STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED MEAT CUTTERS & TANNERY WORKERS UNION, LOCAL 73, AFL-CIO, Complainant, vs. KOHL'S FOOD STORES, Respondent.	Case XLV No. 22175 Ce-1753 Decision No. 15903-A

Appearances:
Goldberg, Previant & Uelmen s.c., Attorneys at Law, by Mr. Alan M. Levy, for Complainant.
Franks, Pikofsky, and Peck, S.C., Attorneys at Law, by Mr. Barton M. Peck, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amalgamated Meat Cutters & Tannery Workers Union, Local 73, AFL-CIO, herein referred to as Complainant, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, herein referred to as Commission, alleging that Kohl's Food Stores, herein referred to as Respondent, had committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act; and the Commission having appointed Stanley H. Michelstetter II, a member of its staff, as Examiner to make and issue findings and orders as specified in Section 111.07(5) of the Wisconsin Employment Peace Act; and the parties having stipulated to the facts, waived hearing and filed briefs; and the examiner having considered the evidence and arguments of counsel makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant Amalgamated Meat Cutters & Tannery Workers Union, Local 73, AFL-CIO, is a labor organization with offices at 50 East Bank Street, Fond du Lac, Wisconsin.

2. That Respondent Kohl's Food Stores is an employer engaged in the business of selling foodstuffs with facilities located at 11100 West Burleigh Street, Milwaukee, Wisconsin; that Respondent is an employer over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.

3. That at all relevant times Respondent recognized Complainant as the representative of certain of its employes including at the relevant times Thomas Grisbaum; that in regard thereto Complainant and Respondent have been party to at least two collective bargaining agreements, the first for the period May 20, 1974, to and including February 19, 1977 and the second for the period May 20, 1977, to and including February 16, 1980 both of which agreements provide in relevant part:

"ARTICLE XII

LEAVE OF ABSENCE

. . .

F. An employee on sick leave or who is absent for any reason for more than one (1) year may be separated from the payroll and considered terminated, except employees on leave for occupational injury.

. . .

ARTICLE XIV

ARBITRATION AND GRIEVANCE PROCEDURE

A. The Union shall have the right to designate a Shop Steward for each store.

B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be an earnest effort on the part of both parties to settle such promptly through the following steps:

Step 1. By conference between the aggrieved employee, the Shop Steward, or both, and the Head of the Department.

Step 2. By conference between the Shop Steward and Business Agent and the Supervisor.

Step 4. In the event the last step fails to settle satisfactorily the complaint, it shall be referred to the Board of Arbitration.

C. The Board of (Arbitration) [Abritration] 2/ [sic] shall consist of one (1) person appointed by the Union and one (1) person appointed by the Employer. Said two (2) persons shall within five (5) days request the Director of Federal Mediation and Conciliation Service to submit a panel of five (5) from which a third (3rd) arbitrator will be selected, and the decision of the majority shall be final and binding on both parties. The expenses of the third (3rd) arbitrator shall be paid for jointly. If mutually agreed upon the Wisconsin Employment Relations Board may be designated as the third (3rd) arbitrator.

D. The Employer at any time[s] 3/ may discharge any worker for proper cause. The Union, if it wishes to contest the discharge, shall file a written complaint within ten (10) days with the Employer asserting that the discharge was improper. Such complaint must be taken up promptly, and if the Employer and the Union fail to agree within five (5) days, it shall be referred within twenty-four (24) hours to the Board of Arbitration. Should the Board determine that it was an unfair discharge, the Employer shall reinstate the employee in accordance with the findings of the Board.

E. No grievance will be considered or discussed unless the outlined procedure has been followed, except that Step 1 and Step 2 of the grievance procedure may be waived.

F. Grievances not settled in Step 1 and Step 2 of the grievance procedure shall be presented in writing. All grievances other than discharges must be presented within twenty-one (21) calendar days after such has happened. If grievances are not presented within these time limits, they will not be considered or discussed.

G. The arbitrator may interpret the Agreement and apply it to the particular case presented to him, but he shall, however, have no authority to add to, subtract from, or in any way change or modify the terms in this Agreement or any Agreements made supplementary hereto.

H. During the term hereof the Union agrees that there shall be no strike or interference with or interruption of the normal conditions of the Employer's business by the Union or its employees. The Employer agrees that there shall be no lockout.

I. It shall not be a violation of this Agreement for an employee to refuse to cross a legal picket line sanctioned by the Central Federated Trades Council, AFL-CIO and the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 73. The Employer shall be notified in writing of the action taken by these bodies."

2/ Ibid.

3/ Ibid.

4. That on June 17, 1975, Grisbaum suffered an injury which left him unable to work until January 3, 1977; that at all relevant times Respondent has taken the position that this injury was not compensible under Wisconsin workers' compensation law and that it was not an occupational injury as that term is used in Article XII, Section F of the parties' agreements.

5. That, although it was notified Grisbaum was available for work effective January 3, 1977, Respondent in effect discharged him effective the same date on the basis it was relieved of any obligation to further employ him by the terms of Article XII, Section F of the collective bargaining agreement then in effect.

6. That on January 5, 1977, Complainant filed a grievance with Respondent alleging said discharge was made in violation of the parties' collective bargaining agreement then in effect, which grievance sought reinstatement with full backpay.

7. That on January 18, 1977, Grisbaum filed a claim with the Wisconsin Department of Industry, Labor and Human Relations, herein DILHR, seeking workers' compensation for the aforementioned injury.

8. That after processing said grievance through all of the steps of the applicable grievance procedure short of arbitration, Complainant and Respondent submitted said dispute to arbitration before Arbitrator George C. Berteau under a submission agreement dated May 4, 1977, the body of which is as follows:

> "It is hereby stipulated and agreed by the parties including the Grievant by his counsel that the arbitration of the pending grievance be bifurcated as follows:
>
> 1. That the issues at the hearing scheduled for May 12, 1977 be limited solely to the employer's claim
>
> a) That the Grievance herein is not arbitrable.
>
> b) That if the Grievance is found to be arbitrable, the Grievant is nevertheless estopped from asserting reinstatement or backpay resulting from his termination.
>
> 2. That if the above issues are decided in favor of the grievant, [sic] that the merits of the issue, whether or not the leave of absence taken by the Grievant had been the result of a work

related injury be decided at a hearing conducted by the Workers' Compensation Division of the Department of Industry, Labor and Human Relations subject to appellate review. That the final decision resulting from this hearing shall be binding upon the Arbitrator and shall be adopted by him as if his own. It is further agreed that in no event shall liability extend for the period dating from the Arbitrator's original decision on the issues set forth in item 1 above."

9. That by award dated June 30, 1977, Arbitrator Berteau dismissed the first grievance, on the basis that although it was timely filed, Complainant's request to arbitrate the matter was untimely under the applicable collective bargaining agreement; that in so doing he rejected Complainant's assertions that the instant grievance was of a continuing nature, that Respondent had waived enforcement of the grievance procedure's time limits and that there was an agreement to extend the time limits.

10. That on October 4, 1977, DILHR by its examiner found that the instant injury was compensible under Wisconsin workers' compensation law; that since no review thereof was sought, said decision finally determined his eligibility for workers' compensation for the injury specified in Finding of Fact 4, above.

11. That on October 5, 1977, Grievant filed a written request with Respondent requesting reinstatement by virtue of the aforementioned DILHR determination with uninterrupted seniority; that on October 10, 1977, Respondent denied said request for reinstatement.

12. That on October 14, 1977, Complainant filed a grievance protesting Respondent's refusal to reinstate Grisbaum, herein referred to as the second grievance; that on October 17, 1977, Respondent, by its attorney Barton M. Peck, sent Complainant a letter the body of which states:

"Your letter to Mr. Rieter dated October 14, 1977 has been submitted to me for reply.

As you know, Mr. Grisbaum's grievance has already been considered by the Company, rejected and adjudicated. Hence not only is your renewed request for a first step grievance untimely, but the entire matter is res adjudicata. [sic] The decision of Arbitrator Berteau has fully and finally disposed of this matter, hence the Company is unwilling to review the matter further."

that Respondent has refused and continues to refuse to process the second grievance to arbitration; and that Complainant's position in this matter is that the Commission or arbitrator hearing the second grievance should order Grisbaum's reinstatement with backpay from his January 3, 1977 discharge.

