STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN AND HELPERS LOCAL NO. 199, Complainant, vs. GATEWAY FOODS, INC., Respondent.	Case VIII No. 18523 Ce-1572 Decision No. 13188-A

Appearances:
Chojnacki & Chojnacki, Attorneys at Law, by Mr. Leonard R. Chojnacki, appearing on behalf of the Complainant.
Steele, Smyth, Klos & Flynn-Chartered, Attorneys at Law, by Mr. Francis D. Papenfuss, making a special appearance on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Chauffeurs, Teamsters, Warehousemen and Helpers, Local 199, having filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging that Gateway Foods, Inc. has committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Commission having appointed Sherwood Malamud, a member of its staff, to act as Examiner and rake and issue Findings of Fact, Conclusions of Law and Orders pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at LaCrosse, Wisconsin on December 20, 1974; and the Examiner having considered the evidence, arguments and briefs of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Chauffeurs, Teamsters, Warehousemen and Helpers, Local No. 199, hereinafter the Union or Complainant, is a labor organization and is the collective bargaining representative of employes employed as packers and general haulers of merchandise by Gateway Foods, Inc.

2. That Gateway Foods, Inc., hereinafter the Respondent, is a corporation engaged in the warehousing and distribution of foodstuffs and sundry items in several states including the State of Wisconsin; that Respondent maintains an office at I.G.A. Court, LaCrosse, Wisconsin, and is an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes; that Respondent is engaged in a business affecting commerce within the meaning of the Labor Management Relations Act, as amended, (LMRA), and Respondent's volume of business is within the jurisdictional standards established by the National Labor Relations Board pursuant to Section 14(c)(1) of the LMRA, as amended.

3. That at all times material hereto, Complainant and Respondent were signators to a collective bargaining agreement effective from May 1, 1972 through April 30, 1975, covering wages, hours and other conditions of employment of packers and general haulers of merchandise in Respondent's employ, and that said agreement contains the following provisions pertinent hereto:

PREAMBLE

"THIS AGREEMENT entered into this 1st day of May, 1972, by and between Gateway Foods, Inc., La Crosse, Wisconsin, hereinafter referred to as 'Employer,' party of the first part, and TEAMSTERS LOCAL UNION NO. 199 of La Crosse, Wisconsin, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, hereinafter referred to as the 'Union,' party of the second part:

The parties subscribing to this agreement desiring to prevent strikes and lockouts, to maintain a uniform minimum scale of wages, working hours, and conditions of employment among the members of the Union and the Corporation hiring and employing persons as packers and general haulers of merchandise, and to facilitate peaceful adjustment of all grievances and disputes which may arise from time to time between the employer and the employee, have entered into this agreement,

WHEREIN IT IS MUTUALLY AGREED AS FOLLOWS:

. . .

ARTICLE XII

Grievance Procedure - Arbitration

There shall be a shop steward appointed, and in case of any grievance, the shop steward shall try to settle same with the foreman or superintendent, and if he is unable to settle same, he shall then refer the grievance to the Executive Board of the Local Union or authorized Business Agent. However, if the authorized Business Agent or Executive Board and the Company are unable to effect a settlement, either party may request the services of the Wisconsin Employment Relations Commission, whose decision shall be final and binding."

4. That on June 28, 1974, Complainant filed a grievance with Respondent, hereinafter the product-transfer grievance, which in material part provides as follows:

"CONTRACT ARTICLES VIOLATED Preamble of Contract
COMPLAINT IN DETAIL Company moved Health & Beauty Aids to another Location & Building in LaCrosse and are not using Teamster members to do the work as we have done in the past.
UNION POSITION IN DETAIL Contention of Union Company, give this work to the Teamsters Members of Gateway Foods."

5. That on October 30, 1974, or sometime prior thereto, Complainant demanded of Respondent, and Respondent agreed, to submit said grievance to an arbitrator appointed from the staff of the Wisconsin Employment Relations Commission for a final and binding determination of the dispute; and that pursuant to the agreement of Complainant and Respondent to arbitrate the product-transfer grievance, hearing was set in the matter for November 19, 1974, before the Arbitrator appointed by the Commission, Mr. Donald B. Lee.

6. That on November 19, 1974, just prior to the commencement of said hearing, Respondent refused to proceed with the hearing on said grievance.

7. That the dispute between Complainant and Respondent concerns the assignment of certain duties to non-unit employes, and it arises out of a claim, which on its face, is covered by the terms of the collective bargaining agreement existing between the parties.

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

CONCLUSION OF LAW

That the dispute between Complainant, Chauffeurs, Teamsters, Warehousemen and Helpers, Local 199 and Respondent, Gateway Foods, Inc., concerning the transfer of certain products warehousedby Respondent to another facility and Respondent's employment of employes who are not members of Complainant to handle said products, arises out of a claim which, on its face, is governed by the terms of the parties' collective bargaining agreement; and that Gateway Foods, Inc., by its refusal to proceed to arbitration on the product-transfer grievance is violating the terms of said agreement and has thereby committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that Gateway Foods, Inc., its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the product-transfer grievance to arbitration.

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

   (a) Comply with the arbitration provisions of the May 1, 1972 - April 30, 1975 collective bargaining agreement existing between the parties.

   (b) Notify Chauffeurs, Teamsters, Warehousemen and Helpers, Local 199, that it will proceed to arbitration on the product-transfer grievance and on all issues related thereto before the arbitrator so appointed.

   (c) Participate in the arbitration proceeding on the product-transfer grievance and on all issues related thereto before the arbitrator so appointed.

   (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the date of this Order what action has been taken to comply herewith.

Dated at Madison, Wisconsin this 17th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Introduction

Complainant alleges that by refusing to proceed with the arbitration hearing on the product-transfer grievance, Respondent violated the May 1, 1972 through April 30, 1975 collective bargaining agreement.

Respondent made a special appearance at the hearing by its counsel Francis D. Papenfuss. Mr. Papenfuss was present at the hearing, and the Examiner afforded him every opportunity to present his own witnesses, to cross-examine Complainant's witnesses, to voice objections, and make opening and closing statements during the course of the hearing which Mr. Papenfuss declined on the grounds that he wished to limit his participation in the hearing to his special appearance. However, Mr. Papenfuss filed a brief and supplemental brief in support of Respondent's presence at the hearing by special appearance. 1/ Respondent maintains that the product-transfer grievance raises representation issues which must be determined by the National Labor Relations Board. On that basis, Respondent argues that this grievance is not arbitrable and that the Wisconsin Employment Relations Commission is without jurisdiction to determine the arbitrability of said grievance.

Jurisdiction

Respondent raises the threshold issue whether the Commission may properly assert its jurisdiction in this matter. Complainant alleges that Respondent violated Section 111.06(1)(f) of the Wisconsin Statutes which makes it an unfair labor practice for an employer to breach the terms of a collective bargaining agreement. Pursuant to Section 301 of the Labor Management Relations Act, as amended, both federal courts and state tribunals have concurrent jurisdiction to enforce the terms of collective bargaining agreements. 2/ The Commission is an appropriate state tribunal empowered under the Wisconsin Employment Peace Act to determine whether an employer has violated the terms of the collective bargaining agreement and it may assert its jurisdiction over employers "in commerce" to enforce the terms of a collective bargaining agreement between an employer and an appropriate collective bargaining representative. 3/ However, when the Commission asserts its jurisdiction over commerce employers it must apply federal substantive law, in those instances. 4/

1/ Respondent, in its brief and supplemental brief, made various assertions of fact which were not in the transcript of the hearing: therefore, said assertions of fact were not considered by the Examiner in the Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum.

2/ Textile Workers Union vs. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957); Charles Dowd Box Co., vs. Courtney, 368, U.S. 502, 49 LRRM 2619 (1962).

3/ Seaman-Andwall Corp., (5910) 1/62; Tecumseh Products Co., (5963) 4/62, aff'd. subnom. Tecumseh Products Co. vs. WERB 23 Wis 2d 118 (1964); American Motors Corp. vs. WERB 32 Wis 2d 237 (1966).

4/ Local 164, Teamsters vs. Lucas Flour, 369 U.S. 95, 49 LRRM 2917 (1962).

Federal substantive law for the enforcement of arbitration provisions contained in collective bargaining agreements was established in the Steelworkers Trilogy; 5/ the function of a 301 tribunal in determining such cases was stated by Justice Douglas in his opinion written for the majority of the U.S. Supreme Court in American Manufacturing Co., supra, at p. 2415:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpreation for the arbitrator."

In Warrior and Gulf Navigation Co., supra, at p. 2419, Justice Douglas continued his explication of the judicial role in enforcing arbitration provisions when he noted that:

> "The Congress, however, has by ss. 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under ss. 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." (Emphasis added)

Here, Complainant maintains that the Preamble of the agreement requires that the work transferred to another facility be assigned to unit employes. Although the grievance procedure contained in the 1972-75 agreement does not contain a specific definition of a grievance it does provide that any grievance may be processed under the procedure established by Article XII of the agreement, a procedure which concludes with final and binding arbitration. Thus, the grievance states a claim which, on its face, is governed by the collective bargaining agreement.

Respondent contends that the grievance raises representation issues which may only be resolved by the National Labor Relations Board. Assuming, arguendo, that the product-transfer grievance raises certain representation issues, other issues which arise solely from the collective bargaining agreement are raised as well. Had the National Labor Relations Board taken jurisdiction of this case and made a determination under its unit clarification procedure or should it do so in the future, its determination would take precedence over an arbitrator's award. 6/ However, there is no evidence anywhere in the record before the Examiner that either party has petitioned the NLRB to clarify the unit.

5/ The following three cases comprise what is commonly known as the Steelworkers Trilogy: Steelworkers vs. American Mfg. Co., 46 LRRM 2415 (1960); Steelworkers vs. Warrior & Gulf Navigation Co., 46 LRRM 2416 (1960); Steelworkers vs. Enterprise Wheel and Car Corp., 46 LRRM 2423 (1960).

6/ Teamsters Local 542 vs. Ace Enterprises 332 F. Supp. 36 (D.C. Calif.) 77 LRRM 3009 (1971).

Therefore, the question squarely before the Examiner is whether Respondent may be required to arbitrate a grievance which may contain representation issues over which the NLRB may have probable jurisdiction.

In Carey vs. Westinghouse, 375 U.S. 261, 55 LRRM 2042, 2045 (1964), the principle case in this area, the Supreme Court considered the question whether arbitration could be pursued as an alternate remedy to the NLRB unit clarification procedure. Mr. Justice Douglas writing for a majority of the court provided the Supreme Court's answer as follows:

> "If this is truly a representation case, either IUE or Westinghouse can move to have the certificate clarified. But the existence of a remedy before the Board for an unfair practice does not bar individual employees from seeking damages for breach of a collective bargaining agreement in a state court, as we held in Smith v. Evening News Assn., 371 U.S. 195, 51 LRRM 2646. We think the same policy considerations are applicable here; and that a suit either in the federal courts, as provided by ss. 301 (a) of the Labor Management Relations Act of 1947 (61 Stat. 156, 29 U.S.C. ss 185 (a); Textile Workers v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113, 2120), or before such state tribunals as are authorized to act (Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 49 LRRM 2619; Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 49 LRRM 2717) is proper, even though an alternative remedy before the Board is available, which, if invoked by the employer, will protect him."

Mr. Justice Douglas stated the rationale for the above policy as follows:

> "By allowing the dispute to go to arbitration its fragmentation is avoided to a substantial extent; and those conciliatory measures which Congress deemed vital to 'industrial peace' (Textile Workers v. Lincoln Mills, supra, at 455) and which may be dispositive of the entire dispute, are encouraged. The superior authority of the Board may be invoked at anytime. Meanwhile the therapy of arbitration is brought to bear in a complicated and troubled area." Carey vs. Westinghouse, supra, at p. 2047.

Based on the above, the Examiner has concluded that the Commission may properly assert its jurisdiction in this case and that federal substantive law dictates that Respondent proceed to arbitration on the product-transfer grievance and all issues related thereto.

Dated at Madison, Wisconsin this 17th day of April, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner