STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRED STEVENS, TRUSTEE, INTERNATIONAL FEDERATION OF PROFESSIONAL & TECHNICAL ENGINEERS, LOCAL 92, Complainant, vs. LADISH CO., TRI-CLOVER DIVISION, Respondent.	Case XXXIII No. 18445 Ce-1569 Decision No. 13143-A

Appearances:
Mr. Fred Stevens, Trustee, appearing on behalf of Complainant.
Mr. Elwin J. Zarwell, Quarles and Brady, Attorneys at Law, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission in the above-entitled matter alleging that the above-named Respondent committed unfair labor practices in violation of Chapter 111 of the Wisconsin Statutes; and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act (WEPA); and a hearing on said complaint having been held at Kenosha, Wisconsin on December 5, 1974 before the Examiner, and the Examiner having considered the evidence, arguments and briefs of Counsel and being fully advised in the premises, makes and issues the following:

FINDINGS OF FACT

1. That International Federation of Professional & Technical Engineers, Local No. 92, AFL-CIO, referred to herein as Local 92, is a labor organization with a mailing address of 5522 - 36th Avenue, Kenosha, Wisconsin 53140; that the above-named Complainant, Fred Stevens, is a trustee of Local No. 92; and that Complainant Stevens filed the instant complaint on behalf of Local No. 92 in his capacity as a trustee thereof.

2. That Respondent, Ladish Co., Tri-Clover Division, is an

employer with offices and plant located at 9201 Wilmot Road, Kenosha, Wisconsin.

3. That at all times material hereto, Local No. 92 has been the certified representative of a bargaining unit of employes in the employ of Respondent at its Kenosha, Wisconsin plant; that at all times material hereto, the Respondent and Local No. 92 have been parties to a collective bargaining agreement, referred to herein as the Agreement, covering the wages, hours and conditions of employment of the employes in said bargaining unit for the period May 24, 1971 - September 29, 1974; that the Agreement makes express reference to the following job codes or classifications which reflect the nature of the work normally performed by Local 92 bargaining unit employes: Parts Programmer, Methods Engineer SR., Methods Engineer, Time Study SR., Time Study JR., Time Study Trainee, Designer, Draftsmen SR., Draftsmen, and Detailer; that the Agreement further provides for a multi-step grievance procedure but does not provide for a final and binding means of resolving grievances not settled during processing pursuant to said procedure; that the Agreement further provides as follows:

ARTICLE V

Grievance Procedure

> No Strike-No Lockout: The Company agrees that it shall not engage in a lockout, and the Union agrees there shall be no strike, slowdown or action which interferes with or interrupts production, provided that if any grievance as herein defined has been fully processed in the Grievance Procedure as set forth in Article V and remains unresolved, then the Company, after a forty-eight (48) hour notice to the Union shall be free to engage in a lockout, and the Union shall have the right, after giving forty-eight (48) hour notice to the Company, to authorize a strike, provided further that no strike shall be permitted hereunder which has as an object the enforcement of any demand other than such unresolved grievance(s).

ARTICLE VI

Senority

> Layoff and Recall: Whenever it becomes necessary either to reduce or increase the number of employees in any occupation, they shall be laid off or recalled, as the case may be, on the basis of Bargaining Unit seniority under the following procedure:
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> Employees affected by such a reduction shall be assigned to positions in which they were previously classified in reverse order of their advancement during their present term of employment, pro-

vided the employee has the qualifications to perform the work. An employee who does not have sufficient current Bargaining Unit seniority to be assigned to a position in the reverse order of his advancement may be assigned to fill a vacancy within his department for which he is qualified in the judgement of the Company. In the event there is no such vacancy, such employee may exercise his current Bargaining Unit seniority by displacing probationary, temporary and co-op employees, provided such employee has the necessary qualifications to perform the work satisfactorily. Before an employee is laid off, he will be assigned to any existing Bargaining Unit vacancy for which he is qualified to perform the work satisfactorily. Under this provision, an employee classified as a technician may reject an assignment to a trainee or detailer position. Such employee's right of employment and seniority shall not be terminated for rejecting such assignment to a trainee or detailer position or for failing to meet the recall requirements for a trainee or detailer position. Employees assigned to a lower classification will be returned to their original classification when conditions warrant in reverse order of the above.

In the recall of employees from layoff, the employees shall be called back on the basis of Bargaining Unit seniority, provided such employee is qualified to do the work for which a vacancy exists. In the event the Company requires laid off employees to return to work for a period of four (4) weeks or less, such laid off employee, if he has been able to obtain work elsewhere or because of some compelling personal reason acceptable to the Company may elect not to return to work and not lose his seniority. Whenever such temporary work is available, the Company is obligated to send out a registered letter or telegram, but can contact laid off employees by telephone calls or home calls.

An employee who is scheduled for layoff and the affected departmental committeeman shall be given a minimum notice of five (5) work days, except in the case of emergency, such as fire, flood or other acts or causes beyond the Company's control.

