STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TILE, MARBLE AND TERRAZZO HELPERS LOCAL 47, AFL-CIO, Complainant, vs. WISCONSIN MOSAIC & TILE COMPANY, Respondent.	Case I No. 15001 Ce-1372 Decision No. 10573-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Albert J. Goldberg, for the Complainant.
McLario, Bernoski & Koener, Attorneys at Law, by Mr. John J. McLario, for 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 authorized Robert M. McCormick, a member of the Commission's staff, to act as an 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 a hearing on such complaint having been initially scheduled for November 23, 1971, and thereafter postponed to December 1, 1971; that hearing was conducted before the Examiner on the latter date in the course of which the parties agreed to adjourn the matter to conciliation; that the parties having been unable to resolve the matters giving rise to the complaint through conciliation, requested the schedule of a continued hearing; that thereafter the matter was noticed for continued hearing and scheduled to be heard on March 9, 1972, and thereafter thrice postponed at the request of the parties to May 24, July 6 and July 13, 1972, respectively; that on July 13, 1972, a continued hearing on such complaint having been conducted by the Examiner in Milwaukee, Wisconsin; and the parties having filed briefs by November 27, 1972; and the Examiner having considered the evidence, arguments and briefs of counsel 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 Tile, Marble and Terrazzo Helpers Local 47, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having offices at W156 N11576 Fond du Lac Avenue, Germantown, Wisconsin.

2. That Wisconsin Mosaic & Tile Company, hereinafter referred to as the Respondent, is a Wisconsin corporation engaged in the construction business, particularly the construction of terrazzo floors, aggregate walls and related construction; and its President is Mr. Louis P. Basso, hereinafter referred to as Basso.

3. That at least for the period from August 10, 1970 to June 9, 1971, Respondent had recognized a predecessor labor organization, Terrazzo Skilled Helper Union, Local No. 51, hereinafter referred to as Local #51, as the exclusive bargaining representative of certain of its employes employed as terrazzo and mosaic helpers and machine men, and that in said relationship Respondent and Local #51 were parties to a collective bargaining agreement, effective August 10, 1971, covering wages, hours and conditions of employment of said employes; that Local 51 and Complainant belonged to the same parent international union.

4. That said labor agreement contained a grievance procedure and a rather elaborate joint employer-union disputes-panel, at a local level, for final and binding resolution of unresolved disputes, and contained among its provisions the following:

> "THIS AGREEMENT made and entered into this 10th day of August, 1970, by and between the undersigned Terrazzo Contractor, hereinafter referred to as 'CONTRACTOR' and Terrazzo Skilled Helpers Union, Local No. 51 of Milwaukee, Wisconsin, hereinafter referred to as 'UNION'.
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> . . .
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> ARTICLE I
>
> JURISDICTION
>
> Section 1. The jurisdiction of the UNION shall be that territory in the State of Wisconsin lying within the following counties; Milwaukee, Racine, Kenosha, Jefferson, Walworth, Washington, Ozaukee, Waukesha, Fond du Lac and Dodge. The jurisdiction of the UNION within Fond du Lac County will terminate, effective August 10, 1970. The jurisdiction of the UNION within Dodge County will terminate, effective January 1, 1971.
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> Section 2. Work opportunities shall be offered first to employee-members when terrazzo and mosaic helpers and machine men are sent by the CONTRACTOR to install any work in any territory outside of the City of Milwaukee and its suburbs within the jurisdiction of Local No. 51.
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> . . .
>
> ARTICLE VI
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> The UNION shall elect its own business agent and representative and notify the CONTRACTOR of his name, telephone number and post office address to the end that the CONTRACTOR may know with whom to confer on all matters. Any representative of such Business Agent possessing, carrying and exhibiting proper creditials showing his authority shall be permitted to visit all jobs and shops of the CONTRACTOR during working hours for the purpose of interviewing and conferring with the employer or the foreman in charge of terrazzo and mosaic work for the men at work thereon.
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> . . .
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> ARTICLE VIII
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> TRANSPORTATION AND ROOM AND BOARD ALLOWANCES
>
> Section 1. For all work performed outside an area bounded by Highway 100, which surrounds the City of Milwaukee, and within twenty-five (25) miles from said Highway 100, CONTRACTOR

shall pay the employee eleven (11) cents per mile round trip from said Highway 100, to employee's place of work.

Section 2. For all work performed within an area between twenty-five (25) miles and fifty (50) miles from said Highway 100, CONTRACTOR shall pay the employee the sum of Six ($6.00) Dollars per day room and board plus one weekly round trip bus fare transportation from said Highway 100 to the site of the job.

Section 3. For all work performed in an area between fifty (50) miles and one hundred (100) miles from said Highway 100, the employee shall receive the sum of Seven and one-half ($7.50) Dollars per day room and board plus his weekly round trip bus fare transportation from said Highway 100 to the site of the job.

. . .

ARTICLE XIV

ARBITRATION

Section 1. In the event a dispute arises regarding questions between any CONTRACTOR, his employees, and their UNION representative which cannot be adjusted by the Business Representative for said UNION with such CONTRACTOR, before any other action has been taken by either party to said controversy the same shall be submitted to said joint board of arbitration for its decision in the manner herein provided, and that meanwhile and until said board of arbitration shall have acted in the matter there shall be no cessation of work or other action taken by either party to such dispute.

Section 2. The arbitration procedure shall be as set forth in Articles IX and XVI of the National Agreement by and between the National Terrazzo and Mosaic Association, Incorporated and the International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters Helpers and Terrazzo Workers' Helpers and the Bricklayers, Masons and Plasterers' International Union of America, dated the sixth day of December, 1956, a copy of said Agreement being attached hereto and incorporated herein by reference as though fully set forth herein.

. . .

ARTICLE XX

DURATION OF AGREEMENT

Section 1. The effective date of this Agreement shall be the 10th day of August, 1970, and all provisions and benefits provided for in this Agreement shall be retroactive to July 1, 1970, except as heretobefore specifically provided, and shall continue in full force and effect through June 30, 1972, and year to year thereafter unless written notice of desire to cancel or terminate this Agreement is served by either party upon the other at least ninety (90) days prior to the date of expiration of this Contract.

Section 2. Where no such cancellation or termination notice is served and the parties desire to continue this Agreement but also desire to make amendments to this Agreement, either party may

serve a written notice upon the other at least ninety (90) days before June 30, 1972, or any anniversary thereof, advising that such party desires to continue the Agreement but also desires to amend the terms thereof. Amendments agreed upon shall be effective as of July 1, 1972, or July 1 of any subsequent year. The parties shall be permitted all economic or legal recourses to support their request for amendments if the parties fail to agree thereon. Probationary employees shall not receive Retroactive Pay."

5. That the aforementioned contractual reference to a national arbitration forum contained in Article XIV of Helpers Local #51 agreement, incorporated by reference to the provisions of the National Agreement of the National Terrazzo and Mosaic Association, Inc. (Employers) and International Association of Marble, Slate and Stone Polishers, Rubbers and Sawyers, Tile and Marble Setters' Helpers, Marble, Mosaic and Terrazzo Workers' Helpers (International Union), is hereinafter referred to as the National Agreement.

6. That said National Agreement contains machinery for dispute-settlement, which clauses provide in material part as follows:

"ARTICLE IX

SECTION 1. The respective Parties to this Agreement, desiring to promote harmony, stability, and fair dealing in the business of contracting for terrazzo and mosaic work, and based on many years of experimentation and experience, hereby adopt and declare as the policy of the business the doctrine that virtually all labor troubles can and ought to be settled and rectified by reason, conciliation and arbitration.

SECTION 2. To give effect to the foregoing expression of the fundamental policy of the business, each local organization of the Party of the First Part located in any territory in which there is a Subordinate Union of terrazzo and mosaic workers' helpers of the Party of the Second Part, and each subordinate group of terrazzo and mosaic workers' helpers so located, shall select or elect a committee of at least three (3) men, which two committees shall promptly meet, form, and comprise a Local Joint Arbitration Board for the territory in question, with powers and duties as hereinafter set forth.

SECTION 3. The agreements establishing such Local Joint Arbitration Board shall conform to the principles herein enunciated and shall include all such matters as are most likely to be the subjects of dispute, including the rate and hours per day for employment, the rate per hour for extra and overtime work, the hours and rate for legal holidays and the specification of the same, and such other matters as may be of mutual interest and benefit to employers and employees parties to such agreements.

SECTION 4. Such agreements shall specify the procedure to be followed by the Local Joint Arbitration Boards, and shall provide that all decisions, settlements, and awards by such Boards shall be final and binding on the Parties, without recourse to any other procedure or to the local Association or Union, except that there may be included in such local agreements a provision for appeal by the Party against whom any decision, settlement, or award is made to the national officers of the Parties of the First, Second, and Third Parts to this Agreement. Since the deliberations of the Local Joint Arbitration Boards will involve the peculiar facts, processes, and customs of the terrazzo and mosaic business such local agreements shall provide that only terrazzo and mosaic workers' helpers members of the Helpers'

Union shall sit on such Boards as representatives of the Unions, and only members of The Contractors Division of THE NATIONAL TERRAZZO AND MOSAIC ASSOCIATION shall serve.

It shall however, be agreed upon that where a mixed Union exists in any territory, the business agent of the Union shall be permitted to sit in the meetings of the Arbitration Boards, in order to make reports, regardless of whether he is a terrazzo or mosaic worker. He shall, however, have no vote on the settlements of questions before the Board.

SECTION 5. To such Local Joint Arbitration Boards shall be referred all questions, disputes, or controversies between employers and employees parties to such local arbitration agreements arising out of the matters enumerated in the preceding section as well as all other matters which may be included in the local agreements.

SECTION 6. It is expressly understood and agreed by the Parties hereto (and this understanding and agreement shall be included in every local agreement), that all matters in which the LOCAL JOINT ARBITRATION BOARD fails to agree or where appeals are taken from the decision of the LOCAL JOINT ARBITRATION BOARD, shall be submitted to respective Officers of the National Organizations for settlement; that any and all disputes, and any and all claims, demands, or actions resulting therefrom, shall be settled exclusively by the full use of the processes of free collective bargaining; failing in which the matter shall be submitted to arbitration through a Board of mutually agreed upon arbitrators whose decision shall be final and binding.

. . .

ARTICLE XVI

SECTION 1. It is further agreed that all questions or differences arising between the Parties hereto as to the proper interpretation of this Agreement that cannot be settled locally by the agents of the respective Parties, shall be forthwith certified to the national officers of both organizations for immediate settlement. In case said national officers are unable to agree on a solution of the controversy, the same shall be settled by arbitration as herein provided."

7. That on February 5, members of Local #51 voted by secret ballot to merge with Complainant Local #47, and applied to their International Union for approval of same; that on April 13, 1971, Complainant advised the International Union that its members had approved merger with Local #51; that the International Union approved said merger as of June 7, 1971 and the books and property of former Local #51 were turned over to Complainant on August 2, 1971;

8. That after date of merger, Complainant began to enforce the contract of old Local #51, and in furtherance of that task, its Business Representative, Patrick Havey, hereinafter referred to as Havey, sent letters on August 16, 1971 to signator contractors who were parties to the labor agreement initially negotiated by Local #51, including a letter to Respondent which reads as follows:

"We at Local #47 believe there are some violations of our Local Labor Agreement and the National Agreement in regards to the men working out of town and out of our jurisdiction. According to Article 14 of the Local Agreement we must have arbitration at the Local level to try and work this out. I am trying to set this up now. The Union is ready to meet at your earliest convenience. So please let me know when we can get together.";

that Respondent, on August 23, 1971, over the signature of Basso, sent Complainant the following reply:

> "We have your letter dated August 17th, 1971 which was sent to us certified mail. You indicate there may be violations. We would like to have you state specifically what you deem to be the violation so we can have some preparedness.
>
> Further, to may (sic) knowledge this company never signed an agreement with Local #47. We signed a contract with Local # 51. In section XX of the current contract it states that if contract is to be changed in any way a niney (sic) day notice shall be served upon the parties. If Local No. 51 has been dissolved this would constitute a change of contract (sic) Therefore, let us go through the legal and proper method as indicated in the article which I have quoted above.";

that Havey, as Complainant's Representative, made no contact with Respondent prior to August 16, 1971 for purposes of initiating a grievance on behalf of any of Respondent's employes, but that Havey did personally advise Basso, sometime in July or August 1971, of the fact of merger of Local #51 with Complainant.

9. That Havey, in reply to Basso's request for clarification, advised Respondent in writing on September 7, 1971 as follows:

> "In your letter dated August 23rd.1971 you wanted us to cite what we believe are violations of your signed contract with local # 51 which has since merged with Local #47 and Local #47 is the legal successor of Loal (sic) #51. Here is a list of some of the violations we believe are happening ARTICLE 5 Section 1, ARTICLE 7 Section 3, ARTICLE 8 Section 3, ARTICLE 12 Section 1, and ARTICLE 15 Section 1.Lf (sic) there are any questions regarding the above please feel free to call me."

10. That prior to its letter of August 23, 1971, wherein it questioned whether a change of local unions should call for an amendment to contract, Respondent by Basso arranged to have his son apply to Havey, as Local 47 representative, for a permit to work in the Complainant's jurisdiction, as an employe of Respondent; that Complainant issued a permit to Basso's son.

11. That on September 24, 1971, counsel for Respondent advised Complainant in writing that any agreement that Respondent may have had was then currently with Local 51, and made further request for written verification of Local 51's merger with Complainant; that Complainant made no response to said request, Havey having treated same as being at odds with Basso's prior de-facto recognition of Complainant through his son's procurement of a permit-card from Complainant Local 47.

12. That on October 14, 1971 the Complainant filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission alleging, inter alia, that Respondent had violated the terms of the collective bargaining agreement relating to travel and subsistence pay and that "the labor agreement does not provide for effective arbitration because of impossibility of performance"; and that Complainant, in its prayer for relief, sought a Commission decision on the merits of the dispute under Section 111.06(1)(f) of the Statutes.

13. That Havey's communication to Respondent of August 16, 1971 was couched in executory terms and alluded to the existence of certain unresolved grievances and the possibility of arbitrating same, and further contained Havey's expressed observation that the local agreement required "arbitration at the local level . . ." and that he (Havey) would "try and work this out. I am trying to set this up now . . .";

that on or after August 16, 1971, Complainant never made a request of Respondent that it "select or elect a committee of at least three (3) men", nor did Complainant make a request that Respondent select a smaller size local committee, so that "the two committees shall (could) promptly meet, form, and comprise a Local Joint Arbitration Board for the territory in question . . .", within the meaning of Article XIV of the Local Labor Agreement and Article IX, Section 2 of the National Agreement;

14. That Complainant's representative, Havey, in fact formed an opinion sometime after the dispatch of his letter of August 16, 1971, and before October 14, 1971, that Respondent would be unable to form a "committee of three" from local terrazzo contractors under contract with Complainant, to comprise employer representatives on a local joint arbitration board within the meaning of Article IX of the National Agreement.

15. That Complainant made no request of Respondent at any time prior to October 14, 1971, that Complainant and Respondent agree to submit to a procedure where, "all questions or differences arising between . . . [them] as to the proper interpretation of this Agreement [i.e., the arbitration procedures of the Local and National Agreement] that cannot be settled locally by the agents of the respective parties, shall be forthwith certified to the National Officers of both organizations for immediate settlement . . ." (meaning the National Terrazzo and Mosaic Association and the International Union), within the meaning of Article XVI of the National Agreement and Article XIV of the Local Agreement.

