STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHAUFFEURS, TEAMSTERS, WAREHOUSEMEN, and HELPERS UNION, LOCAL 446 affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, Complainant, vs. ASSOCIATED MILK PRODUCERS, INC., and MILBREW, INC., Respondents.	Case VI No. 18743 Ce-1583 Decision No. 13296-A

Appearances:
Goldberg, Previant & Uelmen, S.C., by Mr. Alan M. Levy, Attorney at Law, appearing on behalf of the Complainant.
Mr. Robert Uvick, Corporate Counsel, appearing specially on behalf of Respondent Associated Milk Producers, Inc.
Bernstein & Bernstein, Attorneys at Law, by Mr. E. Ace Bernstein, appearing for Milbrew, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having, on January 17, 1975, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the above-named Respondents had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Marvin L. Schurke, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Antigo, Wisconsin, on March 19, 1975; 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 Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Complainant, is a labor organization having its principal offices at P.O. Box 1123, Wausau, Wisconsin 54401; and that, at all times pertinent hereto, Gerald Allain has been a business representative of the Complainant.

2. That Associated Milk Producers, Inc., hereinafter referred to as Respondent AMPI, is a Kansas corporation licensed to do business in the State of Wisconsin; that Fred J. Barter is employed by Respondent AMPI as its Director of plants; and that, from or before the year 1968 up to March 1, 1974, Respondent AMPI operated a milk processing facility at Antigo, Wisconsin.

3. That, beginning on an unspecified date during or about the year 1968, Respondent AMPI recognized the Complainant as the exclusive

collective bargaining representative for employes of Respondent AMPI at the aforesaid Antigo, Wisconsin, facility, excluding office employes, plant manager, fieldmen and supervisors; that Respondent AMPI and the Complainant were parties to a series of collective bargaining agreements, the latest being an agreement effective for the period from January 1, 1973 through December 31, 1974; and that the 1973-1974 collective bargaining agreement between Respondent AMPI and the Complainant contained the following provisions pertinent hereto:

"January 1, 1973 --- December 31, 1974

LABOR AGREEMENT

ASSOCIATED MILK PRODUCERS, INC.

THIS AGREEMENT, made and entered into this _____ [sic] day of _____, [sic] 1973, by and between the Chauffeurs, Teamsters, Warehousemen and Helpers Local No. 446, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Union, and the Associated Milk Producers Inc., and its successors and assigns, hereinafter referred to as the Employer, agree to be bound by the terms and provisions of this Agreement.

ARTICLE 1 - SCOPE OF AGREEMENT

Section 1. This Agreement covers all employees of the Employer working at or out of Antigo, Wisconsin, who are within the jurisdiction of the Union, but shall not apply to office employees, plant manager, fieldmen, supervisors, or any other employee who may have the authority to hire or discharge.

ARTICLE 2 - RECOGNITION

Section 1. The Employer recognizes the Union as the sole and exclusive bargaining agency for all of its employees covered by this Agreement.

ARTICLE 3 - UNION SECURITY

Section 1. All present employees who are members of the Local Union on the effective date of this Section shall remain members of the Local Union in good standing as a condition of continued employment. All present employees who are not members of the Local Union, and all employees who are hired hereafter shall on and after the 31st day following the beginning of their employment or on and after the 31st day following the effective date of this Section, whichever is the later, become and remain members in good standing of the Local Union as a condition of employment.

Should any member of the Union be suspended or expelled from the Union the Employer agrees to discharge such person within seven (7) days, after receiving due notice from the officials of the Union, provided, however, that such discharge shall not contravene the provisions of the Labor Management Relations Act, as amended.

. . .

Section 2. A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial basis, during which period he may be discharged without further recourse; provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days, the employees shall be placed on the regular seniority list. In cases of discipline within the thirty (30) day period, the Employer

shall notify the Local Union in writing. The steward shall be notified of all new hires upon completion of their probationary period.

. . .

ARTICLE 4 - TRANSFER OF COMPANY TITLE OR INTEREST

Section 1. This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. In the event an entire operation or any part thereof is sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership or bankruptcy proceedings, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. It is understood by this section that the parties hereto shall not use any leasing device to a third party to evade this contract.

The Employer shall give a five (5) day notice (excluding Sundays and Holidays) to any purchaser, transferee, leasee, assignee, etc. of the existence of this Agreement. Such notice is to be in writing with a copy to the Local Union.

When a branch, division or operation is closed or partially closed and the work of the branch, division, or operation is transferred to another branch, division or operation in whole or in part, employees employed at the closed or partially closed down branch, division or operation who are laid off as a result thereof, shall have the first opportunity in order of their seniority, for employment at the branch, division or operation into which the work was transferred and shall be placed at the bottom of the seniority list of such branch, division or operation but retain all accrued seniority for purposes of fringe benefits provided for in this Agreement, exclusive of layoff, recall and job bidding.

. . .

ARTICLE 9 - GRIEVANCES

Section 1. The grievance procedure shall be limited to interpretation and administration of the labor agreement in the event a dispute arises over such interpretation or administration.

Section 2. A grievance shall be processed as follows:

1. Within thirty days of occurrence or discovery the grievance shall be presented to and discussed with the employee's supervisor, by the employee and steward if requested.

2. If a satisfactory settlement does not result from such discussion, the grievance shall be discussed with the steward and management.

3. If not settled satisfactorily within five (5) days of Step 2, the grievance will be reduced to writing and referred to the Management and the Business Representative of the Union.

4. If not settled satisfactorily in the discussion either party may notify the other within five (5) days (excluding Sundays and holidays) after a deadlock in Step 3 of their desire to arbitrate.

ARTICLE 10 - ARBITRATION

Section 1. The party desiring arbitration shall notify the other party of its desire to arbitrate and within five (5) days, the Employer and the Union shall each select one (1) member who shall act on the Board of Arbitration, and the two (2) so selected shall select a third (3rd) member. If the two (2) members cannot agree upon a person to serve as a third member within five (5) days, such third (3rd) member shall be a member or an appointee of the Wisconsin Employment Relations Commission. The three (3) member Board of Arbitration shall meet within five (5) days (excluding Sundays and holidays) and shall conduct hearings and resubmit their findings and decisions within five (5) days (exclusive of Sundays and holidays) after the completion of the hearing. The decision of the Board shall be final and binding on both parties of this Agreement.

. . .

ARTICLE 13 - DISCHARGE

Section 1. No employee who has completed his probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with copy to the Union and steward, except no warning notice is required for discharge due to dishonesty, being under the influence or intoxicating beverages while on duty, or other flagrant violations. It shall be considered a flagrant violation of Company rules for any employee to bring intoxicating liquor into the processing plant premises or to smoke in areas where "No Smoking" signs are posted. Warning notice to be effective for not more than ninety (90) days from date of notice. Discharge or suspension shall be in writing with a copy to the Union and the employee affected.

Section 2. Any employee desiring an investigation of his dischargem [sic] suspension or warning notice must file his protest in writing with the Employer and the Union within five (5) days (exclusive of Sundays and holidays), of the date the employee received such discharge or warning notice.

The discharge, suspension or warning notice shall then be discussed by the Employer and the Union as to the merits of the case. Should it be found that the employee has been unjustly discharged, or suspended he shall be reinstated and compensated for all time lost at his regular rate of pay plus such overtime as he may have worked.

Section 3. The employee may be reinstated under other conditions agreed upon by the Employer and the Union. Failure to agree shall be cause for the issue to be submitted to arbitration as provided for in Article 10 of this Agreement.

. . .

ARTICLE 20 - SENIORITY

Section 1. Seniority shall be determined by length of service plus such additional time as is required or granted for vacations, leave of absence, illness and accidents. An employee's seniority is nullified if he is laid off and not re-employed within three (3) years from the date of layoff, or if he leaves the Company of his own volition, or is discharged and not subsequently reinstated.

Section 2. In laying off employees because of reduction in forces, the employees shortest in length of service shall be laid off first. In re-employing, those employees having the greatest length of service shall be called back first provided that they are qualified

to perform the available work. In filling vacancies or making promotions, the employees with the longest service record if qualified, shall be given preference.

Section 3. A list shall be made of all employees covered by this Agreement, together with the dates of employment, which shall be furnished to the Union. This list shall be subject to review and revision every six (6_ months.

. . .

ARTICLE 21 - VACATIONS

Section 1. Vacations to be based on the calendar year January 1st to December 31st. All regular employees in the service of the Employer for one calendar year shall be entitled to one week's vacation with pay. All regular employees in the service of the Employer for two (2) calendar years shall be entitled to two (2) week's vacation with pay. All regular employees in the service of the Employer with eight (8) calendar years shall receive three (3) week's vacation with pay. All regular employees in the service of the Employer with fifteen (15) calendar years shall receive four (4) week's vacation with pay.

Section 2. In order to reconcile a new employee's employment date with the calendar year for vacation purposes only, all new employee's vacations shall be pro-rated to the next January 1 following the employment date. Said pro-ration shall be paid at the end of his first full year of continuous service with the Employer. Said pro-rated vacation shall be earned at the rate of 1/10th of the vacation pay allowance per this Article, Section 7, for each month of service between the employee's employment date and the next January 1.

Section 3. During the first year of employment the employee must have worked ten (10) of the twelve (12) months in order to obtain his vacation or must have accumulated ten (10) months of work during the subsequent years. The employee must have worked ten (10) months of the twelve (12) months period in a calendar year to be eligible for full vacation.

. . .

ARTICLE 33 - LAY-OFFS

Section 1. All regular employees who are to be laid off for more than three (3) days shall be given a notice three (3) days prior to such lay-off. Employees not given three (3) day's notice shall receive a week's pay in lieu thereof.

Any employee wishing to quit his employment shall give the Employer one (1) week's notice in writing."

4. That, during or about the month of October, 1972, Respondent AMPI commenced employing one Erik Olsen in a position within the aforesaid collective bargaining unit at Antigo, Wisconsin; that Olsen was retained in employment beyond the completion of the probationary period specified in the collective bargaining agreement between Respondent AMPI and the Complainant; that, on or about December 28, 1972, Respondent AMPI notified Olsen that he would be laid off effective December 30, 1972; and that Olsen ceased to be actively employed by Respondent AMPI after December 30, 1972.

5. That Northland Developers, Inc., hereinafter referred to as Northland, is a Wisconsin corporation having offices at 6101 North Teutonia

Avenue, Milwaukee, Wisconsin 53209; that E. A. Bernstein is President of Northland; that, on or about August 30, 1973, Respondent AMPI entered into an "Option Contract" with Northland for the sale of Respondent AMPI's facilities at Antigo, Wisconsin; that said Option Contract specified that the buyer assume obligations of the seller under existing contracts with a labor union representing employes working in said facilities; and that such Option Contract was subsequently exercised.

6. That Milbrew, Inc., hereinafter referred to as Respondent Milbrew, is a corporation having offices at 6101 North Teutonia Avenue, Milwaukee, Wisconsin 53209; that Sheldon Bernstein, Ph.D. is President of Respondent Milbrew that N. N. Bernstein is Secretary of Respondent Milbrew; and that, through transactions between Northland and Respondent Milbrew which are not fully disclosed in this record, arrangements were made for Respondent Milbrew to take over the operation of the aforesaid Antigo, Wisconsin facilities, effective March 1, 1974.

7. That, on February 13, 1974, Respondent AMPI, by Barter, directed a letter to the Complainant, as follows:

> "This is to confirm our telephone conversation of February 12th in which we advised that effective March 1, 1974, we will sell the Antigo milk processing facilities to Milbrew, Inc., of Milwaukee, Wisconsin.
>
> Milbrew has been advised that they will become a successor to the contract between Local 446 and AMPI covering the labor agreement at the AMPI operation at Antigo, Wisconsin.
>
> We understand that Milbrew has agreed to give you a letter of acknowledgement [sic] relative to this matter.";

and that the Complainant made no objection thereto.

8. That, on February 25, 1974, Respondent Milbrew, by N. N. Bernstein, directed a letter to the Complainant, as follows:

> "This is to inform you that effective March 1, 1974 Milbrew, Inc. will become the successor to Associated Milk Producers, Inc. (AMPI) in the labor agreement between Local 446 and AMPI covering their operations at Antigo, WI.
>
> In doing so, we become bound to all of the terms and conditions of said agreement.
>
> I am sure that the many years of pleasant relations that we have had with the Teamsters, will continue for many more years.";

and that the Complainant made no objection thereto.

9. That the transaction referred to in paragraphs 5, 6, 7, and 8, above, was closed on or about March 1, 1974; that various listings of employes exchanged at or about that time omitted the name of Erik Olsen; that, on and after March 1, 1974, Respondent Milbrew operated the facilities at Antigo, Wisconsin and was the employer of the employes in the collective bargaining unit covered by the aforesaid collective bargaining agreement; that, on and after March 1, 1974, Respondent Milbrew recognized the Complainant as the exclusive collective bargaining representative of the employes in the aforesaid collective bargaining unit and became the successor to Respondent AMPI as the employer party to the aforesaid collective bargaining agreement; and that, effective March 1, 1974, Respondent AMPI ceased to be the employer of employes in the aforesaid collective bargaining unit and ceased to be a party to the aforesaid collective bargaining agreement.

10. That, on or after March 1, 1974, Respondent Milbrew recalled employes for work at the aforesaid Antigo, Wisconsin facility who had previously been laid off by Respondent AMPI under the terms of the aforesaid collective bargaining agreement; that Respondent Milbrew did not recall Erik Olsen from layoff; that, on or about September 13, 1974, Olsen brought to the attention of the Complainant that Respondent Milbrew had failed to recall him from layoff; that the Complainant thereupon filed a grievance with Respondent Milbrew alleging that Respondent Milbrew had, by its failure to recall Olsen from layoff, violated the seniority rights of Olsen under the aforesaid collective bargaining agreement; that, upon the filing of said grievance and at all times subsequent thereto, Respondent Milbrew disputed the claim of Olsen to seniority rights under the aforesaid collective bargaining agreement; that Respondent Milbrew has refused, and continues to refuse, to process the grievance of Erik Olsen to arbitration pursuant to the terms of the aforesaid collective bargaining agreement; and that the grievance of Erik Olsen states a claim which, on its face, is governed by the collective bargaining agreement in effect at the time said grievance arose between Respondent Milbrew and the Complainant.

11. That the Complainant made a demand upon Respondent AMPI for the arbitration of the grievance of Erik Olsen; that Respondent AMPI failed and refused to submit the grievance of Erik Olsen to arbitration pursuant to a collective bargaining agreement; and that the grievance of Erik Olsen fails to state a claim which is governed by a collective bargaining agreement between Respondent AMPI and the Complainant, for the reason that no such agreement was in existence at the time the grievance of Erik Olsen arose.

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

CONCLUSIONS OF LAW

1. That the operative fact giving rise to the grievance of Erik Olsen was and is the failure to recall Olsen from layoff in accordance with his claimed seniority rights; that such operative fact occurred at a time when there was no collective bargaining agreement in existence between Respondent Associated Milk Producers, Inc. and Complainant Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446, the previous agreement between those parties having then been assumed on behalf of Respondent Associated Milk Producers, Inc. by Respondent Milbrew, Inc.; and that, by its refusal to join in the arbitration of the grievance of Erik Olsen, Respondent Associated Milk Producers, Inc. has not violated and is not violating the terms of a collective bargaining agreement and has not committed unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That Respondent Milbrew, Inc., by refusing to join with the Complainant Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446 in the arbitration of the grievance of Erik Olsen, has violated, and continues to violate, the terms of the collective bargaining agreement between Milbrew, Inc. and Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446, and by such violation of a collective bargaining agreement Milbrew, Inc. has committed, and is committing, unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED THAT:

1. Milbrew, Inc. shall immediately cease and desist from refusing to submit the grievance of Erik Olsen to arbitration pursuant to the

collective bargaining agreement between Milbrew, Inc. and Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446.

2. Milbrew, Inc. shall immediately take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

a. Join with Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446 in the appointment of a Board of Arbitration pursuant to the aforesaid collective bargaining agreement and proceed to arbitration on the grievance of Erik Olsen.

b. Notify the Wisconsin Employment Relations Commission, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

3. The complaint of Chauffeurs, Teamsters, Warehousemen and Helpers Union Local 446 as against Associated Milk Producers, Inc. shall be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 19th day of June, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

PLEADINGS AND PROCEDURE

In its complaint filed on January 17, 1975, the Complainant, after identifying the parties, briefly recites the facts concerning the transfer of ownership of the Antigo, Wisconsin facility and alleges that the grievance of Erik Olsen arose on or about May 1, 1974. The Complainant goes on to allege that both Respondents have refused to recall Olsen from layoff and that both Respondents have refused to arbitrate the grievance. The Complainant alleged unfair labor practice violations under the interference, refusal to bargain and violation of agreement provisions of the Wisconsin Employment Peace Act and requested, in the alternative, either adjudication of the grievance of Erik Olsen on the merits or an Order compelling arbitration of the grievance.

Respondent Milbrew filed an answer on February 3, 1975, wherein it alleged that it was only responsible for employes at the facility as of March 1, 1974 and denied knowledge of Erik Olsen being an employe in the bargaining unit. Respondent Milbrew also alleged that Olsen had quit his employment, and that it had no obligation to arbitrate the grievance.

Respondent AMPI did not file an answer. Counsel for Respondent AMPI made a special appearance at the hearing to object to the jurisdiction of the Commission over the subject matter of any dispute involving AMPI, contending that Milbrew, Inc. assumed the collective bargaining agreement in question and that AMPI ceased to be a party to that agreement. The Examiner reserved ruling on the jurisdictional claim advanced by AMPI, but permitted Counsel for AMPI to participate in the hearing without prejudice to his special appearance.

At the outset of the hearing held on March 19, 1975, Counsel for the Complainant made it clear that, consistent with State and Federal labor policy, the primary remedy sought by the Complainant in this proceeding was an order compelling one or both of the Respondents to arbitrate the grievance of Erik Olsen pursuant to the collective bargaining agreement. The Complainant did not pursue the allegations of the complaint relating to interference or refusal to bargain and, in fact, opposed any attempt by the Respondents to litigate the merits of the Olsen grievance in this forum. The hearing was completed and closed on March 19, 1975. All of the parties made their positions clear on the record and waived filing of any post-hearing brief or argument.

DEFENSES ASSERTED BY MILBREW, INC.

It should be noted at the outset that this is not a "successorship" dispute of the type encountered in John Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964), NLRB v. Burns International Security Services, 406 U.S. 272, 80 LRRM 2225 (1972), Howard Johnson Co. v. Detroit Jt. Board, Hotel and Restaurant Employees and Bartenders International Union, 417 U.S. 249, 86 LRRM 2449 (1974), and numerous other cases where a purchaser of a business or the firm resulting from a merger has sought to avoid successorship to the collective bargaining relationship or contract of the business purchased or absorbed. On the contrary, it is clear here that Milbrew, Inc. expressly and willingly undertook to become the successor to AMPI in the collective bargaining relationship between AMPI and the Teamsters and to become bound by "all of the terms and conditions of" the labor agreement between AMPI and the Teamsters.

Milbrew's position in this proceeding has been that there must be some preliminary showing that there are some rights owing to grievant Olsen before there can be an obligation on the part of Milbrew to submit to the jurisdiction of an arbitrator. The facts indicate that this dispute may have its roots in an error or omission which occurred while AMPI owned and operated the Antigo facilities. While there is no dispute that Olsen was hired by AMPI and worked for AMPI beyond the end of his probationary period, it appears that Olsen's name may have never appeared on a seniority list. In any case, Olsen's name was not on the seniority list provided to Milbrew by AMPI at the time the plant changed hands, and Milbrew has therefore asserted, in essence, that it did not buy Olsen with the plant and that Olsen's grievance is AMPI's problem. The several alternative arguments advanced by Milbrew are discussed, below.

Failure to Maintain Union Membership

Noting that the collective bargaining agreement assumed by Milbrew from AMPI requires all employes to become and remain members of the Union, Milbrew sought to inquire during the course of the hearing as to whether Olsen had maintained his Union membership during his layoff to date. Milbrew contends that Olsen could not be eligible for reinstatement under the seniority provision of the collective bargaining agreement if he was subject to discharge for dues delinquency under the union security article of the same agreement. On objection of the Union, the Examiner foreclosed further testimony and argument along this line, as it is apparent to the Examiner that any obligation to maintain membership or pay dues arises out of the collective bargaining agreement itself, and the argument here advanced by Milbrew requires interpretation of the collective bargaining agreement which would be within the proper jurisdiction of an arbitrator.

Voluntary Termination By Olsen

During the course of the hearing Milbrew also adduced evidence concerning a power failure which occurred at the Antigo facilities on December 30, 1972, the last day on which Olsen worked for AMPI. Olsen left the premises before the end of his scheduled work shift on that day, which now gives rise to a claim by Milbrew that Olsen quit his employment rather than having been laid off. Article 20, Section 1 of the collective bargaining agreement provides for a loss of seniority if an employe leaves the Company of his own volition. However, in view of the provision of Article 33 which requires employes to give the Company one week's notice in writing of a desire to quit, and in view of the layoff notice previously given to Olsen (apparently also pursuant to Article 33) questions of fact and contract interpretation arise which the Examiner concludes are appropriate subjects for arbitration.

Discharge

Milbrew brought out through testimony that Olsen's employment record was somewhat tarnished before he ceased working for AMPI, and attempted to show that Olsen was discharged for poor attendance performance rather than laid off. Again, the Examiner notes that the collective bargaining agreement contains detailed provisions, in Article 13, concerning the discharge, suspension and discipline of bargaining unit employes. Interpretations concerning those provisions and determinations as to the adequacy of the employer's compliance therewith are proper subjects for the arbitrator.

Omission From Seniority List

Article 20, Section 3 of the collective bargaining agreement calls for the preparation and service of a seniority list every 6 months. As previously noted, Olsen's name was apparently omitted from such lists. Milbrew now asserts that the Teamsters union is estopped from claiming seniority rights on behalf of Olsen. While there is some temptation to

determine this type of defense in a proceeding such as this, the law is well established to the contrary. The seniority system is a creature of contract, and any seniority rights Olsen may have derived exclusively from the contract. It follows that the loss of seniority is also a contractual phenomenon, including a loss of seniority through estoppel as alleged by Milbrew here. The procedures of the seniority system, like the procedures of a grievance and arbitration system, are themselves contractual, and it is well established that procedural questions are for the arbitrator and not for the Examiner, Commission or Court. See: John Wiley & Sons v. Livingston, supra, in accord with the previous decision of the Commission in Seaman-Andwall Corp. (5910) 1/62 and the decision of the Wisconsin Supreme Court in Dunphy Boat Corp., 267 Wis. 316 (1954).

Omission From Vacation Listing

In closing the sale transaction for the transfer of ownership of the Antigo facility, AMPI gave Milbrew a credit, pro-rata, for the vacation amounts accumulated by bargaining unit employes of AMPI who were being transferred to Milbrew. The name of Erik Olsen does not appear on that listing, and Milbrew claims that this reinforces its claim that Olsen was not considered to be an employe at the time of the transfer. The explanation may well be, as called to the attention of the Examiner by Counsel for AMPI, that Olsen did not have sufficient service with AMPI to have accumulated any vacation rights; but the Examiner is satisfied that the point need not be explored and determined here. Article 21 of the agreement provides for vacations, and the interpretation of that article as well as any inferences to be drawn from the omission of Olsen's name from the list provided to Milbrew by AMPI is a matter within the purview of the arbitrator.

DEFENSES ASSERTED BY ASSOCIATED MILK PRODUCERS, INC.

Termination of Collective Bargaining and Employment Relationships at Antigo

AMPI first asserts that it is not the employer here, and that it is not a party to the collective bargaining agreement involved. While AMPI would acknowledge its past collective bargaining and employment relationships at Antigo, it contends that all of its functions in that regard were assumed by Milbrew. It follows, according to AMPI, that Milbrew is the only party which could reinstate Olsen or make an award of back pay. On the record made here, at least the "reinstatement" portion of AMPI's argument is self-evident. However, Counsel for AMPI did not develop his reasoning with respect to the argument that only Milbrew can make a back pay award and, in view of some of the cases noted by the Examiner during his research on this matter, the Examiner does not find that argument to be persuasive. The sale of a business gives rise to a situation which can be likened in some respects to the situation which exists when a collective bargaining agreement expires and the employes continue working during a hiatus between contracts. The expiration of a collective bargaining agreement does not cut off the obligation of the employer to arbitrate grievances which arose prior to the expiration of the agreement. See: Safeway Stores, Inc. (6883) 9/64 in accord with Rice Lake Creamery Co. 21 Wis. 2d 242 (1963). The sale of a business does not invariably cut off the obligations of the seller. In Eastern Freight Ways, Inc. v. Local Union 707 (U.S.D.C. - So. Dist., N.Y.) 71 LRRM 2631 (1969) the purchaser of a business who did not become a successor to the collective bargaining relationship and contract of the seller of the business, was excused from arbitration with the union representing the employes, but the seller was obligated to arbitrate claims concerning vacation rights which vested while the seller owned the business. See, also: Packinghouse Workers v. Cold Storage Corp., 74 LRRM 3055 (CA-7, 1970). The assumption of the collective bargaining agreement by the purchaser and the willingness of the purchaser to join in arbitration of grievances concerning vested vacation rights did not

serve to excuse the seller of the business from arbitration in Local 552 v. Hydraulic Press Brick Co., (U.S.D.C. - E. Dist., MO.) 87 LRRM 3260 (1974).

On the opposite side of the question, numerous cases indicate that an employer is not obligated to arbitrate grievances and claims which arise following the expiration of a collective bargaining agreement or during a hiatus between agreements. See: Murphy Construction Co., (12173-A) 5/75; Pierce Manufacturing Co., Inc., (9549-A, C) 8/71; and Modern Plumbing, Heating and Supply Co., (10171-A, B) 9/71. In Rubber Workers v. Lee National Corp., (U.S.D.C., So. Dist., N.Y.) 83 LRRM 2516 (1973) the Court found that the assumption of a collective bargaining agreement by the purchaser of the business, with the explicit approval of the Union, cut off any obligation on the part of the seller to arbitrate grievances filed even prior to the sale of the business.

From the foregoing, it is apparent that inquiry is made both into the successorship arrangements between the purchaser and seller of the business and into the date on which the alleged contract violation arose in relation to the sale of the business. The Rice Lake, Eastern Freight Ways, Cold Storage Corp., and Hydraulic cases cited above all involve, in some way, claims for vested vacation benefits or other vested benefits which accrued prior to the expiration of the contract or sale of the business, and no case has been found in which the seller of a business has been obligated to arbitrate a grievance concerning a contract violation which occurred after the sale of the business.

Jurisdiction of Dispute Between AMPI and Milbrew

AMPI has not foreclosed from the realm of possibility that it may have made an error of omission for which it may be liable to Milbrew. However, the main thrust of the "special appearance" of AMPI here, stated in various ways, is that neither the Commission nor an arbitrator appointed pursuant to the collective bargaining agreement has jurisdiction to determine any such dispute. AMPI contends that any liability it may have to Milbrew arises out of its contract with Milbrew rather than out of the collective bargaining agreement with the Teamsters. AMPI suggests that it may have counterclaims which could be asserted against Milbrew, and that the courts are the appropriate forum for the resolution of any dispute between AMPI and Milbrew.

A finding that a collective bargaining agreement was in effect at the time the dispute arose is a necessary jurisdictional antecedent to a finding that a violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act has been committed. In Hydraulic, supra, the Court held that the effect of a "hold harmless" provision in the sales contract between the purchaser and seller of the business was a matter to be separately litigated after the arbitrator had decided the rights of the union under the collective bargaining agreement. The situation here is somewhat comparable, and the Examiner agrees with AMPI that its relationship with Milbrew is outside of the jurisdiction of this agency. The Commission or its Examiner would err in any attempt to compel AMPI and Milbrew to arbitrate claims they may have against one another. This conclusion does not completely remove AMPI from the case, but focuses attention on the crucial question of when the Olsen grievance arose.

OPERATIVE FACT GIVING RISE TO THE OLSEN GRIEVANCE

Olsen was given notice that he was to be laid off. No grievance was filed challenging the decision to lay Olsen off or challenging the adequacy of the notice given. Olsen ceased working for AMPI as of the date scheduled for his layoff. "Quit", "discharge", "union shop" and "vacation pay" questions are now suggested by Milbrew, and the record indicates that the omission of Olsen's name from the seniority list for the Antigo facility could possible have been the subject of a grievance by the Teamsters against AMPI. Determinations as to the survival or

waiver of such possible grievances would lie with the arbitrator if the Union were to now assert claims of contract violation with respect thereto, but the fact is that the Union has not made any claim of a contract violation by AMPI. The record here does not contain sufficient evidence to precisely establish the date of the alleged contract violation protested by the Olsen grievance. The grievance itself asserts that the violation of Olsen's seniority rights occurred on or about May 1, 1974. The record here does indicate that, after assuming control of the Antigo facilities, Milbrew expanded the operations and recalled employes from layoff. The nature of the Olsen grievance is that he was not recalled from layoff in proper order according to his seniority, and that event could only have occurred after Milbrew took over and AMPI ceased to be the employer. That grievance involves a claim which, on its face, is covered by the collective bargaining agreement between Milbrew and the Teamsters. The Examiner concludes that the union cannot compel AMPI to arbitrate the Olsen grievance because, by the time the grievance arose, AMPI had been removed from the scene and was not a party to the collective bargaining agreement under which Olsen's claim is raised.

Dated at Madison, Wisconsin this 19th day of June, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
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