4. That at all times material hereto, a local union affiliated with Office and Professional Employees International Union, which local is referred to herein as OPEIU, has represented certain employes of Respondent including certain clerical and data processing employes; that at all times material hereto, International Association of Machinists and Aerospace Workers, Lodge No. 34, Tri-Clover Division, referred to herein as IAM, has represented Respondent's production and maintenance employes; and that Local 92, OPEIU and IAM are the only labor organizations representing employes of Respondent at its Kenosha facility.

5. That beginning on or about March 10, [1/] IAM struck and picketed Respondent's Kenosha facility in connection with contract negotiations between Respondent and IAM; and that beginning on or about March 11 and continuing through March 24, certain employes of Respondent represented by Local No. 92 refused to cross the existing IAM picket lines to report for work.

6. That Respondent notified each employe in the Local No. 92 bargaining unit by letter dated and mailed on March 21, 1974 as follows:

> Gentlemen: As of this time no further negotiating sessions have been scheduled with the International Association of Machinists & Aerospace Workers, Lodge #34. We continue to stand ready to bargain with their representatives to arrive at a fair agreement; however, we are extremely concerned with the conduct of the AFTE Local #92, AFL-CIO representing the technical employees.
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> We have decided to continue insurance thru March 31, 1974, for AFTE Local #92 employees, including those who have joined the strike; however, in respect of AFTE employees who joined the strike of IAMAW employees by refusing to cross picket lines to report for work, as of April 1, 1974, insurance for such AFTE employees will not be continued by the company. It will be the responsibility of such individual striking AFTE employees to arrange for individual conversion of insurance coverage for Hospitalization, Surgical, Major Medical, Group Life & Accidental Death and Dismemberment benefits thru separate arrangements with the carriers. We will no longer pay the premiums for coverage beginning April 1, 1974, for all striking AFTE Local #92 employees.

7. That from and after the beginning of work on March 25, the entire Local No. 92 bargaining unit crossed the IAM picket line and reported to work; that upon their return to work, the officers of Local No. 92 were called by Respondent's personnel director, Michael Hawkney, to a meeting with Hawkney and representatives of OPEIU; that at said meeting, Hawkney stated that Respondent was pleased to have the Local No. 92 employes back at work, that some or all of the employes of both bargaining units might be asked to perform duties outside of their normal work activity but in no case within the work jurisdiction of the IAM, and that if the Local No. 92 and OPEIU bargaining unit employes cooperated in performing such assigned tasks, there would be work for them to perform in the absence of the IAM bargaining unit for an extended but not unlimited period of time; that during the period March 25-27 inclusive, some of the Local No. 92 bargaining unit were assigned

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[1/] This and all other dates in this Examiner decision shall, unless otherwise noted, refer to 1974.

work of the sort that they normally performed and in quantities sufficient to keep them busy for at least two work weeks while others of them were assigned to inventory activities which were outside the normal scope of their duties but which had on at least some occasions in the past been performed by Local No. 92 bargaining unit.

8. That all personnel of Respondent ordinarily park their cars on Respondent's premises during working hours; that prior to March 26, Respondent had instructed all persons expected to be entering Respondent's facility during the IAM strike that upon attempting to enter or leave the premises through a picket line such persons were to remain in their vehicle, to move their vehicle through the picket line slowly and to be careful not to hurt any of the pickets.

9. That on the afternoon and evening of March 26, larger than usual numbers of IAM pickets were present at both of the gates to the Respondent's Kenosha facility; that at or about that time, the following events occurred: the IAM pickets hindered the flow of vehicular traffic into and out of Respondent's premises; the automobile of a salesman of one of Respondent's suppliers was damaged when struck on the hood, doors and trunk with a piece of wood by one or two pickets; an accusation was made by the pickets that one of the pickets had been hit by someone crossing the picket line; pickets followed each of three managerial or supervisory personnel as they drove Respondent's mail deliveries to the Post Office and/or a parcel delivery service.

10. That on or about March 26, 1974, the Kenosha County Sheriff informed representatives of the Respondent that his office was not sufficiently manned or equipped to, and would not be able to prevent the sort of picket conduct referred to in Finding No. 9 above from continuing.

11. That on or about March 26, 1974, a number of Respondent's supervisory personnel expressed fear of injury to person or property in connection with the IAM strike and requested time off during the balance of that strike.

12. That beginning sometime before 6:30 a.m. on March 27, and continuing until approximately 9:30 a.m. on that morning, IAM pickets entirely prevented vehicles driven by or transporting Respondent's supervisory and managerial personnel from entering Respondent's premises, while at the same time permitting all other vehicles to enter; that as a result of said conduct on the part of the IAM pickets and Respondent's instructions noted in Finding No. 8 above, almost all of said supervisory and managerial personnel either remained in their vehicles

outside of the picket line or returned to their homes; that however, one supervisor entered the facility by driving a jeep across a field so as to enter the premises at other than one of its gates; that one or two other supervisors left their vehicles on the highway outside of Respondent's premises and entered Respondent's premises on foot; and that none of the supervisors who entered the plant as noted above suffered damage either to his vehicle or his person as a result of having done so.

14. That at approximately 8:00 a.m. on March 27, representatives of the IAM and of Respondent attended a meeting called by the Kenosha County Sheriff in response to an IAM complaint that Respondent's shipping activities during a strike were illegal; that at said meeting, IAM representatives requested that the Sheriff take steps to prevent Respondent from continuing to ship and indicated that the IAM pickets would continue to interfere with ingress and egress of vehicles to and from Respondent's premises unless Respondent promised to discontinue shipping; that the Sheriff questioned whether Respondent would agree to discontinue shipping for the duration of the strike; that Respondent refused to agree to do so, stating instead that it would limit its conduct only to the extent required in order to comply with the law; that said meeting concluded with an agreement between the Sheriff, the representatives of IAM and the representatives of Respondent that the Sheriff would consult with the County Corporation Counsel concerning the state of the law on the disputed legality of shipping during a strike, and that during the period of time taken for such consultation, Respondent would cease shipment activities and the IAM pickets would refrain from interference with the ingress and egress of Respondent's supervisory and managerial personnel to and from Respondent's premises; that Respondent refrained thereafter from shipping activities until on or after March 30; that at no material time after 9:30 a.m. on March 27 did IAM pickets interfere with vehicular traffic into or out of Respondent's premises; but that neither the Sheriff nor any other public official communicated at any material time with Respondent concerning the results of the aforesaid planned consultation.

15. That, thereafter, Respondent's Kenosha plant management reported its situation to Ladish Co. top management in Milwaukee; that said top management directed said plant management to lay off the Local No. 92 and OPEIU bargaining units effective at the end of work on March 27; that at approximately noon on March 27 Respondent called a meeting with representatives of Local No. 92 and OPEIU; that at said meeting,

Respondent's representatives orally explained that the Local No. 92 and OPEIU bargaining units were being laid off because of the risk that picket line incidents such as had occurred that morning might recur so as to effectively prevent the supervisors of Local No. 92 and OPEIU employes from entering the plant and supervising such employes; that no oral statement was made by representatives of Respondent at that time or at any other material time to any representative of Local No. 92 to the effect that said layoff actions were being taken because of a lack of work; that during the course of said March 27, 1974 meeting, Respondent served upon the Local No. 92 representatives a notice the body of which read as follows:

> Gentlemen: As you know the IAMAW struck this Division of the Company. This leaves the Company in a very difficult position without the production and maintenance work usually done by IAMAW members.
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> This condition, which is beyond our control, has effectively stopped our operations and we must recognize that fact by closing down until further notice. It is therefore necessary that all AFTE members be laid off at the end of their particular shift on Wednesday, March 27, 1974 until further notice.
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> Under the provisions of our insurance plans, insurance coverages other than Life will terminate for laid off employees in your unit on or before March 31, 1974. Each employee desiring coverage after termination must make his own arrangements with and pay the carrier involved.
>
> To assist you in advising your members and to help them in making their decision, we are enclosing a general information sheet and an application for conversion of Life Insurance.
>
> We regret that the strike action by some of our employees makes the above decision necessary.

that the Local No. 92 representatives protested said notice both orally at said meeting and thereafter in writing as follows:

> In response to your letter of March 27, 1974, it is to be deemed a violation of our existing Labor-Management Agreement, Article VI, Paragraph 49.
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> Therefore, all members of this Labor Unit will be informed to report for work as usual March 28, 1974, at the beginning of their respective shift.
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> In the event they are prohibited from doing so, we shall have no other course of action than to consider this a lock out and take the necessary steps to recover all lost wages and benefits.

16. That on March 28, 1974, the Local No. 92 employes tendered their services to the Respondent; that said employes found their entry to Respondent's premises denied by a locked and guarded door; that

Respondent thereby denied work place access to said employes and continued to do so through and including April 10; and that during the same period, March 28-April 10, the Respondent's nonunion personnel (including supervisors, managerial personnel and guards) continued working.

17. That representatives of Local No. 92 immediately filed written grievances alleging that the Local No. 92 employes had been laid off in violation of Agreement Pars. 46-49 and particularly without due and proper notice as required by Par. 49 and that such employes had been locked out by the Respondent in violation of Agreement Par. 32; that each such grievance requested that Respondent immediately return all such employes to work with all back wages and benefits reinstated; that Respondent denied said grievances; and that the parties stipulated that the grievance procedure had been exhausted with respect to said grievances on April 24; and that the instant complaint was filed with the Wisconsin Employment Relations Commission on October 31.

18. That Respondent reached tentative contract settlement with the IAM on Saturday, March 30; that beginning on Sunday, March 31, 1974, the OPEIU struck and picketed Respondent in connection with negotiations for a new contract; that on April 2, 1974, the IAM membership ratified the terms of its contract settlement with Respondent; that notwithstanding that ratification and a notice from Respondent that IAM bargaining unit employes should return to work, the IAM bargaining unit employes honored the OPEIU picket lines until the OPEIU contract negotiations were concluded and a new contract was ratified by the OPEIU; that the OPEIU contract was tentatively settled on April 9 and ratified by the OPEIU membership on April 10; that the IAM and OPEIU bargaining unit employes returned to work on April 11; and that the Local No. 92 bargaining unit employes also returned to work on April 11, 1974 pursuant to telephone calls to each of them from Respondent directing them to report at said time.

19. That Respondent is in the business of manufacturing parts for, inter alia, various types of industrial machinery; that the normal duties performed by Local No. 92 bargaining unit employes consist essentially of preparation of drawings to assist the Respondent's sales department in making proposals to customers for future product orders and of programming, writing operating instructions, setting rates and performing related industrial engineering functions in connection with the production of particular products; that the normal function of the Local No. 92 bargaining unit is interrelated with the functions of the OPEIU

and IAM bargaining units such that the inputs of OPEIU and IAM bargaining unit functions must be performed with respect to any customer product order worked on by Local No. 92 bargaining unit employes before such order can be produced and shipped to the customer; that at all times, March 25-April 10, there existed a backlog of customer product orders which required Local 92 bargaining unit work inputs before they could be produced and shipped; but that all such customer product orders were subject to cancellation by the customer on account of a strike among Respondent's employes; that Respondent did not know and had no way of knowing which of said orders would be so cancelled; that a number of customers did, in fact, cancel product orders during the period of nonperformance of duties by the IAM bargaining unit, March 10-April 10; and that at no time between March 10 and April 9 did Respondentknow or have reason to know when the IAM bargaining unit employes would resume performance of their job duties; that at all times, March 25-April 10, 1974, there existed a number of requests from Respondent's sales department for the production of drawings to be used in connection with the presentation of proposals to potential customers for future product orders; but that a number of potential customers chose to delay their placement of product orders with Respondent until delivery date uncertainties arising out of the nonperformance of duties by IAM employes were resolved on or shortly before April 11, 1974; and that, therefore, the potential economic value to Respondent of the performance of normal duties by each of the Local No. 92 bargaining unit employes during the period March 25-April 10 was adversely affected by the existence and uncertain duration of the IAM strike and of the OPEIU strike and IAM refusal to cross OPEIU picket lines.

20. That the actions of Respondent set forth in Findings Nos. 15 and 16 above have not been shown by a clear and satisfactory preponderance of the evidence to have been taken in connection with a labor dispute with Local No. 92, in order to gain a concession from Local No. 92 in favor of Respondent, or as an offensive exercise of economic force against Local No. 92 or any other labor organization; and that for the aforesaid reasons, said actions of Respondent did not constitute a lockout within the meaning of Agreement Par. 32 and did not constitute a violation of said Paragraph.

21. That the actions of Respondent set forth in Findings Nos. 15 and 16 above constituted a layoff within the meaning of Agreement Pars. 46-49; that said layoff was imposed with less than five working days' notice to affected employes and committeemen; that said layoff action

was taken initially during the period March 27-30 because of the risk that IAM pickets would effectively prevent supervisory employes from entering Respondent's plant and from supervising the work of Local No. 92 bargaining unit employes; and that after Respondent achieved a tentative contract settlement with IAM on March 30 said layoff continued with less than five work days' notice to affected employes and committeemen as regards layoff on the work days of April 1, 2 and at least a portion of April 3; and that said layoff was continued March 30-April 10 because of the adverse economic impact of the OPEIU strike and the IAM refusal to cross the OPEIU picket line on the potential value to Respondent of the performance of normal duties by Local No. 92 bargaining unit employes during the period March 30-April 10; that the IAM strike, the risk that IAM pickets would effectively prevent supervisory employes from entering Respondent's plant, the OPEIU strike and the IAM refusal to cross OPEIU picket lines were all acts or causes "beyond the Company's control" and constituted a "case of emergency" within the meaning of Agreement Par. 49; and that, therefore, the aforesaid layoff action did not constitute a violation of Agreement Pars. 46-49 or any of them.

CONCLUSION OF LAW

That Respondent, Ladish Co., Tri-Clover Division, did not violate the terms of a collective bargaining agreement and did not commit an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act when it denied work place access to its employes represented by Federation of Technical Engineers, Local No. 92, AFL-CIO from March 28, 1974 to April 10, 1974, inclusive, without notifying affected employes and committeemen of said action five work days in advance thereof.

Based upon the foregoing Findings of Fact, and Conclusion of Law, the Examiner makes and issues the following

ORDER

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

Dated at Milwaukee, Wisconsin, this 21st day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

by Marshall L. Gratz

Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant, in its complaint alleges that by physically denying work to the Local 92 bargaining unit employes on and after March 28, 1974 [2/] Respondent violated its collective bargaining agreement (the Agreement) with Local 92. Complainant argues that such actions constituted either a lockout in violation of Agreement Par. 32 or a layoff lacking the five work day notice required in Agreement Par. 46, either of which would be a violation of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA); [3/] that since only Local 92 and OPEIU employes but no nonunion personnel were refused work during said period and since the record confirms that there existed work to be performed by Local 92 employes during said period, it must be concluded that Respondent's actions complained of herein were intended to retaliate against prior Local 92 support for the IAM strike, to cause Local 92 to curtail such support in the future and to pressure IAM into a contract settlement; that, so motivated, the physical denial of work at issue herein constituted a contractually prohibited lockout; that even if the actions are deemed a nonlockout, no emergency existed such as would relieve Respondent of the Agreement Par. 49 notice requirements; that the IAM strike was within the Respondent's control since the Respondent could have ended same through a zealous effort to reach agreement; that the IAM pickets' actions were within the Respondent's control since all violence would have been avoided had Respondent negotiated with the IAM for an agreement in good faith and refrained from antagonizing IAM pickets by attempts to ship and engage in minor assembly operations during the IAM strike. By way of remedy, Complainant requests that Respondent be ordered to pay the employes in the Local 92 bargaining unit back pay for the ten working days (March 28-April 10 inclusive) lost due to their

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2/ As noted earlier all dates herein refer to 1974 unless otherwise noted.

3/ Section 111.06(1)(f), Wis. Stats. (1973), reads as follows:

> "It shall be an unfair labor practice for an employer individually or in concert with others...(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)."

improper lockout or layoff.

Respondent, in its Answer, denies that it violated either the Agreement or WEPA when it engaged in the complained of actions and affirmatively alleges that it took said actions because of causes beyond its control. In its brief, Respondent argues that a lockout is a cessation of the furnishing of work to employes in an effort to get more desirable terms for the employer; that there has been no evidence herein of a controversy between Local 92 and Respondent as to the terms of employment under which the Local 92 bargaining unit was being employed; that, therefore, a lockout within the meaning of Agreement Par. 46 did not occur herein; that the Employer's actions were, instead, a layoff made necessary by the IAM strike, by illegal IAM interference with the ingress to and egress from Respondent's plant of supervisory and managerial personnel, by the threat of actual violence implicit in such IAM interference and by the position of the County Sheriff that he could not control the violence; that the foregoing were all "causes beyond the Company's control" sufficient to make the instant situation an "emergency", thereby relieving the Respondent of the notice requirements in Agreement Par. 49; that in view of the foregoing, the question of whether there was Local 92 unit work to be performed during the period of the layoff is immaterial; that, in any event, the record shows that the only work available for said employes to have performed during said period was either "make-work" or work that could have become valueless to the Respondent since the existing and anticipated product customer orders to which all such work related were subject to cancellation or nonplacement on account of prolongation of the IAM strike; and that, for the foregoing reasons, the Complaint should be dismissed.

DISCUSSION

Alleged Lockout

It is presumed, in the absence of contextual indications in the Agreement to the contrary, that the parties to the Agreement intended the term "lockout" to have the meaning normally attributed to it in labor relations parlance. [4/] "In its simplest sense and one embodying

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4/ Wisconsin Porcelain Co., 36 LA 485, 487 (Anderson, 1961)

all its uses[by the courts and by the National Labor Relations Board], a lockout is the withholding of employment by an employer from his employees for the purpose of resisting their demands or gaining a concession from them...." 5/ A thoroughgoing review of arbitration awards on the question "....demonstrated definitely that a lockout in violation of a no lock[out] provision will be found only where the shutdown was offensive, where there was a labor dispute and where the employer attempted thereby to gain some concession from the union whose members were deprived of work." 6/

In the light of those definitional criteria, Complainant's assertion that Respondent's actions herein must have been a lockout because the Local 92 employes were literally met with a locked door and because the action, unlike prior layoffs, affected the entire unit rather than only a portion thereof are found to be without merit. The foregoing definitions make clear that the physical form of the disputed employer action is not, in and of itself, determinative of the existence or nonexistence of a lockout. Rather, it must also be shown, inter alia, that such employer action was taken in the manner of an exercise of economic pressure to gain some concession in favor of Respondent. Complainant bears the burden of proof on that issue. 7/

Complainant essentially urges the Examiner to infer that Respondent's

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5/ Morris, The Developing Labor Law, 539 (BNA, 1971) (referring to the various meanings attributed to the term by the courts and by the National Labor Relations Board, and citing NLRB v. Goodyear Footwear Corp., 186 F. 2d 913, 27 LRRM 2278 [CA 7, 1951]. Accord, Roberts' Dictionary of Industrial Relations, Rev. Ed., 295 (BNA, 1971) at 295 (Lockout... The lockout generally implies the temporary withholding of work, by means of shutting down the operation or plant, from a group of workers in order to bring pressure on them to accept the employer's terms....")

6/ Brown & Williamson Tobacco Corp., 58 LA 733, 739 (Belkin, 1972) and cases cited therein.

7/ The Complainant bears the statutory burden of proof with respect to each element necessary to the proof of his claim that an unfair labor practice has been committed. See, Golden Guernsey Dairy Co-op, 238 Wis. 379 (1941).

actions herein were imposed in an effort to retaliate against Local 92 for its previous refusal to cross IAM picket lines March 11-24, to pressure Local 92 to refrain from future support of IAM strike activities, and to "drive a wedge" into the interunion solidarity historically exhibited between OPEIU, Local 92 and IAM so as to bring additional pressure on IAM to settle its then-pending contract dispute and strike and in order to benefit Respondent in its long run relationships with each of its three unions. 8/

In support of that proposed inference, Complainant notes that Respondent permitted its nonunion personnel (guards and salaried personnel, none of whom had apparently previously honored IAM picket lines) to continue working while Respondent denied work to the Local 92 bargaining unit (which had honored IAM picket lines for a time) and to the only other union-organized group working, the OPEIU bargaining unit.

For the reasons which follow, however, the Examiner concludes that Complainant has not met its burden of proving by a clear and satisfactory preponderance of the evidence 9/ that Respondent imposed the actions at issue herein in an effort to gain concessions from or an economic advantage over Local 92 or IAM. First, there is no evidence of any overt labor dispute in existence between Local 92 and Respondent on March 27 or 28 or at any other material time. Second, there is no evidence that Respondent ever expressly sought a concession from either Local 92 (or from IAM) in return for nonimposition or termination of the denial of work place access to Local 92 employes. Instead, the record indicates that Respondent clothed its oral and written explanations to Local 92 concerning the instant actions in terms of conditions beyond Respondent's control. Third, Respondent presented plant manager, Kenneth Joanis' uncontroverted explanation that the nonunion employes were used to protect and maintain the Respondent's plant and equipment on and after March 28, 10/ and there is no evidence that the

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8/ Complainant's Brief at 7; Transcript at 53.

9/ Section 111.07(3) of WEPA.

10/ Transcript at 45.

nonunion personnel performed normal Local 92 bargaining unit duties at any time March 28-April 10. Finally, the evidence herein suggests that Respondent took the disputed actions defensively and in response to the risk of harm to itself posed by the possibilities of repetition of certain IAM picket line activities and by the adverse impact of the IAM and OPEIU strikes and the IAM refusal to cross OPEIU picket lines on the potential economic value to Respondent of the performance March 28-April 10 of the normal duties of the Local 92 bargaining unit employes. 11/

Expanding on a portion of the final point noted above, the Examiner notes that as a general proposition, a company would risk considerable harm were it to allow units of employes to enter and remain on its premises for the purposes of working in the absence of managerial and supervisory personnel. On March 27 the IAM pickets effectively put Respondent in such an untenable position by preventing managerial and supervisory personnel to drive into Respondent's premises given Respondent's reasonable directive that no such personnel should risk property damage to his car, bodily harm to himself or exacerbation of the dispute (due to bodily contact with a striker) by leaving his car on the highway outside the plant and entering the premises on foot through the pickets. Moreover, Respondent's discussion with Sheriff's personnel and discussion at the Sheriff's office on the morning of March 27 gave Respondent good reason to believe that the IAM pickets would resume their unlawful interference with ingress and egress of managerial and supervisory personnel without meaningful intercession by law enforcement authorities once Respondent again attempted to exercise its right to ship goods or once that right was expressly recognized by the law enforcement authorities. 12/ Furthermore, it is un-

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11/ See, Finding No. 19, above.

12/ From Respondent's indication at the March 27 meeting at the Sheriff's office that it would not refrain from shipping during the IAM strike unless required by law to do so, the IAM could reasonably expect that Respondent would resume efforts to ship once the Sheriff affirmed the legality of its doing so. Respondent reasonably expected that the Sheriff would affirm its right to ship within a short time after said meeting. Therefore, Respondent could reasonably expect that a short time after said meeting, IAM would, in response to such affirmation by the Sheriff, resume interference with vehicular ingress and egress to and from the premises, of supervisory and managerial personnel.

disputed that Respondent had a business-related reason not to discontinue all shipments, to wit, that some of Respondent's customers were so dependent upon Respondent for spare parts for certain of their machinery that they would have to shut down their plants in the event that such parts were not immediately forthcoming from Respondent. 13/

For the foregoing reasons, then, the Examiner concludes that the actions of Respondent complained of herein did not constitute a lockout within the meaning of Agreement Par. 32.

Layoff Without Allegedly Required Notice

Having determined above that the Respondent's actions herein do not constitute a lockout, it remains to be determined whether the Respondent's failure to give five work days' advance notice of such action constituted a violation of the Agreement layoff provisions or whether, instead, the instant circumstances constitute an "emergency" within the meaning of Sec. 49 of the Agreement so as to relieve Respondent of the notice requirement.

The pertinent language of Sec. 49 reads as follows:

> "An employee who is scheduled for layoff and the affected departmental committeeman shall be given a minimum notice of five (5) work days, except in cases of emergency, such as fire, flood or other acts or causes beyond the Company's control."

Two questions must therefore be answered. First, what act(s) and/or cause(s) led Respondent to conclude that its actions at issue herein were necessary? And second, were those act(s) and/or cause(s) beyond the Respondent's control?

The Examiner has found that the events of March 27 14/ in the context of prior IAM picket line activity and of the express position taken by the County Sheriff led Respondent to issue the March 27 layoff notice at issue herein. Other factors such as the impact of the IAM strike on the potential economic value to Respondent of performance of the normal duties of Local 92 bargaining unit employes may also have contributed to the decision to initiate the layoff, 15/ but the

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13/ Transcript at 47.

14/ Those events are analyzed in some detail in the text paragraph ending with note 13, above.

15/ The statement in Respondent's written notice of layoff to the effect that the IAM strike "...leaves the Company in a very difficult position without the production and maintenance work usually done by [IAM] members" (See, Finding No. 15) is consistent with the conclusion stated in the text. See also, Finding No. 19, above.

events of March 27 appear to have been the precipitating cause-- i.e. the straw that broke the camel's back. For prior to its March 27 issuance of said layoff notice, despite the existence of the IAM strike and picketing, Respondent had shipped some product by private automobile, apparently engaged in some "minor assembly operations", [16] urged the Local 92 bargaining unit employes refusing to cross IAM picket lines to return to their duties and allowed the Local 92 bargaining unit to work on March 25, 26 and 27. On and after March 27, as Respondent stated in its layoff notice, such "operations" were "effectively stopped"; Respondent did not ship product on or after March 27 until a tentative settlement was reached with the IAM on March 30, and Respondent did not engage in even minor assembly operations. [17]

The precipitating cause noted above for the initiation of the instant layoff cannot, however, be said to have continued throughout the alleged "emergency" which Respondent alleges existed throughout any period for which notice of layoff would otherwise have been required. For the IAM strike was effectively over when that union reached a tentative contract settlement with Respondent on March 30. There is no evidence, for example, that IAM bargaining unit employes joined in the OPEIU picket lines, but rather only that they refused to cross same. Thus, the record evidence does not support the conclusion that after March 30 there continued to be a significant risk that supervisors would be effectively prevented by pickets from entering Respondent's premises. Although the parties did not focus much of their presentations on post-March 28 conditions, the Examiner has found, based on record evidence, that Respondent continued the instant layoff - i.e. did not recall the Local 92 bargaining unit employes to work immediately after the March 30 settlement or even after the April 2 IAM ratification - because of the adverse impact of the OPEIU strike (which immediately followed the March 30 settlement) and the IAM refusal to cross OPEIU picket lines on the potential economic value to Respondent of performance of normal Local 92 duties during said strike and refusal to cross.

The question remains, were the aforesaid bases for Respondent's initiation of the instant layoff action and for the continuation of said layoff after March 30 and April 2 both of such a nature as to be "acts

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16/ Transcript at 45.

17/ Ibid.

or causes beyond [Respondent's] control" within the meaning of Agreement Par. 49? If so, the instant layoff situation would constitute a "...case of emergency..." within the meaning of that paragraph, relieving Respondent of any obligation to provide five work days advance notice of said layoff to the affected Local 92 employes and committeemen.

Arbitrators interpreting qualified notice requirements similar to the pertinent Agreement Par. 49 language herein have held that a strike among one unit of a company's employes constitutes an emergency [18/] or a reason beyond the control of the company [19/] sufficient to relieve the company of contractual requirements of notice prior to layoff of employes in other bargaining units. Complainant has cited no authorities reaching a contrary conclusion, and the Examiner's independent research has revealed none.

In addition, an analysis of the instant fact situation in the light of the meaning attached to the term "beyond the Company's control" confirms that the result herein should be the same as that reached by the arbitrators referred to above.

An act or cause "beyond the Company's control" has been briefly defined as one "...which could not be reasonably expected and prepared for by the Company." [20/] Another arbitrator expressed the following more detailed considerations:

> "Considered in context 'cause beyond the control of the management' cannot mean all causes over which, regardless of the reason, the Company exercises no control. Rather, and at most, it must mean either a cause not falling within the general area of the Company's responsibilities or, if falling within this area, a cause which could not be anticipated or, if anticipated, could not have been guarded against at all or except by unreasonably burdensome or unrealistic measures. However, if a cause does fall within this area and could have been anticipated and reasonably guarded against, failure to provide such necessary safeguards, either unintentionally or as a calculated risk, would not place the cause beyond the control of the management." [21/]

The Examiner finds the above-noted definitional guidelines appropriate for application herein. [22/]

The prevention by IAM pickets of Respondent's supervisory and managerial personnel from driving vehicles into Respondent's premises for a matter of hours on March 27, in the context of the County Sheriff's

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18/ Owens-Corning Fibreglas Corp., 23 LA 603 (Uible, 1954); American Airlines, Inc., 27 LA 448, 451 (Wolff, 1956).

19/ Burgermeister Brewing Corp., 44 LA 1031, 1032 (Updegraff, 1965)(dictum).

20/ Gould National Batteries, Inc., 42 LA 609, 611 (Linn, 1964).

21/ Chrysler Corp., 21 LA 573, 579 (Wolff, 1953).

22/ See, note 4, above, and accompanying text.

statement to Respondent's representatives that he could not control the activities of the pickets (and therefore could not prevent recurrences of such incidents), is not a matter that should have been reasonably expected or anticipated by Respondent.

Complainant argues, however, that such exigency was within Respondent's control because Respondent could have guarded against the occurrence or continuation of the IAM strike by putting forth a "zealous effort" to settle with the IAM. In essence, however, that amounts to an assertion that Respondent could have readily avoided or coped with the "emergency" by assenting to the demands of the IAM, regardless of their merits. To require an employer to take such a stance at the bargaining table in order to avoid a strike or picket line incidents of the sort involved herein seems unreasonably unrealistic and potentially quite burdensome. Such a response or anticipatory preparation cannot be reasonably expected of Respondent, and so the Complainant's first argument is rejected by the Examiner. 23/

Complainant has also emphasized that Respondent could have avoided or quickly ended such picket line incidents by abstaining from or ceasing its efforts to produce and by agreeing not to ship during the strike. But there is at least some question as to whether these proposed measures would necessarily have brought an end to the interference with the ingress of managerial and supervisory personnel. Although the IAM had indicated at the Sheriff's office that its objective was simply to stop the shipping activity and although there was no ingress interference when Respondent agreed for a time not to ship, the potential for renewed ingress interference would still loom since the activities of the pickets had (as in the case of prior damage to the car of an entering salesman) previously been unexpected and apparently unrelated to a stated limited objective. Moreover, as noted earlier, Respondent had a business-related reason for remaining unwilling to forego all shipping--to wit, the need to retain the means of supplying spare parts needed to permit certain customers to avoid costly shutdowns of their own. Furthermore, to require Respondent to relinquish its rights to ship and produce during a strike in order to avoid interference with ingress to Respondent's premises would seem, in the above-noted circumstances, unreasonably burdensome.

Finally, Complainant has suggested that Respondent could have avoided the absence of managerial and supervisory personnel by permitting

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23/ Arbitrator Wolff expressly rejected the same union argument in his American Airlines opinion, supra, note 18, 27 LA 448 at 451.

them to leave their cars outside Respondent's premises and to walk through the picket line into the plant. In this regard, Complainant notes that the supervisorswho did so on March 27 suffered no harm either to person or property. Notwithstanding that fact, however, and especially in view of the previous damage by the pickets to the salesman's car, Respondent had reason to believe that damage to the automobiles of managerial and supervisory personnel could have resulted from their being parked on the highway outside Respondent's premises. Moreover, especially in view of a pending accusation that someone crossing the picket line earlier in the strike had hit a picket, the Respondent had reason to believe that bodily injury to its personnel and/or exacerbation of picket line animosities or bargaining table disputes could have resulted had it ordered its managerial and supervisory personnel to walk through the picket line on foot. To require Respondent to make such a response would be unreasonably burdensome, as well.

Hence, for the foregoing reasons, the Examiner has concluded that the circumstances existing between March 27 and March 30 constituted a "case of emergency" and that the Respondent's actions complained of herein were initiated and taken during said period as a result of "acts or causes beyond the control of the Company" within the meaning of Agreement Par. 49.

The causes noted above for the continuation of the instant layoff after the March 30 tentative IAM settlement and after the April 2 ratification--to wit the adverse impact of the OPEIU strike and the IAM refusal to cross the OPEIU picket lines on the potential economic value to Respondent of the performance of the normal duties of the Local 92 bargaining unit is also a cause beyond Respondent's control. For even if the OPEIU strike and IAM refusal could reasonably have been anticipated by Respondent, they could have been guarded against, if at all, only by unreasonably burdensome or unrealistic measures. Again, it would be unrealistic and potentially unreasonably burdensome to require Respondent to assent to the bargaining demands of another union, in this instance the OPEIU, regardless of merit, in order to expedite the return of the Local 92 bargaining unit employes to their work. [24/] In addition, to require Respondent to call back all or part of the Local 92 bargaining unit after March 30 would have required Respondent either to permit Local 92 bargaining unit employes to perform their normal duties with

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24/ See, note 23, above.

respect to existing or prospective customer product orders (some or all of which could have become worthless to Respondent in the event of prolongation of the OPEIU strike and the IAM refusal to cross OPEIU picket lines 25/) or to find or make work for such employes outside their normal duties. Both of those alternatives appear unreasonably burdensome in view of facts that the OPEIU strike and IAM refusal to cross OPEIU picket lines were presumably of uncertain duration and that, unlike the period prior to March 28, any normal Local 92 duties performed would have been performed in the absence of OPEIU and the IAM bargaining units with both of which units the Local 92 normal duties are integrally related. 26/ It might also be noted in this regard that there is no evidence that any Local 92 bargaining unit work was performed by others during the layoff. 27/

Hence, for the foregoing reasons, the Examiner has concluded that the circumstances existing after the IAM tentative agreement on March 30 and after the IAM ratification on April 2 and in existence until at least April 9 constituted a "case of emergency" and that the layoff action complained of herein was continued by Respondent during said period as a result of "acts or causes beyond the control of the Company" within the meaning of Agreement Par. 49.

Since the layoff complained of herein was initiated and continued throughout the period March 27 through at least April 9 for reasons beyond Respondent's control, Respondent's failure to give five work days notice of the initiation or continuation of said layoff did not violate the Agreement.

CONCLUSION

Since it has been concluded herein that Respondent neither committed a lockout in violation of Agreement Par. 32 nor a violation of Agreement Pars. 46-49 by reason of the conduct alleged in the instant complaint, the Examiner has concluded that Respondent has not been shown herein to have committed an unfair labor practice in violation of WEPA, and the complaint has, for that reason, been dismissed.

Dated at Milwaukee, Wisconsin, this 21st day of October, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz, Examiner

25/ See, Finding No. 19, above.

26/ Ibid.

27/ Two Local 92 employes testified that after the layoff they completed the projects they had been working on before the layoff. Transcript at 11, 13, 23 and 28.