STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LODGE 34,<br><br>Complainant,<br><br>vs.<br><br>G & H PRODUCTS, INC.,<br><br>Respondent. | Case IV<br>No. 18596 Ce-1576<br>Decision No. 13225-A |

Appearances:
Mr. Gerhard Roemer, Business Representative, appearing on behalf of the Complainant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. John C. Coughlin, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practice having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Orders 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 January 27, 1975 before the Examiner; and both parties having executed a waiver of compliance with Sec. 227.12 of the Wisconsin Statutes for the purposes of the above-entitled matter; and the Examiner having considered the evidence and 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 International Association of Machinists and Aerospace Workers, Lodge 34, referred to herein as Complainant, is a labor organization with offices at 1010 - 56th Street, Kenosha, Wisconsin 53140.

2. That G & H Products, Inc., referred to herein as Respondent, is an employer with offices at 5718 - 52nd Street, Kenosha, Wisconsin 53140.

3. That Complainant and Respondent were parties to a collective

bargaining agreement effective from July 1, 1971 until July 1, 1974, referred to herein as the 1971-74 Agreement; and that the 1971-74 Agreement provided, in pertinent part, as follows:

". . .

AGREEMENT

. . .

PURPOSE AND SCOPE OF THE AGREEMENT

Para. 1. It is the intent and purpose of the parties hereto to set forth herein the basic Agreement covering rates of pay, wages, hours of employment and conditions of employment to be observed in good faith between the parties hereto and to provide procedure for the equitable and peaceful settlement of differences, alleged grievances or disputes which may arise between the Company and its employees or the Union.

. . .

DISCIPLINARY ACTION PROCEDURE

. . .

Para. 15. Should the employee or his steward consider the action to be improper, a written protest may be presented to the Plant Manager within two (2) working days after the time of such action. Such protest will be handled in accordance with the Grievance Procedure herein. If in such review it is determined that the Company's disciplinary action was unjustified, the disciplined employee shall be reinstated to his former position on the seniority list, and shall be paid his regular rate of compensation for the time he was out of the employment of the Company as a result of such discipline. Failing to file a written protest within ten (10) working days, the employee forfeits all rights under this Paragraph. If not filed in two (2) working days, the employee forfeits all rights to retroactive pay.

. . .

GRIEVANCE PROCEDURE

Para. 21. For the purpose of this Agreement, the term 'grievance' means a dispute between an employee and the Company or the Union and the Company concerning a claim of breach or violation of the provisions of this agreement.

Para. 22. Any such grievance shall be settled in accordance with the following procedure:

Step 1. . . . .

. . .

Step 5. Arbitration

(a) The grievance shall be considered settled in Step 4 unless within ten (10) days after the meeting, either party requests that the grievance be submitted to an impartial umpire. . . .

. . .

(c) The function and jurisdiction of the impartial umpire shall be fixed and limited by this agreement. . . . He shall have jurisdiction only to determine issues based upon interpretation or application of this agreement. . . .

(d) The written decision of the impartial umpire, in conformity with his jurisdiction, shall be binding upon both parties during the term of this agreement, but shall not constitute a binding precedent in connection with negotiations for a new agreement.

. . ."

4. That on or about February 12, 1974, Respondent discharged one Stanley Berezinski, an employe covered by the 1971-74 Agreement; that a grievance challenging said discharge was filed and processed without agreement being reached with respect thereto; that thereafter, the parties selected Neil Gundermann as impartial umpire and submitted to him the following Stipulated Issue:

> "Was the grievant, Stanley Berezinski, discharged for just cause in accordance with the provisions of the agreement and the plant rules?";

that in said arbitration proceeding, the Complainant requested that Impartial Arbitrator Gundermann ". . . reinstate the grievant and make him whole for any loss in wages which he may have suffered as well as make the grievant whole for any surgical, medical or hospital expenses which he may have incurred during the period of his discharge"; and that following a hearing and the submission of briefs, Impartial Umpire Gundermann issued his written Award in said matter on August 21, 1974; that said Award concluded as follows:

"AWARD

1. That the grievant was not discharged for just cause.

2. The Company is ordered to reinstate the grievant in accordance with Paragraph 15 of the Collective Bargaining Agreement."

5. That following the issuance of said Award, Respondent reinstated Berezinski and paid him back pay computed on his base rate

(i.e., day rate not including incentive pay) plus Cost of Living Allowance for the time he was out of the employment of the Respondent as a result of said discharge.

6. That Respondent contends that the mode of back pay computation noted in Finding No. 5 above yields the ". . . regular rate of compensation . . ." called for in Paragraph 15 of the 1971-74 Agreement.

7. That Complainant contends that the mode of back pay computation noted in Finding No. 5 above yields less than that to which Berezinski is entitled; that Complainant further contends that Berezinski's back pay must properly be computed based on his average hourly earnings (over the eight weeks preceding the discharge, including incentive pay) plus Cost of Living Allowance.

8. That Respondent has refused and continues to refuse to pay to said Berezinski back pay in excess of that noted in Finding No. 5 above.

9. That Complainant and Respondent have a legitimate dispute about the mode of computation of back pay ordered by Impartial Umpire Gundermann in his aforesaid Award.

Based upon the foregoing Findings of Fact, the Examiner issues the following

## CONCLUSIONS OF LAW

1. That inasmuch as Impartial Umpire Neil Gundermann's Award dated August 21, 1974 has generated a legitimate dispute between the parties thereto concerning the mode of back pay computation required thereby, said Award is not a definite award as contemplated in Sec. 298.10(1) of the Wisconsin Statutes.

2. That there is, therefore, no basis on which to conclude herein that Respondent, by refusing to pay additional back pay to Stanley Berezinski as noted in Finding No. 8 above, violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

## ORDER

That the Arbitration proceeding referred to above shall be, and the same hereby is, remanded to Impartial Umpire Neil Gundermann for further proceedings for the purpose of issuing a definite award concerning the amount of back pay to be paid by Respondent to grievant

Stanley Berezinski in connection with the reinstatement ordered in the Award of said Impartial Umpire Gundermann dated August 21, 1974.

Dated at Milwaukee, Wisconsin, this 22nd day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges that the Respondent has failed and refused to fully comply with Impartial Umpire Gundermann's Arbitration Award insofar as the amount of back pay owing to grievant Berezinski is concerned. Complainant further alleges that such failure and refusal violate the Respondent's agreement with Complainant to accept as binding the decision of an impartial umpire appointed under Paragraph 22 of the parties' 1971-74 Agreement. Such a violation, if proven, would constitute a violation of a collective bargaining agreement in contravention of Sec. 111.06(1)(f) of WEPA. [1/]

It is clear that Respondent has refused and continues to refuse to pay Berezinski the additional amount of back pay demanded by Complainant. Respondent denies that it has committed an unfair labor practice by so doing, however, contending that the Award in question is unenforceable in its present form due to its indefinite and ambiguous provisions with respect to the mode of back pay computation ordered. Respondent therefore requests that the Complaint be dismissed and that, if necessary, the disputed Award be remanded to Impartial Umpire Gundermann in order that it be made to comply with the definiteness standard set forth in Sec. 298.10(1)(d).

The 1971-74 Agreement is apparently a collective bargaining agreement ". . . covering employes in an industry affecting commerce . . ." within the meaning of Sec. 301 of the Labor-Management Relations Act (LMRA).[2/] State tribunals have concurrent jurisdiction with the

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[1/] "What are unfair labor practices.

(1) 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)."

[2/] 61 Stat. 156 (1947), 29 U.S.C. 185 (1958). That the instant dispute involves employes in an industry affecting commerce is strongly suggested by the fact that the recognition clause, Paragraph 3, of the 1971-74 Agreement states that Complainant was certified by the National Labor Relations Board. Moreover, Paragraph 2 of that Agreement makes reference to the LMRA in defining the term "employees" as used in that Agreement.

federal courts for purposes of enforcing such agreements, [3] and it has been held that the WERC is a competent state tribunal for that purpose. [4] In enforcing such agreements, however, the Commission's policy must be consistent with the federal case law developed under Sec. 301. [5]

In determining whether an arbitration award issued pursuant to a collective bargaining agreement warrants enforcement, the Commission's policy, which is consistent with Sec. 301 federal case law, [6] is to apply the statutory standards warranting vacation of an arbitration award by the courts of Wisconsin. [7] Those statutory standards are set forth in Sec. 298.10(1) of the Wisconsin Statutes and include, inter alia, Subsec. (d) which warrants a court's vacating an award:

> "Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made. [emphasis added]"

Thus, if the award in question is indefinite [8] as to the remedial actions ordered, it cannot be concluded that Respondent has violated Sec. 111.06(1)(f) by failing and refusing to comply therewith.

The Award in question herein orders Respondent "to reinstate the grievant in accordance with Paragraph 15 of the Collective Bargaining Agreement". With regard to back pay, Paragraph 15 of the 1971-74 Agreement requires that a grievant ". . . shall be paid his regular rate of compensation . . ." for the time he was out of the employment of the Respondent as a result of his improper discipline. The refusal by Respondent (to pay additional back pay to Berezinski) giving rise to the instant Complaint reflects a dispute between the parties about the ". . . interpretation and application . . ." of the above-quoted provision of the 1971-74 Agreement. In Paragraphs 1, 21 and 22 of that

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[3] Dowd Box v. Courtney, 368 U.S. 502, 49 LRRM 2619 (1962).

[4] Tecumseh Products Co. v. WERB, 23 Wis. 2d 118, 55 LRRM 2732 (1963).

[5] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957).

[6] Research Products Corp., Dec. No. 10223-A, aff'd by WERC, Dec. No. 10223-B (1/72).

[7] E.g., H. Froebel & Son, Dec. No. 7804 (11/66); Research Products Corp., supra, note 6.

[8] cf. Mercury Oil Refining Co. v. Oil Workers Int'l Union, CIO, 187 F. 2d 980, 982, 16 LA 129 (CA 10, 1951) wherein the degree of definiteness required was defined as follows: "[t]he award . . . must be sufficiently definite that only ministerial acts of the parties are needed to carry it into effect.

Agreement, the parties have agreed that such disputes shall be ultimately resolved by arbitration.

A general preference for resolution of such disputes by agreed-upon arbitration procedures has been expressed in the case law developed by the federal courts under LMRA Sec. 301 [9] and by the Commission. [10] Following that general principle, the federal courts have held that where a labor arbitration award, albeit final, appears to the court to have generated a collateral dispute concerning the meaning of its essential terms, "[i]t is not within the province of [the] Court to intrude into the arbitration procedure and interpose its interpretations of a disputed award on the parties to a collective bargaining agreement." [11] It has similarly been held that ". . . ambiguities and uncertainties of labor arbitration awards should not be resolved by the court acting as interpreter. Rather the approach is to resubmit the award to its author for clarification." [12] The federal courts have applied that approach where ". . . there is room for question in the award of the arbitrators as to what they fully intended" [13] and where "[t]here exists a legitimate disagreement regarding the scope and effect of [the] Award . . .". [14]

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[9] See the "Steelworkers Trilogy": United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

[10] See, e.g., Seaman-Andwall Corp., Dec. No. 5910 (1/62).

[11] Transport Workers Union of Philadelphia, Local No. 234 v. Philadelphia Transportation Co., 228 F. Supp. 423, 55 LRRM 3014 (E.D. Pa., 1964); accord, Enterprise Wheel & Car Corp. v. United Steelworkers of America, 269 F. 2d 327, 44 LRRM 2349 (CA 4, 1959) approved in this regard 363 U.S. 593, 46 LRRM 2423 (1960); IAM v. Crown Cork and Seal Co., Inc. 300 F. 2d 127 49 LRRM 3042 (CA 3, 1962).

[12] Hanford Atomic Metal Trades Council, AFL-CIO v. General Electric Co., 353 F. 2d 302, 61 LRRM 2004 (CA 9, 1965); but see, IAM Lodge 917 v. Air Products and Chemicals, Inc., 341 F. Supp. 874, 80 LRRM 3204 (E.D. Pa., 1972) (court found award sufficiently definite to warrant enforcement but then proceeded to interpret same in fashioning enforcement remedy).

[13] Hanford, supra, note 12.

[14] Transport Workers, supra, note 11.

The Examiner has found, upon review of the entire record, [15] that the instant parties have a legitimate disagreement regarding the scope and effect of the Award involved herein. Neither of the respective interpretations of the term "regular rate of compensation" urged by the parties can be characterized as frivolous. Complainant contends that the above-quoted term is neither indefinite nor ambiguous; that the mode of back pay computation contemplated thereunder has been precisely defined by the mode of payment agreed upon between the parties with respect to a prior back pay award issued under language identical to Paragraph 15; that Respondent has never expressed or otherwise indicated a desire to change that precedent; and that the mode of back pay computation demanded herein is the same as was adopted by the parties in said previous case. Respondent contends that the mode of computation in the previous case cited by Complainant was erroneous, nonbinding and contrary to the true and intended meaning of the term ". . . regular rate of compensation . . ." that is derived when that term is interpreted in the context of several other provisions of the 1971-74 Agreement.

The Complainant has essentially requested that the enforcement forum (i.e., the WERC) resolve the above dispute and resolve it in Complainant's favor. The Examiner, however, declines to interpose any resolution of that dispute and has, instead, ordered the matter remanded to Impartial Umpire Gundermann for resolution of the parties' dispute as to the scope and effect of his Award. While it is true that such remand will delay the ultimate resolution of said dispute, such remedy gives effect to the parties' agreement to arbitrate disputes concerning the interpretation and application of provisions of

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[15] At the hearing, Respondent objected to the materiality of Complainant's offer of evidence concerning the details of and circumstances surrounding payment of back pay to a grievant pursuant to a prior arbitration award. Specifically, such evidence constituted the prior award, the 1968-71 agreement pursuant to which said Award was issued, a letter from the Union to the Company outlining the Union's proposed computation of the back pay owing to the grievant involved, that grievant's certification of receipt of an amount of back pay from the Company and the testimony of Union Business Representative Gerhard Roemer concerning said payment. The Examiner reserved ruling on Respondent's objections.

The Examiner is satisfied that said documents and testimony are relevant and material to the issues herein since they tend to show whether the parties have a legitimate dispute concerning the scope and effect of the instant Award. Such evidence has, therefore, been received into the record and considered by the Examiner in issuing the instant decision.

their 1971-74 Agreement. Moreover, the remedy ordered herein is consistent with the approach adopted in similar cases by the federal courts under LMRA Sec. 301 [16/] and by the Commission. [17/]

Dates at Milwaukee, Wisconsin, this 22nd day of May, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

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16/ See, cases cited in notes 11 and 12, supra.

17/ See, City of Neenah, Dec. No. 10716-B (10/72).