

CONSTRUCTION AND GENERAL LABORERS
UNION LOCAL 464,

vs.

Respondent.

Case II
No. 19473 Ce-1625
Decision No. 13889-A

Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing
on behalf of the Union.

Mr. Lynn E. LeGault, Attorney at Law, appearing on behalf of the Employer.

Construction and General Laborers Union, Local 464, having on August 14, 1975, filed a complaint wherein it alleged that J. H. Findorff and Son, Inc. has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Byron Yaffe, a member of its staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and the parties having waived a hearing in the matter and having submitted the matter to the Examiner as an agreed case upon stipulated facts; and the Examiner having considered the stipulated facts and briefs and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Interim Order Remanding and Holding Proceeding in Abeyance.

1. That Construction and General Laborers Union, Local 464, hereinafter referred to as the Complainant, is a labor organization and has its offices at 2025 Atwood Avenue, Madison, Wisconsin.

2. That J. H. Findorff and Son, Inc., hereinafter referred to as Respondent, is an employer and maintains a principal place of business at 601 West Wilson Street in the City of Madison, Dane County, Wisconsin, and is engaged in the business of a general construction contractor.

3. That Respondent and the Complainant, at all times pertinent hereto were signatory to and bound by the terms of a collective bargaining agreement setting forth the wages, hours and conditions of employment of those employes of the Respondent who were represented by the Complainant during the term commencing on April 21, 1975 and ending May 31, 1978.

4. That Section 8 of Article II of said collective bargaining agreement contains a "sub-contracting clause" which provides as follows:

"It is agreed that the Employer will not sublet any work in the jurisdiction of the Madison Building Trades Council which he has contracted or agreed to do to any person, firm or corporation unless at the time of subletting such sub-contractor is bound by the applicable collective bargaining agreement of the trades [sic] or trades involved to provide the wages, fringe benefits and working conditions provided in such collective bargaining agreement."

5. That the Respondent, at all times material herein, was a contractor for construction work being done at Blackhawk Country Club in the City of Madison, County of Dane, State of Wisconsin.

6. That the Respondent's work at aforesaid construction site was governed by the terms of the aforementioned collective bargaining agreement and in particular Section 8 of Article II, thereof.

7. That the Respondent, on or about June 2, 1975, sublet work in the jurisdiction of the Madison Building Trades Council which the Respondent had agreed to do, to Dahlk and May, Inc. at a time when Dahlk and May, Inc. was not bound by a collective bargaining agreement with the Complainant requiring Dahlk and May, Inc. to provide the wages, fringe benefits and working conditions set forth in such collective bargaining agreement.

8. That two persons employed by Dahlk and May, Inc. performed work in the jurisdiction of the Madison Building Trades Council and more specifically the Complainant on the job site for five full eight-hour days.

9. That two qualified persons on the Complainant's Referral Register were available and ready, willing and able to perform the work performed at the job site by the two persons employed by Dahlk and May, Inc. on each of the five full eight-hour days involved.

10. That each of the two persons on the Complainant's Referral Register would have had the sums of \$.30, \$.25 and \$.02 per hour contributed on their behalf, to the Wisconsin State Laborers Health, Pension and Training Funds, respectively, for each hour worked if they had performed the work performed by the persons employed by Dahlk and May, Inc. on the job site.

12. That the Complainant, on its behalf, and on behalf of the two persons on its Referral Register, submitted to the Joint Trade Board, in a timely manner, the following written grievance alleging a violation of Section 8 of Article II of the collective bargaining agreement:

"Local 464 is of the opinion that J. H. Findorff and Son, Inc. sublet landscaping work, i.e. Laborers' work to Dahlk and May, 3328 Meadow Road, Verona despite the fact that such firm is not party to any agreement of any kind requiring it to pay the wages, fringe benefits and working conditions established in collective bargaining agreements presently in effect with Local 464.

Local 464 submits that the subletting of such work under such circumstances was violative of said sub-contracting clause.

The parties have been unable to resolve this dispute between themselves, hence we, on behalf of Local 464, hereby refer such dispute to the 'Joint Trade Board' per Article III of the Collective Bargaining Agreement in effect between the parties. We ask that the Joint Trade Board be convened to hear such dispute and that we be informed of the place, date and time of such hearing on a timely basis."

14. That Article III of the collective bargaining agreement provides in pertinent part:

"ARTICLE III
GRIEVANCE PROCEDURE

JOINT TRADE BOARD: The Madison Employers Council and the Madison Building and Construction Trades Council, Inc. shall form a Joint Trade Board consisting of three members of the Madison Employers Council and three members of the Building Trades Council. The Joint Trade Board, when composed, shall provide for alternates to serve when regular members are absent or directly involved. In addition to the powers of arbitration as contained herein, it shall meet regularly to discuss, consider and act on matters of interest to the construction industry. The Board shall be subject to twenty-four (24) hours notice when called by either party.

The settlement of contractual disputes and grievances for the duration of this Agreement between the parties shall be settled as follows:

The parties shall attempt to settle the matter between themselves immediately on the job site by the Business Representatives and/or Steward and a representative of the Employer. If, after twenty-four (24) hours from the incident or discovery of the incident, a settlement is not reached, the matter will be referred to the Joint Trade Board. The Board shall be subject to twenty-four (24) hours call by either party. After hearing both parties to the dispute, the Board shall render an award by majority vote which shall be final and binding upon the parties. In the event there is a tie vote, the issue shall then be submitted to arbitration proceedings as follows:

1. The party initiating arbitration proceedings shall appoint one representative and the other party shall appoint one. After notice of the desire to arbitrate has been served by either party, if within two (2) days either party has not appointed its representative, the other party may apply to the W.E.R.C. to appoint the representative of the party who has failed to do so.

2. The two representatives, when selected, shall elect a third neutral member by majority vote within two (2) days after they have been selected. In the event they cannot agree, the third neutral party shall be selected by the W.E.R.C.

3. The third neutral member shall then act as an arbitrator, and his award shall be final and binding upon the parties.

4. The expenses of the third party shall be divided equally."

15. That the Joint Trade Board heard and considered the Union's grievance on July 1, 1975.

16. That the Joint Trade Board unanimously found that the Employer, in subletting said work at the job site to Dahlk and May, Inc., violated Section 8, Article II of the collective bargaining agreement.

17. That the Joint Trade Board has the authority to render an award including a remedy, which is final and binding on the parties; that the Joint Trade Board did not consider what, if anything, should be required

by way of remedy for such violation of the contract, but instead refused to exercise its authority and neither denied nor granted a binding remedy on the basis that it was not politically expedient to do so; and that the Joint Trade Board informed the parties that unless the parties could fashion a remedy amongst themselves they would have to resort to another forum.

18. That the parties have been unable to resolve the dispute amongst themselves.

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

CONCLUSIONS OF LAW

1. That decisions by a majority vote of the Joint Trade Board which are binding upon the Respondent and Complainant pursuant to Article III of the parties' collective bargaining agreement are enforceable by the Employment Relations Commission pursuant to Section 111.06 (1)(f) and 111.06(2)(c) of the Wisconsin Employment Peace Act.

2. That the decision of the Joint Trade Board in the instant proceeding does not constitute a final and definite award upon the subject matter submitted to it as contemplated in Section 298.10, Wisconsin Statutes, and therefore the award issued by the Joint Trade Board is not one which the Employment Relations Commission will enforce pursuant to Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That it is premature for the Wisconsin Employment Relations Commission to determine whether the Respondent has violated the terms of the parties' collective bargaining agreement, including the agreement to accept as binding an enforceable arbitration award issued by a majority of the Joint Trade Board.

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

INTERIM ORDER

That the subject matter of this dispute be, and the same hereby is, remanded to the Joint Trade Board for the purpose of obtaining a final and definite award with respect to the question whether the Respondent's violation of Section 8, Article II of the parties' collective bargaining agreement requires a remedy, and if so, what that remedy should be; or in the event of a tie vote by the Joint Trade Board, said matter shall be remanded to the binding arbitration procedure set forth in Article III of the parties' collective bargaining agreement.

IT IS FURTHER ORDERED that the instant proceeding be, and the same hereby is, held in abeyance until the Commission is notified that the Joint Trade Board, or in the event of a tie vote on said Board, an impartial arbitrator issues a final and definite award in the matter as contemplated in Section 298.10, Wisconsin Statutes.

Dated at Madison, Wisconsin this 27th day of February, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM
ORDER REMANDING AND HOLDING PROCEEDING IN ABEYANCE

The Complainant in this proceeding contends that the Respondent has violated the parties' collective bargaining agreement and thus has violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA). Although the matter was heard and decided by a Joint Trade Board pursuant to the grievance procedure contained in the parties' collective bargaining agreement, the Complainant contends that the Joint Trade Board's award was neither final nor definite and that said award is therefore not enforceable. The Complainant submits that it therefore follows that the Commission has the authority to remedy the contractual violation which was found by the Joint Trade Board to have occurred. The Respondent, on the other hand, argues that the Joint Trade Board's disposition of the matter is final and binding, and therefore is enforceable by the Commission in its entirety, in spite of the fact that it contains no remedy for the contractual violation which the Board found to have occurred.

Thus, the issues which must be resolved in this proceeding are:

1. Whether the Joint Trade Board's decision on the grievance is enforceable by the Commission, and if not
2. Whether the Commission should assert jurisdiction to decide the merits of the alleged contractual violation, including the question whether a remedy is called for.

With respect to the first issue, although the Commission has the jurisdiction pursuant to Section 111.06(1)(f) and 111.06(2)(c) of the WEPA to enforce a binding award of a majority of the Joint Trade Board, 1/ in order to enforce such an award, the Commission must find said award to be "final and definite" as prescribed in Section 298.10, Wisconsin Statutes. 2/

The instant proceeding arose because the Joint Trade Board, which found the Respondent had violated its contract with the Complainant, refused to exercise the discretion it had pursuant to Article III of the parties' collective bargaining agreement to dispose of the question whether a remedy was appropriate and if so, what that remedy should be. Had the Joint Trade Board decided that a remedy was not appropriate for the contractual violation found, there is no question that the Commission would enforce the award since the Joint Trade Board would merely be exercising the discretion it has to award or refuse to award remedies for contractual violations it finds have occurred.

The instant matter is complicated, however, by the fact that the Joint Trade Board, in its award, indicated that although it had the

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- 1/ Whose authority is derived from Article III of the parties' collective bargaining agreement.
 - 2/ The Commission has previously decided in Harker Heating & Sheet Metal (6704) 4/64, and City of Neenah (10716-B) 10/72 that it will not enforce arbitration awards which are contrary to the standards for court review set forth in Section 298.10, Wisconsin Statutes, which sets out, in relevant part, the following ground as being sufficient to warrant the vacation of an arbitration award by a court:

"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."

authority to provide a remedy, it "refused to exercise its authority" and "neither denied nor granted a binding remedy on the basis that it was not politically expedient to do so". In addition, the Joint Trade Board stated to the parties "that unless the parties could fashion a remedy amongst themselves, they would have to resort to another forum."

It thus seems clear in this case that the Joint Trade Board, instead of issuing a final and definite award as contemplated by Section 298.10, Wisconsin Statutes, refused to execute such an award because of "political expedience" and instead directed the parties to resolve said matter "in another forum".

The Joint Trade Board's failure to resolve the remedy issue and its clearly expressed intention to have such matter resolved in another forum compels a finding that its award is neither definite nor final within the meaning of Section 298.10, Wisconsin Statutes, and therefore is not enforceable by the Employment Relations Commission pursuant to Sections 111.06(1)(f) and 111.06(2)(c) of the WEPA.

In view of this finding, a second issue must be resolved, and that arises from the Complainant's request that the Commission issue an order remedying the contractual violation found by the Joint Trade Board. To grant the Complainant's request would undermine the viability of the parties' agreed upon procedures for the resolution of contractual disputes and would contravene the well-established federal policy to defer to such procedures where they can effectively dispose of such disputes. 3/ The Commission, traditionally has not asserted jurisdiction to decide such contractual disputes where the parties have failed to exhaust the voluntary procedures contained in their collective bargaining agreement and where such procedures provide for a final and binding means of resolving such disputes. 4/

For the foregoing reasons, the Examiner has remanded the remedy issue in the instant dispute to the Joint Trade Board for a final and definite award by a majority of said Board, or in the event of a tie vote on the Board, the matter should be referred to an arbitrator for final disposition in accordance with the procedure set forth in Article III of the parties' collective bargaining agreement.

Until a final and definite award has been rendered through the procedures set forth in the parties' agreement, it would be premature for the Commission to determine whether or not there has been a violation of Section 111.06(1)(f) of the WEPA. Thus, the Examiner will hold this proceeding in abeyance until an enforceable, binding award has been rendered pursuant to the parties' agreement, or until it is clear that the parties' agreed upon contractual procedure cannot provide a final

3/ United Steelworkers v. Warrior & Gulf Navigation Co. 363 U.S. 574, 46 LRRM 2416 (1960). The U.S. Supreme Court found support for its deference to voluntary arbitration in the legislative history [See Textile Workers Union v. Lincoln Mills 353 U.S. 448, 40 LRRM 2113 (1957)] and in Section 201 and 203 (d) of the LMRA [See Carey v. Westinghouse Electric Corp. 375 U.S. 261, 264-65, 55 LRRM 2042 (1964) and United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 LRRM 2414 (1960)] which provide that final adjustment by an agreed-upon method is the most desirable method for settling contract disputes.

4/ J. I. Case Co. (9727-A, B) 7/70; Bartell Broadcasters, Inc. (9763-A, B) 7/70; D. L. Bradley Co., Inc. (9526-A, B) 9/70; Rodman Industries, Inc. (9650-A, B) 11/70; Aff'd Brown Co. Cir. Ct. 2/72; Stokley-Van Camp, Inc. (10349-A) 7/71; Bausch Machine Tool Co. (11287) 9/72.

and definite award enforceable by the Commission in which case the Commission might assert its jurisdiction to resolve the contractual issue presented herein.

Dated at Madison, Wisconsin this 27th day of February, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Byron Yaffe
Byron Yaffe, Examiner