On the basis of the above and foregoing findings of fact, the examiner makes and files the following

CONCLUSIONS OF LAW

1. That Respondent Kohl's Food Stores is an employer over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.

2. That since the substantive dispute of the second grievance is a matter which on its face is subject to the grievance and arbitration provisions of the parties' applicable collective bargaining agreement, the examiner refuses to assert the jurisdiction of the Wisconsin Employment Relations Commission to decide the merits of said dispute under Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That since the arbitration award rendered by Arbitrator George C. Berteau on June 30, 1977, precludes Complainant from asserting that the second grievance is timely filed, Respondent, by having refused to arbitrate the second grievance, has not committed, and is not committing, 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 conclusions of law, the examiner makes and files the following

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

KOHL'S FOOD STORES, Case XLV, Decision No. 15903-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed in this matter alleges Respondent committed an unfair labor practice within the meaning of Subsections 111.06(1)(a), (1)(c)1., (1)(d), and (1)(f)[4] when it allegedly on October 10, 1977 refused to reinstate Grisbaum.[5] However, Complainant's brief addressed only allegations under Section 111.06(1)(f).[6] It alleged that Respondent unlawfully refused to arbitrate the second grievance or, alternatively, the Commission should decide whether the Employer violated the agreement by refusing to reinstate Grisbaum. In response to Respondent's position that the Berteau award precludes litigation of the merits of the refusal to reinstate, Complainant alleges the second grievance involves a different dispute than the first grievance, i.e., involves the refusal to reinstate, rather than the discharge. Alternatively, if it is concluded they involve the same substantive dispute, it alleges that because the award was based on procedural grounds it should not preclude litigation or arbitration of the merits. Alternatively, it alleges that the Berteau award incorrectly decided the procedural dispute. In both the complaint and its brief, Complainant sought a remedy of reinstatement and backpay sufficient to make Grisbaum whole for all losses suffered as a result of his "improper discharge."[7] Alternatively, it sought an order requiring Respondent to arbitrate the second grievance.

4/ All statutory citations herein are to Wis. Stats., unless otherwise noted.

5/ For purposes of clarity only, I use the term "discharge" to refer to the January 3, 1977 incident, Finding of Fact 5, and the term "refusal to reinstate" to refer to the October 10, 1977 incident, Finding of Fact 11.

6/ I, therefore, treat the allegations with respect to Subsections 111.06(1)(a), (1)(c)1. and (1)(d) as abandoned.

7/ Emphasis supplied. Because Complainant carefully and consistently used the terms "discharge" and "refusal to reinstate" as I do (see note 5 above), I conclude Complainant seeks backpay to January 3, 1977.

Respondent's answer denied that on October 10, 1977, Grisbaum was an employe covered by the parties' collective bargaining agreement then in effect, denies the second grievance was a "grievance" within the meaning of said agreement, alleges he sought "rehire" rather than "reinstatement" and denies Grisbaum's absence was for a compensible injury. It did not set up an affirmative defense of prior arbitration of the dispute. However, by its brief Respondent alleged the matters in dispute had been arbitrated before Arbitrator Berteau and that Complainant was contractually obligated to accept the Berteau award as final and binding and/or the award was res judicata of the matter.[8/]

DISCUSSION

It is the well established policy of the Commission not to determine the merits of disputes subject to resolution in grievance and arbitration procedures, except for circumstances not present in this case. Accordingly, I have refused to exercise the jurisdiction of the Commission to determine the merits of this dispute. Although Complainant failed to specifically request arbitration of the second grievance, I am satisfied Respondent's October 17, 1977 response constituted an anticipatory refusal to arbitrate the second grievance and an assertion that the second grievance was untimely.

Respondent has denied its obligation to arbitrate on the basis of the defenses raised in its answer and its later raised affirmative defense that Complainant is precluded from arbitrating the second grievance by the Berteau award. In view of the result with respect to the affirmative defense, I do not reach the former issues.

The leading case with respect to Respondent's affirmative defense is Local 616, I.U.E. v. Byrd Plastics, Inc. 74 L.R.R.M. 2551 (C.A. 3,

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8/ Complainant did not object to Respondent's later raising of this affirmative defense. Instead, it has been fully litigated.

1970). In that case an arbitrator had dismissed a grievance with respect to a discharge on the basis it should not have been filed as a class grievance. The union then filed a second grievance concerning the same discharge. In determining whether the employer was obligated to arbitrate the later grievance, the court held that it, not the arbitrator, was to determine the substantive arbitrability. Thus, it found that the subsequent grievance involved the same dispute; that the parties had agreed to accept the prior award as "final and binding"; but that the award did not dispose of the merits of the dispute or the procedural right of the union to file a second grievance concerning the same dispute. Thus, it concluded the merits and the issue concerning the union's procedural right to file a second grievance were matters properly subject to a second arbitration.

Under Article XIV, Section C of the parties' most recent agreement they have agreed to accept Arbitrator Berteau's award as a "final and binding" disposition of the first grievance. I am satisfied that the substantive dispute of the first grievance is identical to the substantive dispute of the second grievance.[9/] First, the remedy sought is essentially the same. Second, resolution thereof depends solely on the same determination as to whether the June 17, 1975 to January 3, 1977 absence was occasioned by an occupational injury within the meaning of Article XII, Section F. While the DILHR determination was rendered after the Berteau award, the agreement submitting the dispute to Arbitrator Berteau fully anticipated the possibility DILHR would determine the injury was compensible. Thus, there has been no unanticipated change in circumstances which might make the Berteau award inapplicable to the second grievance.

9/ I state the substantive issue as:

> "Is Respondent relieved of its obligation under the terms of the parties' agreements to employ Grievant by virtue of Article XII, Section F of said agreements?"

While the Berteau award does not preclude Complainant from asserting its procedural right to file a second grievance concerning the same substantive dispute, Complainant is precluded from asserting that a second grievance was timely filed. With respect to the issue of timeliness of the second grievance Complainant might conceptually present all of the following sub-issues:

1. Did Complainant, in fact, file the second grievance within the applicable time limit for the initial filing of the second grievance?

2. If the answer to 1. is "no," should what constitutes a waiver of compliance with the applicable time limit for initially processing the second grievance be determined on a different basis than that which Arbitrator Berteau used to determine what constitutes a waiver of compliance with the time limit for requesting arbitration of the first grievance?

3. If the answer to 2. is either "yes" or "no," did Respondent expressly or implicitly waive Complainant's compliance with the time limit for initially filing the second grievance by:

   a. conduct on or prior to the date of the Berteau award; or

   b. conduct after the date of the Berteau award?

4. If the answer to 3. a. and b. is "no," should what constitutes an excuse for not complying with the applicable time limit for initially processing the second grievance be determined on a different basis than that which Arbitrator Berteau used to determine what constitutes an excuse for not complying with the time limit for requesting the arbitration of the first grievance?

5. If the answer to 4. is either "yes" or "no," should Complainant be excused from complying with the time limit for initially filing the second grievance because of:

   a. facts arising on or prior to the date of the Berteau award; or

b. facts arising after the date of the Berteau award;

or

c. the nature of the substantive dispute?[10/]

It is clear that if an arbitrator finds Complainant may procedurally file a second grievance concerning the same substantive dispute and the arbitrator finds the answer to 1., 3. a. or b., or 5. a., b. or c. is "yes," the dispute is procedurally arbitrable.[11/]

Complainant has not asserted that the second grievance was timely filed (timeliness sub-issue 1., above), nor does it assert Respondent took any new actions after June 30, 1977, the date of the Berteau award, which would constitute waiver or excuse (timeliness sub-issues 3. b. and 4. b.). Complainant is clearly precluded from relitigating sub-issue 5. c.[12/]

Arbitrator Berteau based his policy positions with respect to waiver and excuse on his determination that the totality of the grievance procedure's time limits dictated their uniform interpretation.[13/] I find Complainant ought to be precluded by this determination from asserting the answer to both timeliness sub-issues 2. and 4. is other than "no."

10/ It should be clear timeliness sub-issues 3. and 5. both include mixed determinations of fact and policy.

11/ Unless Respondent raises other procedural issues before the arbitrator.

12/ Arbitrator Berteau found the substantive dispute was not a continuing one.

13/ For example Arbitrator Berteau states at page 15 of his award:

> ". . . Thus, since the agreement contains clear and specific time limits for filing and prosecuting (procedural steps) grievances it is necessary to determine:

Because the answers to sub-issues 2. and 4. must be "no" and because Complainant must rely on the existence of and interpretation of precisely the same factual occurrences as involved in the first grievance, Complainant is precluded by the Berteau award from asserting the answers to 3. a. and 5. a. are other than "no." I, therefore, conclude Complainant is precluded from asserting that the second grievance was timely filed. I have, therefore, dismissed its complaint.

Dated at Milwaukee, Wisconsin this 21st day of November, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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