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

CONCLUSIONS OF LAW

1. That Tile, Marble and Terrazzo Helpers Local 47, AFL-CIO, is the successor to Terrazzo Skilled Helpers Union Local No. 51, and is a proper party to enforce the aforementioned predecessor labor agreement with Wisconsin Mosaic and Tile Company.

2. That Wisconsin Mosaic and Tile Company did not violate its collective bargaining agreement by failing to respond to the Complainant Union's equivocal request of August 16, 1971, which made reference to possible arbitration of certain disputes relating to jurisdiction and "out-of-town work"; that Complainant has failed to prove by a clear and satisfactory preponderance of the evidence that the grievance and arbitration provisions of its then existing collective bargaining agreement with Wisconsin Mosaic and Tile Company were impossible of performance, that Complainant failed to exhaust its contractual grievance machinery by failing to request that Respondent join in certifying their possible difference over the format for a local joint arbitration board to the International forum provided by Article XIV of the local labor agreement and Article XVI of the National Agreement, and, therefore, Wisconsin Mosaic and Tile Company has not committed, and is not committing, any unfair labor practice within the meaning of Section 111.06(1)(f), or any other provision of the Wisconsin Employment Peace Act.

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

Dated at Madison, Wisconsin this 20th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND POSITION:

The Complainant Union, on October 14, 1971 filed a complaint of unfair labor practices alleging, inter alia, as follows:

". . .

1. . . . Complainant is the successor . . . to . . . Terrazo (sic) Skilled Helpers Union Local No. 51 by virtue of a merger.

. . .

3. Complainant and Respondent are parties to a collective bargaining agreement dated August 10, 1970 . . .

. . .

5. . . . on or about January 21, 1971 and continuing thereafter [six (6) named employes] . . . performed work in the City of Juneau, Wisconsin. Respondent did not pay them . . . for daily room and board or bus fare as provided by Section 2 of the aforesaid Article VIII.

6. . . . commencing on or about June 15, 1971 . . . [six named employes] . . . performed work in the City of Madison, Wisconsin. The Respondent did not pay them . . . the sums . . . as provided by . . . the aforesaid Article VIII.

7. Articles V, XII and XV . . . provide that the employer shall make payments into a vacation fund, health & welfare and pension fund . . . The Respondent failed to pay into said funds for all work performed . . . [at sites, supra, paragraph #5 and #6].

8. . . . Respondent failed to pay the aforesaid employees in accordance with the wage scales set forth in the contract for work performed . . . [at sites, supra, paragraph #5 and #6].

9. The aforesaid labor agreement does not provide for effective arbitration because of impossibility of performance."

Complainant further alleged that Respondent had violated its labor agreement and Section 111.06(1)(f) of the Peace Act by such conduct, and requested that the Commission find a violation on the merits and order payment of the travel, subsistence and wages due.

Respondent, in its Answer, denies having been notified of said merger and successorship in the manner prescribed in the contract with Local No. 51 denies being party to a labor agreement with Complainant; in the alternative, Respondent denies that its contract provisions relating to subsistence, travel pay or other benefits is applicable to work performed outside the jurisdiction of the contract as established by Article I, Section 1; denies that the labor agreement does not provide for effective arbitration.

Respondent, in material part, further alleges an affirmative defense:

". . .

6. . . . that the contract does not provide for . . . pay for work performed outside the jurisdiction of the contract . . .

. . .

10. . . . that Madison was never within the jurisdiction of the labor contract . . . and Dodge County [City of Juneau] . . . was not within the jurisdiction of the contract after January 1, 1971.

. . ."

Respondent asked for dismissal of the complaint. In the course of hearing the parties accepted the Examiner's format for hearing with respect to the threshold matters only; namely, that the question of successorship and the alleged "impossibility of performance" of the arbitration machinery were to be determined before hearing evidence relating to the other issues on the merits.

In its pleading and brief, Respondent contends that it did not refuse to proceed to the arbitration forum provided by the contract; that Complainant never made a demand for arbitration over any alleged violations of the contract; and that Complainant by its own inaction has frustrated the performance of the provisions relating to local arbitration. Respondent argues that Complainant's only mention of arbitration came with Havey's letter of August 16, 1971, wherein Complainant's representative indicated he would "try to set this up now", meaning arbitration machinery at the local level. Respondent notes that nothing further regarding a demand for arbitration was ever received from Complainant.

Respondent urges that if Complainant thought that the local arbitration provisions were impossible to perform because there was no local association of contractors, this would clearly be a problem of interpretation of the contract, a potential difference over interpretation which could have been processed under Article XVI, Section 1 of the National Agreement.

Complainant contends that the evidence clearly indicates that Local 47 was a proper successor to Local No. 51 and entitled to enforce the agreement to which Respondent had been a party. The facts establish that a merger vote of the two organizations carried; that the International approved; and that the assets of Local No. 51 were turned over to Complainant. In addition, argues Complainant, Respondent's president, Louis Basso, gave de-facto recognition to Local 47 as a successor when he referred his son to Havey to secure a work permit in Complainant's jurisdiction as an employe of Respondent.

Complainant contends that the record discloses that Respondent and fellow terrazzo contractors established no recognizable "Local Organization of Terrazzo Contractors" in the territory covered by the jurisdiction set forth in the contract. It contends that the Local Joint Board of Arbitration is detailed by reference in the National Agreement. Given no local organization of contractor-employers, there was no source existing to which Complainant could turn to get a "Local Joint Arbitration Board."

The Complainant urges that under these circumstances, the Examiner should find that there was no practicable arbitration procedure to be followed by virtue of the parties' contract. It therefore requests that the Examiner find the arbitration provision to be a nullity under the contract, and exercise the jurisdiction of the Commission to consider whether the alleged violations of the contract constitute Respondent-Employer violations of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

ANALYSIS AND CONCLUSIONS

Successorship

The evidence indicates that the membership of Local No. 51 took formal action and voted to merge with Complainant. Similar action was taken by the members of Complainant Union, and thereafter written confirmation of both actions was dispatched to the parent International Union. The latter body approved of said merger. The record further discloses that by August 2, 1971, the officers of former Local No. 51 had turned over all records, books and monies to Complainant's Treasurer. The Examiner therefore concludes that Complainant Local No. 47 is a continuance of Local No. 51 and a legal successor to said predecessor-union. Complainant as a successor is a proper party to enforce the provisions of the labor agreement to which Respondent and Local No. 51 were signators. 1/

The Examiner further concludes that Complainant had no obligation to formally reopen the labor agreement under Article XX, Duration of Agreement clause in order to establish Local 47 as the successor to Local No. 51 with a right to administer the labor agreement to which Respondent was a party. Section 2 of Article XX in referring to "amendements" contemplates matters to be negotiated, and the question of a valid successorship is not something to be negotiated. (Emphasis supplied)

EXHAUSTING THE GRIEVANCE AND ARBITRATION PROCEDURES OF THE LABOR AGREEMENT

Here the Complainant contends that Respondent was subject to the local agreement originally negotiated by Local #51, including the portion of the National Agreement incorporated by reference into said local agreement. It is apparent from the form of the National Agreement that in the past various member locals through their International Union have negotiated the provisions of the National Agreement with member units of the National Terrazzo & Mosaic Association, so that the terms of the National Agreement which had been presented to Respondent Employer or to other terrazzo contractors for acceptance in prior years by Local #51 or by Complainant, would be fairly "boiler-plate" in the controlling arbitration provisions. In the commercial field in contracts, where one of the parties discovers that his promised performance merely becomes more difficult or expensive, such a contractor cannot secure a discharge from his contractual duty under a theory of impossibility.

The Complainant here stands in the shoes of its predecessor, Local #51, which Union secured Respondent's accord over the model-language of the National Agreement, which was incorporated in the local agreement. The fact that Complainant's representative believed that Respondent would find it difficult to structure a three-man panel of local sheetmetal employers as a local arbitration board, does not make operative the doctrine of "impossibility of performance" so as to relieve Complainant from exhausting its contractual procedure.

The Commission's decisions relating to claimed employer violations of Section 111.06(1)(f) of the Wisconsin Employment Peace Act (MEPA) for alleged refusal to proceed to arbitration of a dispute, reveal that a complaining union must prove that it has exhausted its grievance-arbitration machinery of its labor agreement. In Appleton Memorial Hospital (10535-A, B, 12/71), a case involving the question

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1/ Milbrew, Inc., (8926-A & B, 9/69).

of when the statute of limitations should start to run under Section 111.07(14), the Commisison decided that "from the date of the specific unfair labor practice alleged" meant the date that the Respondent employer had transmitted its final answer to the union. The Commission in affirming, adopted the Examiner's rationale and stated in material part:

> "The Commission has concluded that where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder, and where the parties thereto have attempted to resolve such disputes with such procedures, the cause of action before the Commission cannot be said to arise until the grievance procedure has been exhausted."

Similarly, in River Falls Cooperative Creamery, (2311, 2/50) the Commisison refused to accept jurisdiction of a dispute involving a claimed violation of the labor agreement (one of several alleged causes of action), declining to rule on the merits of the controversy because the complaining union had falied to request arbitration before a board of arbitration provided for in the contract. In Fred Reuping Leather Co., (10986, 5/72) the labor agreement required that the grieving union specify the provision of the agreement it alleged to have been violated; and the facts indicated that the union had failed to so specify. The Commisison found that the union had failed to comply with the grievance procedure and declined to order the employer to process the grievance to the terminal steps of the grievance procedure.

The record discloses that Complainant never presented Respondent with an unequivocal demand to arbitrate the question of travel pay and subsistence pay. Complainant suggested in its letter of August 16, 1971, that it was "trying to set this up now." (Meaning local arbitration procedures.) The evidence indicates that after said letter Complainant never made a request that Respondent proceed to arbitration before a local joint board or any other arbitration forum.

We do not have a situation here where a defense of "procedural arbitrability" 2/ has been raised by an employer, such as a union's failure to make timely application for arbitration; or the untimely process of a greivance between steps of the procedure; or the commission of "laches" by inordinate delay in the filing of a grievance. Neither is this a case where one party resists arbitration on the grounds that the complaining party has failed to make a claim, which on its face is governed by the labor agreement, commonly referred to as a question of "substantive arbitrability." 3/

Assuming that Complainant's letter of August 16, 1971 alerted Respondent to the fact that Complainant desired to meet to establish a local board of arbitration, Complainant had an obligation to process the grievance to the arbitration forum established by the collective bargaining agreement; in the alternative it could have pressed for a different forum by seeking to persuade Respondent to submit the matter to an abbreviated local panel of terrazzo contractors and union representatives.

2/ Racine Motor Hotel, (10751-A & B, 6/72); Stokely Van Camp, Inc., (10340-A, 7/71); Liedtke Vliet Super, Inc., (8685-B & C, 7/69).has bee

3/ Podman Industries vs. WERC, Brown Co. Cir. Ct., 1972, (Affirming WERC #9650-B, 11/70); Seaman-Andwall Corp., (5910, 1/62); Frito-Lay, Inc., (9513-A & C, 7/70).

The evidence clearly indicates that Complainant on August 16, 1971 invited Respondent, among others, to set a meeting date ostensibly to explore the formation of a local joint arbitration board. Assuming arguendo that the parties failed to develop such a local arbitration panel, Complainant had the contractual option to request that Respondent join in certifying to the National Association and International Union the parties' difference, pursuant to Article XVI of the National Agreement, over the creation of the local board of arbitration.

Though its contractually adopted arbitration machinery may seem to be very cumbersome for handling unresolved grievances, nevertheless Complainant is relegated to its contractual machinery. The Examiner must conclude from the evidence that Complainant has simply failed to exhaust the grievance procedure.

For the above and foregoing reasons, the Examiner has found that the Respondent Employer did not violate its then existing labor agreement, and therefore the complaint has been dismissed.

Dated at Madison, Wisconsin this 20th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner