STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 139, Complainant, vs. GRUNAU COMPANY, INC., Respondent.	Case II No. 15475 Ce-1419 Decision No. 10937-A

Appearances:
Mr. Richard Perry, Attorney at Law, for the Complainant.
Mr. Walter S. Davis, Attorney at Law, 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 appointed Robert M. McCormick, 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 June 14, 1972; and the parties having filed briefs and reply briefs by September 7, 1972; and the Examiner having considered the arguments, evidence and briefs 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 International Union of Operating Engineers Local Union No. 139, hereinafter referred to as the Complainant, is a labor organization having its principal office at 7283 West Appleton Avenue, Milwaukee, Wisconsin 53216 and represents for purposes of collective bargaining certain equipment-operators employed by Grunau Company at various construction sites in the state of Wisconsin.

2. That Grunau Company, Inc., hereinafter referred to as the Respondent, is a corporation engaged in building and construction industry having its main yard and offices located at 307 West Layton Avenue, Milwaukee, Wisconsin 53207, and is engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended, and of Section 301 of the Act.

3. That at all times material herein the Complainant and Respondent have been parties to a collective bargaining agreement which contains among its provisions the following material herein:

"ARTICLE I

1.1 Recognition. The Association and the Contractor hereby recognize the Union as the sole and exclusive bar-

gaining agent for all employees in the bargaining unit. The bargaining unit shall consist of all heavy equipment operators and other workers in the jurisdiction of the Union as set forth in Article VI, on a multi-employer basis.

. . .

1.3 Assignment of Work. The Contractor hereby assigns all work that is to be performed in the categories described in Article VI and over which the Union has jurisdiction to employees in the bargaining unit covered by this agreement.

. . . .

ARTICLE VI
JURISDICTION

6.1 Equipment Assignment. The Contractor hereby agrees to assign any equipment over which the Union has jurisdiction to bargaining unit employees. The operation of all hoisting and portable engines on building and construction work where operated by steam, electricity, diesel, gasoline, hydraulic or compressed air, butane, propane or other gases and nuclear or atomic power, limited to the following:

. . .

forklifts

. . .

ARTICLE VIII
JURISDICTIONAL DISPUTES

8.1 Arbitrator. It is hereby agreed by the parties hereto that in the event they are unable to settle jurisdictional disputes between the Operating Engineers and/or the Teamsters and/or Laborers on a local level, they will submit the same to the International Board of Review of the Laborers, Teamsters and Operating Engineers as outlined in their May 14, 1970 Memorandum of Understanding, or any other boards to which the I.U.O.E. becomes a party. Disputes involving any other trades which cannot be settled at a local level will be submitted to the National Joint Board for the Settlement of Jurisdictional Disputes in the Construction Industry. The Contractor hereby agrees to abide by the decisions of said boards.

8.2 Acceptance of Decision. The Contractor agrees to make all work assignments in accordance with the terms of this Agreement and to maintain such assignments until and unless said assignment is reversed by a final decision of either of the boards referred to in Section 8.1.

8.3 Nonstoppage of Work. In the event of a jurisdictional dispute it is agreed that there shall be no stoppage of work called by the Union while the jurisdictional dispute is pending and the craft doing the work shall continue work until the jurisdictional dispute is settled.

ARTICLE IX
ENFORCEMENT

9.1 Arbitrator. All grievances, disputes or complaints of violations of any provisions of this Agreement shall be submitted to final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. The arbitrator shall be a member or staff member of the WERC. The arbitrator shall have sole and exclusive jurisdiction to determine the arbitrability of such a dispute as well as the merits thereof. Written notice by registered return receipt letter of a demand for arbitration shall be given to the Contractor and Association or as applicable to the Union at its Milwaukee headquarters. The Contractor and Association as the case may be shall agree in writing within seven (7) calendar days to arbitrate the dispute.

. . ."

4. On or near May 1, 1971 and extending to November 1, 1972, the Respondent was the prime contractor for a building project at the Milwaukee-South Shore Waste Water Treatment Plant; particularly for the installation of "process pipe" for the new addition to the sewerage plant; that in the course of construction at said site the Respondent employed equipment-operators and engineers represented by Complainant as well as other mechanical tradesmen including members of the Steamfitters Union Local 601; that on or near January 1, 1972 mechanical tradesmen employed by Respondent were engaged in the installation of piping in the "gallery" portion of the sewerage-plant addition which required the installation of large pipes, 36 inches in diameter, which were hung from the ceiling; that the Steamfitters in the aforesaid gallery installation were assisted in hanging the piping by operators of forklifts, who did lift the materials into place for installation and hanging; that said operators of such forklifts were members of Local 601 Steamfitters Union, Milwaukee. That no members of Complainant were assigned by Respondent to the operation of forklifts for the period material herein.

5. That Respondent was also a signator to a collective bargaining agreement with Local 601 Steamfitters Union covering tradesmen who perform the skills within the jurisdiction of said Local 601, which includes among its terms, material herein, the following provisions:

"ARTICLE II
JURISDICTION

. . .

Section 2.2 (a) It is recognized that employees covered by this labor agreement and represented by the Union have historically performed the work described in subsection (b) of this section while employed by employers covered by, and subject to, this Agreement and the employer hereby expressly assigns the performance of such work to the employees covered by this Agreement.

Section 2.2 (b) The work referred to in sub-section (a) of this section shall consist of the following: The operation of (1) hoisting and portable engines on building and construction work, but not limited to, fork lifts, end loaders,

winch trucks, A-frames and hoists, provided these engines and equipment are used in conjunction with the other work covered by this Agreement as a time-saving installing device to hoist material and equipment to a holding position for permanent attachment to said building or construction and (2) operation of pumps and welding machines in conjunction with the work covered by this Agreement.

Section 2.3 Work Covered. The duties of the employees covered by this agreement shall include without limitation because of enumeration the use of all tools, equipment and skills necessary for the making of all pipe joints used in the Piping Industry regardless of the method or mode; the hanging, connecting or setting of unit heaters; the driving of service trucks transporting materials and equipment to or from the installation upon which the Journeyman will work, where the transportation of materials and equipment is incidental to the work being done by the Journeyman; the laying out and cutting of all holes, notches, chases and channels, and the setting and erection of bolts, inserts, stands, brackets, supports, sleeves, thimbles, boxes, hangers and conduits used in connection with the Piping Industry in all its divisions, branches, and aspects, irrespective of the material of which they are constructed and for reception of piping and appurtenances thereto; the loading, unloading, handling, rigging, moving, placing, setting, laying out, fabricating, stress relieving, assembling, bending, making, joining, erecting, installing, calibrating, testing, repairing, servicing, dismantling, welding, brazing, cutting or burning of piping and the appurtenances thereto used in connection with the Piping Industry in all divisions, branches, and aspects (excluding piping and the appurtenances normally referred to as the plumbing or sanitary system) within the work jurisdiction of the Union."

. . .

ARTICLE XVIII
JURISDICTIONAL DISPUTES

Section 18.1 In the event of a jurisdictional dispute, it is agreed that there shall be no stoppage of work while the jurisdictional dispute is pending and the craft doing the work shall continue until the jurisdictional dispute is settled.

Section 18.2 It is further agreed that the International Presidents of the trades involved shall settle such jurisdictional dispute, except those described in Section 3 of this Article.

. . ."

6. That for all time material herein and for the time prior to the effective date of the most current collective bargaining agreement with Complainant, Respondent followed the practice of assigning employe-members of the Steamfitters Union to operate forklifts when such equipment was employed to aid fellow Steamfitters in the installation of piping and fixtures; that prior to May 1, 1971 the

Respondent also followed a practice of assigning Engineers and members of the Complainant-Union to the operation of forklifts utilized for general materials handling; that for all time material herein Respondent did assign Engineers to the operation of cranes, booms and back filling equipment, utilized on the South Shore WasteWater job, but that any materials handling incidental to the hoisting of pipe on said job was performed by Steamfitters operating forklifts.

7. That on January 12, 1972 the Complainant by its business representative, Edward W. Engelhardt filed a grievance which by implication challenged the Respondent's assignment of Steamfitters to the operation of the aforementioned forklifts, which grievance reads as follows:

"Contract Involved	Area I Building Agreement
Aggrieved Employee	First qualified operators on the referral list.
Nature of Grievance	Aggrieved engineers were deprived of all hours worked on Fork Lifts by persons who were not members of the bargaining unit.
Contract Section Violated	Article I, Section 1.3; Article VI
Settlement Desired	Pay the first qualified engineers on referral list for all hours worked by persons who were not members of the bargaining unit.";

that said representatives of Complainant received no reply from Respondent to said grievance by February 2, 1972 and on said date sent the following communication to the Respondent:

"Re: Grievance Filed January 12, 1972

Dear Sir:

Please be advised we have not received an answer to the above grievance communication.

Therefore, if an answer is not received as to your intention on this dispute within seven (7) days, we will assume it is your choice to arbitrate this case. Should it be your decision to arbitrate by failing to communicate with this office, I shall make the necessary arrangements with the Wisconsin Employment Relations Commission to appoint an arbitrator to satisfy the violation.";

that on February 24, 1972, the Respondent over the signature of Mr. Gary P. Grunau made written reply to the Complainant's February 2nd communication, which letter reads as follows:

"Gentlemen: Re: South Shore Waste Water Treatment Plant

We are in receipt of your correspondence concerning the above job. This correspondence concerns the operation of a fork lift truck at the above jobsite.

The operation of a fork lift truck to install pipe has always been handled by the trade whose pipe is being installed. In this case it is by the members of Local 601, Steamfitters Union. Our assignment, based upon this historical policy, has been and in this case is to the Steamfitters Union.

It is our position, as it has been in past grievance cases, that this item involves a jurisdictional issue and is not the proper subject for the arbitration provision of the labor agreement. Therefore, we feel that if you believe that the work assignment is incorrect and unfair to your Union that your recourse lies with the National Joint Board.

We shall look forward to hearing from you for the purpose of clearing up this problem."

8. That on March 23, 1972 the Complainant advised the Respondent that its response of February 24, 1972 was unacceptable and further advised the Respondent that it desired to proceed to arbitration of the dispute; that on March 29, 1972 the Respondent restated its position of February 24, 1972 and rejected the Complainant's request to arbitrate the matter, having advised Complainant in writing as follows:

"It is our position that this item involves a jurisdictional issue and is not the proper subject for the arbitration provision of the Labor Agreement. We feel that if you believe that the work assignment is incorrect and unfair to your Union then your recourse lies with the National Joint Board."

9. That on February 24 and March 29, 1972, the Respondent refused and continues to refuse to proceed to arbitration in accordance with the provisions of Article IX, supra, alleging that said procedure is not applicable to the aforementioned forklift dispute.

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

CONCLUSIONS OF LAW

1. That the dispute between Grunau Company, Inc., and International Union of Operating Engineers Local Union No. 139 concerning the grievance filed by Complainant on January 12, 1972, which challenged the Respondent's assignment of the operation of forklift to non-unit employes at the jobsite, South Shore Waste Water Treatment Plant, arises out of a claim which on its face is covered by the terms of the parties' existing collective bargaining agreement.

2. That Grunau Company, Inc., by its refusal to proceed to arbitration in the matter of the grievance filed by Complainant on January 12, 1972, which challenged Respondent's assignment of the operation of forklifts to non-unit employes on the aforementioned job, has violated and is violating the terms of the collective bargaining agreement existing between it and International Union of Operating Engineers Local No. 139 and by such refusal has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) 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 Grunau Company, Inc., its officers and agents shall immediately:

1. Cease and desist from refusing to submit the grievance filed on January 12, 1972 concerning the challenge to its assignment of the operation of forklifts to non-unit employes to arbitration.

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

a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and International Union of Operating Engineers Local Union No. 139 with respect to the grievance filed on January 12, 1972, challenging its assignment of the operation of forklifts to non-unit employes on the South Shore Waste Water Treatment Plant and the claim made therein that said assignments should have been made to employe-members of the Complainant-Union under the terms of the collective bargaining agreement.

b. Notify the International Union of Operating Engineers Local Union No. 139 that it will proceed to such arbitration on said grievance and the issues concerning same.

c. Participate with International Union of Operating Engineers Local Union No. 139 in the selection of the arbitrator to hear said grievance and the issues concerning same.

d. Participate in the arbitration proceeding before the arbitrator so selected, on the grievance, and the issues concerning same.

e. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from receipt of a copy of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 4th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND JURISDICTION

The Complainant Union, on March 30, 1972 filed a complaint of unfair labor practices alleging inter alia as follows:

> "4. On or about January 10, 1972, a dispute arose concerning South Shore (Oak Creek) Waste Water Treatment Plant building project located at Oak Creek, Wisconsin, in that Respondent, Grunau, violated Article VI, Sec. 6.1, Article I, Sec. 1.3, and Article XIII of the collective bargaining agreement by assigning the operation of a fork lift to employees outside of the bargaining unit in direct contravention of the specific provisions of said collective bargaining agreement.
>
> 5. . . .The dispute (grievance) was processed through the grievance procedure without resolution and on February 2, 1972, Complainant informed Respondent that if the matter was not satisfactorily responded to within seven (7) days, the Complainant would invoke arbitration pursuant to the terms of the collective bargaining agreement.
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> 6. On March 23, 1972, Complainant invoked arbitration . . .
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> 7. Respondent . . . has failed and refused . . . to proceed to arbitration in the dispute. . .
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> 8. Respondent . . . in refusing to proceed to arbitration in accordance with the provisions of the collective bargaining agreement . . . has been and is committing unfair labor practices in violation of Sec. 111.06(1)(a) and (f), Wis. Stats."

The Complainant, in its prayer for relief, sought an order directing Respondent:

> "To cease interfering or coercing its employes in the manner complained of
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> . . .
>
> To cease and desist from proceeding to arbitration";

and made further request that the Examiner be permitted to take evidence concerning the merits of the dispute

> "and to make recommendation (findings) disposing of the matter in controversy as if functioning as the arbitrator duly selected . . . in accordance with the provisions of the collective bargaining agreement. . ."

The Respondent in Answer, denied committing any violation of said collective bargaining agreement and alleged as an affirmative defense that it resisted Complainant's efforts to proceed to arbitration on the basis:

> ". . . That the work which is the subject of the instant matter is, essentially, a jurisdictional dispute between Complainant and Steamfitters Local 601. 1/
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> That the respective International Unions to which Local 601 and Complainant are affiliated are parties to an agreement whereby a Board known as National Joint Board for Settlement of Jurisdictional Disputes, Building and Construction Industry . . . was created for the express purpose of settling any . . . jurisdictional disputes between the International Union or . . . their local affiliates who are signators to said agreement, . . . (that) said agreement requires all such disputes to be referred to said Joint Board which alone is given the authority to make binding and final decisions on said disputes.
>
> That because of the foregoing International agreement the subject jurisdictional dispute must be determined by the Joint Board and cannot be decided by arbitration."

At outset of hearing, Complainant withdrew its allegation relating to alleged "interference and restraint, namely, that the Respondent, by its conduct, had committed independent and derivative violations of Section 111.06(1)(a), Wis. Stats. Complainant also withdrew paragraph #4 of its prayer for relief set forth in the complaint, relating to its request that the Examiner hear and decide the merits of the controversy as if functioning as the contractually selected arbitrator.

The Wisconsin Employment Relations Commission would only have jurisdiction to consider those allegations in the Complainant's complaint involving the claimed violation by Respondent of Section 111.06(1)(f) of the Wisconsin Statutes, by Respondent's declination to submit the work-assignment controversy (jurisdictional dispute) to arbitration. Since Respondent is an employer engaged in "commerce" within the meaning of the Labor Management Relations Act and falls within the jurisdictional guide lines governing the NLRB, this agency cannot consider whether a "commerce" employer has committed an interference within the meaning of Section 111.06(1)(a) of the Employment Peace Act, under the doctrine of federal preemption.

An examination of the Wisconsin Employment Relations Commission cases involving the Commission's Orders remedying employer conduct constituting violations of contract proscribed by Section 111.06(1)(f), reveals no situations where the Commission has made a conclusion

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1/ Respondent and Steamfitters Local 601 are party-signators to a labor agreement, wherein the Respondent has assigned the "performance of hoisting engines on construction work, including fork lifts, to steamfitters, provided such equipment is used in conjunction with other work covered by the agreement as a time-saving installing device to hoist material and equipment . . . for permanent attachment."

of law that a respondent-employer did commit a derivative 111.06(1)(a) violation when it violated 111.06(1)(f) of the Peace Act. In "commerce" cases, a very good policy reason for such a void as to the existence of such 111.06(1)(a) derivative violations, given a 111.06(1)(f) violation, is the fact that the WERC cannot act on or remedy, an alleged Section 111.06(1)(a) interference, violation, independent or otherwise, since "interference with the rights of one's employes" is a matter prohibited by the federal act.

The parties in their positions recognize the Commission's jurisdiction, when deciding claimed violations of Section 111.06(1)(f) of the Peace Act, to determine whether a respondent-employer engaged in a business affecting commerce within the meaning of Section 301 of the LMRA has in fact violated its labor agreement in declining to arbitrate a dispute. The Commission is constrained to apply federal substantive law when performing the functions of a Section 301 forum. [See American Motors Corp. v. WERB, 32 Wis. 2d 237 (1966); Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S. Ct. 912, (1957)].

POSITIONS:

The Respondent argues that the machinery established by the parties in the contract, namely, Section 8, Jurisdictional Disputes, was clearly designed as the exclusive procedure for disposing of disputes involving two competing unions' claims to work and equipment. Additionally, the Respondent points out that the evidence indicates that each of its agreements with the Engineers and Steamfitters sets forth a claim to the work; and that both agreements provide for outside settlement of such disputes by the respective International Union. It argues that the evidence makes clear that Respondent has agreed to such outside settlement.

The Respondent urges that the record discloses that at the time the Complainant filed and processed the grievance, it merely asserted a "bare-bones" claim of a wrongful machine-assignment on a job, but did not indicate a willingness to abide by Section 8.2 of the contract, namely, to seek determination of the question as to whether Respondent has made a work assignment and maintained a work assignment "until and unless said assignment is reversed by a final decision of either of the Boards referred to in Section 8.1." The Respondent points out that Complainant's belated attempt as reflected in its brief to satisfy the Section 8.2 requirement quoted above, does not conform to the facts, and when considered together with Respondent's experience with the Steamfitters' historic performance of pipe-hanging work and the attending forklift transport, the Complainant cannot validly characterize Respondent's declination to proceed under Article IX as a "per se refusal" to arbitrate a work assignment. The facts indicate that Complainant took no steps and made no claim to submit the dispute to the Joint Board prescribed in Sections 8.1 and 8.2.

In conclusion the Respondent contends that this controversy, as to which craft-union should have operated forklifts utilized in the hanging of pipe at the Milwaukee Water Treatment Plant, is pure and simply a jurisdictional dispute; that such peculiar controversies, by the parties' clear language contained in Article VIII of the contract, are to be resolved in a forum other than arbitration; and that Respondent has communicated to the Complainant its willingness to submit the forklift dispute to the National Joint Board according to

Section 8.1. The Respondent therefore requests that the Commission dismiss the instant complaint, as a decision to the contrary would amount to nullification by the Wisconsin Employment Relations Commission of the parties' own design to send jurisdictional disputes to a Section 8.1 forum, one outside of the arbitration clause-Article IX; that the latter arbitration provision was strictly established for the disposition of other "garden-variety" controversies arising under the contract.

Complainant argues that Respondent's very defense in resisting arbitration of the work assignment of January 1972, requires an interpretation of the terms contained in Articles VI, VIII and IX of the labor agreement. Complainant concludes that the Examiner's adoption of one plausible construction over a more plausible construction of the agreement advocated by the Complainant requires an interpretation of the several contractual provisions involved, a function of the arbitrator and not for an examiner. Complainant urges that given the plain meaning of the language of Section 9.1, all unresolved grievances involving claimed violations of any provision of the agreement go to the arbitrator. The Union further contends that where non-arbitrability is raised with regard to such grievances, said provision makes clear that the question of arbitrability is for the disposition by the arbitrator exclusively. The Union further argues that the grievance and controversy as to whether the Respondent's assignment of the forklift in the instant case is a jurisdictional dispute, or whether it constitutes a failure by Respondent to make an initial assignment to the Engineers pursuant to Sections 6.1, 1.3 and 8.2 of the contract, involves a matter of contract interpretation for disposition by an arbitrator only, rather than one for a 301 type forum. (Citing, among other authorities, the Trilogy and the Commission's decision in Seaman-Andwall). 2/ (emphasis supplied)

The Complainant also urges in its brief that Respondent's defense in resisting arbitration, namely, its contention that Complainant should have complied with the procedure of Sections 8.1 and 8.2 and given notice of its intention to proceed to the Joint Board, is a question of "procedural arbitrability", which is peculiarly for the arbitrator and not for the Commission or the Courts to decide under federal substantive law. Complainant seeks an order compelling the Respondent to proceed to arbitration as provided by Section 9.1 of the labor agreement.

ANALYSIS AND CONCLUSIONS

The labor agreement in Articles VI and VIII contain no reference to the term "initial assignment" of equipment going to Engineers pending the Section 8.1 disposition of a jurisdictional dispute. However, the record discloses an issue here as to whether Complainant's grievance did in fact raise a jurisdictional dispute or whether it constituted a claim to a work assignment. Initially Complainant, in its grievance of January 12, 1972 spoke of "aggrieved engineers having been deprived of hours worked on fork lifts" by non-unit employes, citing Section 1.3 and Article VI of the agreement. On February 24, 1972, Respondent

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2/ Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Seaman-Andwall Corp., (WERC #5910, 1/62).

referred to Complainant's claim to the forklift assignments of hoisting pipe for installation as a "jurisdictional issue". Complainant further reacted in writing on March 23, 1972, stating, "your response of . . . asserting that the case involves a jurisdictional dispute is unacceptable", and Complainant further asserted, "your . . . labor agreement requires your firm to assign the disputed work to a member of the bargaining unit. In argument made in brief, Complainant characterizes the issue raised by the grievance, as a failure on the part of Respondent "to make initial assignment of the work" to the Engineers under the jurisdiction language of Article VI and Sections 1.3 and 8.2. (emphasis supplied)

The testimony of Mr. Gary Grunau indicates a past practice of assigning Steamfitters to the operation of forklifts where utilized to hoist pipe for installation. However, he also testified that Steamfitters may have hauled materials on the instant job, in the sense that said forklift operators transported pipe horizontally from stock piles next to the construction site to the point of vertical hoist for installation. Examining the contractual provisions advanced by each party, the Respondent would rely upon the terms of Article VIII, Jurisdictional Disputes, as imposing a threshold obligation upon Complainant to proceed thereunder to the Joint Board as the exclusive forum before which it might seek relief not only as to the propriety of the assignment, but impliedly Complainant is precluded from upsetting Respondent's initial assignment of the work to Steamfitters under the terms of Section 8.3. Said language provides:

> "In the event of a jurisdictional dispute . . .there shall be no stoppage of work called by the Union while the jurisdictional dispute is pending and the craft doing the work shall continue work until the jurisdictional dispute is settled." (emphasis supplied)

Where as here, the Respondent-Employer defends on grounds that the controversy is one not governed by the arbitration provision of the agreement (i.e. lies exclusively in a forum for resolution of jurisdictional disputes) the function of the Commission consistent with the function of a 301 forum in such matters is solely to ascertain whether the party seeking arbitration is making a claim which, on its face, is governed by the collective bargaining agreement. 3/ An examination of Article VIII, Jurisdictional Disputes, reveals possible internal contradiction in the language of Section 8.3 supra, with the verbiage of Section 8.2 which reads:

> "The Contractor agrees to make all work assignments in accordance with the terms of this Agreement and to maintain such assignments until and unless said assignment is reversed by a final decision of either of the boards referred to in Section 8.1."

That precise language above restates in part the provision 1.3 Assignment of Work, which Complainant relies upon together with the general jurisdictional clause, Section 6.1 of Article VI, Complainant contending that jurisdiction to operate the forklift has been awarded in the first instance to the Engineers, regardless of the pendency, or lack thereof, of a dispute before the Joint Board. It goes without saying that an arbitrator, or this Examiner, would be tempted to speculate that Respondent "sold or gave away the horse" of jurisdiction twice

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3/ Ibid.

to both Steamfitters and Engineers where operation of the forklift is concerned. The Respondent urges that the submitted labor agreements of each craft and practice reflect a differentiation between two aspects of forklift operation, namely transport of materials only for the Engineers, and transport of pipe in hoisting for installation for the Steamfitters. It may very well be that when considering the merits, an arbitrator or a 301 forum, may conclude that evidence of historic award of forklift operation to Steamfitters, when such equipment is used for hoisting pipe for installation, followed by competing claims to such work by Operators and Steamfitters would persuade him that the Engineers are obliged to press their claim before the forum of Section 8.1, the Joint Board. However, it is difficult for the Examiner, or a 301 forum, to state positively 4/ that the instant dispute is not arbitrable under Article IX of the agreement based upon Respondent's contention that the Joint Board is the exclusive forum under Article VIII for resolving this dispute.

The Examiner, to be consistent with federal substantive law cannot defeat arbitrability of the issue joined herein by adopting one plausible construction, namely, the one advocated by Respondent, over an equally plausible construction of the contractual provisions controlling herein. The Commission in Seaman-Andwall Corp. (WERC #5910, 1/62) adopted the rule of the cases enuniciated by the U.S. Supreme Court in the Trilogy (footnote #2, supra) when it stated:

> "In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face, is governed by the contract. We will resolve doubts in favor of coverage." 5/

Recently, the Circuit Court of Brown County, 6/ in its decision of February 1972, quoted with approval a ruling from United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, L.ed 2d 1409, 80, S. Ct. 1347 (1960), which reads as follows:

> ". . . the judicial inquiry . . . must be strictly confined to the question of whether the reluctant party did agree to arbitrate the grievance . . . An order to arbitrate the particular grievance shall not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."

With regard to the question of arbitrability and the arguments advanced by the parties concerning substantive arbitrability, the Examiner concludes that Complainant's grievance of January 1972 involving its challenge to Respondent's assigning the operation of forklifts to

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4/ United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 4 L.ed 2d 1409, 80 S. Ct. 1347 (1960).

5/ Seaman-Andwall Corp., (5910) at p. 14 1/62.

6/ Rodman Industries v. WERC (1972), affirming WERC decision No. 9650-B.

non-unit employes, represents a "claim which on its face is governed by the contract." It therefore is arbitrable under the terms of the labor agreement.

Since Respondent argues that Complainant has failed to establish from the record that assignment of operation of the forklift is arbitrable, under the agreement applying the tests of substantive arbitrability we need not deal with Complainant's contentions that Respondent's defense to arbitrability are procedural in nature and that the authorities dealing with procedural arbitrability have ruled that such defenses are for the arbitrator and not the 301 forum. Respondent contends that it has raised no such procedural defense.

For the above and foregoing reasons, Grunau Company, Inc. has been ordered this day to proceed to arbitration on the grievance filed by Operating Engineers Local 139 on January 12, 1972 challenging the Respondent's assignment of the operation of forklift to non-unit employes, involving the job at the South Shore Waste Water Treatment Plant.

Dated at Madison, Wisconsin, this 4th day of September, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner