STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| RICHARD D. VENNE,<br><br>Complainant,<br><br>vs.<br><br>CONSOLIDATED PAPERS, INC.,<br><br>and<br><br>UNITED PAPERWORKERS INTERNATIONAL UNION LOCAL 94,<br><br>Respondents. | Case II<br>No. 16604 Ce-1478<br>Decision No. 11705-A |

Appearances:

Mr. Richard D. Venne, Rt. 5, Tomahawk, Wisconsin, appearing on behalf of himself.

Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by Mr. Robert E. Mann, appearing on behalf of Respondent Consolidated Papers, Inc.

Mr. John A. Bergs, Representative, appearing on behalf of Respondent United Paperworkers International Union, AFl-CIO, Local 94.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above named Complainant having on March 12, 1973 filed a complaint with the Wisconsin Employment Relations Commission, wherein he alleged that Consolidated Papers, Inc. and United Paperworkers International Union, AFL-CIO, Local 94 had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Marvin L. Schurke, 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, pursuant to notice issued by the Examiner on March 21, 1973, hearing on said complaint having been held at Wisconsin Rapids, Wisconsin, on April 24, 1973, before the Examiner; and during the course of said hearing the Examiner having granted in part a motion of Respondent Consolidated Papers, Inc. for dismissal of the complaint; and the Examiner having considered the evidence and arguments concerning the remaining allegations of the complaint, 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 Richard D. Venne, hereinafter referred to as the Complainant, is an individual residing at Rt. 5, Tomahawk, Wisconsin.

2. That Consolidated Papers, Inc., hereinafter referred to as Consolidated is a corporation having manufacturing facilities and its principal offices at Wisconsin Rapids, Wisconsin.

3. That United Paperworkers International Union, AFL-CIO, Local 94, hereinafter referred to as the Union, is a labor organization having

its principal offices at 904 Park Avenue, Wausau, Wisconsin.

4. That, at all times material herein, Consolidated has recognized the Union as the exclusive collective bargaining representative in various bargaining units, including a unit of production and maintenance employes of Consolidated's Kraft Division at Wisconsin Rapids, Wisconsin; and that Consolidated and the Union were parties, together with another corporation and other labor organizations, to a Joint Labor Agreement for the period May 1, 1970 through April 30, 1972.

5. That, on January 27, 1969 the Complainant commenced employment in the Kraft Division of Consolidated at Wisconsin Rapids, Wisconsin, in the bargaining unit wherein the Union was the exclusive representative.

6. That, on October 23, 1969 the Complainant suffered an injury in the course of his employment by Consolidated; that the Complainant was totally disabled for some unspecified period following said occupational injury; that, thereafter, the Complainant returned to employment within the bargaining unit specified above.

7. That the Complainant was absent from work during the periods: February 1, 1970 to February 11, 1970, February 18, 1970 to March 3, 1970, April 20, 1970 to May 5, 1970, May 26, 1970 to June 1, 1970, June 23, 1970 to July 7, 1970, July 13, 1970 to July 20, 1970, July 22, 1970 to December 13, 1970, and December 18, 1970 to January 27, 1971; and that on February 2, 1971 Consolidated terminated the Complainant's employment.

8. That on September 23, 1971 a Workmen's Compensation hearing was held by the Wisconsin Department of Industry, Labor and Human Relations in the matter of Richard Venne v. Consolidated Papers, Inc. (69 36675); that on January 24, 1972 an Examiner of said Department issued an Order, wherein Consolidated was ordered to pay the Complainant certain sums as workmen's compensation in connection with the occupational injury incurred by the Complainant on October 23, 1969; that Consolidated filed a petition for review of said Examiner's order; and that on March 17, 1972 the Department of Industry, Labor and Human Relations affirmed the order of its Examiner.

9. That, on February 4, 1973 the Complainant filed a grievance with Consolidated, wherein he alleged that he had been improperly discharged by Consolidated; that a meeting was held between the Complainant, a representative of Consolidated, and representatives of the Union on February 8, 1973; and that during said meeting and thereafter, Consolidated took the position that the Complainant was not an employe of Consolidated and that said grievance had no validity.

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

## CONCLUSIONS OF LAW

1. That the termination of the Complainant's employment by Respondent Consolidated Papers, Inc., on February 2, 1971 is the specific operative fact giving rise to the allegations of the complaint filed in the instant proceeding before the Wisconsin Employment Relations Commission.

2. That the complaint initiating the instant unfair labor practice proceeding before the Wisconsin Employment Relations Commission was not timely filed within the meaning of Section 111.07(14) of the Wisconsin Employment Peace Act.

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

ORDER

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

Dated at Madison, Wisconsin, this 16th day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Preliminary Correspondence and Pleadings

On March 1, 1973 the Complainant directed a letter to the Commission, wherein he claimed that he was unjustly and unfairly discharged by Consolidated. Copies of various correspondence between the Complainant and Consolidated were enclosed, along with a copy of the grievance filed on February 4, 1973 and Consolidated's response thereto. On March 2, 1973 the Chairman of the Commission answered the Complainant's letter, advising him of the requirement for filing and processing of a formal complaint, and of the possible impact of provisions for final and binding arbitration in the collective bargaining agreement.

On March 12, 1973 the Complainant filed the complaint initiating the instant proceeding, wherein he alleged that Consolidated discharged him in violation of the collective bargaining agreement covering his employment, and that the Union denied him fair representation in the assertion of his rights under the collective bargaining agreement.

On April 12, 1973 Consolidated filed an answer wherein it asserts the following defenses: That Consolidated is under the jurisdiction of the National Labor Relations Board, so that the Commission is without jurisdiction in the matter; that the complaint is time barred by Section 111.07(14) of the Wisconsin Employment Peace Act; that the Complainant has failed to follow or exhaust the grievance procedures contained in the agreement; and that its termination of the Complainant was not in violation of the collective bargaining agreement.

On April 24, 1973 the Union filed an answer, wherein it asserts the following defenses: That the complaint is time barred by Section 111.07(14) of the Wisconsin Employment Peace Act; that the Complainant failed to follow or exhaust the grievance procedures contained in the agreement; and that there was no denial of fair representation.

During the hearing a clarification of the complaint was made with the consent of all parties to correct erroneous citations of the Wisconsin Employment Peace Act made in the complaint. As corrected, the complaint alleges that Consolidated violated Sections 111.06(1)(a), 111.06(1)(b), 111.06(1)(f), 111.06(1)(h) and 111.06(3), and alleges that the Union violated 111.06(2)(a), 111.06(2)(b), 111.06(2)(f) and 111.06(3), of the Wisconsin Employment Peace Act.

Federal Pre-emption

At the outset of the hearing Consolidated offered evidence to show that it is engaged in a business affecting interstate commerce within the meaning of the Labor-Management Relations Act, as amended, and that the National Labor Relations Board has previously asserted jurisdiction over Consolidated as an employer. Thereafter, Consolidated moved for dismissal of the complaint as it relates to allegations under Section 111.06(1)(a) and (1)(b) of the Wisconsin Employment Peace Act, on the grounds of federal pre-emption through the parallel provisions of Section 8(A)(1) and 8(A)(2) of the National Labor Relations Act. The Examiner granted the partial motion to dismiss as to the allegations under the jurisdiction of the National Labor Relations Board, and reaffirms that ruling here.

Statute of Limitations

Section 111.07(14) of the Wisconsin Employment Peace Act provides that "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." Section 893.48 of the Wisconsin Statutes provides: "The periods of limitation, unless otherwise specifically prescribed by law, must be computed from the time of the accruing of the right by action, special proceedings, defense or otherwise, as the case requires, to the time when the claim to relief is actually interposed by the party as a plaintiff . . . ." In effectuating the policies of the Wisconsin Employment Peace Act, the Commission has concluded that where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such disputes with such procedures, the cause of action before the Commission cannot be said to arise until the grievance procedure has been exhausted. The policy of the Commission has been to compute the one year period of limitation for the filing of complaints of unfair labor practices from the date on which the grievance procedures have been exhausted by the parties to the agreement, provided that the complaining party has not unduly delayed the grievance procedure. 1/ In the instant case the Complainant does not assert that he made a timely attempt to process a claim under the contractual procedures. On the contrary, both the Union and Consolidated vehemently deny that such a timely attempt was made. The grievance filed on February 4, 1973 was apparently the first grievance filed by the Complainant. Consolidated has not waived the time periods set forth in the agreement, and the Examiner is not persuaded that its meeting with the Complainant and the Union concerning the February 4, 1973 grievance was a processing of the grievance which had the effect of extending the statute of limitations in the manner described above.

The Complainant also relies on the language used by the Chairman of the Commission in his reply to the Complainant's initial letter to the Commission, wherein it was stated:

> "We have reviewed the contents of the file sent by you with respect to your discharge from your employment by the above named employer [Consolidated]. If you believe that you were discharged in violation of a collective bargaining agreement, you may file a complaint with this agency in that regard.
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> . . .
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> We are herewith enclosing a set of complaint forms . . . The responsibility for prosecuting the complaint lies with you. Upon receipt of a properly executed complaint, the Commission will set hearing in the matter."

Section 227.07, Wisconsin Statutes, requires hearing prior to the final disposition of any contested case, and Section 227.09, Wisconsin Statutes requires that every party to a contested case be given a clear and concise statement of the issues involved. Rules of the Commission in Chapter ERB 2, Wisconsin Administrative Code are particularly directed to obtaining orderly presentation of issues in unfair labor practice cases. The letter directed to the Complainant on March 2, 1973 does not constitute a decision by the Commission on the Complainant's

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1/ Harley-Davidson Motor Co. (7166) 6/65.

claim of unjust discharge or on any part of the file submitted by the Complainant, 2/ nor does it grant any exception to the time limitations specified in Section 111.07(14) of the Wisconsin Employment Peace Act.

The Complainant asserts that his failure to timely file a grievance under the grievance procedure or to earlier file a complaint with the Commission is due to fact that he waited more than a year for a determination from the Department of Industry, Labor and Human Relations on his Workmen's Compensation claim. He claims that only after that Order was entered did he have evidence of the validity of his disability claim. The Examiner finds no precedent, however, for the proposition that the pendency of proceedings before another administrative agency of the State should toll the statute of limitations set forth in Section 111.07(14) of the Wisconsin Employment Peace Act.

Finally, the Complainant asks for liberality in construction of rules, as provided in Rule ERB 1.05. In Tully v. Fred Olson Motor Service 27 Wis. 2d 476, our Supreme Court said:

> "We can therefore conclude that the jurisdiction to decide sec. 301 (a) cases is not vested exclusively in the NLRB, nor even in the federal courts. It is a jurisdiction that the federal courts share with the states, but it is clear that federal law, if there be any, is the law to be applied.
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> "We then face up to the very crux of the appeal. The trial court held that all of the causes of action were barred by the federal statute of limitations applicable to unfair labor practices. Certainly the federal limitation is to be applied if there is one. It is urged that the proper limitation appears in sec. 10 (b) of LMRA (1947), 29 USCA, sec. 160 (b). It details the procedure for bringing unfair labor practices before the NLRB and provides inter alia, ". . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . ."
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> "We are urged to invoke "judicial inventiveness" to make the six-month limitation specified for unfair labor practices before the NLRB applicable to breach of contract suits (under sec. 301(a)) arising under another section of the act.
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> "The "judicial inventiveness" that the respondent asks for would have us apply a statute designed for the disposition of unfair labor practices in an administrative tribunal of the United States to an action for breach of contract (that may or may not also constitute an unfair labor practice) in a state court. One thing is clear, and that is that no limitation is specifically made applicable to sec. 301 (a) by any provision of the LMRA. If we are to find a limitation in the act, it can only be by what we consider an inordinate and

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2/ Universal Organization of Municipal Foremen, etc. v. WERC 42 Wis. 2d 315, 166 NW 2d 239 (1969).

unjustifiable transplanting of the provisions of one section to another.

. . .

"Since we find no limitations spelled out in the LMRA and none that can be supplied by reasonable construction, the state statute of limitations is applicable.

"Where federal statutes, which create federal rights of action, do not include a period of limitations, it has been the practice of state and federal courts to apply state statutes of limitations." McAllister v. Magnolia Petroleum Co., 357 U.S. 221, 78 Sup. Ct. 1201 (1957), page 228, concurring opinion.

"It is our opinion that the six-year limitations set forth in sec. 330.19(3), Stats., is applicable to this case. We agree with the trial court that the one-year limitation of sec. 111.07 (14) is not relevant since that limitation is made applicable only to the right to proceed under that section, while in the case before us we are concerned with the right to pursue a remedy resulting from the alleged breach of a federally created right."

The Examiner is satisfied that the converse of the foregoing controls this case, and that considerations of liberality cannot be stretched to permit transplanting of the six year period of Section 330.19(3) Wisconsin Statutes, into proceedings under Section 111.07, Wisconsin Statutes.

Dated at Madison, Wisconsin, this 16th day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner