STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES UNION, LOCAL NO. 75 affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. REIMER'S MEAT PRODUCTS, INC., Respondent.	Case I No. 21760 CE-1737 Decision No. 15577-A

Appearances:
Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Mr. Albert J. Goldberg, appearing on behalf of the Complainant.
Bittner, Petitjean, Hinkfuss and Sickel, Attorneys at Law, by Mr. Robert L. Bittner, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local No. 75, Drivers, Warehouse and Dairy Employees Union having, on June 13, 1977, filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Reimer's Meat Products, Inc. had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Duane McCrary, a member of the Commission's 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 pursuant to notice, hearing on said complaint having been held on July 19, 1977 at Green Bay, Wisconsin before the Examiner with the parties presenting oral arguments in lieu of written briefs; 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 Local No. 75, Drivers, Warehouse and Dairy Employees Union, hereinafter referred to as the Complainant, is a labor organization representing all truck drivers, truck driver salesmen and truck mechanics employed by Reimer's Meat Products, Inc.

2. That Reimer's Meat Products, Inc., hereinafter referred to as the Respondent, is a corporation engaged in the production of meat products, maintaining offices at 2146 Riverside Drive, Green Bay, Wisconsin, and is an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes.

3. That the Complainant and Respondent were parties to a collective bargaining agreement effective March 1, 1973 through March 1, 1976.

4. That the Complainant and Respondent are parties to a collective bargaining agreement effective March 1, 1976 through March 1, 1979 containing the following pertinent provisions:

"ARTICLE 6. GRIEVANCE

A grievance shall be processed as follows:

1. The grievance shall be presented to and discussed with the employee's supervisor, by the employee and steward if requested.

2. If not settled satisfactorily within five (5) days of Step 1, the grievance shall be reduced to writing and referred to the Management and the Business Representative of the Union.

3. 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 7. ARBITRATION

Any grievance that cannot be amicably resolved between the parties to this Agreement may be submitted by either party to the Wisconsin Employment Relations Commission and they shall appoint an arbitrator or member of their staff to act as arbitrator. The arbitration award shall be final and binding on both parties to this Agreement.

It is understood that the Board of Arbitration shall not have the authority to change, alter or modify any of the terms or provisions of this Agreement. . . .

. . .

ARTICLE 10. SENIORITY

Seniority shall be determined by length of service, plus such additional time as required or granted for vacations, leave of absences, illnesses and acccidents. [sic] (Provided, however, that in case of illness or accident noncompensable, seniority shall be broken after two years; in case it is compensable, after four years.) An employee's seniority is nullified: (1) if laid off and is not recalled to work within one (1) year from the date of layoff; (2) if the employee quits; (3) if having been laid off and is recalled to work and fails to report at the scheduled time unless prevented from doing so because of illness or other good cause; (4) if employee is discharged and not subsequently reinstated. . . .

Recall to work shall be by certified mail, return receipt requested, to employee's last known address. The employee must respond to such notice within three (3) days after receipt thereof and actually report to work in seven (7) days after receipt of notice unless otherwise mutually agreed to. In the event the employee fails to comply with the above, he shall lose all seniority rights under this Agreement.

Employees who are hired during the period from May 15th to September 15th, shall be considered as temporary employees and accumulate no seniority, holiday pay, funeral leave pay or shall not be covered by Health and Welfare payments. However, employees hired during the period of May 15th to September 15th shall have Pension payments made on such employee after thirty (30) days of employment.

Employees retained beyond September 15th shall be considered regular employees and their seniority shall be retroactive to date of hire. Such employee's sick leave, holiday pay and funeral leave shall be retroactive to date of completion of his probationary period.

Every year the employer shall furnish the Union a seniority list of the employees and their classifications covered by this Agreement, with a copy to the Steward."

5. That Mr. William Doyen, Sr. was employed by the Respondent as a truck driver on June 10, 1974, was injured at work on August 19, 1974 and has not returned to the employ of the Respondent since the date of his injury.

6. That on August 24, 1974, Mr. Doyen underwent surgery and sometime in October, 1974 he obtained permission from his physician to return to work with a 60-pound lifting restriction. Upon approaching Respondent's representative he was told he would have to be able to lift up to 100 pounds in order to return to work. After obtaining a 100-pound lifting restriction from his physician, Mr. Doyen again sought to return to work, but was told a total release was needed. Mr. Doyen obtained a total release from his physician and offered to return to work on August 17, 1976, but was told by a representative of Respondent that he had been replaced.

7. That on August 20, 1976 Mr. Doyen filed a grievance with the Complainant which stated:

"I was off work on workmen's compensation and received a full release on 8-17-76 to go back to work with no limitations. On that date the Company refused to take me back. Therefore, I am requesting I be reinstated with full seniority and be compensated for any time lost."

Subsequently, Complainant's business agent met with representatives of the Respondent concerning the grievance, but was informed that the matter would be referred to Respondent's legal counsel.

8. That on September 8, 1976 Complainant's business agent met with Respondent's legal counsel. The business agent was informed by Respondent's legal counsel that Respondent was not going to take the grievant back to work. Prior to the end of the meeting, Complainant's business agent informed Respondent's attorney that the Complainant wished to proceed to arbitration on the matter.

9. By letter dated September 22, 1976, Complainant requested that a joint letter be sent to the Wisconsin Employment Relations Commission requesting the appointment of an arbitrator. Respondent, by letter dated September 28, 1976, advised Complainant that it did not consider the Doyen grievance to be a proper matter to be grieved under the collective bargaining agreement in that Doyen was a temporary employe and could not be considered a "regular" employe under Article 10 of the agreement inasmuch as he was not retained as an employe after September 15. Complainant reiterated its desire to proceed to arbitration by its letter of October 5, 1976, but received no response from the Respondent.

10. That the dispute between Complainant and Respondent concerning whether the grievant was retained beyond September 15th, thus making him a regular employe with seniority retroactive to the date of hire, raises a claim which on its face is covered by the terms of the collective bargaining agreement which exists between said parties.

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

CONCLUSION OF LAW

That Respondent, Reimer's Meat Products, Inc., has violated, and continues to violate the terms of Article 7 of the 1976-1979 collective bargaining agreement existing between it and Local No. 75, Drivers, Warehouse and Dairy Employees Union by refusing to submit to arbitration the grievance of Mr. William Doyen, Sr., and thus has committed and continues to commit an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

That Respondent, Reimer's Meat Products, Inc., its officers and agents shall immediately:

1. Cease and desist from refusing to submit the grievance filed by Mr. William Doyen, Sr. filed on August 20, 1976, and issues related thereto to arbitration.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   a. Comply with the arbitration provisions of the collective bargaining agreement existing between it and Local 75, Drivers, Warehouse and Dairy Employees Union with respect to the subject Doyen grievance.

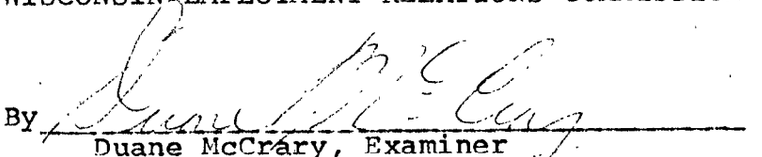
   b. Notify Local No. 75, Drivers, Warehouse and Dairy Employees Union that it will proceed to arbitration of the Doyen grievance and the issues concerning the same.

   c. Participate in the arbitration proceeding before the arbitrator appointed by the Wisconsin Employment Relations Commission with respect to said grievance and issues concerning same.

   d. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 19th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Duane McCrary, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

At the outset of the hearing, Respondent challenged the right of the Wisconsin Employment Relations Commission to hear the instant matter and reserved the right to de novo jurisdiction and determination of the matter by the Circuit Court for Brown County. Under Section 111.06(1)(f) of the Wisconsin Statutes it is an unfair labor practice for an employer to violate the terms of a collective bargaining agreement. Further, by authority of Section 111.07 of the Wisconsin Statutes any controversy concerning unfair labor practices may be submitted to the Wisconsin Employment Relations Commission; however, parties are not prevented from pursuing relief in courts of competent jurisdiction.

The Commission in Seaman-Andwall Corp., (5910) 1/72, adopted the rule of the cases enunciated by the U.S. Supreme Court in the Trilogy cases 1/ when it stated: "In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall continue our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face, is covered by the contract. We will resolve doubts in favor of coverage. . . ." 2/ Therefore, the issue before the Examiner is limited to a determination of whether the Doyen grievance makes a claim under the applicable collective bargaining agreement.

The term "grievance" is not defined in either the 1973-1976 or the 1976-1979 collective bargaining agreement. However, the Doyen grievance essentially complains that after obtaining a full release to go back to work, the Respondent refused to take him back. The Respondent replied in its letter of September 28, 1976 that grievant Doyen was a temporary employe and cannot be considered a "regular" employe under Article 10 of the agreement inasmuch as he was not retained as an employe after September 15. Article 10 of the 1976-1979 collective bargaining agreement provides in pertinent part, "Employees who are hired during the period from May 15th to September 15th, shall be considered as temporary employees and accumulate no seniority, holiday pay, funeral leave pay or shall not be covered by Health and Welfare payments. . . . Employees retained beyond September 15th shall be considered regular employees and their seniority shall be retroactive to date of hire. . . ." Whether the grievant qualified as a "temporary" or "regular" employe and whether he has any rights under the agreement requires an interpretation of Article 10 are questions best left for the arbitrator to determine. Given the determination that the Doyen grievance raises an issue which on its face is covered by the 1976-1979 agreement, the Examiner must conclude that the Doyen grievance states a claim which is prima facie substantively arbitrable. However, the question of whether, in fact, the 1976-1979 agreement governs the dispute is for the arbitrator to ultimately determine. Consistent with the Commission policy of giving arbitration provisions in collective bargaining agreements their fullest meaning, the Examiner concludes that the instant grievance states a claim "which on its face" is arbitrable.

1/ Steelworkers vs. American Mfg. Co., 363 U.S. 564 (1960); Steelworkers vs. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers vs. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

2/ Seaman-Andwall Corp., (5910) 1/72 at p. 14.

The Respondent asserted in its Answer and reiterated in closing argument that Articles 6 and 7 of the 1973-1976 collective bargaining agreement is controlling rather than Article 7 of the 1976-1979 collective bargaining agreement. It further argued that Complainant failed to comply with Article 6, Section 3 of both aforementioned agreements by not giving notice of desire to arbitrate within five (5) days of deadlock. Asserted deficiencies of the grievance such as the type asserted by Respondent constitute "procedural" defenses which are, pursuant to the well established policy of the Commission, to be left to the arbitrators. 3/

Therefore, in light of the foregoing the Examiner has found that Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act by refusing to process the instant grievance to arbitration.

Dated at Madison, Wisconsin this 19th day of April, 1978.

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By Duane McCrary, Examiner

3/ Seaman-Andwall Corp. supra and City of Green Bay, Joint School District No. 1, (11021-A) 11/72, setting forth the same policy as is found in John Wiley & Sons, Inc. vs. Livingston, 379 U.S. 543, 55 LRRM 2769 (1964) wherein the U.S. Supreme Court declared the following:

> "Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. . . ."