

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEET METAL WORKERS LOCAL #166	:	
	:	
Complainant,	:	
	:	Case I
vs.	:	No. 15444 Ce-1411
	:	Decision No. 11345
SAL ANNY SHEET METAL,	:	
	:	
Respondent.	:	
	:	

Appearances:

Losby, Losby, Howard & Riley, S.C., Attorneys at Law, by Mr. Cletus D. Howard, appearing on behalf of the Union.
Mr. Marvin H. Davis, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above entitled matter, having come on for hearing before the Wisconsin Employment Relations Commission in the LaCrosse County Courthouse, LaCrosse, Wisconsin, on April 18, 1972, Commissioner Zel S. Rice II being present, and the Commission, having considered the entire record, arguments and briefs of Counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Sheet Metal Workers' International Association, Local Union #166, hereinafter referred to as Complainant, is a labor organization having offices at Eau Claire, Wisconsin; and that Dick E. Mars, a resident of Eau Claire, Wisconsin, is the Business Manager of the Complainant.

2. That Sal Anny Sheet Metal, hereinafter referred to as the Respondent, is a sheet metal contractor, having its principal place of business at 310 Kertzman Place, LaCrosse, Wisconsin; that the Respondent, is a member of the Sheet Metal Contractors group of the LaCrosse Employers Association, Inc., LaCrosse, Wisconsin, hereinafter referred to as the LaCrosse Association; that the LaCrosse Association and Local #316 are parties to a collective bargaining agreement covering the wages, hours and working conditions of employes of sheet metal contractors who are members of the LaCrosse Association, including the Respondent, and further said collective bargaining agreement covers

sheet metal work performed by contractors in LaCrosse, Monroe, Juneau, Richland, Vernon, Grant, and Crawford counties.

3. That the Complainant represents sheet metal workers in the employ of sheet metal contractors who are members of the Chippewa Valley Sheet Metal and Heating Contractors Association, hereinafter known as the Chippewa Valley Association, and in that regard the Complainant and the Employer members of the Chippewa Valley Association are parties to a collective bargaining agreement covering the wages, hours and conditions of employment of those sheet metal workers in the employ of members of the Chippewa Valley Association performing sheet metal work in various counties in the northwestern part of the State of Wisconsin, including the County of Douglas.

4. That on February 16, 1971, Sal J. Anny, on behalf of the Respondent, and Dick E. Mars, on behalf of the Complainant, executed a stipulation of agreement wherein the Respondent agreed to comply with the provisions of the collective bargaining agreement existing between the Complainant and the Chippewa Valley Association when employing members of the Sheet Metal Workers' International Association on any work within the jurisdictional area of the Complainant, as set forth in the aforementioned collective bargaining agreement, including the County of Douglas.

5. That the collective bargaining agreement between the Complainant and Chippewa Valley Association in effect at all times material herein, contained among its provisions, the following material herein:

"ARTICLE X

SECTION 1. Grievances of the Employer or the Union, arising out of interpretation or enforcement of this Agreement, shall be settled between the Employer directly involved and the duly authorized representative of the Union, if possible. An Employer may have the local Association present to act as his representative.

SECTION 2. Grievances not settled as provided in Section 1 of this Article may be appealed by either party to the Local Joint Adjustment Board in the area in which the work is performed and such Board shall meet promptly on a date mutually agreeable to the members of the Board, but in no case more than fourteen (14) calendar days following the request for its services, unless the time is extended by mutual agreement of the parties, to render a final and binding determination, except as provided in Sections 3 & 5 of this Article. The Board shall consist of an equal number of representatives of the Union and of the local Employer's Association and both sides shall cast an equal number of votes at each meeting. The local Employer's Association, on its own initiative, may submit grievances for determination by the Board as provided in this Section.

Notice of appeal to the Local Joint Adjustment Board shall be given within thirty (30) days after termination of the procedures prescribed in Section 1 of this Article, unless the time is extended by a mutual agreement of the parties.

SECTION 3. Grievances not disposed of under the procedure prescribed in Section 2 of this Article, because of a dead-lock, or failure of such Board to act, may be appealed jointly or by either party to a Panel consisting of one (1) representative appointed by the General President of Sheet Metal Workers' International Association and one (1) representative appointed by the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. Appeals on behalf of employees shall be mailed to the General Secretary-Treasurer of the Sheet Metal Workers' International Association and those on behalf of an employer mailed to the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Joint appeals shall be mailed to the Secretaries of both Associations. Notice of appeal to the Panel shall be given within thirty (30) days after termination of this Article. Such panel shall meet promptly, but in no event more than fourteen (14) calendar days following receipt of such appeal, unless such time is extended by mutual agreement of the Panel members. Except in case of dead-lock, the decision of the Panel shall be final and binding.

Notwithstanding the provisions of paragraph 1 of this Section, a contractor who was not a party to the labor agreement of the area in which the work in dispute is performed may appeal the decision of the Local Joint Adjustment Board, including a unanimous decision, and request a Panel hearing as set forth in Section 3 of this Article, providing such appeal is approved by both the Chairman of the Labor Relations Committee of Sheet Metal and Air Conditioning Contractors' National Association, Inc. and by the General President of Sheet Metal Workers' International Association.

SECTION 4. Grievances not settled as provided in Section 3 of this Article may be appealed jointly or by either party to the National Joint Adjustment Board, as established by the Sheet Metal Workers' International Association and the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submission shall be made and decisions rendered under such procedures as may be prescribed by such Board, from time to time, and mutually approved by the parties creating it. Copies of the procedures shall be available from, and submissions of grievances may be made to, either the General Secretary-Treasurer of Sheet Metal Workers' International Association or the Secretary of the Labor Committee of the Sheet Metal and Air Conditioning Contractors' National Association, Inc. Submissions on appeal to the National Joint Adjustment Board shall be made within thirty (30) days after termination of the procedures prescribed in Section 3 of this Article.

SECTION 5. A Local Joint Adjustment Board, Panel, and the National Joint Adjustment Board are empowered to render such decisions and grant such relief to either party as they deem necessary and proper, including awards of damages or other compensation and, if it is believed warranted, to direct that the involved agreement and any other agreement

or agreements between the employer and any other local union affiliated with the Sheet Metal Workers' International Association be cancelled, provided that any decision of a Local Joint Adjustment Board directing cancellation of an agreement or agreements may be appealed by the affected employer or local union as a matter of right, directly to the National Joint Adjustment Board.

SECTION 6. In the event any party fails or refuses to comply with any decision of a Local Joint Adjustment Board or Panel, without appeal, or any decision of the National Joint Adjustment Board, within thirty (30) days after notice thereof, a Local Joint Adjustment Board, Panel, or any party to the dispute may, in addition to any other legal remedies which may be available to the parties, request the National Joint Adjustment Board to cancel the involved agreement and any other agreements between the involved employer and other local unions affiliated with Sheet Metal Workers' International Association. Unless otherwise decided by unanimous vote, the National Joint Adjustment Board shall cancel such agreements if it finds the involved party to be in noncompliance with the decision in question. Requests for the Board's services shall be made in the same manner and in the same form as other appeals to the National Joint Adjustment Board and the procedures followed shall be the same except that any intermediate step or steps shall be omitted and the request made directly to the National Joint Adjustment Board.

SECTION 7. Failure to exercise the right of appeal at any step thereof within the time limit provided therefore shall void any right of appeal applicable to the facts and remedies of the grievances involved. There shall be no cessation of work by strike or lockout during the pendency of the procedures provided for in this Article. Except in case of dead-lock, the decision of the National Joint Adjustment Board shall be final and binding.

SECTION 8. Nothing contained in this Article shall apply to any controversy or dispute arising out of any notice of reopening of this Agreement as provided in Article XIII thereof.

. . .

Addendum ARTICLE XVI

Referral Clause

SECTION 1. When the Employer needs additional duly qualified journeymen, sheet metal workers and registered apprentices to properly execute work contracted for and by the Employer in the manner and under the conditions specified in the Agreement, the Employer shall give the Union an equal opportunity with all other sources to provide suitable journeymen sheet metal workers and registered apprentices.

. . ."

6. That in the fall of 1970 the Respondent commenced performing sheet metal work on a building project in Superior (Douglas County), Wisconsin; that on July 13, 1971, Nicholas W. Kienzle, a member of the Complainant, upon an offer of employment by the Respondent, quit his employment at Sandberg Sheet Metal Corporation, Superior, Wisconsin, and commenced employment with the Respondent at Superior, Wisconsin; that on July 13, 1971, Dick E. Mars contacted the Respondent by phone and claimed that the Respondent was in violation of Article XVI of the collective bargaining agreement existing between the Chippewa Valley Association and the Complainant, an agreement to which the Respondent had previously agreed to be bound, covering sheet metal work performed in the area within the jurisdiction of the Complainant, in that Respondent did not give the Complainant an equal opportunity to furnish the Respondent with sheet metal workers prior to the hiring of Kienzle by the Respondent.

7. That on July 15, 1971, Dick E. Mars, by letter to the president of the Chippewa Valley Association, requested the convening of the Eau Claire Adjustment Board to determine the grievance between the Complainant and Respondent with respect to the action of the Respondent in hiring Kienzle; that said Board, which convened on July 27, 1971 to hear said grievance, consisted of Kenneth Olson, a resident of Menomonie, Wisconsin, Duane Gilmore, a resident of Chippewa Falls, Wisconsin, and Dick E. Mars, all designated by the Complainant as its members on the Board; that the Sheet Metal Contractors Employers representatives included Ralph A. Hovland, Rupert Johnson, Jr., and Erv Smith, all residents of Eau Claire, Wisconsin; that the minutes of the hearing and disposition of the Kienzle grievance were reduced to writing and reflected the following;

"EAU CLAIRE SHEET METAL LOCAL ADJUSTMENT BOARD
EAU CLAIRE LOCAL ADJUSTMENT BOARD MEETING HELD JULY 27, 1971

Meeting was called to order at 1:40 p.m. at Eau Claire Labor Temple, July 27, 1971. Present were: Kenneth Olson, Duane Gilmore, and Dick Mars, Union members and Ralph Hovland, Rupert Johnson Jr, and Erv Smith, Contractor members.

Parties to the dispute are Sheet Metal Workers International Association Local 166, Birch Street, Eau Claire, Wisconsin and Anny Sheet Metal, 310 Kertzman Place, La Crosse, Wisconsin.

Names and addresses of Local Board Members, Union Representatives:

Kenneth Olson	1720 9th Street	Menomonie, Wisconsin
Dick Mars	2001 Vine Street	Eau Claire, Wisconsin
Duane Gilmore	Route 2	Chippewa Falls, Wisconsin

Contractor Representatives:

Ralph A. Hovland	P.O. Box 226	Eau Claire, Wisconsin
Rupert Johnson, Jr.	1813 Brackett Ave.	Eau Claire, Wisconsin
Erv Smith	222 Westgate Road	Eau Claire, Wisconsin

Issue of the dispute is that Sheet Metal Workers Local 166 charges Anny Sheet Metal of being in violation of their agreement, specifically Addendum XVI- Referral Clause.

Facts of the case are:

- (a) Under discussion is Addendum XVI- Referral Clause.
- (b) Standard Form of Agreement used is A-369, June 1, 1970 date signed, expiration date May 31, 1972.
- (c) Local addendum, attached.
- (d) Dick Mars introduced as evidence a copy of a letter from Nick Kienzle, Jr., Superior, Wisconsin, dated July 10, 1971, in which he stated that he was called July 10, 1971 by Sal Anny of Anny Sheet Metal of La Crosse, Wis., telling him to report to work on July 12, 1971.

Dick Mars, Business Rep. of Local 166 stated his case:

'On July 13, 1971, received Kienzle's letter and Howard Sandberg of Sandberg Sheet Metal Corporation called me on same day. He said Kienzle had turned in his shop tools previous evening and informed them that he had gone to work for Anny Sheet Metal on Fine Arts Job. On same day I contacted Sal Anny by Phone and advised him that he is in violation of contract by not giving the union an equal opportunity to furnish Sheet Metal Workers. In the course of conversation, Sal Anny said he doesn't feel union could tell him who or whom he could not hire. I did tell Mr. Anny we have no intention as to who he has to hire, but he is required to give us a chance to provide suitable journeyman sheet metal workers. I have talked to Sal Anny since and he still feels the same way. The standard form of agreement states in Art. VIII- see 6 in part, that the Employer shall be governed by the established working conditions of that Local Agreement.'

Mars said that Kienzle was working steady for Sandberg at the time he quit and went to work for Sal Anny. Smith asked for more interpretation of who you can and cannot hire. Mars stated that there are 35 to 40 sheet metal workers on the bench and if the man he sent you was not qualified in contractor's mind, you could send him back and ask for another man.

Discussion on referral clause was made by all on the pros and cons of it, even though it is in our Standard Agreement, some felt they don't have to believe it is a good clause.

Mars made a motion that this Board finds Anny Sheet Metal in violation of the agreement as charged. Seconded by Kenneth Olson, carried unanimously.

Mr. Sal Anny appeared at the meeting at 2:25 p.m. The Board asked Sal Anny if he wanted to make a statement. Mr. Anny says he doesn't believe the union or Business Agent can tell him who he can or cannot hire as long as he is a union man that he hires. He says he does not believe Local 166 has a hiring hall so it is his constitutional right to hire whom he wants. He says he has been in contracting business for 16 years, and has never seen anything so ridiculous as this.

Mr. Sal Anny says he has hired 2 people, and Union furnished 3 men in Eau Claire and Superior which gives the union an edge over what Union calls equal opportunity.

Mars pointed out to Sal Anny that he has signed a Standard Form of Agreement that states he has to abide by agreement of area in which he is working. Sal Anny repeatedly stated he believes the employer has the right to hire whom he wants as long as it is a union man he hires.

Sal Anny left the meeting at 3:00 p.m.

Our regular meeting was now continued.

Mars made a motion that his Board after hearing Mr. Sal Anny's testimony, still concur in the motion made before his arrival that found him in violation as charged.

Seconded by Rupe Johnson, Jr., carried unanimously.

Gilmore made a motion that this Board demand Anny Sheet Metal to discharge Kienzle at once and reimburse the top man on the Union's out-of-work list for lost wages and fringe benefits from the date Kienzle was hired until the date of Kienzle's discharge. Payment of Lost wages and fringe benefits to be paid to August Brummond, Social Security No. 388-16-7634 within 3 days receipt of this notice of this decision.

Motion seconded by Mars. In favor of: Mars, Olson, Gilmore, Hovland, and Johnson. Opposed: Smith. Carried by a majority vote.

Motion made by Olson that Local 166 take action against Nick Kienzle as he was also in violation of the agreement.

Seconded by Smith. Carried unanimously.

Being no further business, the meeting was adjourned.

Signed by:

R. A. Hovland
Rupert Johnson, Jr.
Ervin Smith
Duane D. Gilmore
Kenneth M. Olson
Dick E. Mars

R. A. Hovland /s/
Ervin L. Smith /s/
Rupert Johnson Jr. /s/
Duane D. Gilmore /s/
Kenneth M. Olson /s/
Dick E. Mars /s/

8. That on July 28, 1971, said Board directed a letter to the Respondent indicating the results of their determination of the grievance, to the effect that the Board had found that the Respondent had violated the collective bargaining agreement involved, and further that the Respondent was required to discharge Kienzle immediately and to reimburse "the top man on the union's out-of-work list for lost wages and fringe benefits from the date Kienzle was hired until the date of Kienzle's discharge"; and that said letter was signed by Dick E. Mars as a Board member representing the Complainant and Ralph A. Hovland as a Board member representing the Chippewa Valley Association.

9. That Respondent refused to comply with said award and appealed the matter to the National Joint Adjustment Board, as provided in Article X of the collective bargaining agreement in existence between Complainant and Respondent; that on September 17, 1971, the National Joint Adjust-

ment Board, in writing, advised the Respondent that it was denying the Respondent's appeal and that the decision rendered by the Eau Claire Adjustment Board remained valid and binding; and that, however, the Respondent refused to comply with the decision of the Eau Claire Adjustment Board.

10. That the decision of the Eau Claire Adjustment Board was not issued in a fair and impartial manner for the reason that Dick E. Mars, a representative of the Complainant, who presented the grievance involved to the Eau Claire Adjustment Board, also was a member of the Eau Claire Adjustment Board and participated in the determination thereof in finding that the Respondent had violated the collective bargaining agreement existing between the Complainant and Respondent with respect to the grievance involved.

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

CONCLUSION OF LAW

That, since the decision of the Eau Claire Adjustment Board with respect to the Nicholas Kienzle grievance was not issued in a fair and impartial manner, the Wisconsin Employment Relations Commission will not enforce the decision rendered by the Eau Claire Adjustment Board and affirmed by the National Joint Adjustment Board, and that therefore the Respondent, Sal Anny Sheet Metal, has not committed, and is not committing, any unfair labor practices within the meaning of Section 111.06(1)(g) of the Wisconsin Employment Peace Act by refusing to comply with the decision issued by the Eau Claire Adjustment Board on July 27, 1971, as well as the affirmation thereof by the National Joint Adjustment Board on September 17, 1971.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes the following

ORDER

IT IS ORDERED that the complaint in the above entitled matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Slaney, Chairman


Zel J. Rise II, Commissioner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In this proceeding the Union has alleged that the Respondent has committed an unfair labor practice in refusing to comply with a decision rendered by the Eau Claire Adjustment Board, and affirmed by the National Joint Adjustment Board, to the effect that the Respondent violated the collective bargaining agreement existing between the parties in hiring an employe without first conferring with the Union as required in the collective bargaining agreement. The agreement existing between the Respondent and the Union provided that the decision of the Eau Claire Adjustment Board would be final and binding where the members thereof were in agreement and further, however, that there could be an appeal of said decision to the National Joint Adjustment Board. The decision of the Eau Claire Adjustment Board was unanimous and, upon appeal by the Respondent, the National Joint Adjustment Board affirmed the decision of the Eau Claire Adjustment Board. Section 111.06(1)(g) of the Wisconsin Employment Peace Act provides that it is an unfair labor practice for an employer not to comply with an award issued by a tribunal which the employer had accepted, and normally the Commission has enforced such awards. 1/

Counsel for the Complainant contends that the Eau Claire Adjustment Board had competent jurisdiction and made a final determination of the grievance, and therefore the Commission should enforce the decision involved and find that the Employer committed an unfair labor practice by refusing to do so.

Counsel for the Respondent contends, among other things, that a member of the Eau Claire Adjustment Board, Dick E. Mars, also played the role of a prosecutor and thereby the Employer questions the fairness of the award. In its brief, Counsel for the Respondent also argues other points which the Commission deems unnecessary to consider for the purposes of its decision.

In unfair labor practice proceedings before this agency to enforce awards issued without prior Commission participation, we have observed the statutory tests provided in Chapter 298 of the Wisconsin Statutes with respect thereto. Section 298.10(1) provides as follows:

"In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or undue means;

(b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;

1/ Marmet Corporation, (5368), 10/59; Svendsen Brothers, Inc., (8983-A, B), 12/69.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

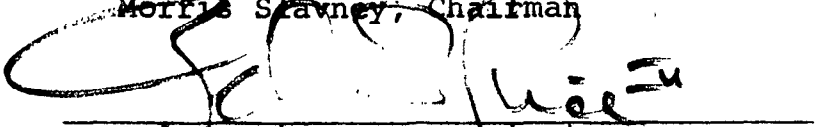
In the collective bargaining agreement which is binding upon the Employer, the Employer agreed to the "grievance procedure" in said agreement and agreed to the jurisdiction of the Eau Claire Adjustment Board to resolve grievances arising under the collective bargaining agreement. Said Board consisted of three designees made by the Union and three designees made by the Employer-Contractors. The mere fact that the tribunal involved was composed of an equal number of Union and Employer representatives does not in itself prevent the tribunal from issuing an award which would be enforced by this Commission. 2/ However, Dick E. Mars, the Business Representative of the Complainant, who initiated the grievance and who presented same to the Board, was also a member thereof, and participated in the unanimous decision of the Board in finding that the Respondent had violated the collective bargaining agreement with respect to the grievance involved. As the Counsel for the Employer argues, Mars acted as prosecutor and judge in the same proceeding, and therefore it is obvious to the Commission that the decision of the Eau Claire Adjustment Board was not issued in a fair and impartial manner as contemplated in Chapter 298 of the Wisconsin Statutes. It is obvious that Dick E. Mars, as a member of the Board, was partial to the Union, since he in fact represented the Union and presented the Union's case on the grievance before the Board. Since the decision of the Board was not issued in a fair and impartial manner the Commission has refused to enforce the decision and has dismissed the complaint alleging that the Employer has committed an unfair labor practice by failing to comply therewith.

Dated at Madison, Wisconsin, this 1st day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Morris Stavney, Chairman


Zel S. Rice II, Commissioner

2/ Wm. O'Donell, Inc., (5736-A), 12/62.