STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL # 336 Complainant, vs. LADISH CO., TRI-CLOVER DIVISION Respondent.	Case XXXIV No. 18600 Ce-1577 Decision No. 13226-A

Appearances:
Mr. Michael C. Walker, representative, for the Complainant.
Quarles & Brady, Attorneys at Law, by Mr. Elwin J. Zarwell, for the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission by Office & Professional Employees International Union Local #336, herein referred to as Complainant, on December 16, 1974, wherein it alleged that Ladish Co., Tri-Clover Division, herein referred to as Respondent, had committed violations of Section 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Commission having appointed Stanley H. Michelstetter II as Examiner to make and issue findings of fact, conclusions of law, and orders in the matter as provided in Section 111.07(5) thereof; and hearing having been held before the Examiner on January 30, 1975 at Kenosha, Wisconsin; and Respondent having filed its brief on March 27, 1975; and Complainant having filed its brief on April 4, 1975; and the Examiner having considered the evidence and arguments of Counsel, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant Office & Professional Employees International Union, Local No. 336 is a labor organization; and that International Association of Machinists and Aerospace Workers Lodge #34, herein referred to as IAM and American Federation of Technical Engineers, Local 92, herein referred to as AFTE are also labor organizations.

2. That Respondent Ladish Co., Tri-Clover Division is an employer with offices and plant at 9201 Wilmot Road, Kenosha, Wisconsin; that Respondent is a subsidiary of Ladish Company with its headquarters at Cudahy, Wisconsin; that Respondent is engaged in the business of producing stainless steel sanitary fittings for food service equipment; that at all relevant times Respondent recognized Complainant as the exclusive collective bargaining representative of certain of its office and plant clerical employes; and that they were party to a collective bargaining agreement executed March 30, 1971 by G.C. Bitters, K.A. Joanis, J.J. Scheibl and F.S. Russ, Jr. for the term April 1, 1971 to March 31, 1974 with the following provisions:

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. . .

ARTICLE VI. WORK SCHEDULE

. . .

2. The regular daily starting and quitting time of employees covered by this contract shall continue in effect except as may be required because of emergency conditions. Any contemplated change in the starting or quitting times of employees covered by this contract will be discussed with the Union before being made effective.

. . .

8. All scheduled overtime will be posted 24 hours in advance of the start of the scheduled overtime. However, employees may be requested to work overtime on a voluntary basis with shorter notice.

. . .

ARTICLE VIII. VACATIONS

. . .

8. Every effort will be made to notify employees of the vacation period by April 1st of the vacation year.

. . .

9. Taking a vacation shall be mandatory and employees shall not receive vacation pay in lieu of a vacation, except in cases of emergency mutually agreed upon by the Company and the Union. In the event an employee is sick or off work because of an industrial injury 2,4,6,8 weeks, he may waive one week of vacation time off for each two weeks of consecutive disability. In order to exercise this right, the employee must notify the Company in writing of his election by November 1st. There shall be no carry over with the cut off date being December 31st of each year.

. . .

ARTICLE XIII. LAYOFFS AND RECALL

. . .

2. When any layoff or return to work is in accordance with straight unit seniority, the Company shall notify the Union not less than seventy-two (72) hours before such layoff or return to work is to be effected. In the event of a slowdown in business to the extent that reduction in hours

becomes necessary, the Union shall be given twenty-four (24) hour prior notice in case of reduction in hours. Any grievance involving a layoff or return to work shall be submitted to the Company in writing no later than five (5) working days after the Company has given due notice of this fact. No layoffs or return to work not in accordance with straight unit seniority within his area shall be effected unless mutually approved by the Bargaining Committee of the Union and the Company.

. . .

ARTICLE XIV. DISCIPLINE AND DISCHARGE

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2. The Company agrees to notify the Union before any employee is discharged under the provisions of this article and if this is not possible, the company agrees to notify the Union immediately thereafter.

. . .

ARTICLE XVI. GENERAL WORKING CONDITIONS

4. Managerial employees shall not, so long as they continue to have such status, perform the work of employees covered by this contract if by so doing an employee of the appropriate unit would suffer loss of any working time. However, the Managerial employees may, in case of emergency, temporarily perform the work of an employee of the appropriate unit.

. . . . "

That employes represented by Complainant normally process orders placed and cancelled for the goods produced by the unit represented by IAM and other related clerical work under the direct supervision of non-unit supervisory personnel.

3. That at all relevant times Respondent recognized AFTE as the exclusive collective bargaining representative of certain of its technical employes and that they were party to a collective bargaining agreement executed on Respondent's behalf on May 17, 1963 by K.A. Joanis, Elmer Lassen, James Scheibl, Frank Russ, G.C. Bitters, John Foley and T.W. Whitmer effective May 23, 1971 to September 29, 1974 with the following relevant provisions:

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. . .

Article VI
Senority

. . .

49. 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 relevant times Respondent recognized IAM as the exclusive collective bargaining representative of certain of its pro-

duction and maintenance employes and that they were party to a collective bargaining agreement executed March 9, 1971 on behalf of Respondent by G.C. Bitters, K.A. Joanis, Paul Thornton, Elmer Lassen, James Scheibl, Frank Russ, Jr. effective February 28, 1971 through February 24, 1974 which provides in relevant part:

"

. . .

ARTICLE IX. LAYOFF, RECALL AND TRANSFER

. . .

25. When and before any employee may be laid off out of plant, that employee and the Committee Chairman shall be notified in writing at least forty-eight (48) hours prior to the effective date of such layoff.

. . . . "

5. That IAM commenced a strike against Respondent on March 10, 1974 during which no IAM unit members worked at Respondent's plant and during which ordinarily IAM maintained two to four pickets at each of Respondent's four driveway exits, but did not interfere with pedestrian or vehicular ingress or egress over the remainder of Respondent's ninety-three acre tract.

6. That Respondent's employes ordinarily use parking lots on its premises; that prior to March 26, 1974, Respondent directed its supervisory and managerial employes to remain in their automobiles while attempting to cross IAM's picket line in either direction and that if it was impossible to do so to return to their point of origin.

7. That on March 25 and March 26, 1974 all employes represented by AFTE and by Complainant other than those on leave performed their assigned duties.

8. That at all relevant times on March 26 and 27, 1974, there were approximately fifteen to twenty IAM pickets at each of Respondent's four gates; that on the afternoon and evening of March 26 IAM's pickets damaged a salesman's automobile, accused a supervisor of having driven his automobile into some of the pickets and refused to permit Respondent's supervisors to leave its premises unless they permitted pickets to search their automobiles to establish whether or not they were carrying packages for shipment; that thereupon Kenosha County Sherriff's deputies were called to escort supervisors across the picket line.

9. That commencing at or before 6:30 a.m. and continuing until 9:30 a.m., all on that date, IAM pickets prevented Respondent's supervisory and managerial personnel from entering Respondent's premises by automobile at those entrances, but permitted all employes represented by AFTE and Complainant to enter thereby; that during that period one

supervisor drove his Jeep over Respondent's back field and another walked through an area where there were no pickets; that all other supervisors and managers remained in their automobiles outside the picket line or returned to their homes.

10. That at 7:30 a.m. until approximately 8:00 a.m., Respondent's representatives and IAM's representatives met at IAM's request at the offices of the Kenosha County Sherriff during the course of which IAM took the position that Respondent was violating the law by making shipments from its plant and that violence on the picket line would continue as long as Respondent continued to do so; that Respondent stated that it would stop shipping if and only if it was illegal to do so; that IAM and Respondent agreed that there would be no shipments until the Kenosha County Corporation Counsel, at their request determined whether such shipping was legal; that IAM's representatives told Respondent that its managerial and supervisory personnel would be permitted to cross its picket line on that morning; that during the course of that meeting Kenosha County Sherriff's representatives told Respondent that his deputies had reported seeing two pickets with side arms and that the Kenosha County Sherriff's Department did not have sufficient manpower to protect Respondent's plant or enforce the law if there was mob violence; that thereafter Respondent did not make shipments until at least March 31, 1974; that neither the Kenosha County Corporation Counsel or any other public official ever communicated any response to the aforementioned question posed by Respondent and IAM; that at no time after 9:30 a.m. March 27, 1974 did IAM pickets interfere with access to Respondent's premises.

11. That, thereafter, Respondent's Kenosha plant management reported its situation to Ladish Co. top management in Cudahy, Wisconsin during which said top management directed said plant management to lay off the Local No. 92 and Complainant's 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 Complainant.

12. That Respondent's agent Kenneth Joanis who took part in the conversation with Cudahy office management personnel described in Finding of Fact 11 above testified as to the following reasons for the decision to lay off personnel represented by Complainant:

"Q. Was the situation in respect to the picket line discussed with Cudahy as of the 27th?

A. Yes, it was.

Q. Did that have any influence on the decision of the 27th?

A. Sure it did.

Q. What influence did it have?

A. My opinion--personal opinion was that was the straw that broke the camel's back, and we had to shut it down.

. . .

Q. Mr. Joanis, what was the reason--just give us a brief synopsis of what the reason was for--what was the reason for laying the people off, the OPEIU employes?

A. I would say it was probably three things. No. 1, that supervisors couldn't come into the plant. We were sure that would start again, that we'd start to make shipments. No. 2, that the orders that were inhouse we had no way of knowing at that point whether we should enter into them, or whether they would be cancelled, or whether we could do any work on them or not. No. 3, that this was a very expensive thing. We had so many people who were not doing their normal work: and there was also the violence. We were concerned about the people's safety.

. . . . "

That during the course of said March 27, 1974 meeting with representatives of Complainant and AFTE Respondent read the following statement to Complainant's representatives, but delivered no copy thereof to them:

"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

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 OPEIU members be laid off at the end of their particular shift on Wednesday, March 27, 1974 until further notice.

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 Complainant's 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 XIII, Paragraph 2.

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.

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."

13. That on March 28, 1974, employes represented by Complainant and AFTE 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 for employes represented by Complainant through and including March 31, 1974; and that during the same period, March 28-March 31, 1974, the Respondent's nonunion personnel (including supervisors, managerial personnel and guards) continued working.

14. That thereafter Complainant filed grievances alleging the violation asserted herein and that Complainant exhausted the applicable grievance procedure prior to filing the instant complaint.

15. That Respondent permitted the second shift of employes represented by Complainant to report at the close of the first shift on March 27, 1974; that Respondent directed its supervisors and management personnel to report for their assigned shifts on March 28 and 29, 1974; that the normal compliment of fifteen supervisors per shift reported without incident on those dates.

16. That Respondent reached tentative contract settlement with the IAM on Saturday, March 30; that beginning at midnight at the close of Sunday, March 31, 1974, Complainant 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 Complainant's picket lines until Complainant's contract negotiations were concluded and a new contract was ratified by Complainant; that the IAM and Complainant's bargaining unit employes returned to work on April 11; and that AFTE employes also returned to work on April 11, 1974.

Based on the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That Respondent Ladish Co., Tri-Clover Division by having laid off employes represented by Complainant Office & Professional Employees International Union Local 336 at the close of their respective shifts on March 27, 1974 without seventy-two hours notice in violation of Article XIII, Section 2 of a collective bargaining agreement then in existence between said parties, committed and is committing, an unfair

labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Respondent Ladish Co., Tri-Clover Division take the following affirmative action which the Examiner has determined will effectuate the policies of the Wisconsin Employment Peace Act: That Respondent reimburse all of its employes represented by Complainant for all earnings they would have received but for Respondent's failure to provide a seventy-two hour notice of the layoff announced and effected on March 27, 1974 in violation of Article XII, Section 2 of the parties' collective bargaining agreement then in effect.

Dated at Milwaukee, Wisconsin this 26th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On March 27, 1974 at approximately 12:30 p.m., Respondent informed Complainant that it was "necessary that all OPEIU members be laid off at the end of their particular shift on Wednesday, March 27, 1974 until further notice." Thereafter it effected the announced intention.

Complainant contends that Respondent failed to give it the seventy-two hours notice required by Article XIII, Section 2 of the parties' collective bargaining agreement.

Respondent primarily asserts that the circumstances surrounding its March 27, 1974 decision to lay off unit employes constitute circumstances beyond the scope of that provision or circumstances under which it should be excused from its performance by virtue of the doctrine of impossibility of performance. It asserts that giving the required notice herein was impossible because unit employes were performing work of little value during the IAM strike; the strike itself impaired the inflow of orders the unit would process; as the strike continued it made it increasingly more possible that the remaining orders would be cancelled; and IAM's threat of violence necessitated laying off all unit personnel without notices.

Article XIII, Section 2 states:

> When any layoff or return to work is in accordance with straight unit seniority, the Company shall notify the Union not less than seventy-two (72) hours before such layoff or return to work is to be effected. In the event of a slow-down in business to the extent that reduction in hours becomes necessary, the Union shall be given twenty-four (24) hours prior notice in case of reduction in hours. Any grievance involving a layoff or return to work shall be submitted to the Company in writing no later than five (5) working days after the Company has given due notice of this fact. No layoffs or return to work not in accordance with straight unit seniority within his area shall be effected unless mutually approved by the Bargaining Committee of the Union and the Company.

The last sentence therein suggests that the undefined term "layoff" is used with its commonly understood meaning of "a temporary or indefinite separation from employment." [1/] The context makes no definitional exception for layoffs of short duration or resulting from circumstances beyond Respondent's control. [2/] The term "layoff" is, however contrasted

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1/ H. Roberts, Roberts' Dictionary of Industrial Relations, Bureau of National Affairs, (Rev. Ed., 1971) at p. 281.

2/ Greer Hydraulics, Inc., 29 LA 706 at pp. 707-8 (M. Friedman, 1957); International Paper Co., 60 LA 447 at pp. 450-1 (R. Ray, 1973); Phillips Waste Oil Pick up Service, et. al., 24 LA 136 (A. Kohn, 1955). Distinguish International Harvester Company, 14 LA 136 (W. McCoy, 1958); where both parties agreed that a similar provision was not applicable under certain circumstances.

with the undefined term "reduction in hours" and Respondent has strenuously alternatively argued that the instant action was a "reduction in hours" rather than a "layoff". The announced suspension of work had an unlimited duration, actually lasted two normally scheduled work days before this unit went on strike and had no recurring pattern. The Examiner concludes that the foregoing is a "layoff" within the meaning of the provision. 3/

It is Respondent's purpose in entering into this job security provision to obtain unit employe services at the other wages, hour and working conditions provided in the agreement during non-layoff periods. Pursuant thereto unit employes can expect continued normal income during the period, while Respondent has the use of services rendered during the notice period. Thus, it is Respondent's secondary purpose in entering into this agreement that it should be able to use these services profitably, but to achieve this purpose Respondent must plan its announcement of layoff so that services are rendered when they are still profitable. The provision allocates the risk of failure to adequately plan to Respondent without express exception.

Respondent alleged that it was necessary to layoff unit employes because as the strike progressed it caused a reduction in the number of orders placed and increased the number of cancellations. 4/ It became aware of the strike on March 10, 1974 and knew that the strike would have the foregoing effects to some degree. Respondent, as entrepeneuer, therefore had more than enough opportunity to decide whether it wished to use unit services under the existing contract. Accordingly, the Examiner finds the doctrine of impossibility inapplicable to the foregoing risks.

During the March 27, 1974 meeting at the Kenosha County Sherriff's office, responsible IAM officials effectively threatened that it would use violent means to prevent Respondent's supervisors from entering and/or leaving the plant if Respondent continued to ship. Respondent agreed, and did, discontinue shipping pending the Kenosha County Corporation Counsel's decision as to the lawfulness thereof 5/ : the emergency

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3/ Pine Transportation Inc., 64 LA 1227 (G. Roberts, 1975); American-Standard, Inc., 52 LA 736, at pp. 737-8; Alan Wood Steel Co., 35 LA 819 (J. Hill, 1960); Lehigh Portland Cement Co., 37 LA 778 (J. Klamon, 1961).

4/ Respondent's reasons for the layoff decision are set out in Finding of Fact 12.

5/ Neither the IAM or Respondent received any word and Respondent did not ship for the remainder of the period.

nature of that decision deprived Respondent of any opportunity to plan the resulting, but apparently minor, decrease in unit work. Thereafter, Respondent concluded that its supervisory and managerial personnel might be prevented from entering or leaving its plant on, and after, March 28, 1974. In that event it might not be able to supervise unit employes in their work--effectively being deprived of the profitable use of unit employes' services. Respondent could have taken difficult, expensive or other impractical measures to insure the presence of supervisory personnel, but as a practical matter the IAM effectively threatened to frustrate one of Respondent's purposes in entering into the layoff notice requirement, to use unit services profitably after the notice. 6/

There is substantial authority under similar language of not applying the doctrine of impossibility to release an employer from similar responsibilities when its purpose is frustrated. 7/ The Examiner is satisfied that it should not be applied under the aforementioned circumstances to create an exception to the instant provisions. First, similar notice and other provisions in the same agreement expressly except or regulate circumstances that could lead to frustration of Respondent's purposes. Second, all of Respondent's agents who executed this agreement shortly thereafter executed the AFTE agreement cited in Finding of Fact 3 which contains express exceptions to a similar layoff notice requirement. Testimony established that both Complainant and Respondent coordinated their bargaining with respect to this agreement to that for the cited AFTE agreement. 8/ Thus, it appears more likely that the parties actually intended that Respondent bear similar risks than that they expected the application of the doctrine of impossibility. The Examiner finds that Respondent violated the parties' collective bargaining agreement by laying off unit employes without the notice required by Article XIII, Section 2 thereof.

REMEDY

Neither party has contended that the remedy the Examiner has found

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6/ Respondent's proffered reasons do not fully explain its conduct: it may be that it believed unit employes would join in the IAM's violent conduct or that this was an opportune time to shift blame to the IAM for a cost saving action. Either would explain the conduct entirely. It is necessary to note that although Complainant had cooperated with IAM, there is no evidence that it even knew of the threat or in any way appeared to be cooperating therein.

7/ Greer, Supra., at p. 708; International Paper Co., 60 LA 447 at p. 451 (R. Ray, 1973); Alan Wood Steel Co., 35 LA 818 (J. Hill, 1960); General Baking Co., 18 LA 227 (I. Feinberg, 1952); Mobil Chemical Co., 50 LA 80 (L. Kisselman, 1968); Phillip's Waste Oil Pick-Up Service, et. al., 24 LA 136 (M. Kahn, 1955); Clune v. School District, 166 Wis 452, 166 N.W. 11, (1918).

8/ Primarily, transcript p. 6.

appropriate, reimbursement for time lost, is inappropriate.[9/] During the course of the hearing Complainant offered evidence tending to establish that certain employes presented themselves for work on March 28, 1974. Respondent challenged the sufficiency thereof. Since the employes should have been able to rely on Respondent's notice of layoff, the failure of an employe to present himself the following day had little probative weight in establishing that he could not have been available that day. For example, he could have been seeking other employment, could have decided not to participate in Complainant's protest of this action, or could have decided to use the time for other purposes. In any case, individual entitlement to back pay is reserved for supplementary hearing, if necessary.

Dated at Milwaukee, Wisconsin, this 26th day of November, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner

9/ Greer Hydraulics, Inc., 29 LA 706 at p. 708 (M. Friedman, 1957); Pine Transportation, Inc., 64 LA 1227 at p. 1234 (G. Roberts, 1975), See, dicta in American Standard, Inc., 52 LA 736 at p. 739; International Paper Co., 60 LA 447 at p. 452 (R. Ray, 1973); Canadian Porcelain Co., LTD, 41 LA 417 at p. 419-20 (J. Haurahan, 1963); Alan Wood Steel Co., 35 LA 819 at p. 826 (J. Hill, 1960); Donaldson Co., Inc., 21 LA 254 at p. 259 (D. Louisell, 1953); Phillips Waste Oil Pick-Up Service Et. Al., 246 LA 136 (M. Kahn, 1955).