STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS, DAIRY EMPLOYEES & HELPERS LOCAL UNION NO. 579, Complainant, vs. JANESVILLE BRICK & TILE COMPANY, INC., Respondent.	Case III No. 20610 Ce-1677 Decision No. 14748-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, appearing on behalf of the Complainant.
Mr. Douglas Kelly, President, Janesville Brick & Tile Company, Inc., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

General Drivers, Dairy Employees & Helpers Local Union No. 579, having on June 24, 1976 filed a complaint wherein it alleged that the Janesville Brick & Tile Company, Inc., has failed to comply with an arbitration decision issued on May 17, 1976 by Arbitrator Dennis P. McGilligan, thereby violating Section 111.06 Statutes; 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), Statutes; and pursuant to notice, a hearing having been held in the matter at Janesville, Wisconsin, on November 1, 1976 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That General Drivers, Dairy Employees & Helpers Local Union No. 579, hereinafter referred to as the Complainant, is a labor organization; and that Fred H. Fuller is the representative of the Complainant, which has its principal offices at Janesville, Wisconsin.

2. That the Janesville Brick & Tile Company, Inc., hereinafter referred to as the Respondent, is an employer having its principal offices in Janesville, Wisconsin; and that Douglas Kelly is the President of the Respondent.

3. That the Respondent has recognized Complainant as the collective bargaining representative for certain of its employes and that the parties were subject to a collective bargaining agreement.

4. That at all times material herein there was a provision in the parties' collective bargaining agreement providing for the processing of grievances up to and including binding arbitration.

5. That a grievance was filed on March 10, 1976, alleging that Arthur F. Lietz was discharged in violation of the collective bargaining agreement for an alleged refusal to work; and that following unsuccessful attempts at resolving said issue, and pursuant to the agreement, the parties submitted the question to Arbitrator Dennis P. McGilligan for a binding determination.

6. That after conducting a hearing in the matter, Arbitrator McGilligan issued his Arbitration Award on May 17, 1976, wherein he found that the grievant, Arthur F. Lietz, was discharged in violation of the collective bargaining agreement.

7. That Arbitrator McGilligan's Award, in pertinent part, provides as follows:

> "That the Company immediately reinstate the grievant, restore him all his rights under the collective bargaining agreement, pay him all wages lost (including overtime hours) because of the discharge excluding: all the wages the grievant earned in the interim that he would not have received except for his discharge . . ."

8. That for the past several years the grievant primarily drove a truck for the Respondent; and that since 1972 the grievant received driver's wages.

9. That the grievant was not in the Respondent's employ from March 9, 1976 through July 12, 1976, whereupon he was reinstated pursuant to Arbitrator McGilligan's award, and upon said reinstatement he received the driver's hourly rate until the week of August 16, 1976 at which time his pay was reduced to the yardman rate.

10. That the Complainant and Respondent entered into a collective bargaining agreement effective April 1976 which, inter alia, raised the driver's hourly wage from $4.35 to $4.60.

11. That in 1972, 1973 and 1974, the grievant worked an average of 40 hours per week during the period between the second week in March and the second week in July.

12. That the grievant worked an average of 22 hours per week from March 9, 1975 to July 12, 1975.

13. That Respondent's drivers, from March 9, 1976 to July 12, 1976 worked an average of at least 30 hours per week.

14. That the grievant has not to date received lost wages from the Respondent pursuant to the Arbitration Award issued on May 17, 1976.

15. That the grievant did receive $1,235.00 unemployment compensation benefits for the period in question.

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

CONCLUSION OF LAW

The failure of the Respondent to reinstate the grievant with all wages lost is in violation of Arbitrator McGilligan's May 17, 1976 Award, and therefore constitutes an unfair labor practice within the meaning of Section 111.06(1)(f), Statutes.

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

ORDER

1. IT IS ORDERED that the Respondent immediately pay the grievant all lost wages for the period March 9, 1976 to July 12, 1976 on the basis of the following formula: The pertinent driver's rate specified in the parties' collective bargaining agreement times 34.4 hours per

week 1/ less the amount the grievant received in unemployment compensation benefits during said period, said amount to be reimbursed to the State Employment Security Division, Department of Industry, Labor and Human Relations.

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

Dated at Madison, Wisconsin this 21st day of February, 1977.

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Byron Yaffe, Examiner

1/ 34.4 hours per week is equivalent to the average number of hours worked per week by the grievant during the same period in 1972 (40 hours); 1973 (40 hours); 1974 (40 hours); 1975 (22 hours) and the minimum average number of hours worked per week during the same period by the drivers in 1976 (30 hours) totalled and divided by five (the number of years utilized to determine the average number of hours per week the grievant was likely to have worked during the period in question.)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant, by its complaint, filed with the Commission on June 24, 1976, alleges that the Respondent, Janesville Brick & Tile Company, Inc., failed and refused to comply with a previously issued arbitration decision and award by failing and refusing to reinstate the grievant, Arthur F. Lietz, with all wages lost, thereby violating Section 111.06(1)(a), (c), (d), (f), and (g) of the Wisconsin Statutes.

POSITION OF THE COMPLAINANT:

The Complainant contends that the grievant should receive lost wages, pursuant to the arbitration award at the driver's rate covering the period March 9, 1976 to July 12, 1976 either on the basis of a 30-hour or better work week which represents what junior drivers received during this time period in 1976, or a 40-hour work week which is what the grievant worked in past years during the applicable time period.

POSITION OF THE RESPONDENT:

The Respondent, on the other hand, contends that since the grievant refused to drive a truck before his discharge, but commented that he would work in the yard, he was reinstated as a yardman and should receive yardman's pay for the period in question on the basis of a 22-hour work week which represents the average number of hours per week the grievant worked during the applicable time period in 1975.

DISCUSSION:

The Award provided for the grievant's immediate reinstatement, restoration of all his rights under the collective bargaining agreement, and the payment of all wages lost (including overtime hours) because of the discharge, excluding wages earned in the interim that the grievant would not have received but for his discharge. The grievant was reinstated on July 12, 1976 and presumptively, upon reinstatement, was restored with all rights under the collective bargaining agreement. The only remaining issue is the amount of lost wages he is entitled to.

It seems clear from the record that for the past several years the grievant primarily drove a truck for the Respondent. Furthermore, it is unrefuted that the grievant received driver's wages since 1972. Although Respondent stated that the grievant was reinstated as a yardman, Respondent did not deny that the grievant was paid the driver's hourly rate upon his reinstatement until the week of August 16, 1976. Hence, it is reasonable to assume that if the grievant had not been discharged, he would have continued to have been compensated at the driver's hourly rate at least until that date.

The major issue in dispute in this proceeding involves the number of hours the grievant would have worked during the period March 9 through July 12. Respondent characterized this period as a slow part of the season, requiring layoffs or hourly reductions. The record indicates that during the same period of time in 1972, 1973 and 1974 the grievant worked 40 hours per week. In 1975 during this same period of time, it is apparent from the record that the grievant worked an average of only 22 hours per week. It is also evident that during this time period in 1976, while the grievant was not working, the drivers averaged a minimum of 30 hours per week.

It appears to the Examiner that the fairest basis for computing the number of hours the grievant would have worked during the period in question would be to utilize an average of the number of hours the

grievant worked during the same period in previous years (1972-1975), and the minimum number of hours worked by other less senior drivers in his absence in 1976. The result, 34.4 hours per week, takes into consideration and gives weight to all of the factors which both parties assert are relevant to this dispute. It has accordingly been utilized herein.

The Arbitrator's Award included overtime hours; however, it seems reasonable to conclude that the grievant would not have worked any overtime hours in 1976 as the average number of hours worked per week is less than 40. Accordingly, this Examiner concludes that no overtime wages should be paid to the grievant.

To further comply with the spirit of the Arbitration Award, the Examiner has directed the Respondent to deduct from the backpay due the grievant an amount equal to the unemployment compensation benefits received by the grievant during said period and to reimburse the State Employment Security Division, Department of Industry, Labor and Human Relations in the same amount.

Dated at Madison, Wisconsin this 21st day of February, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner