARTICLE XXXII -- HEALTH AND SAFETY

. . .

32.03 When an employe is on the sick list for thirty (30) days or more, or when Superintendent in charge feels it is in the best interest of the employe and the Company, a release from the Chief Medical Director is required.

. . ."

4. That on or about December 16, 1970, the Respondent discharged an employe by the name of Roland William Wetley, for alleged misconduct while driving a bus; that Wetley filed a grievance alleging that his discharge was in violation of the collective bargaining agreement and said grievance was submitted to a tripartite Board of Arbitration, pursuant to the collective bargaining agreement; that on July 14, 1971, the Board of Arbitration met and discussed Wetley's grievance and unanimously agreed that Wetley's conduct warranted severe disciplinary action short of discharge and he should therefore be reinstated without back pay; that during the discussion of Wetley's grievance at the July 14, 1971, meeting, the Respondent's Arbitrator expressed concern respecting Wetley's attitude, behavior and emotional stability and that the Board of Arbitration discussed the provisions of Article XXXII, Section 32.03, set out above; that on July 26, 1971, the Respondent's Arbitrator received a copy of the Neutral Arbitrator's proposed Decision and discussed its contents, including its reference to Article XXXII, Section 32.03, with the Complainant's Arbitrator; that on July 30, 1971, the Respondent's Arbitrator signed the proposed Decision and returned it to the Neutral Arbitrator and that sometime after July 27, 1971, and before August 4, 1971, the Complainant's Arbitrator signed the Decision and returned it to the Neutral Arbitrator; that on August 4, 1971 the Complainant and Respondent received a copy of the signed Decision of the Board of Arbitration which reads in relevant part as follows:

"Both parties stipulated that the matter was properly before the Board of Arbitration for determination. Although each party emphasized different factors in stating the issue, the following is the basic issue for decision by the panel:

Was the discharge of Roland Wetley as a result of an incident alleged to have occurred on December 1, 1970, appropriate under the collective bargaining agreement between the parties?

. . .

It is the conclusion of the Panel that severe disciplinary action is warranted in this situation. However, in view of Grievant's satisfactory work record during the five years of his employment, the Panel concludes that the

appropriate penalty is suspension without back pay rather than discharge, and looking to the time which has elapsed since the discharge, Grievant should be reinstated forthwith.

The Company expresses concern respecting Grievant's attitude, behavior and emotional stability. On this matter, the Panel takes judicial notice that a medical release from the Chief Medical Director is required when the superintendent in charge feels it is to the best interest of the employee and the Company.

AWARD

It was appropriate under the collective bargaining agreement for the Company to impose severe disciplinary action short of discharge upon Grievant for driving a bus full of high school students while playing a harmonica with both hands. It is ordered that Grievant be reinstated forthwith to the Company's employ, without loss of seniority, but without back pay.

. . ."

5. That on August 2, 1971 the Respondent's Superintendent of Transportation sent Wetley a letter which reads as follows:

"We have been advised that the Award of the Arbitration Panel in the matter of your discharge will be forthcoming shortly. It will order that you be reinstated to the Company's employ, without loss of seniority, but without back pay.

Accordingly, you are directed to contact the Company's medical director, Mr. Ervin L. Bernhart at telephone number 873-8340 as soon as possible for the purpose of scheduling a complete physical and mental examination to determine your fitness to return to work.

If you have any questions about this matter, telephone me at 344-6711.

. . ."

that on August 5, 1971, Wetley was placed on sick leave by the Respondent and was not allowed to perform his regular duties or any other duties for the Respondent; that on August 9, 1971 Wetley was advised by the Medical Director that his physical health was satisfactory and that he should contact the Superintendent of Transportation; that on August 9, 1971, the Respondent's Medical Director advised the Superintendent of Transportation that Wetley's physical health was satisfactory; that thereafter the Respondent's Superintendent of Transportation made arrangements to have Wetley examined by a psychiatrist on August 11, 1971, at 3:30 p.m.; that the Respondent's Superintendent of Transportation notified Wetley at 4:30 p.m., on August 10, 1971, that he was to see the psychiatrist selected by the Company on the following day; that on August 11, the Complainant's President notified the Respondent's Superintendent of Transportation that Wetley did not intend to submit to an examination by the psychiatrist unilaterally selected by the Company and

that Wetley had cancelled his appointment; that the Respondent's Director of Operations wrote a letter to the Complainant's President on August 12, 1971, summarizing the Respondent's position with regard to Wetley's reinstatement which reads as follows:

> "The recent arbitration award in the dispute involving the discharge of Roland Wetley orders that Mr. Wetley be reinstated forthwith to the company's employ, without loss of seniority, but without back pay. In accordance with that award, Mr. Wetley will be considered reinstated as of Thursday, August 5, 1971.
>
> Based on the incident that had brought about Mr. Wetley's discharge, and other evidence as to Mr. Wetley's conduct as a bus driver that was presented at the arbitration hearing, it is the Superintendent of Transportation's opinion that it is to the best interests of the employee and the company that a release from the Chief Medical Director is required before Mr. Wetley will be returned to duty as a bus operator. Pending such release, Mr. Wetley will be on the sick list.
>
> If Mr. Wetley will promptly contact Mr. Murphy, arrangements for completion of his physical and mental examination will be made as quickly as possible.
>
> . . ."

6. That on August 16, 1971, the Complainant's President and the Respondent's Director of Operations agreed that the Complainant would allow Wetley to submit to a mental evaluation in order to expedite his return to his regular duties, without prejudice to the Complainant's position that the Respondent had no right to insist on such an evaluation prior to returning Wetley to work, provided the Complainant could select the psychiatrist subject to the Respondent's power to veto any selection; that thereafter the Complainant selected a psychiatrist who was acceptable to the Respondent and Wetley was examined on August 24, 1971, by the psychiatrist so selected; that on September 13, 1971 the Respondent received the report from the psychiatrist who examined Wetley and Wetley was given a release by the Respondent's Medical Director on September 14, 1971; that on September 15, 1971, Wetley reported to his supervisor who ordered him to return to work on December 16, 1971, which he did.

7. That Wetley had accumulated sick leave equal to 15 days, which accumulated sick leave was exhausted on August 25, 1971, and that Wetley received no compensation, other than vacation benefits which he had previously earned, between August 25, 1971 and September 16, 1971.

8. That Wetley was not in fact sick at any time between August 5, 1971 and September 16, 1971.

Based on the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Milwaukee & Suburban Transport Corporation, by placing Roland William Wetley on sick leave status on August 5, 1971, has

violated and is violating its agreement to accept an arbitration award and has refused and failed to recognize and accept as conclusive and is refusing and failing to recognize and accept as conclusive the final determination of a tribunal having competent jurisdiction over an issue in a controversy as to employment relations and has thereby committed unfair labor practices within the meaning of Section 111.06(1)(f) and Section 111.06(1)(g) of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Milwaukee & Suburban Transport Corporation, its officers and agents shall immediately:

1. Cease and desist from violating the terms of Section 6.05 of its collective bargaining agreement with the Amalgamated Transit Union, Division 998, which requires that it accept as binding the decision of the Board of Arbitration in the Roland William Wetley grievance.

2. Cease and desist from refusing and failing to recognize or accept as conclusive the final determination of the Board of Arbitration in the Roland William Wetley grievance.

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

   a. Credit the accumulated sick leave account of Roland William Wetley with 15 days of sick leave to compensate him for the sick leave which he was compelled to use between August 5, 1971 and August 25, 1971.

   b. Pay Roland William Wetley a sum of money equal to the wages, fringes and monetary benefits lost by said Wetley due to its failure to return said Wetley to active employment from August 5, 1971 until September 16, 1971, less the amount of any wages, fringes and other monetary benefits received by said Wetley while on sick leave or while working in other employment that he would not normally have received while working for Milwaukee & Suburban Transport Corporation.

   c. 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 7th day of April, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint the Complainant alleged that the Respondent refused to comply with the Decision 1/ of the Board of Arbitration on July 22, 1971, the date on which the Neutral Arbitrator signed the Decision. In its Answer the Respondent contends that it has not refused to reinstate Wetley and that it in fact reinstated Wetley on August 5, 1971, one day after it received the final Decision signed by all three members of the Board of Arbitration. At the hearing the Complainant and Respondent stipulated that the effective date of the Decision was August 4, 1971, and that therefore the Respondent's obligation to implement the Decision commenced on August 5, 1971.

The Complainant contends that the clear meaning of the language employed in the award section of the written Decision issued by the Board of Arbitration required the Respondent to reinstate Wetley to its employ "forthwith" and that by placing Wetley on sick leave when he was not in fact sick and by failing to return Wetley to the payroll when his accumulated sick leave was exhausted the Respondent has not "reinstated [Wetley] forthwith to the Company's employ".

The Respondent contends that the award portion of the written Decision issued by the Board of Arbitration must be read in conjunction with the discussion portion and should be interpreted in light of the conversations which preceded the issuance of the final written Decision. According to the Respondent it was the intent of the Board of Arbitration that Wetley should be "reinstated" in a sick leave status and that the Respondent should be allowed to require Wetley to obtain a medical release before returning to work and that such intent is reflected in the discussion portion of the Award. The Respondent argues that it made every effort to speed up the medical evaluation and that the Complainant is responsible for the delay that resulted when Wetley failed to keep his appointment with the psychistrist selected by the Respondent on August 11, 1971.

The threshhold question that must be answered is whether or not the Respondent complied with the Board of Arbitration's Decision when it "reinstated" Wetley by placing him on sick leave on August 5, 1971. If that action constituted compliance with the Award the Respondent's argument that the Complainant must bear the responsibility for some of the delay that followed would appear to have considerable merit. The answer to that question requires an interpretation of the Decision itself.

1/ Reference made herein to the "Decision" of the Board of Arbitration is intended to refer to the entire document including both the discussion portion and the award portion.

In enforcing arbitration decisions a reviewing tribunal must take care that it does not lapse into an interpretation of the agreement under the guise of interpreting the Decision. 2/ The parties bargained for the interpretation of the Board of Arbitration and that interpretation is embodied in the written Decision received by the Respondent on August 4, 1971. For reasons that are not disclosed in the record, the parties did not see fit to ask the Board of Arbitration to reconvene for the purpose of deciding whether or not the Respondent has complied with its intent. 3/ It is therefore incumbent upon the Examiner to enforce the Decision according to its express terms without substituting his judgment regarding the interpretation of the agreement or speculating with regard to whatever subjective intent the Board of Arbitration may have had when the award was issued.

The Examiner is satisfied that the Respondent did not reinstate Wetley to its employ when it placed him on sick leave status on August 5, 1971. The Respondent's argument that Wetley was returned to its "employment" without being returned to the payroll requires a strained and artificial interpretation of the words used. If the Board of Arbitration had intended to reach the result now urged by the Respondent it failed to say so in the award portion of the Decision. 4/

The Respondent contends that the interpretation of the Decision urged by the Complainant would enforce the award portion of the decision and ignore the reference to Section 32.03 contained in the discussion portion. The Examiner agrees that the award portion should not be read in isolation from the rationale contained in the discussion portion of the Decision. However the Respondent seeks to modify the clear meaning of the language employed in the award portion through that reference. The award portion clearly orders that Wetley should be reinstated forthwith to the Company's employ and not that he be "reinstated upon presentation of a medical release". 5/ The reference to Section 32.03 is more akin to obiter dicta and does not appear to modify the result clearly required by the other discussion and the award portion of the Decision. 6/

2/ Steelworkers v. Enterprise Wheel and Car Corporation, 363 US 593, 46 LRRM 2423 (1960); Research Products Corporation (10223-A & B) 12/71

3/ Any such request ought to be joint in order to avoid a claim by one of the parties that the Board of Arbitration had relinquished jurisdiction. See e.g. the discussion in Updegraff, Arbitration and Labor Relations (BNA 1970) at p. 283.

4/ The Respondent attempted to show that the discussions preceding the Decision support its interpretation. In the absence of a showing that the words employed were the result of a mutual mistake or clerical error, prior or contemporaneous discussions should not be allowed to modify or change the meaning of the words employed.

5/ As the Complainant points out in its brief arbitrators can and frequently do order conditional reinstatement.

6/ Any interpretation of Section 32.03 would appear to be outside the issue submitted except insofar as it may have been related to the remedy ordered and the reinstatement ordered was not conditioned on compliance with Section 32.03.

The Board made specific reference to the "time which has elapsed since the discharge" and concluded that that period of time constituted an appropriate period of suspension. The Board was satisfied that Wetley had suffered sufficient loss of earnings at that point in time. In spite of that conclusion Wetley was involuntarily placed on sick leave status when he was not in fact sick, and when his accumulated sick leave ran out he was put in a non pay status. This unilateral deprivation of accumulated sick leave benefits and wages was contrary to the express terms of the Decision, and constituted a violation of the Respondent's contractual agreement to accept the Decision as binding and its statutory obligations under Sections 111.06(1)(f) and 111.06(1)(g) of the Wisconsin Statutes. The Respondent should have returned Wetley to its employ on August 5, 1971 without any further loss of pay or benefits. If the Respondent wanted to insist on a medical release before allowing Wetley to drive a bus, which it claims it has the right to do under Section 30.03, it could have given him other duties to perform. 7/ By refusing to properly reinstate Wetley to its employ on August 5, 1971 the Respondent clearly violated the express terms of the Decision.

Dated at Madison, Wisconsin, this 7th day of April, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

7/ The Examiner does not mean to imply that the Respondent has such a right under Section 32.03; if a question arose regarding the proper interpretation of that section, it would constitute a new dispute and could be the subject of another grievance. It should be noted that the Respondent at no time claimed that it had the right to insist that medical releases required pursuant to the second clause of Section 32.03 are to be obtained on the employe's own time. The determination of the validity of such a claim would require an interpretation and application of Section 32.03, which is beyond the scope of this proceeding.

65-10-AB5999