STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION NO. 310, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO, Complainant, vs. WISCONSIN PUBLIC SERVICE CORPORATION, Respondent.	Case IX No. 16893 Ce-1493 Decision No. 11954-D

Appearances:
Perry & First, Attorneys at Law, by Mr. Richard Perry, for the Complainant.
Foley & Lardner, Attorneys at Law, by Mr. David W. Croysdale, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having authorized Howard S. Bellman, a member of the Commission's staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on such complaint having been conducted at Milwaukee, Wisconsin on September 11, 1973; and the Commission having, on November 12, 1973 issued an Order Setting Aside Appointment of Examiner and Transferring Case to Commission; and the Commission having considered the evidence, arguments and briefs of counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That International Union of Operating Engineers, AFL-CIO, Local 310, hereinafter referred to as the Complainant, is a labor organization having offices at 403 West Walnut, Green Bay, Wisconsin.

2. That Wisconsin Public Service Corporation, hereinafter referred to as the Respondent, is a public utility engaged, inter alia, in providing natural gas distribution and services, having its principal offices at 700 North Adams, Green Bay, Wisconsin.

3. That at all times material herein the Respondent has recognized the Complainant as the exclusive bargaining representative of certain of its employes; that in said relationship the Respondent and the Complainant, at least since November, 1968, have been parties to collective bargaining agreements concerning wages, hours, and conditions of employment for said employes, and which agreements were effective at all times material herein; that the most recent collective bargaining agreement became effective on November 14, 1971, and was to remain in effect until November 1, 1973; and, that said agreement provided, inter alia, as follows:

"ARTICLE II
GRIEVANCES AND ARBITRATION

. . .

Section 2. Arbitration. (a) All disputes involving the application and interpretation of this agreement which cannot be agreed to by the parties shall be submitted at the request of either party to binding arbitration in the manner herein provided for.

(b) Either party desiring to arbitrate any matter in dispute involving the application and interpretation of this agreement shall notify the other party in writing and failure of either party to appoint its arbitrator, as hereinafter provided, within five working days after receipt of such notice shall forfeit its case.

(c) An Arbitration Board shall be organized promptly consisting of three persons, one to be chosen by the Union, one to be chosen by the Company, and the two thus chosen shall meet and select an impartial and disinterested third person within five working days.

(d) If the arbitrators chosen by the parties are unable within five working days to agree upon a third arbitrator, then the Director of the Federal Mediation and Conciliation Service shall be requested to submit a panel of seven impartial arbitrators.

(e) The Union and the Company will mutually agree on one member of the panel by each secretly selecting five members of the panel most acceptable to it. The Union and the Company will then meet within five working days and accept as a third person to the arbitration board the first name called which was chosen by both parties secretly.

(f) The decisions of the Arbitration Board concerning any matter referred to it pursuant to the provisions hereof shall be final and conclusive upon the employees, the Union and the Company.

(g) Each party shall bear the expense of preparing and presenting its own case and the expense of its own arbitrator. The expense of the third arbitrator and incidental expenses mutually agreed to in advance shall be borne equally by the parties hereto."

4. That the aforesaid agreement at Article XVIII, Section 2 provided for the contracting of work; that said provision was supplemented by the Contracting Gas Street Work Agreement effective May 15, 1960 as revised June 28, 1960 and September 15, 1964; and, that Section A, Subdivision 1 of the Contracting Gas Street Work Agreement is material herein.

"ARTICLE XVIII
MISCELLANEOUS

Section 2. Contracting of Work. (a) It is agreed that wherever practicable, work let to contractors will be given to contractors employing union labor.

(b) Electric and gas operating and maintenance work normally performed by regular crews shall not be contracted except when conditions are such that regular crews cannot

perform the work or when the work requires the use of special construction equipment which the Company does not possess."

"CONTRACTING GAS STREET WORK

. . .

A. Normal Division of Work Between Company and contractor

1. All tapping of and making connections to live mains will be done by Company employees."

5. That as found in an Arbitration Award issued by Arbitrator Samuel Edes, pursuant to the above-quoted contractual arbitration provisions, on June 20, 1972, in July 1971, Respondent employed an outside contractor at Stevens Point, Wisconsin to install plastic services 1/ to an existing steel gas main; that the aforesaid installation required the contractor to attach a plastic-to-steel service tee to the existing pressurized steel gas main; that Respondent did not receive prior permission of the Complainant to use the outside contractor for aforesaid installation; and, that subsequent to the aforesaid events the Complainant grieved Respondent's actions and processed said grievance to arbitration.

6. That in the aforesaid arbitration award Arbitrator Edes, held that the Respondent had violated aforesaid Article XVIII, Section 2(b) and Section A, Subdivision 1 of the Contracting Gas Street Work Agreement when it "employed an outside contractor to install service tees connecting into the live mains of Stevens Point without receiving prior approval to do so," during July 1971.

7. That on or about April, 1973, Inspector Fred Landowski, a member of the bargaining unit represented by the Complainant, was ordered by his supervisor, Peter Meronek, to place a hydraulic press on a two-inch plastic gas main located on Water Street in the City of Stevens Point, Wisconsin to stop the flow of gas; that said employe was told by said supervisor to cut and did cut said gas main; and, that employes of Gabes Construction Company were authorized by the Respondent, without prior permission of Complainant, to, and did, extend said gas main with an unspecified length of plastic pipe, by securing said plastic pipe to the aforesaid existing gas main.

8. That, on or about June 26, 1973, Inspector Roger Bemowski, a member of the bargaining unit represented by the Complainant, was ordered by his supervisor, Peter Meronek, to place a hydraulic press on a two-inch plastic gas main located on Jefferson Street in the City of Stevens Point, Wisconsin, to stop the flow of gas; said employe was told by said supervisor to cut and did cut said gas main; and, that employes of S & Z Construction Company were authorized by the Respondent without prior permission of Complainant, to, and did, extend said gas main with an unspecified length of plastic pipe by securing said plastic pipe to the aforesaid existing gas main.

9. That at no time subsequent to the alleged incidents enumerated in paragraphs 7 and 8, supra, has the Complainant filed, or attempted

---

1/ The Edes Award defined a "service" as a "line of pipe which is attached to the main by a 'service tee' at one end and which is connected to a 'riser' and valve at the other end, carrying gas from the main to the individual customer's appliances for consumption."

to file, a grievance or grievances concerning said incidents; and, that on or about May 25, 1973, in a meeting between representatives of both Complainant and Respondent, Respondent's representatives expressed their willingness to process grievances relating to said incidents through the grievance procedure to final and binding arbitration, as provided for in aforesaid collective bargaining agreement.

10. That the utilization of contractors by the Respondent involving the incidents occurring on or about April, 1973, and on or about June 26, 1973, differ significantly from those material to the aforesaid Edes Award.

On the basis of the above and foregoing Findings of Fact the Commission makes the following

CONCLUSIONS OF LAW

1. That the inclusion in the November 14, 1971 collective bargaining agreement of a final and binding arbitration clause providing for submission to arbitration, at the request of either party, "all disputes involving the application and interpretation" of the aforesaid agreement did not constitute a waiver of Complainant's statutory rights provided for in Section 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act.

2. That inasmuch as the facts of the alleged contract violation occurring on or about April, 1973, in Stevens Point, Wisconsin differ significantly from those material to the aforesaid Edes Award, the Respondent's actions did not violate said award and therefore did not constitute an unfair labor practice within the meaning of Section 111.06(1)(g) of the Wisconsin Employment Peace Act.

3. That inasmuch as the facts of the alleged contract violation occurring on or about June 26, 1973 in Stevens Point, Wisconsin differ significantly from those material to the aforesaid Edes Award, the Respondent's actions did not violate said Award, and therefore did not constitute an unfair labor practice within the meaning of Section 111.06(1)(g) of the Wisconsin Employment Peace Act.

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

ORDER

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

Given under our hands and seal at the City of Madsion, Wisconsin this 15th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

WISCONSIN PUBLIC SERVICE CORPORATION, IX, Decision No. 11954-D

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union filed a complaint on June 12, 1973 alleging that the Employer was refusing to accept and abide by a prior arbitration award in violation of Section 111.06(1)(f), of the Wisconsin Employment Peace Act. 2/ In its prayer for relief, the Union requests that the Employer be ordered to cease and desist from refusing to accept an arbitration award and to abide by its results, and that the Commission grant any other relief it deems appropriate.

In its answer, the Employer admits that sometime in April, 1973, and on or about June 26, 1973, its employes placed a hydraulic press on a two-inch plastic main, cutting off the flow of gas through the pipe and, then cut off the end cap of said pipe allowing the gas to escape. The Employer denies, however, that employes of Gabes Construction Company and S & Z Construction Company then made connections to a live gas main, in violation of the Edes arbitration award. The Employer asserts that the exclusive remedy of the Union is in the utilization of the grievance-arbitration procedure set forth in the collective bargaining agreement and, alternatively, that Employer's actions complained of in the Amended Complaint do not constitute a violation of Section 111.06(1)(f) inasmuch as the work as described therein differs materially from that which was found violative of the Contracting Gas Street Work Agreement by the Edes Award.

JURISDICTION:

The Union, in its Amended Complaint, specifically alleges that the Employer's conduct on or about April, 1973 and on or about June 26, 1973, constitutes an unfair labor practice under Section 111.06(1)(f), of the Act. Section 111.06(1)(f) provides that it is an unfair labor practice "to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)."

Section 111.06(1)(g), of the Act provides that it shall be an unfair labor practice "to refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted."

Previously, the Commission and the Wisconsin Supreme Court have applied Section 111.06(1)(f) to cases wherein the employer refuses to arbitrate, 3/ whereas they have applied Section 111.06(1)(g) to cases wherein the employer is alleged to have failed to abide by an award. 4/

2/ The Complainant amended its complaint on July 9, 1973 in response to the Examiner's Order of July 2, 1973 granting Respondent's Motion of June 29, 1973, to Make Complaint More Definite and Certain.

3/ Dunphy Boat Corp. v. WERB, 267 Wis. 316, 34 LRRM 2321 (1954); Aluminum Goods Mfg. Co. v. WERB, 271 Wis. 316, 37 LRRM 2333 (1956); Wisconsin Motor Corp. v. WERB, 274 Wis. 85, 39 LRRM 2071 (1956).

4/ Allis-Chalmers Mfg. Co. v. WERB, 254 Wis. 484, 24 LRRM 2016 (1949); Allen-Bradley Company, (Decision No. 7659), 7/66; Wisconsin Gas Co., (Decision No. 8118-E), 3/68; Handcraft Co., Inc. (Decision No. 10300-A, B), 7/71.

Notwithstanding that the Complaint and Amended Complaint refer specifically to subsection (f), the allegations contained therein, and the evidence adduced at hearing may be construed to implicitly refer to subsection (g). Therefore, for purposes of this decision the ambiguity will be construed in favor of the Union and it will be assumed Union intends to allege violations of subsections (f) and/or (g).

The Employer argues that Union's exclusive remedy is in arbitration. This argument is founded on the belief that by agreeing to the inclusion of a final and binding arbitration clause in the collective bargaining agreement the Union waived its statutory rights provided in Section 111.06(1)(f).

The Commission has not heretofore been confronted with a claim that by including a final and binding arbitration clause in a collective bargaining agreement that the parties to that agreement thereby waive any statutory rights they may have with respect to an issue that is arbitrable under said agreement. The law, however, is well settled that any intent to waive one's statutory rights must be expressed in unambiguous language. 5/

It is clear that the language of Article II of the collective bargaining agreement makes no reference directly or indirectly to Section 111.06(1)(g). The mere inclusion of a final and binding arbitration clause, and nothing more, does not amount to a waiver of any right either party may have to proceed under 111.06(1)(g).

RES JUDICATA

In prior cases 6/ the Commission has not exhibited any reluctance to make a determination as to whether a particular grievance or fact situation before it is governed by a prior arbitration award. In order to insure the viability of the arbitral process, it is necessary to grant res adjudicata effect to prior awards in appropriate cases. However, rigid standards will be invoked to guard against unwarranted invasion of the arbitrator's province of deciding the merits of a dispute that is arbitrable under the collective bargaining agreement.

The Commission, has held that where the facts of a particular grievance are materially different from those material to a prior arbitration award, it will defer to the arbitrator for a decision on the merits of the grievance. 7/ However, where the Commission finds no material difference in fact, it will apply the principle of res judicata to the case before it.

5/ Timken Roller Bearing Co. v. NLRB, 325 F 2d 746, 54 LRRM 2785 (CA6, 1963).

6/ Wisconsin Telephone Co. (Decision No. 4471) 2/59; Wisconsin Gas Co. (Decisions No. 81180-C and 8118-E) 3/68; Handcraft Co., Inc. (Decision No. 10300-A, B) 7/71.

7/ See Note 4, supra.

There continues to be a split of authority in the Federal sustantive law with some courts finding issues of res judicata to be procedural and reserved to the arbitrator 8/ whereas others have concluded the principle of res judicata should be applied under appropriate circumstances to arbitration awards. 9/ The court in UAW v. Robertshaw Controls Co. 63 LRRM 2348 (1966), where the Union sought to compel the employer to submit multiple dissimilar grievances in a single arbitration, the court held:

> "To compel defendant at this time to submit multiple dissimilar grievances to a single arbitrator, this Court would have to disregard and ignore the arbitration decision previously referred to which is binding on the parties. While it is undoubtedly important that disputes arising over labor contracts be settled quickly and efficiently by arbitration where the contract so provides, it is just as important to maintain the integrity of the arbitration process by respecting binding decisions once they have been handed down. While this Court fully agrees with plaintiff's contention that arbitrators are not bound by the precedents of prior arbitration decisions, this cannot be taken to mean that arbitration decisions which are generally applicable to more than one specific grievance are to be ignored, and that the same issue should be submitted to a potentially unending string of arbitrators until the aggrieved party is given an award with which he is satisfied. This would make a mockery of the contract provision that the arbitrator's decision is final."

Nothwithstanding this split of authority, this Commission has said repeatedly that it will apply the principles of res judicata to a prior arbitration award in complaint cases filed alleging a violation of Section 111.06(1)(g), where there is no significant discrepancy of fact involved in the prior award and in the subsequent case to which a complainant is requesting the Commission to apply the award. A balance must be struck between the need for consistency and finality to contract interpretation as evidenced by prior arbitration awards and invading that province specifically reserved by the courts to the arbitrator - deciding the merits of the dispute. Where no material discrepancy of fact exists, the prior award should be applied. In these circumstances both interests are accomodated without undermining either.

The Edes Award was based on a set of facts that differ materially from those facts in the instant case. That award was concerned with whether the installation of plastic service tees to a pressurized steel gas main was a connection to a "live main" within the meaning of Subdivision A.1 of the Contracting Gas Street Work Agreement. There apparently was no dispute that at the time that the service tee was attached to the steel main, there was gas under pressure in the main at the point where the tee was being attached. Also, there apparently was no dispute that after the tee had been attached, the main was punctured to permit gas to flow into the service line while the main was under pressure at the point of puncture.

8/ Michigan Shippers v. Local 299, Teamsters, 61 LRRM 2466 (ED Mich., 1966); Legion Utensils Co. v. Trenz, 78 LRRM 2121 (NY Sup Ct. 1971) Air Line Pilots v. United Airlines, 83 LRRM 2070 (1973).

9/ Wisconsin Telephone Co., (Decision No. 4471) 3/57; Wisconsin Gas Co., (Decision Nos. 8118-C and 8118-E) 3/68; Handcraft Co., Inc., (Decision No. 10300) 5/71; Drake Motor Lines v. Truck Drivers, 343 F. Supp. 1130, 80 LRRM 3003 (DC Pa, 1972).

The instant case however, deals with two incidents which occurred in 1973 where, according to the record herein, existing mains were extended by fusing additional lengths of plastic pipe to an existing plastic main; and hydraulic pipe squeezers were attached to the existing main to cut off the flow of gas, which enabled workers to sever the end cap from the main and fuse new lengths of pipe to the old main. It can be legitimately argued before an arbitrator that the nature of the work which was performed in the instant case is different from attaching a service line to a main.

More importantly, however, the technology allegedly applied in this case arguably differs significantly from that used to attach the service tees as described in the Edes Award. This technology may be a significant consideration for an arbitrator in terms of the language of the Contracting Gas Street Work Agreement. The decision as to whether the use of the hydraulic squeezer significantly changes the status of a gas main from "live" to dead, beyond the point where the squeezer is placed, is for an arbitrator to determine and not the Commission.

We believe that the differences between the nature of operations and the technology allegedly applied in the instant case and that dealt with by the Edes Award present a material discrepancy of fact sufficient to preclude us from applying herein the principle of res judicata.

The Commission has attempted to avoid making any findings or reaching any conclusions pertaining to matters raised herein that might prejudice any matter which may, at some time, come before an arbitrator. Our decision herein distinguishes the Edes award from the allegations and contentions respecting the instant grievances, rather than the facts and contract requirements of these disputes.

Dated at Madison, Wisconsin this 15th day of May, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner