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-B

Appearances:
Mr. Richard Perry, Attorney at Law, for the Complainant.
Mr. Walter S. Davis, Attorney at Law, for the Respondent.

ORDER DENYING MOTION TO REMAND AND FURTHER ORDER REVISING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Robert M. McCormick having on September 4, 1973 issued Findings of Fact, Conclusions of Law and Order in the above entitled matter; and on September 18, 1973 Counsel for the above named Respondent having filed a petition for extension of time for the filing of a petition for review in the matter; and the Commission on September 25, 1973 having issued an order extending time for the filing of such petition for review until October 15, 1973; and on the latter date Counsel for the Respondent having filed a petition to remand the record to the Examiner to hear newly discovered evidence; and on November 2, 1973 Counsel for the Complaint having filed a motion in opposition to the Respondent's motion for remand; and the Commission, having reviewed the entire record, including the Findings of Fact, Conclusions of Law and Order issued by the Examiner, the subsequent motions by Counsel for the Respondent and the Complainant, and being satisfied that the motion of the Respondent to remand the matter to the Examiner should be denied, and further that the Examiner's Findings of Fact, Conclusions of Law and Order should be revised;

NOW THEREFORE IT IS ORDERED that the motion of the above named Respondent to remand the proceeding to the Examiner to hear newly discovered evidence be denied, and

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Order issued by the Examiner herein be revised to reflect the Commission's decision herein as follows:

REVISED 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.

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 bargaining 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; and 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 juris-

dictional dispute, except those described in Section 3 of this Article.

. . ."

6. That at all times material herein and at times 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

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 provisions 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.

10. That the dispute between the Complainant and the Respondent as to whether the forklift grievance should be determined by an arbitrator appointed pursuant to Article IX or by the National Joint Board pursuant to Article VIII constitutes a dispute between the parties concerning the application and interpretation of the provisions of the collective bargaining agreement existing between the parties.

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

REVISED CONCLUSION OF LAW

1. That Grunau Company, Inc., by its refusal to proceed to arbitration, pursuant to Section 9.1 of the collective bargaining agreement existing between it and International Union of Operating Engineers Local Union No. 139, on all issues with respect to the grievance filed by said Union on January 12, 1972, which challenged said Employer'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 said Union, 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 Conclusion of Law, the Commission issues the following

REVISED ORDER

IT IS ORDERED that Grunau Company, Inc., its officers and agents, shall immediately cease and desist from failing and refusing to proceed to arbitration, as required in Article IX of the collective bargaining agreement existing between it and International Union of Operating Engineers Local No. 139 on any grievance, dispute or complaint of violations of any provisions of said collective bargaining agreement, when a request for such arbitration is made upon it.

Given under our hands and seal at the City of Madison, Wisconsin, this 26th day of November, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING
REVISED FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Commission would revise the Examiner's memorandum as follows: 1/

PLEADINGS

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.
>
> 6. On March 23, 1972, Complainant invoked arbitration . . .
>
> 7. Respondent . . . has failed and refused . . . to proceed to arbitration in the dispute . . .
>
> 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
>
> . . .
>
> 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

---

1/ This memorandum is comprised of the Examiner's memorandum with additions, deletions and corrections as are necessary to reflect the Commission's rationale.

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/

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.

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."

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. 2/

2/ Despite the withdrawal of the alleged Sec. 111.06(1)(a) violation the Examiner, in his memorandum concluded that the Commission would not exercise its jurisdiction to determine whether the activity of the Respondent was violative of said provision of the Act. This issue was not before the Examiner. It was not briefed by Counsel. Therefore we deem it unnecessary to include any

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 con-

tends 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). 3/ (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 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

---

3/ 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.)

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 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 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. 4/ 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.

The Commission cannot defeat arbitrability of the issue joined herein by adopting one plausible construction, namely, the one advocated by Respondent, over another plausible construction of the contractual provisions controlling herein. The Commission in Seaman-Andwall Corp. (WERC #5910, 1/62) adopted the rule of the cases enunciated by the U.S. Supreme Court in the Trilogy (footnote #3, 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/

4/ Ibid.

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

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, the Commission concludes that Complainant's grievance of January 1972 involving its challenge to Respondent's assigning the operation of forklifts to non-unit employes, and the jurisdiction of the arbitrator, appointed pursuant to Article IX, to determine the merits thereof, represents a "claim which on its face is governed by the contract." It therefore is arbitrable under the terms of the labor agreement.

As indicated in the preface to the Order Denying the Motion to Remand and further Order Revising the Examiner's Findings of Fact, Conclusions of Law and Order, following the receipt of the Examiner's decision, the Respondent, by its Counsel, filed a petition to remand the record to the Examiner to hear newly discovered evidence. In such petition Counsel for the Respondent alleged that the grievance involved in the instant matter was resolved in negotiations leading to a new collective bargaining agreement which became effective July 1, 1973, a date following the close of the hearing before the Examiner, and on a date prior to the issuance of the Examiner's decision. Said petition was supported by an affidavit executed by the Secretary-Treasurer of the Respondent. Thereafter Counsel for the Complainant filed a motion in opposition to the petition for remand, wherein it was admitted that the Complainant agreed to drop the grievance involved. The Complainant nevertheless desired the Commission to issue a decision in the matter contending that "the employer is likely at any time to reassert its position in other grievances or which may be filed by the Complainant."

Even if the grievance involved has been settled, we conclude that the matter is not entirely moot, since an identical issue may arise between the parties in the future. In that regard, it is to be noted that we have ordered the Respondent to cease and desist from failing and refusing to proceed to arbitration on any grievance, dispute or complaint of any provision of the collective bargaining agreement existing between the Complainant and the Respondent.

Had the grievance involved herein not been resolved, the Commission would have ordered the Respondent, upon the request of the Complainant, to proceed to arbitration to determine (1) whether said arbitrator had jurisdiction to determine the merits of the grievance, or whether the merits thereof was subject to the jurisdiction of the National Joint Board?; and (2) should the arbitrator determine that

---

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

he had jurisdiction to determine the grievance, whether Respondent violated the collective bargaining agreement with respect to the forklift assignment?

Dated at Madison, Wisconsin, this 26th day of November, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Howard S. Bellman, Commissioner