

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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|-----------------------------------------------------------------|---|----------------------|
| INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNION NO. 139, | : |                      |
|                                                                 | : |                      |
| Complainant,                                                    | : |                      |
|                                                                 | : | Case II              |
| vs.                                                             | : | No. 20768            |
|                                                                 | : | Ce-1687              |
| EDW. RYAN, INC. <sup>1/</sup>                                   | : | Decision No. 14878-A |
|                                                                 | : |                      |
| Respondent.                                                     | : |                      |
|                                                                 | : |                      |

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Appearances:

Edward W. Engelhardt and Richard R. Sette, Business Representatives for Complainant.<sup>2/</sup>

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Union of Operating Engineers Local 139 having on August 26, 1976 filed a Complaint with the Wisconsin Employment Relations Commission wherein it alleged that Edw. Ryan, Inc. has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Stanley H. Michelstetter II, a member of its Staff, to act as examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07 (5) of the Wisconsin Employment Peace Act; and Respondent having filed its Answer September 29, 1976; and pursuant to notice of hearing on said Complaint having been held at Milwaukee, Wisconsin on September 30, 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

1. That International Union of Operating Engineers Local Union No. 139, hereinafter referred to as Complainant, is a labor organization with offices at 7283 West Appleton Avenue, Milwaukee, Wisconsin.

2. That Edw. Ryan, Inc., hereinafter referred to as Respondent, is an employer engaged in the construction industry which employs

<sup>1/</sup> Complainant amended its Complaint during hearing to allege the correct name of Respondent.

<sup>2/</sup> Respondent did not appear at hearing herein and specifically declined the Examiner's pre-hearing telephone offer of an opportunity to do so.

employees in Wisconsin and has its address at Post Office Box 800, Delafield, Wisconsin; that Respondent meets the jurisdictional standards of the National Labor Relations Board.

3. That at all relevant times Respondent recognized Complainant as the exclusive collective bargaining representative of certain of the employees and that in that regard Respondent on August 27, 1973 assumed effective June 1, 1973 the provisions of a collective bargaining agreement existing between Complainant and Associated Public Works Contractors of Greater Milwaukee, Inc. which agreement provides

" . . .

### ARTICLE III

#### PERIOD OF AGREEMENT

Section 3.1. PERIOD OF AGREEMENT: This Agreement shall continue in full force and effect until May 31, 1976, and from year to year thereafter and shall be subject to amendment or termination only if either party notifies the other party in writing of its desire to amend or terminate the same ninety (90) days prior to May 31, 1976, or of any subsequent year, except that either party may upon written notice at least ninety (90) days prior to May 31, 1975, open this Agreement for negotiating a change in hourly wage and classifications.

Section 3.2. HEALTH AND WELFARE AND/OR PENSION: However, the Union may have the option of applying any part of the newly negotiated wage rate to increase the contributions to the Health and Welfare and Pension Funds.

### ARTICLE IV

#### SUBCONTRACTING

Section 4.1. UNION SUBCONTRACTOR: The Contractor agrees that when subletting or contracting out work covered by this Agreement which is to be performed within the geographical coverage of this Agreement at the site of the construction, alteration, painting, or repair of a highway, building, structure or other work, he will sublet or contract out such work only to a subcontractor who has signed, or is otherwise bound by, a written labor agreement entered into with the Union.

Section 4.2. When situations arise wherein it is claimed that no union contractor is available for the proposed work the Contractor and the Union shall meet and agree upon an equitable solution. Any such equitable solution shall include the requirement that such subcontractor shall be obligated to compensate his employees at a level not less than the combined wage and fringe benefit contribution rates contained in this Agreement. In the absence of mutual agreement either party may submit the issue to arbitration as provided in Article IX.

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. . .

ARTICLE IX

ENFORCEMENT

Section 9.1. ARBITRATOR: All grievances, disputes or complaints of violation of any provisions of this Agreement shall be submitted to final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. The arbitrator shall be a member or staff member of the WERC. The arbitrator shall have sole and exclusive jurisdiction to determine the arbitrability of such a dispute as well as the merits thereof. Written notice by registered return receipt letter of a demand for arbitration shall be given to the Contractor and Association or as applicable to the Union at its Milwaukee headquarters. The Contractor and Association as the case may be shall agree in writing within seven (7) calendar days to arbitrate the dispute.

Both parties shall cooperate to have the case heard by an arbitrator within seven (7) calendar days of the written agreement to arbitrate, provided an arbitrator is available. The arbitrator shall have the authority to give a bench decision at the close of the hearing, unless he shall deem the issues to be unusually complex, and thereafter he shall reduce the award to writing. Grievances over discharge or suspension shall be filed no later than ten (10) calendar days after the matter is brought to the attention of the Business Representative of the Union and in no event later than thirty (30) calendar days after the event giving rise to the grievance for all grievances involving monetary liability excluding Health and Welfare and Pension Benefits.

Section 9.2. BACK PAY: In the event the arbitrator finds a violation of the Agreement he shall have the authority to award back pay to aggrieved person or persons, or person on the referral list in addition to whatever other or further remedy may be appropriate.

Section 9.3. FAILURE TO ARBITRATE: In the event the Contractor or the Union does not agree to arbitrate a dispute within seven (7) calendar days or does not cooperate to have the case heard within seven (7) calendar days after the written agreement to arbitrate or does not comply with the award of the arbitrator, the other party shall have the right to use all legal and economic recourse.

Section 9.4. COST OF ARBITRATION: All expenses of the arbitration except attorneys' and witness' fees shall be shared equally by the Union and Contractor involved.

. . . "

4. That on January 26, 1976, Complainant received a letter from Respondent dated January 24, 1976, the body of which states:

"Pursuant to Article III of the above agreement we hereby notify you of our election to terminate the existing collective bargaining agreement effective May 31, 1976."

5. That by letter dated July 14, 1976 and received by Respondent, Complainant filed a grievance of the same date asserting that Respondent on July 12, 13 and 14, 1976 subcontracted work in violation of Article IV of the collective bargaining agreement

specified in Finding of Fact 3 above; that by the aforementioned letter Complainant demanded arbitration thereof; that Respondent refused and continues to refuse to arbitrate said grievance.

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

CONCLUSIONS OF LAW

1. That Respondent, Edw. Ryan, Inc. is an employer within the meaning of the Wisconsin Employment Peace Act, and the Labor Management Relations Act, as amended, who meets the jurisdictional standards of the National Labor Relations Board actions under the Labor Management Relations Act, as amended.

2. That since Respondent meets the jurisdictional standards of the National Labor Relations Board acting under the Labor Management Relations Act, as amended, the Examiner declines to assert the jurisdiction of the Wisconsin Employment Relations Commission over allegations of violations of Section 111.06 (1) (a) made by Complainant International Union of Operating Engineers Local No. 139.

3. That since the instant substantive provisions and agreement to arbitrate all expired by virtue of the expiration of the parties' collective bargaining agreement which expiration occurred prior to the occurrences underlying the instant grievance filed by Complainant July 14, 1976, Respondent has not, and is not, committing an unfair labor practice within the meaning of Section 111.06 (1) (f) of the Wisconsin Employment Peace Act by refusing Complainant's request to arbitrate said grievance.

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

ORDER

IT IS ORDERED, that the Complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II  
Stanley H. Michelstetter II  
Examiner

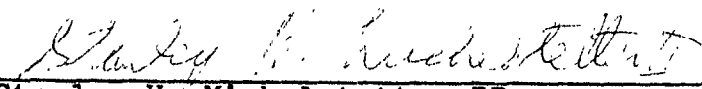
MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Complainant admits that Respondent terminated the instant collective bargaining agreement effective May 31, 1976. It also admits that the instant grievance arose entirely after the expiration thereof. Its sole position is that the parties have a past practice of extending agreements by mutual consent. The Examiner is satisfied that there is no evidence that Respondent ever actually or impliedly agreed to extend the instant agreement and, therefore, it has no duty to arbitrate this grievance under the expired agreement.

Dated at Milwaukee, Wisconsin, this 29th day of October, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Stanley H. Michelstetter II  
Examiner