STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS LOCAL UNION NO. 695, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. SINAIKO BROTHERS COMPANY, Respondent.	Case VI No. 18440 Ce-1568 Decision No. 13137-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of the Complainant.
Quarles & Brady, Attorneys at Law, by Mr. Fred G. Groiss, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, having on October 30, 1974 filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, wherein it alleged that Sinaiko Brothers Company had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Dennis P. McGilligan, a member of its 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 hearing on said complaint having been held at Madison, Wisconsin on December 16, 1974; and Complainant and Respondent having filed briefs on January 20, 1975; and Respondent having filed a reply brief on January 22, 1975; and the Examiner having considered the evidence, arguments 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 Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Complainant, is a labor organization having its principal offices at 1314 North Stoughton Road, Madison, Wisconsin; and that, at all times material herein, William J. Renz, has been a Business Representative for the Complainant.

2. That Sinaiko Brothers Company, hereinafter referred to as the Respondent, is a company engaged in the scrap metal business, with facilities located at Madison, Wisconsin.

3. That at least since 1962, and continuing at all times material thereafter, the Complainant has been, and is, the collective bargaining representative of certain employes of the Respondent in Madison, Wisconsin; that on June 1, 1973 the Complainant and Respondent entered into a collective bargaining agreement effective from June 1, 1973 to June 1, 1974, 1/ covering wages, hours and other conditions of employment of certain employes of the Respondent; that said collective bargaining agreement contained a discharge and suspension article, as well as a grievance and arbitration provision culminating in final and binding arbitration; and that said collective bargaining agreement also contained an article on the term of the contract which stated that said agreement "shall remain in effect until June 1, 1974 and for yearly periods thereafter unless a written notice of a desire to modify or terminate the contract is given not later than sixty (60) days prior to the applicable June 1 date."

4. That the Complainant reopened the contract pursuant to the terms of said agreement; that the Complainant and Respondent commenced negotiations for a successor agreement on May 14; that on June 1, the contract between the Respondent and the Complainant terminated; that the parties met again on June 4, and August 1; that at no time during this period, or since, have the Complainant and Respondent reached an agreement on a new contract.

5. That on April 5, David Johnson, an employe covered by the aforementioned collective bargaining agreement, filed a written grievance concerning his alleged discharge by Respondent on April 1 with the Complainant's Business Representative, William J. Renz; that Renz discussed said grievance with Keith E. Boeger, Respondent's General Manager, but did not deliver a copy of said grievance to the Respondent; that on April 9 Renz sent a letter to the Respondent requesting that Respondent put David Johnson back to work, or in the alternative, to submit the matter to arbitration; that by letter dated April 16 to the Commission, the Respondent agreed to submit the David Johnson grievance to arbitration, but subsequently withdrew this agreement for arbitration by letter dated April 17 to the Commission.

6. That, on June 28, Gilman Nelson, an employe of the Respondent represented by the Complainant was allegedly discharged by Respondent; that Nelson immediately contacted the Complainant concerning his alleged discharge; that on the same day Nelson and two representatives of the Complainant went to Respondent's office to discuss the matter; that Renz later spoke with Respondent's attorney, James Mallien, regarding Nelson's grievance; that on August 13 Nelson filled out a written grievance which Complainant sent to the Respondent; that by letter dated October 8, the Complainant requested arbitration of the Nelson grievance; and that Respondent refused to proceed to arbitration on the matter.

7. That, on September 9, Harold L. Krier, an employe of the Respondent represented by the Complainant, was allegedly discharged by Respondent; that on September 17 Krier filed a grievance concerning his alleged discharge with Renz; that by letter dated September 17, Renz requested Respondent to put Krier back to work or, in the alternative, to submit the matter to arbitration; that by letter dated September 23, Renz again requested arbitration of Krier's grievance; and that the Respondent refused to proceed to arbitration on said grievance.

1/ Unless otherwise indicated, all dates hereinafter referred to are in 1974.

8. That Complainant's claim with respect to the alleged discharge of Johnson, and the issue whether there has been timely and/or proper compliance with the grievance -- arbitration and/or the discharge -suspension provisions in the collective bargaining agreement arose during the term of the contract and constitute differences and disputes arising over the interpretation and application of the collective bargaining agreement between the Complainant and Respondent; and that the Respondent has refused, and continues to refuse, to proceed to arbitration on either or all of said issues.

9. That the agreement between the parties expired on June 1, and since there is no agreement in effect between the Complainant and Respondent, the Respondent is under no obligation to arbitrate the claims of the Complainant with respect to the grievances of Gilman Nelson and Harold L. Krier which arose after June 1, 1974.

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

CONCLUSIONS OF LAW

1. That the Respondent, Sinaiko Brothers Company, by refusing to proceed to arbitration on all issues pertaining to the David Johnson grievance, at a time when the contract was in effect, has violated, and continues to violate, the terms of the collective bargaining agreement which existed between it and the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Local Union No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and by such violation, the Respondent, Sinaiko Brothers Company, has committed and is committing, an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That on June 1, 1974, and since that date there has been no contract in effect between the Complainant and the Respondent and, as a result, Respondent is not required to arbitrate the grievances of Gilman Nelson and Harold L. Krier, since those grievances arose after June 1, 1974, and, therefore, Respondent has not violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act for refusing same.

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 allegations with regard to the grievances of Gilman Nelson and Harold L. Krier be, and the same hereby are, dismissed.

IT IS FURTHER ORDERED that Sinaiko Brothers Company, its officers and agents, shall immediately:

1. Cease and desist from refusing to agree to the appointment of a member of the staff of the Wisconsin Employment Relations Commission as an arbitrator to determine the issues arising under the grievance filed by David Johnson or otherwise refusing to submit the grievance filed by David Johnson, and the issues concerning same, to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and Complainant with respect to the selection of a member of the staff of the Wisconsin Employment Relations Commission to act as arbitrator with respect to the David Johnson grievance and the arbitration of all issues concerning same.

   b. Notify the Complainant that it will proceed to arbitration on said grievance, and all issues concerning same.

   c. Notify the Wisconsin Employment Relations Commission that it will agree to the appointment of a member of the staff of the Wisconsin Employment Relations Commission as an arbitrator to determine the aforementioned grievance and all issues concerning same, and otherwise participate with the Complainant in the selection of an arbitrator to determine the dispute concerning said grievance, and all issues concerning same.

   d. Participate in the arbitration proceeding, before the arbitrator so selected, on the aforementioned grievance, and all issues concerning same.

   e. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days after the receipt of a copy of the instant Order, as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 5th day of February, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Johnson Grievance

The David Johnson discharge grievance arose during the effective term of the agreement which existed between the parties from June 1, 1973 to June 1, 1974. That agreement provided for arbitration of any dispute or misunderstanding relative to the provisions of said agreement. It established a three-step grievance procedure, with the last step providing for final and binding arbitration. The grievance and arbitration provision contained time limitations with respect to the initial processing of the grievance. The discharge or suspension article also contained certain procedures and limitations for the processing of a grievance concerning discharge.

The Respondent contends that the Complainant and David Johnson failed to comply with applicable contract provisions contained in Articles VII and VIII thereof and that those provisions constituted express conditions precedent to invocation of the arbitration procedure.

An issue exists, therefore, as to whether the grievance was timely and properly presented. Accordingly, said issue, in itself, becomes a difference or dispute over the interpretation or application of the agreement. Whether the Complainant has complied with the contractual procedure in requesting arbitration is a decision to be made by the arbitrator, rather than by the Wisconsin Employment Relations Commission in the instant unfair labor practice forum. 2/ Additionally, the claim of the Complainant that the Respondent discharged David Johnson without just cause in violation of the collective bargaining agreement is a claim, which on its face, is covered by the agreement and, therefore, is subject to arbitration. 3/ The arbitrator must, therefore, first determine whether the grievance was timely and properly processed. If the arbitrator should find that said requirements were not met, then he/she need not determine the merits of the grievance.

The fact that the collective bargaining agreement expired as of June 1 does not excuse the Respondent from a duty to proceed to arbitration in this matter since the dispute arose during the term of the agreement. 4/

Based on the above, the Examiner finds that the Respondent is under a duty to proceed to arbitration on the Johnson grievance; that its failure to do so is a violation of the contract between it and the Complainant; and that therefore the Respondent has violated Section 111.06 (1)(f) of the Wisconsin Employment Peace Act.

Nelson and Krier Grievances

The threshold issue present here is whether there existed a collective bargaining agreement on or about June 28, 1974, the date the Respondent allegedly discharged Gilman Nelson; and on or about September 9, 1974, the date the Respondent Employer allegedly discharged Harold L. Krier. If the contract was in existence at the above times, then the claims of the Complainant regarding said grievances on their face

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2/ The leading case is Seaman-Andwall Corp., (5910) 1/62.

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

4/ Safeway Stores Inc. (6883) 9/64; the Kroger Co. (7563-A) 9/66.

are covered by the agreement, and, therefore subject to arbitration. 5/ If, however, there was no contract in existence at those times, the Respondent's refusal to arbitrate said employes' grievances would not have constituted an unfair labor practice since the agreement had expired prior to said refusal. 6/ The burden is clearly on the Complainant to establish that the contract that expired on June 1 was, in fact, extended and that said contract was in existence on June 28, and September 6. 7/

In making a determination whether a contract exists, all the facts material to said issue must be examined in light of the collective bargaining relationship. However, it is noted that the collective bargaining agreement, which the Complainant contends is applicable, contained the following provision:

> "ARTICLE XIX. TERM OF CONTRACT
>
> Section 1. This Agreement shall remain in effect until June 1, 1974 and for yearly periods thereafter unless a written notice of a desire to modify or terminate the contract is given not later than sixty (60) days prior to the applicable June 1 date."

The Complainant reopened the contract pursuant to the terms of the above article and commenced negotiations with the Respondent Employer for a successor agreement on May 14, 1974. The contract, in effect from June 1, 1973, expired by its terms on June 1, 1974. The parties met again on June 4, 1974 and August 1, 1974 but to date have been unable to reach an accord on a new agreement.

The Complainant admits that the Nelson and Krier grievances arose after the expiration of the collective bargaining agreement. However, the Complainant argues that despite the fact the agreement expired, the Employer had a duty to arbitrate said grievances citing NLRB v. Frontier Homes, 371 F2d 974; 980 (8th Cir. 1967) in support thereof. Relying on that case, the Complainant argues that the grievance procedure including the arbitration provisions became "a part of the status quo of the entire plant operation." Therefore, the Complainant adds, the right to arbitrate the above grievances survived the expiration of the agreement.

The Examiner finds that the Complainant's reliance on NLRB v. Frontier Homes is misplaced. There, the employer sought to rely on the provisions concerning layoff in an expired collective bargaining agreement. It was not permitted to do so and was ordered to comply with established past practice in connection with a charge of a refusal to bargain. In the present unfair labor practice case, the Complainant relies on a grievance - arbitration clause contained in a contract which had expired on June 1, 1974. However, like the Employer in NLRB v. Frontier Homes, the Complainant here will not be allowed to rely on "the fruit of these past negotiations" which "must end with the expiration of the contract." When the contract ceased to exist on June 1, 1974, the Complainant can no longer rely on the grievance - arbitration contained within to support its claims unless past practice establishes the continuation of such a clause.

5/ See Footnote 2.

6/ Splicewood Corp., (3139) 5/52.

7/ 111.07(3) of the Wisconsin Statutes; Browning v. Fox, 1920, 230 N.Y. 535, 130 N.E. 883.

Although the Complainant and Respondent have had a collective bargaining relationship at least since 1962, the Complainant did not introduce evidence at the hearing as to past practice with respect to grievance handling or arbitration after contract expiration which would support its claim in the present case. Nor does the Complainant introduce any facts to support its claim that the grievance-arbitration provisions somehow became a part of the status quo of the plant operation. Nowhere in the record does the Complainant establish that the contract was somehow extended in such a manner as to obligate the Respondent to proceed to arbitration on the Nelson and Krier grievances.

Based on the above, the Examiner finds that the Respondent is not under a duty to proceed to arbitration on the Nelson and Krier grievances; that Respondent has not violated the contract between it and the Complainant for refusing to proceed to arbitration on said grievances; and that, therefore, the Respondent has not violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act for refusing same.

Dated at Madison, Wisconsin this 5th day of February, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner