STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON TEACHERS, INC., Complainant, vs. JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURKE AND WESTPORT and the BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al., Respondents.	Case XXX No. 19106 MP-461 Decision No. 14866
JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG, BURKE AND WESTPORT and the BOARD OF EDUCATION OF JOINT SCHOOL DISTRICT NO. 8, et al., Complainants, vs. MADISON TEACHERS, INC., Respondent.	Case LV No. 20738 MP-652 Decision No. 14867

Appearances:

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

Mr. Gerald C. Kops, Assistant City Attorney, appearing on behalf of the District and Board.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed by Madison Teachers, Inc., with the Wisconsin Employment Relations Commission on April 29, 1975, wherein it alleged that Joint School District No. 8, City of Madison, et al. and Board of Education of Joint School District No. 8, City of Madison, et al., had committed certain prohibited practices within the meaning of Sections 111.70(3)(a) 1 and 5 of the Municipal Employment Relations Act (MERA); and the Commission having appointed George R. Fleischli, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been scheduled for June 18, 1975, and thereafter postponed indefinitely upon request of Madison Teachers, Inc., pending receipt of an arbitration award; and Madison Teachers, Inc., having advised the Examiner on October 13, 1975 that the parties had received the arbitration award in question but that Madison Teachers, Inc. still desired to pursue its complaint herein; and that thereafter on

December 2, 1975 Joint School District No. 8, City of Madison, et al., and Board of Education of Joint School District No. 8, City of Madison, et al., having filed their answer and a "cross-complaint" alleging that Madison Teachers, Inc., had committed and was committing a prohibited practice within the meaning of Section 111.70(3)(b)4 of MERA; that hearing on said complaint and cross-complaint having been held at Madison, Wisconsin on December 4, 1975 before the Examiner and during the course of said hearing Madison Teachers, Inc., having entered its appearance and orally answered said cross-complaint; and the Commission thereafter having issued an Order appointing George R. Fleischli, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Orders on said cross-complaint as provided in Section 111.07(5) of the Wisconsin Statutes; and the Examiner having considered the evidence and arguments of counsel 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 Madison Teachers, Inc., hereinafter referred to as MTI is a labor organization and the certified representative of certain teaching and related personnel more fully described below, for purposes of collective bargaining over matters affecting wages, hours and conditions of employment.

2. That Joint School District No. 8, City of Madison, et al., hereinafter referred to as the District, and the Board of Education of Joint School District No. 8, City of Madison, et al., hereinafter referred to as the Board, are, respectively, a public school district organized under the laws of the State of Wisconsin and a public body charged under the laws of the State of Wisconsin with the management, supervision and control of the District and its affairs.

3. That from January 1, 1972, until at least December 31, 1975, and at all times relevant herein, MTI and the Board have been parties to collective bargaining agreements which contained the following provisions 1/ which are relevant herein:

"I - Recognition - B

B. COLLECTIVE BARGAINING REPRESENTATIVE

1. The Board of Education, pursuant to a Certification of Representatives for Joint School District No. 8, City of Madison, et al, (Case I No. 9691) ME-150 Decision No. 6746) made by the Wisconsin Employment Relations Board on June 11, 1964 and revised on June 7, 1966, recognizes Madison Teachers as the exclusive collective bargaining representative* for the purposes of conferences and negotiations with the Board of Education on questions of wages, hours and conditions of employment in a mutually genuine effort to reach agreement with reference to the subjects under negotiation.

2. Hereinafter the term 'teacher' refers to anyone in the collective bargaining unit.

1/ Quoted provisions are from the 1975 collective bargaining agreement. The only substantial difference between the three agreements that existed during the period in question is in the compensation provided for extra duty assignments set out in Article III, Section M, Paragraph 12.

*for all regular full-time and regular part-time certificated teaching personnel employed by Joint School District No. 8, City of Madison, et al, including psychologists, psychometrists, social workers, attendants and visitation workers, work experience coordinator, remedial reading, University Hospital teacher, trainable group, librarians, guidance counselors, teaching assistant principals (except at Sunnyside School), teachers on leave of absence, but excluding on-call substitute teachers, interns and all other employees, principals, supervisors and administrators.

II - Procedure - A

A. CONFERENCE AND NEGOTIATION

. . .

2. The Board of Education and Madison Teachers each recognize its legal obligation imposed by Section 111.70 of the Wisconsin Statutes to meet for the purposes of negotiating in good faith at reasonable times in a bona fide effort to arrive at a settlement on questions of wages, hours and conditions of employment. Without limiting this legal obligation, the parties to this agreement agree as follows:

. . .

c. Each party to this agreement desiring to be represented by agents for negotiating agrees to furnish to the other party a list of its duly authorized agents for such purposes. Each party agrees to negotiate only with said agents and no others, including their principals, namely, the Board of Education or Madison Teachers, as the case may be, unless the latter as principals authorize negotiations with others or themselves.

d. If matters which are proper subjects of negotiations are brought, whether in the form of a grievance, petition or otherwise, to the attention of either of the parties to this agreement by any individual, group of individuals or organization other than the other party to this agreement or its duly authorized agents, such latter party shall be punctually informed of such action.

. . .

II - Procedure - B

B. GRIEVANCE PROCEDURE

. . .

3. Definition:

a. A 'Grievance' is defined to be a dispute concerning the interpretation or application of any of the terms of any 'written' agreement establishing salaries, hours, or other conditions of employment for the employees of the Board of Education for whom Madison Teachers is the collective bargaining representative. Aggrieved parties may be Madison Teachers or any such employees.

. . .

6. The procedural steps for Madison Teachers shall commence at Level 3. Organizational (Class) Grievance: Madison Teachers must submit the alleged grievance within sixty (60) days after Madison Teachers knew of the act or condition on which the grievance is based, or the grievance will be deemed waived. If the act or condition reoccurs the time limit will be renewed.

. . .

LEVEL 4:

If any grievance is not resolved in Level 3, then Madison Teachers and only Madison Teachers may present the grievance in writing to the Board of Education. Same shall be submitted within ten (10) school days after receipt of the Superintendent's answer. If the grievance is filed with the School Board at least seven (7) school days prior to its next regular meeting, the School Board shall at said meeting determine whether it shall or shall not consider the grievance. In case the grievance is filed within less than seven (7) days prior to the meeting of the School Board, it shall make such determination at the following meeting of the School Board. If the School Board decides not to consider the grievance, it shall notify the Executive Director of Madison Teachers. If the School Board determines to consider the grievance, it shall immediately notify the Executive Director of Madison Teachers. The grievance will be considered at the next regular meeting of the School Board and the School Board shall issue its determination of the grievance within five (5) school days in writing and shall clearly and concisely state its decision in the matter and shall serve a copy thereof upon the Executive Director of Madison Teachers. Should the School Board fail to notify the Executive Director of Madison Teachers of its intent to consider or not to consider the grievance within the time limits set forth above, Madison Teachers may proceed to arbitration on the grievance involved.

LEVEL 5:

a. To the extent the grievance remains unresolved at the conclusion of Level 3 or 4, Madison Teachers may call for compulsory, final, and binding arbitration. Said call must be within fifteen (15) school days after the receipt of the answer at Level 3 or 4.

. . .

d. The decision of the arbitration panel shall be final and binding on all parties except as forbidden by law and shall be rendered within thirty (30) days following the final day of hearings or receipt of briefs, whichever is later. Any brief not postmarked on or before the date set by the parties at the conclusion of the arbitration hearing as the date for submission of briefs shall not be considered or accepted by the arbitrator and shall be returned to the party submitting same with a letter of transmittal. The other party shall receive a copy of the letter of transmittal.

. . .

M. EXTRA DUTY COMPENSATION SCHEDULE

1. Teachers performing in a professional extra duty situation as listed on the extra duty compensation schedule shall be paid a percent of one of three base rates.

   a. Base 1 - is Step 1 of the regular BA schedule and is applied to the teacher's first involvement in this program.

   b. Base 2 - is Step 5 of the regular BA schedule. It is reached after four previous years of service in a position covered by this schedule.

   c. Base 3 - is Step 9 of the regular BA schedule. It is reached after eight years of service in a position covered by this schedule.

. . .

12.

Activity	% of Base
Senior High School Head Coach - Football & Basketball (Boys) Director, Physical Activities	12
Newspaper Advisor (14 issues) Senior High School Head Coach (Baseball, Swimming) (Boys) Track, Hockey, Gymnastics, Wrestling	10
Senior High Head Coach - Basketball (Girls)	9
Yearbook Advisor Dramatics Coach (2 3-act productions) Junior Varsity Football Senior High Assistant Coach - Football and Basketball (Boys) Sophomore Football Junior Varsity Basketball Coach (Boys)	8
Fall Equipment Manager Senior High Assistant Coach - Baseball, Track (Boys and Girls) Wrestling, and Swimming (Boys) Four Lakes Coach - Football and Basketball (Boys) Ninth Grade Head Coach - Football and Basketball (Boys) Gymnastics (9th Grade and Assist with Varsity) Head Coach Swimming (Girls) Head Coach Softball (Girls)	7

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Activity	% of Base
Head Coach Cross Country Senior High Head Volleyball Coach Ninth Grade Assistant Coach - Football High School Band Director Debate Coach Wrestling (9th Grade Boys) Junior Varsity Basketball (Girls)	6
Senior High Head Coach - Curling, Tennis, Golf Ninth Grade Coach - Track, Volleyball, Basketball (Girls) Bookstore Manager Baseball (9th Grade Boys) Spring Equipment Manager Softball Assistant (Girls) Swimming Assistant (Girls) Volleyball Assistant to Head Coach	5
Forensics Coach High School Choir Director High School Orchestra Director Senior High Cheerleader Advisor Ninth Grade Assistant Track Coach (when squad exceeds 35) Cross Country (9th Grade Boys) Ninth Grade Golf and Assist with Varsity Ninth Grade Tennis and Assist with Varsity Four Lakes Soccer	4
Intramurals (all levels) - one period per week	3

* Noon Hour Playground and Lunchroom Supervision
.0006 X base per hour (Bases 2 and 3 not used)
Compensation is computed in 1/2 hour lots

* Does not apply toward experience credit for base placement.

* Assistant Coaches assigned to any one of the above, but not so delineated, shall be paid 70% of the rate for the coaching of the activity in which he or she is assisting."

4. That beginning sometime in the fall of 1972, the District began, or greatly expanded, the practice of employing certain "non-faculty" individuals as coaches in its inter-scholastic sports program; that said "non-faculty" individuals were persons who were not otherwise employed by the District or, if employed, were employed as aides, for example, and were not otherwise considered to be included within the above described bargaining unit represented by the MTI; that the District determined at that time that effective on or about November 1, 1972, said individuals would be compensated at a rate which was less than that which was set out in Article III, Section M, of the collective bargaining agreement; that pursuant to that decision the District compensated said individuals in accordance with the following schedule:

"1. Interns should be paid at 80% of Base 1 of the particular sport they are coaching.

2. Unlicensed graduates and undergraduate students should continue to be paid at 80% of Base 1 of the particular sport they are coaching.

3. Teacher aides holding Wisconsin Teaching Authority and assigned to coaching responsibility in the same building as they are employed as an aide should receive 100% of Base 1 of the particular sport they are coaching.

4. Coaches who hold Wisconsin Teaching Authority but are not employed in the Madison Public Schools should be paid at 80% of Base 1 of the particular sport they are coaching."

5. That the District continued the practice of compensating said "non-faculty" personnel in accordance with the above schedule during the balance of the 1972-73 school year and during the 1973-74 school year; that sometime during the 1974-1975 school year, probably in December, 1974, the District changed its practice to some extent and began compensating coaches who held Wisconsin Teaching Authority but were not otherwise employed by the District and teacher aides and other "non-faculty" employes employed by the District holding Wisconsin Teaching Authority, an amount equal to that set out in Article III, Section M above; that on or about March 13, 1975 MTI filed a grievance with regard to said practice which read in relevant part as follows:

"Madison Teachers Incorporated, as petitioner and aggrieved party, with and on behalf of those employed as described below, hereby submits a written grievance alleging breach of contract by the administration and/or the Board of Education of Joint School District No. 8, City of Madison, et. al.

As an organizational grievance, said grievance shall commence at level 3 of the grievance procedure, Section II-B of the Collective Bargaining Agreement.

Violation of Section II-A of the Collective Bargaining Agreement is alleged inasmuch as the Board of Education and/or its agents have unilaterally established wages, hours and conditions of employment for individuals governed by the terms and conditions of the Collective Bargaining Agreement between MTI and the Board of Education (see Addendum A).

Further violation of the Collective Bargaining Agreement is claimed inasmuch as the Board of Education and/or its agents have failed to compensate coaches, who are not also employed as teachers in the Madison Public Schools in accordance with the terms and conditions of the Collective Bargaining Agreement, Section III-M.

RESOLUTION SOUGHT

Madison Teachers demands immediate compliance with the terms and conditions of the Collective Bargaining Agreement and that those individuals who have not been paid in accordance with the Collective Bargaining Agreement for services performed be made whole for their loss of wages and fringe benefits."

6. That thereafter on or about April 2, 1975, MTI appealed its grievance described above to the 5th level of the grievance procedure contained in the 1975 collective bargaining agreement which provides for

final and binding arbitration; that the parties selected Arbitrator Anthony B. Sinicropi to hear the grievance and sometime prior to April 24, 1975, agreed to the date for the hearing; that Arbitrator Sinicropi held the hearing on May 29, 1975, wherein MTI was given an opportunity to present evidence and arguments in support of its grievance; that after the preparation of transcript and submission of post hearing briefs Arbitrator Sinicropi issued his award on October 17, 1975; that in issuing said award Arbitrator Sinicropi adopted the statement of issues submitted by MTI as a correct statement of the issues before him which statement read as follows:

"I. DID THE BOARD OF EDUCATION VIOLATE THE COLLECTIVE BARGAINING AGREEMENTS THEN IN EFFECT* WHEN IT FAILED TO PAY

a) Interns
b) Unlicensed graduate and undergraduate students
c) Teacher aides holding Wisconsin Teaching Authority
d) Coaches who hold Wisconsin Teaching Authority but not otherwise employed by the Madison Public Schools
e) Coaches who teach at a Madison Public School different from the one at which they coach
f) Any other non-faculty member coach

THE COMPENSATION SET FORTH IN PARAGRAPH M OF ARTICLE III OF SAID AGREEMENT FOR PERFORMING THE COACHING ACTIVITIES SET FORTH IN THE SAME ARTICLE, BUT USED UNILATERALLY FORMULATED JOINT EX. 3B INSTEAD AS THE BASIS FOR COMPENSATION?

II. DID THE BOARD OF EDUCATION VIOLATE ITS DUTY TO COLLECTIVELY BARGAIN WITH MADISON TEACHERS INCORPORATED AS THE MAJORITY AND EXCLUSIVE REPRESENTATIVE OF ITS BARGAINING UNIT EMPLOYEES BY UNILATERALLY ESTABLISHING THE RATE OF PAY FOR 'NON-FACULTY COACHES'?

III. IS THE EXTENT OF THE REMEDY AVAILABLE IN THIS GRIEVANCE LIMITED TO THE TIME PERIODS UNDER THE CURRENT AGREEMENT (JOINT EXHIBIT 1) BECAUSE THE ARBITRATOR'S AUTHORITY STEMS FROM JOINT EXHIBIT 1.

* The Collective Bargaining Agreements in effect for January 1, 1975 through December 31, 1975, January 1, 1973 through December 31, 1974 and January 1, 1972 through December 31, 1972 (Jt. Exhibits 1, 2 and 9 respectively)."

7. That Arbitrator Sinicropi's opinion and award read in relevant part as follows:

"If one strips the various complexities from the arguments offered by both parties, it may be considered that each party has advanced one major overriding argument. The School Board claims that the work in question--extra duty coaching is not exclusively bargaining unit work, and the MTI argues that such work is, indeed, exclusively bargaining unit work whether it is performed by the Madison faculty or by others.

It seems that the above question should first be answered and once it is disposed of, several of the other contentions will likewise be answered.

Unquestionably Article III, Section M was negotiated in anticipation of what the pay should be for the Madison faculty when it performs coaching duties. On the other hand it appears

that Article III, Section M was not negotiated for purposes of establishing compensation rates for non-Madison faculty. Evidence of these conclusions can be realized from reviewing several of the proviisions [sic] of Article III.

. . .

. . . Thus, the writer has concluded that the Article III, Paragraph M was designed to establish rates of pay, duties, and placement procedures for Madison teachers when and if they assume extra duty assignments. The provision does not appear to have contemplated a situation where teachers, or others outside the Madison system, were to be hired for these positions.

Based upon the practice usually found in schools, it is a reasonable assumption to conclude that the parties did not contemplate that persons other than Madison teachers would do extra duty jobs. Hence, the contract has not addressed that alternative. Indeed, it is silent on that point.

From the above analysis, it appears that the parties intended that extra duty jobs were to be performed by Madison Teachers and the pay schedule for those extra duty jobs was bargained for those Teachers. But the question still remains--can such jobs be given to persons outside the Madison faculty? The answer appears to be 'yes' for several reasons.

. . . there is nothing in the Agreement restricting the Board from employing non-unit personnel for the work in question.

While it is true the MTI argues that it does not challenge Management's right to go outside the School District to secure 'teachers' to coach, it does argue that those outsiders, when hired, are 'teachers' and thus are covered by the Agreement. That MTI contention must be rejected because the contract clearly spells out just as Management argues, that 'interns, unlicensed graduate and undergraduate students, teacher aides, and those teachers not holding regular full-time and part-time teaching contracts are excluded from the unit.' Thus, the contract does not act as a bar to Management.

. . . Moreover, unit employees were not required to do the jobs but could volunteer and the evidence shows volunteers were not realized in sufficient enough numbers.

The effect on unit employees appears to be minimal, if anything at all. The MTI could not give evidence of one unit employee who sought a coaching job being deprived of such an opportunity. In fact, the MTI witness, Margaret Mueller, a non-Madison faculty coach in part, testified she was replaced by a Madison faculty teacher. Thus, there is no evidence of unit erosion or discrimination against unit employees. On the contrary, Madison faculty are given preference over non-Madison faculty and Madison faculty are paid as per the Agreement.

. . .

The MTI's second argument regarding the Board's obligation to bargain over the rates is also without merit. Since this writer has viewed the employees in question as being outside the preview of the Agreement and the bargaining unit, there is no restriction upon Management's unilateral right to act.

It goes without mention that this allegation by the MTI may also be viewed as an unfair practice for which the MTI may seek relief in another forum.

Finally is the question of remedy. For the reasons set forth above, that question need not be considered.

VIII. AWARD

For the reasons set forth above, the grievance should be and is hereby denied."

8. That thereafter MTI asked that a hearing on the complaint herein be scheduled for the purpose of determining whether the District has interfered with the rights of employes represented by MTI or violated the terms of its collective bargaining agreements with MTI and, in that regard, argues that the Commission should not defer to the award of Arbitrator Sinicropi with regard to either claim because:

a. The Arbitrator, in determining that the above described "non-faculty" persons were not members of the above described bargaining unit represented by the MTI when employed by the District as coaches, exceeded his jurisdiction; and

b. The Arbitrator so imperfectly executed his authority that a final and binding award with respect with the issues presented to him was not made.

Based on the above and foregoing Findings of Fact the undersigned makes and enters the following

CONCLUSIONS OF LAW

1. That by failing to file its complaint herein until April 29, 1975, MTI has lost its right to proceed against the District and the Board with regard to any prohibited practices allegedly committed by them prior to April 29, 1974.

2. That, because the parties have agreed to submit and submitted such disputes to binding arbitration, the Wisconsin Employment Relations Commission is without jurisdiction to consider the claim of MTI that the District has, since April 29, 1974, violated any of the provisions of the collective bargaining agreements existing between MTI and the Board by its practice of paying the above described "non-faculty" individuals at a rate of compensation less than that set out in Article III, Section M of said agreement.

3. That the proceedings before Arbitrator Sinicropi were fair and regular; that the Arbitration Award of Arbitrator Sinicropi wherein he concluded, inter alia, that the above described "non-faculty" coaches are not in the collective bargaining unit represented by MTI and set out above was not in excess of his jurisdiction or imperfectly rendered and is not repugnant to the purposes and policies of the MERA and that therefore the Commission ought to defer to said award and refuse to assert its jurisdiction to determine whether the District interfered with the rights of employes represented by MTI by failing and refusing to pay said "non-faculty" coaches in accordance with Article III, Section M of the collective bargaining agreement set out above.

4. That, by proceeding to hearing on its complaint herein and seeking a determination of the issues raised therein, MTI has not and is not violating its agreement to accept the terms of an arbitration

award as final and binding and has not and is not committing a prohibited practice within the meaning of Section 111.70(3)(b)4 of the MERA.

Based on the above and foregoing Findings of Fact and Conclusions of Law the undersigned makes and enters the following

ORDER

That the complaints herein be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 25th day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MADISON JOINT SCHOOL DISTRICT NO. 8, XXX, LV, Decision Nos. 14866, 14867

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint MTI alleges that by unilaterally establishing a separate schedule of compensation for the "non-faculty" coaches 2/ which is below the agreed to rate set out in Article III, Section M of the agreements covering the period in question, the District has interfered with the rights of employes represented by MTI and violated the provisions of the collective bargaining agreement. A central tenent of its claim in this regard is that all persons employed as coaches by the District are included in the collective bargaining unit certified by the Commission 3/ and set out in the agreement. That same claim was made before Arbitrator Sinicropi.

The District's answer admits most of the facts alleged but alleges in addition that only those persons who were employed as "teachers" (i.e., otherwise included within the certified bargaining unit) are covered by the provisions of Article III, Section M, and that the "non-faculty" coaches are not "teachers". The District denies that it has interfered with the rights of employes represented by MTI or that it has violated the provisions of the collective bargaining agreements and alleges that Arbitrator Sinicropi has issued a final and binding arbitration award which determined that the District has not violated the provisions of the collective bargaining agreement. 4/

As part of their answer District and Board filed a "cross-complaint" wherein they alleged that, by seeking to relitigate the issues raised before and decided by Arbitrator Sinicropi, MTI is refusing to accept as final, the terms of his arbitration award, even though it had previously agreed to do so. MTI waived the notice requirements of Section 111.07(2)(a) of the Wisconsin Statutes and entered an appearance and oral answer on the record so that the Examiner could proceed as scheduled and hear both matters simultaneously.

In its answer to the cross-complaint, MTI admits that it submitted the issues described in Finding of Fact number 6 above to Arbitrator Sinicropi but contends that Arbitrator Sinicropi declined to decide the issue dealing with the District's alleged refusal to bargain. 5/ By way of affirmative defense, MTI alleges that, to the extent that Arbitrator Sinicropi attempted

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2/ The term "non-faculty" coaches refers to all of those persons employed by the District as coaches who were not otherwise employed by the District, or if employed, were employed as aides, for example, and were not otherwise considered to be within the bargaining unit involved herein.

3/ Decision No. 6746, June 11, 1964.

4/ At the outset of the hearing the District moved for dismissal of the complaint on this ground and the Examiner deferred ruling on the motion. The dismissal of MTI's complaint effectively grants said motion.

5/ The MTI complaint does not specifically allege that the District violated its duty to bargain; it merely alleged interference. However, if the District did refuse to bargain as contended by MTI it is that conduct which constituted the interference.

to answer the second issue submitted, he exceeded his authority. Finally MTI alleges that Arbitrator Sinicropi imperfectly rendered his award by the manner in which he dealt with the second issue presented.

MTI asks that the Commission refuse to defer to the award in question and enter a finding that the "non-faculty" coaches are included in the collective bargaining unit set out in the agreement and that the District therefore violated the provisions of Article III, Section M when it failed to pay them in accordance with the terms set out therein.

JURISDICTION OF THE ARBITRATOR

It is clear that the Arbitrator did not exceed his jurisdiction, which derives from the terms of the collective bargaining agreement. MTI claimed that the District violated the provisions of Article III, Section M, by unilaterally establishing a pay range for "non-faculty" coaches and paying them accordingly. It argued inter alia that said individuals were "teachers" within the meaning of Article I, Section B, 2. The Arbitrator had jurisdiction to decide its claim in that regard since it dealt with the interpretation and application of the terms of the agreement.

Alleged Failure to Decide the Second Issue Presented

A fair reading of the rationale of the Arbitrator, some of which is reproduced at finding of fact number 7, reveals that he unquestionably decided that the "non-faculty" coaches were not included in the collective bargaining unit covered by the agreement. The only hint to the contrary is contained in the last sentence of his rationale with regard to the second issue wherein he stated:

> "It goes without mention that this allegation by the MTI may also be viewed as an unfair labor practice for which the MTI may seek relief in another forum". (Emphasis supplied).

Contrary to the position being urged by MTI, the Examiner concludes that this sentence does not establish that the Arbitrator imperfectly rendered his award by failing to answer the second issue presented. The Arbitrator clearly and unequivocally answered the second issue. By this sentence he simply gave recognition to the fact that the Wisconsin Employment Relations Commission also has jurisdiction over the issue raised before him and decided by him. Although the Arbitrator did not expressly state that the Wisconsin Employment Relations Commission is not obligated to defer to an arbitration award which deals with an issue over which it has concurrent jurisdiction, his comment appears to reflect knowledge of such fact.

Deferral to the Arbitrator's Award

The Commission's policy of deferring to the arbitration process is the subject of numerous decisions but requires some explication under the circumstances of this case. First of all, the Commission's policy is to defer to the arbitration process in all cases involving alleged violations of the terms of a collective bargaining agreement where the agreement provides for final and binding arbitration of alleged violations of its terms, unless the parties, by their conduct, waive or forfeit their right to insist that alleged violations be submitted to arbitration. 6/

6/ River Falls Co-op Creamery (2311) 1/50; Oostburg Joint School District No. 1 (11196-A,B) 11/72, 12/72, affirmed Sheboygan County Circuit Court 6/6/74; City of Milwaukee (11854) 5/73; Levi Mews d/b/a Mews Readymix Corp. (6683) 3/64.

In this case MTI not only insisted on exercising its right to arbitrate the issues presented to Arbitrator Sinicropi, but actually obtained a determination of those issues. Consequently, the Commission is without jurisdiction to determine whether the District has violated the terms of the collective bargaining agreement.

It is also the Commission's policy, under appropriate circumstances, to defer to the arbitration process or the award of an arbitrator where one of the parties simultaneously pursues its right to arbitrate an issue or actually arbitrates an issue over which the Commission has concurrent jurisdiction. 7/ This policy is consistent with the policy pursued by the National Labor Relations Board under its Spielberg 8/ and Dubo 9/ decisions but not necessarily with its policy under its Collyer 10/ decision.

In this case MTI filed its grievance at the third level of the grievance procedure on March 13, 1975, approximately a month and a half before it filed its complaint herein. Evidence introduced at the hearing indicates that MTI appealed the grievance to arbitration and requested a panel of arbitrators from the Wisconsin Employment Relations Commission, by letter dated April 1, 1975. Arbitrator Sinicropi was subsequently selected to hear the dispute and, sometime before April 24, the parties agreed to hold the hearing on May 29, 1975. On April 29, 1975, the MTI complaint herein was filed. Hearing on the MTI complaint was postponed at the request of MTI pending the decision of the arbitrator.

Under these circumstances the Examiner is convinced that the Commission ought to defer to the award of Arbitrator Sinicropi. As previously noted the arbitrator acted within his jurisdiction and rendered a decision which resolved the only issue raised by the MTI complaint over which the Commission even arguably has jurisdiction at this point in time. The proceedings were fair and regular and the result was not repugnant to the purposes and policies of the MERA.

The District's claim that MTI has violated the provisions of Section 111.70(3)(b)4 by pursuing its complaint herein is a novel one. Ordinarily allegations that a party has refused to abide by an arbitrator's award involve an award which imposes some requirement on the party who is allegedly refusing to abide by the award. Although most awards which require some action upon one party to the agreement involve awards that have been rendered against an employer, awards sometimes require unions to take some action or refrain from taking some action, such as is the case when a union violates a no strike agreement.

Here, the award in question denied the grievance. Consequently, neither party was required to take any action or refrain from taking any action under the terms of the award. The award in its entirety reads as follows:

7/ Milwaukee Elks (7753) 10/66; Milwaukee Board of School Directors and Steven A. Vrsata (10663-A) 3/72.

8/ Spielberg Manufacturing Company 112 NLRB 1080, 36 LRRM 1152 (1955).

9/ Dubo Manufacturing Corporation 142 NLRB 431, 53 LRRM 1070 (1963).

10/ Collyer Insolated Wire Co. 192 NLRB No. 150, 77 LRRM 1931 (1971).

"For the reasons set forth above, the grievance should be, and hereby is, denied."

The Examiner concludes that, in the absence of a requirement that MTI take some action or refrain from taking some action, it cannot and did not refuse to accept the terms of an arbitration award within the meaning of Section 111.70(3)(b)4 of MERA by pursuing its complaint herein.

For the above and foregoing reasons, and based on the record as a whole the Examiner has dismissed both complaints.

Dated at Madison, Wisconsin this 25th day of August, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner