

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

No. 12173-A

4. That effective May 1, 1969, the Union and Murphy Construction entered into an oral collective bargaining agreement which was identical in terms to the Murphy Concrete Products agreement except for certain salary and other provisions, not material to the issues joined herein; that officers of Murphy Construction, Messrs. Orville and Francis Murphy, and their Attorney, J. Joseph Cummings, hereinafter Cummings, handled labor negotiations and labor relations matters for both companies in their dealings with the Union.

5. That on March 24, the Union mailed a 60-day letter notice of termination signed by its Secretary-Treasurer, Robert Schlieve, to Orville Murphy as representative of Murphy Construction, wherein the Union advised the Company of its intention to terminate their existing labor agreement on the expiration date.

6. That the 1969-1972 oral agreement between the Union and the Company, patterned after the contemporaneous oral accord covering Murphy Concrete employees and later adopted by Murphy Concrete and the Union, in written form, contained among its provisions the following terms material herein:

"ARTICLE 3 - SENIORITY

. . .

Section 2.

Seniority for regular employees shall be determined by the length of service of the employee and shall commence on the date of employment plus such additional time as is required or granted for vacations, leaves of absence, illness or accidents. An employee's seniority is nullified if he is laid off and not reemployed within two (2) years from the date of lay-off; if he fails to return to duty when recalled from lay-off as herein provided; if he leaves the Employer of his own volition; or if he is discharged for just cause and not subsequently reinstated. A laid off employee shall be given notice of recall by certified mail, return receipt requested, to his last known address. The employee must respond to such notice within three (3) days after receipt thereof and must actually report to work in seven (7) days after receipt of such notice unless otherwise mutually agreed to.

Section 3.

In laying off regular employees because of reduction in forces, the employees shortest in length of service shall be laid off first, provided those retained are capable of carrying on the Employer's usual operations. In reemploying, the employees on the seniority list having the greatest length of service shall be called back first, provided they are qualified to perform the available work. In filling vacancies or making promotions, the employee with the greatest seniority, if qualified, shall be given preference. All new jobs, vacancies or promotions shall be bulletined at least three (3) days prior to operating.

. . .

ARTICLE 27 - GRIEVANCE PROCEDURE

A grievance shall be processed as follows:

1. The grievance shall be presented to and discussed with the employee's supervisor, by the employee and steward if requested.

2. If a satisfactory settlement does not result from such discussion, the grievance shall be discussed with the steward and management.

3. If not settled satisfactory [sic] within five (5) days of Step 2, the grievance shall be reduced to writing and referred to the Management and the Business Representative of the Union.

4. If not settled satisfactorily in this discussion, either party may notify the other within five (5) days (excluding Sundays and Holidays) after a deadlock in Step 3 of their desire to arbitrate.

ARTICLE 28 - ARBITRATION

The party desiring arbitration shall notify the other party of its desire to arbitrate and within five (5) days, the Employer and the Union shall each select one (1) member who shall act on the Board of Arbitration and the two (2) so selected shall select a third (3rd) member.

If the two (2) members cannot agree upon a person to serve as a third (3rd) member within five (5) days, such third (3rd) member shall be a member or an appointee of the Wisconsin Employment Relations Commission. The three (3) member Board of Arbitration shall meet within five (5) days (excluding Sundays and Holidays) and shall conduct hearings and receive testimony relating to the misunderstanding or dispute and shall submit their findings and decision within five (5) days (exclusive of Sundays and Holidays) after the completion of the hearing. The decision of the Board shall be final and binding on both parties to this Agreement.

. . .

ARTICLE 36 - TERMINATION

Section 1.

This agreement shall be in full force and effect from May 1, 1969 to and including May 31, 1972 and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to the date of expiration.

Section 2.

Where no such cancellation or termination notice is served and the parties desire to continue the Agreement but also desire to negotiate changes or revisions in the Agreement, either party may serve upon the other, at least sixty (60) days prior to May 31, 1972 or May 31 of any subsequent contract year, a notice that the party desires to revise or change the terms or conditions of the Agreement.

. . ."

7. That sometime in April 1972, a few weeks after the Company had received the Union's termination notice effectively terminating the Murphy Construction agreement as of May 31, Murphy Construction asked the Union for a meeting with its representatives to discuss said termination notice, and for the purpose of clarifying for Orville Murphy just exactly what date the Company's oral agreement with the Union was to expire; that a

meeting was held sometime in April 1972, in the course of which Company representatives agreed with Union representatives that said oral agreement, by its terms and as a result of the Union's notice, should and did expire on May 31.

8. That on May 31, 1972, the contract between the Company and Union terminated.

9. That after May 31, 1972, and for all times material herein, the Company continued to pay vacation and holiday benefits and wages, which were otherwise established by the terms of the expired oral agreement; that the Company also continued to apply the seniority provisions contained in the old agreement.

10. That Union representatives made no contact with the Company for purposes of negotiating a successor labor agreement with Murphy Construction until August 4, 1972, when its representative Jeff Curtin met with Cummings and Orville Murphy for the purpose of negotiating a new labor agreement; that in the course of said bargaining session Curtin raised the subject of the Union's intention to operate and proceed under the terms of the expired oral agreement on a day-to-day basis until such time as the parties reached a new agreement; that Company representatives in fact made no statements in response to such a constructive Union offer to continue the old contract; that there is no clear and satisfactory evidence that the Company expressed an acceptance of the Union's constructive offer to continue the old agreement.

11. That in the course of negotiations between the Union and the Company on or after August 4, and at least to October 1, the Union made several requests that the Company recall one Keith Kruse to full-time employment; that the Company declined to recall Keith Kruse to active employment because of its expressed concern over the physical limitations of Kruse to adequately and safely perform his regular job.

12. That on or near October 31, at a time coincident with the hiatus period between the May 31 expiration of the oral contract and the then yet undetermined date of a new contract, the Company and Union agreed to submit the Kruse dispute to final and binding arbitration; that said parties submitted to the jurisdiction of Arbitrator Bellman for a final binding award and further stipulated that the Arbitrator could apply certain contractual standards to the Company's conduct, which provisions were otherwise set forth in the Seniority and Discharge clauses of the written Murphy Concrete agreement and which also were common to the expired oral agreement between the Union and Murphy Construction.

13. That on May 2, 1973, and on at least two other occasions in June and July of 1973, the Company refused Union requests to recall from layoff status a senior employe, Herbert Betien; that on July 31, 1973, Cummings, on behalf of the Company, mailed a written declination to the Union, refusing a Union request to arbitrate the Betien matter pursuant to Article 28 of the oral labor agreement, on the grounds that same had expired on May 31, 1972.

14. That at the time of the Union's request of July 23, 1973, to arbitrate the Betien grievance, there in fact was no oral or written collective bargaining agreement in existence between the Company and the Union; that no contractual grievance and arbitration provisions governing the parties' conduct survived the expiration date of the oral labor agreement on May 31, 1972.

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

CONCLUSIONS OF LAW

1. That during the period from the date of the termination of the oral labor agreement between Murphy Construction and the Complainant-Union, namely May 31, 1972 to July 31, 1973, the date of the Company's refusal to arbitrate the Betien dispute, the Company continued to pay certain wages and fringe benefits contained in the old contract; and continued to apply seniority provisions and processed at least two grievances according to the terms of the old contract; and that the Company submitted the Kruse grievance to ad hoc arbitration; that the aforementioned activities by the Company do not support a constructive acceptance, by Company conduct, of the Union's constructive offer to continue the oral labor agreement which expired on May 31, 1972, on a day-to-day basis.

2. That there was no collective bargaining agreement in existence from May 31, 1972, the date of the termination of the 1969-1972 oral agreement between the parties and July 31, 1973, the date of the Company's refusal to arbitrate the Betien dispute; and therefore the Company could not violate any terms of a labor agreement by its refusal to recall Betien, and/or its refusal to arbitrate said matter; and that the Respondent-Murphy Construction Company did not commit, and is not committing, any unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that the complaint of unfair labor practices filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 16th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The complaint in the instant matter was filed on September 13, 1973, with answer submitted on November 6, 1973. After hearing conducted on November 13, 1973, the parties filed post-hearing briefs by January 29, 1974.

PLEADINGS.

The Union alleges that the Company violated Section 111.06(1)(f) of the Wisconsin Statutes by breaching its contractual commitment to arbitrate the unresolved grievance involving the recall of Herbert Betien. The Company denies the commission of any unfair labor practice, denies the existence of any labor agreement containing a seniority or arbitration provision, and as an affirmative defense, alleges that no agreement to arbitrate existed after May 31, 1972; and that therefore, the Commission has no jurisdiction to hear the merits of said complaint.

BACKGROUND

The crucial facts are recited in the Findings of Fact, supra, and at least with respect to the expiration of the previous oral agreement between the Company and Union, there is no disagreement that said 1969-72 contract expired on May 31, 1972 by the Union's action of mailing to the Company its 60-day letter of termination on March 24. The conflict in evidence involves the events of the bargaining session between the parties held on August 4, and particularly, whether Company negotiators agreed to an interim agreement which arguably continued in effect all of the provisions of the 1969-72 oral agreement. The testimony of Curtin and Company witnesses is covered in Discussion to follow.

UNION'S POSITION

The Union contends that the parties' working relationship reaffirmed the viability of the old contract provisions, including the seniority and arbitration provisions contained in the expired oral agreement. The Union urges that the evidence indicates that the parties did agree that during the hiatus period between the expiration of the old contract and whatever date that they reached a new agreement, that the old contract would apply on a day-to-day basis.

The Union points to the testimony of Curtin concerning the events of August 4, which it claims was unshaken by cross-examination. Curtin testified that the Murphy Concrete Company's written agreement was the basis for the 1969-72 oral contract with the Company, both agreements having expired on the same dates. Company representatives met with Curtin to negotiate both agreements jointly on August 4, in the course of which, according to Curtin's recollections, Company negotiators agreed to continue operating under the old contract until a new agreement could be reached.

The Union argues that other circumstantial evidence supports the proposition that the old agreement remained operative, including evidence that the Company continued to abide by the old contract terms covering holiday pay, vacation pay, honoring seniority and through the process of other grievances after May 31. In addition the Company submitted a Kruse grievance, involving a transaction which arose after May 31, to an impartial arbitrator, and the Company admitted in those proceedings that the Seniority Grievance, Arbitration and Discharge provisions from the written Murphy Concrete agreement were provisions that applied from the viable oral agreement between the Company and Union. The Union requests that the Examiner direct the Company to proceed to arbitration of the Betien grievance.

COMPANY POSITION

The Company argues that the Union is not contending that the parties extended the old agreement. After a two-month hiatus period following expiration, the Union asserts that the parties resurrected the old contract. The Company points out that there is no evidence that the Union or the Company discussed extension of the agreement prior to its expiration date or at any time after and reasonably proximate to May 31, as was the case in Superior Die Set Corp., (see footnote #4). Neither is there any clear and convincing evidence of Company acceptance of a Union offer, if any, to continue the old agreement. At most, Curtin's testimony here indicates a Union declaration on August 4, that it intended to continue a course of conduct that it had followed for the previous two (2) months. The Company argues that Curtin's testimony in the vein of his personal and subjective interpretations does not establish the objective communication of offer and acceptance necessary to show mutual agreement and the formation of a contract.

With regard to the Kruse arbitration, the Company argues that said matter was submitted to arbitration on an ad hoc basis not based on any contractual obligation to so arbitrate after the Union had repeatedly sought to secure Kruse's recall in negotiations after the oral contract had expired. The Company further contends that mere continuation of benefits does not extend the Company's obligation to arbitrate after a contract has expired. (Citing Pierce Manufacturing Co., Inc., footnote #4.)

The Company requests that the complaint be dismissed.

DISCUSSION AND CONCLUSIONS

The duty to arbitrate grievances strictly flows from the consensual arrangements between the parties contained in the labor agreement. 2/ Both courts, and this Commission, when functioning as Section 301 forums (i.e., in deciding violation of contract claims under Wis. Stats. 111.06 (1)(f)), must determine whether the charged party has breached his promise to arbitrate. 3/ This Commission, as the courts, may decide whether an employer has breached an agreement to arbitrate grievances, be it in written or oral form, by way of an extended accord or one resurrected. 4/

The crucial sub-issue is whether there existed a collective bargaining agreement, by way of a continuation or adoption of an interim agreement, that can be held to apply to the Betien grievance which was filed and processed the following May to August 1973. The evidence clearly indicates that the old oral agreement between the Union and Murphy Construction expired on May 31, 1972, by force of its terms and the Union's 60-day notice of termination mailed to the Company on March 24.

The Examiner will deal with three (3) sub-topics in discussion to follow, which form the gravamen of the Union's position as to the existence

2/ United Steel Workers vs. Warrior & Gulf Co., 363 U.S. 574, 582 (1960).

3/ Dowd Box vs. Courtney, 368 U.S. 502 (1962); American Motors Corp., 32 Wis. 2d 237 (1966); Independent Union vs. Proctor & Gamble Mfg. Co., 312 F. 2d 181 (2d Cir. 1962) 51 LRRM 2573, cert. denied 374 U.S. 830.

4/ Pierce Manufacturing Co., Inc., (WERC 9549-A & C, 8/71); Modern Plumbing, Heating and Supply Co., (WERC 10171-A & B, 9/71); Superior Die Set Corp., (WERC 7571, 5/66).

of an interim labor agreement, namely, Bargaining Table Conduct In Support Of Offer And Acceptance, Company Continuation Of Benefits And Company's Participation In The Kruse Grievance-Arbitration After Expiration Of The Old Agreement.

The Union would rely upon Superior Die Set Corp. (WERC 7571, 5/66) for the proposition that it is not prevented from proving the existence of an interim agreement by its act of terminating the 1969-72 oral agreement. As was the case with Superior Die Set, the Union urges that in this case the Union and Murphy Construction agreed in the course of negotiations on August 4, to continue an oral agreement consisting of the terms of the old contract.

Though it is true that there are some parallel facts between this case and Superior Die Set Corp., namely, an expiration of the old contract followed by a hiatus period and a claimed oral accord concerning an interim agreement, the similarity ceases at the point of a negotiated interim agreement. In Superior Die Set Corp., there was clear evidence that employer negotiators had in fact agreed that "the working conditions were to be extended, there would be no changing of shifts . . . or changing their conditions in any nature." (See: Superior Die Cast Corp., supra, at page 12.) (Emphasis by the WERB).

In the instant case the evidence is far from convincing with respect to an oral accord over an interim agreement. Though the Commission, in Section 111.06(1)(f) actions involving proof of oral contracts, has not insisted upon the Restatement's indices for offer and acceptance applicable to ordinary contract law, it nevertheless stated that:

"their [labor agreements] special status does not dispense with the requirements that their existence should be established by clear and convincing evidence." 5/

Bargaining Table Conduct Which May Support Offer And Acceptance.

Did the parties orally agree to adopt the previously expired Murphy Construction agreement on a day-to-day basis as of August 4? That question requires a careful examination of the testimony relating to said meeting. Curtin, the Union's Business Representative, testified under direct examination as follows:

"Q (by Mr. Kennedy) [Union Counsel] Mr. Curtin, were there any negotiations with the company following May 31, 1972 concerning the possible extension of this agreement?

A I believe our first negotiation session, which occurred--- I believe the date is August 4th, 1972, during the discussions that were held at that time the presentation of the proposals or the changes in succeeding labor agreements, some discussion was held concerning the fact that we would work on a day to day basis under the conditions of the old agreement and that no way were we ever claiming any other action, we would work day by day.

Q Have you ever been told by the company since May 31, 1972 that there was no agreement, that the agreement was kaput?

A That the agreement had been terminated?

5/ Modern Plumbing, Heating and Supply Co., (WERC 10171-A & B, 9/71), at page 11.

Q That it was---there was no actual governing labor contract which controlled the affairs of its workers or the employees represented by your local with their firm, Murphy Construction Company?

A I think at different times there were discussions to the effect that we had not---did not have a signed or written document; but there was also discussion at these same times we were working under the same provisions of the document that we had presented." 6/

Curtin, under cross examination by Counsel for the Company, testified in material part as follows:

(By Mr. Walker)

"Q Is it your testimony that Complainant's Exhibit No. [2] describes---in fact is it your position that it is the contract between the union and Murphy Concrete Products and also between the union and Murphy Construction Company . . . ?

. . .

A Yes, this would be my contention, that this document represents the verbal agreements between Murphy Concrete Products and Murphy Construction Company and Local 563 for the period 5-1-69 to 5-31-72.

Q And thereafter; after 5-31-72?

A I believe that after 5-31-72 at our first negotiating session in August '72 we agreed that we would work on a day to day basis.

Q So that it is your position that that contract---document is the agreement between Murphy Concrete and the union and between Murphy Construction and the union from May 1, 1969 through today, is that right?

A This reflects the verbal agreement reached, yes." 7/

In further cross-examination Curtin testified concerning the codification of the oral agreement in written contract form covering Murphy Concrete, and then in response to further cross-examination he testifies as follows:

(By Mr. Walker)

"Q Respecting the August 4, 1972 meeting that you testified about with Mr. Cummings. . .

A [describes who was present]

Q And what if anything did the company say which led you to think that they agreed to a continuation of the contract?

A There was a discussion concerning the fact that the old contract had expired and that we would be operating on a day to day basis.

6/ Transcript, pages 10-11.

7/ Transcript, pages 15-16.

- Q What if anything did the company say that led you to believe they were agreeing to continuation of the old contract?
- A I believe that there was concurrence in that statement, period.
- Q What did they say; do you remember anything they said?
- A I can't recall any particular words that were said other than I believe I made the statement that working on a day by day basis and getting an assumption from the company that, yes, this is what we're doing.
- Q What I want to get is what did you say and what led you to assume that they agreed to an extension of the contract?
- A I can't recall the exact conversation word for word. As I indicated before, to the best of my knowledge I made the comment at that meeting that we were beyond the expiration date but that it was our intention to continue to operate under the old contract until a new contract was agreed to; and I believe I asked if this was agreeable with the company, and I---to the best of my knowledge we were in agreement.
- Q You're not sure if you asked? But, as a matter of fact, you didn't ask, did you?
- A I believe we did; I did ask, yes.
- Q And you still, after six tries you haven't given any response at all from the company. That's because there wasn't one, isn't it?
- A I believe Mr. Cummings and I had an understanding at that meeting that we would follow the old contract until a new one was reached." 8/

In both direct examination and on cross, both Mr. Cummings and Frances Murphy denied that they had ever engaged in any discussions with the Union regarding an extension, or continuation, of the oral agreement between the Union and Murphy Construction which otherwise expired by its terms as of May 31. However, both Company witnesses testified that, because Orville Murphy had some doubt as to just when the Murphy Construction agreement expired after the Company had received the Union's notice of termination in March, there were discussions held with Union representatives as to the correct expiration date of said agreement. The result of such consultations as to expiration only, according to Company witnesses, was that the parties agreed that May 31 was in fact the date on which the Murphy Construction agreement expired.

In view of Company witnesses' emphatic denials of Curtin's version concerning discussion at the August 4 bargaining session as to an extension or continuation of the previously expired agreement, the Examiner, in evaluating Curtin's testimony, concludes that there is no quantum of evidence of a clear and satisfactory preponderance so as to prove the existence of an agreement between the negotiators with respect to the continuation of an interim agreement beyond May 31, 1972.

Curtin in the early stages of cross-examination, characterized the dialogue between the parties, in testifying that, ". . . I believe . . . we agreed that we would work on a day to day basis." Thereafter, in the course of cross-examination, Curtin could not remember what he had said at the August 4 session; nor what Company negotiators may have said to cause him (Curtin) to form such a belief. Only belatedly, in the course of later cross-examination, could Curtin recall that he had asked Cummings if it were agreeable with the Company to operate under the old contract on a day to day basis. The Examiner credits the testimony of Company witnesses, and concludes that Curtin's recollection is clouded with beliefs and characterizations of the bargaining table conduct. Curtin's testimony as to the events of August 4 does not support the existence of a clear offer and acceptance of a proposition to continue the old contract beyond its scheduled expiration. 9/

Murphy Construction's Continuation Of Economic Benefits And Conditions Beyond May 31, 1972.

The Union urges that the Company by its conduct manifested an intent to continue the old 1969-72 agreement when it continued to abide by its terms well into 1973 by paying holidays and vacation benefits, honoring seniority and processing the Kruse grievance between May 31 and October 31, 1973.

The undersigned concludes that the Examiner's conclusions and rationale in Pierce Manufacturing Co., Inc., at page 10 (WERC 9549-A) and the authorities cited therein, 10/ are dispositive of the Union's argument. The mere fact that the Company, after May 31, chose not to change certain conditions and benefits which prevailed under the expired agreement, and agreed to process grievances does not impliedly establish that the Company treated the old agreement as still being effective.

Company Consent To Arbitrate Kruse Grievance Involving Conduct Occurring After Expiration Of Old Murphy Construction Agreement.

The evidence reveals that the Union sought to secure Kruse's recall on the basis of seniority several times in its negotiations with the Company in August through October 1972. The record also indicates that though the Union sought to characterize the parties' agreement to arbitrate the Kruse matter, in its letter of October 31, 1972, as an agreement in accordance with a viable and binding contract and arbitration provision (referring to Article 28 of Murphy Concrete agreement as controlling), the evidence in the record preponderates for the proposition that the parties made an ad hoc arrangement to arbitrate the Kruse matter. The Examiner is convinced that said arrangement was not bottomed on any Company obligation to arbitrate grievances under a viable labor agreement. Arbitrator Bellman was not called upon to make any findings as to substantive arbitrability, and his reference in the prefatory language of his award, that said "proceeding is in accordance with final and binding arbitration provisions of a collective bargaining agreement in existence between the parties," does not establish an interim contract to apply to other grievances filed after May 31, 1972. The Examiner is convinced that said Arbitrator used the aforesaid label as one of convenience to codify the

9/ Modern Plumbing, Heating & Supply Co., (WERC 10171-A & B, 9/71); Pierce Manufacturing Co., Inc., (WERC 9549-A & C, 8/71).

10/ See also: Proctor and Gamble, supra, footnote #3; Hilton-Davis Chemical Company, Division of Sterling Drug, Inc., 185 NLRB 241, 1970-CCH NLRB Par. 22,288 (1970).

understanding the parties reached at outset of hearing in that case, namely, that "some of the provisions of the labor agreement [Murphy Concrete] govern the relationship between the [parties]." 11/

For the above recited Findings of Fact, Conclusions of Law and Discussion supporting same, the complaint filed herein has been dismissed.

Dated at Madison, Wisconsin, this 16th day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Robert M. McCormick
Robert M. McCormick, Examiner

11/ See Respondent's Exhibit No. 4, page 2, a partial transcript of hearing on Kruse; and Complainant's Exhibit No. 3, Arbitrator Bellman's award.