STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT #10 INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO, Complainant, vs. LADISH COMPANY, Respondent.	Case XXXVI No. 22296 Ce-1757 Decision No. 15982-A

Appearances
Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Mr. Robert E. Gratz, for Complainant.
Quarles & Brady, Attorneys at Law, by Mr. Fred G. Groiss, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and hearing having been held February 10 and April 4, 1978, in Milwaukee, Wisconsin before Examiner Stanley H. Michelstetter II; and the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That District #10 International Association of Machinists & Aerospace Workers, AFL-CIO, herein referred to as Complainant, is a labor organization with offices located at 624 North 24th Street, Milwaukee, Wisconsin.

2. That Ladish Company, herein referred to as Respondent, is an employer engaged in the manufacture of fittings and forgings, with a principal plant and offices located at 5481 South Packard Avenue, Cudahy, 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; that at all relevant times Complainant and Respondent were parties to a collective bargaining agreement in effect from February 16, 1976, until February 18, 1979, which does not provide for a method of the final resolution of grievances and which reads in relevant part:

"ARTICLE IV

GRIEVANCES

. . .

GRIEVANCE PROCEDURE

4.03 Subject to the provisions of Section 9(a) of the Labor-Management Relations Act of 1947, as amended, all differences that may arise between the Company and employees, covered by this agreement, either individually or collectively, as to the meaning and application of the provisions of this agreement, or should differences arise about matters not specifically covered by this agreement, an earnest effort shall be made to settle such differences at the earliest possible time by the use of the following procedure:

STEP 1 The aggrieved employee or the Union shall first discuss the grievance with the Foreman, with or without the Steward or Committeeman, in an effort to have the matter adjusted.

STEP 2 If a satisfactory adjustment or settlement of the grievance is not reached in the above step within one (1) workday, the grievance shall be put into written form and submitted by the Steward to the Bargaining Committee, who, in turn, shall submit it to the Superivsor of Industrial Relations, who shall record the grievance and forward it to the department head or acting department head for a prompt written decision.

STEP 2(a) Prior to submission of the written grievance answer by the Department Head involved, a discussion of the grievance shall be held between the Department Head, the aggrieved employee's supervisor, the aggrieved employee, his Committeeman and Steward, and if desired, Chairman of the Bargaining Committee and representative of the Personnel Department. This discussion should be held with a minimum of lost time for the purpose of attempting to resolve the issue or issues in dispute and arriving at a mutually satisfactory answer to the written grievance.

The department head may waive Step 2a of the grievance procedure and submit his written answer to the Union if he had participated in the discussion as provided in Step 1, with Committeeman and Steward present, and states it in his second stage written reply to the grievance.

STEP 3 In the event the written answer in Step 2 of the Grievance Procedure is not accepted, the grievance will be submitted by the Personnel Department to the Vice President of the Division or department involved (or his designated representative). Grievances appealed to this step shall be heard at a meeting between the Bargaining Committee and Company representatives at such time as is mutually agreeable.

STEP 4 If the Vice President of the Division or the department involved (or his designated representative) fails to give a satisfactory decision within three (3) workdays after the grievance is submitted to him, the Bargaining Committee shall take it up with the president of the Company, or his designated representative, who shall grant a hearing thereon not later than five (5) workdays after a written

request therefor and he shall return his decision within three (3) workdays after the completion of said hearing.

. . .

NO STRIKE - NO LOCKOUT

4.08 The parties agree that there shall be no strikes or lockouts or any interference with production during the term of this agreement until all stages of the grievance procedure have been utilized. In the event that no agreement is arrived at, the Company is free to invoke a lockout and the Union is free to strike. Parties agree that prior to invoking their rights under this section, they shall consult with Federal Mediation and Conciliation Service.

. . .

ARTICLE XVII

GENERAL

. . .

SUBCONTRACTING

17.10 The Company shall, in exercise of Management's functions, subcontract work if it decides such subcontracting necessary for economic reasons, for the benefit of customer requirements and the overall betterment of our employees and the Company. The Company will make a reasonable attempt to have its employees perform the work so long as personnel and equipment are available. Company will keep Committee informed of such subcontracting.

It is not the intention of the Company to subcontract for the purpose of eliminating classifications. As a general rule, Company does not subcontract running repair orders.

The Management rights and subcontracting clauses are not intended to change the rights recognized by Union and Management and evidenced by historical practices and policies related to these matters.

. . ."

4. That Respondent subcontracted the repair of crane rails in its Building 42; that the subcontractor performed the repair throughout the period late October, 1976, through December, 1976, and made corrections thereto in spring, 1977; that for safety reasons, the work had to be performed during what constitutes Respondent's third-shift hours; the work was performed during the subcontractor's nonovertime workweek, Sunday through Friday, during Respondent's third-shift hours; that Respondent normally operates its third shift Monday through Friday; that Sunday constitutes an overtime day for Respondent's employes; that the work performed by the subcontractor is of a type normally performed by unit employes in the classifications of Maintenance Mechanic and Welder; that at all relevant times employes in said classifications

were fully employed during their straight time hours, but were not employed on Sunday evenings; that the work performed by the subcontractor was so integrated that it was impractical to substitute one group of employes for another; that there is no agreement in effect beyond Section 17.10 of the parties' collective bargaining agreement regulating the subcontracting of non-overtime Sunday work; that employes were not available to perform said work.

5. That on November 11, 1976, Complainant filed a grievance, alleging that the subcontracting of the Sunday portion of this work violated Section 17.10 of the parties' collective bargaining agreement; that said grievance was processed through all four steps of the applicable grievance procedure without unusual or undue delay; that Respondent rendered its fourth stage answer on May 27, 1977, and that said grievance was not resolved; that Complainant filed the instant complaint on November 30, 1977; that said complaint was filed within one year of the specific unfair labor practice alleged, concerning grievance 238.

6. That the subcontracting provision of the parties' 1962-1964 agreement was identical to the first paragraph of Section 17.10 of the parties' current agreement; that each successor to the 1962-1964 agreement has contained identical language; that Complainant's initial proposals for the agreement next succeeding the 1962-1964 agreement establish Complainant did not then interpret said provision to require Respondent to schedule weekend overtime before subcontracting.

7. That on February 10, 1976, Complainant filed a grievance, alleging that Respondent violated Section 17.10 of the agreement when it allegedly subcontracted work performed during the period February 2 through February 5, 1976; that said grievance was processed through all four steps of the applicable grievance procedure without unusual or undue delay; that Respondent rendered its fourth step answer thereto June 28, 1976; that the parties have a practice of informal negotiation after Respondent renders its fourth step answer to grievances, during which apparently either party may request, and the other will routinely grant a request, to hold the processing of a grievance in abeyance; that such procedure is not an exclusive means of resolving grievance disputes; that said grievance has not been resolved; that said complaint was filed more than one year after the specific unfair labor practice alleged, concerning grievance 8937.

8. That shortly prior to February 11, 1976, Respondent subcontracted five or six orders of work of a type normally performed by unit employes in its Building 64 tool room; that, thereafter, said work was performed by the subcontractor; that at all relevant times the parties

have agreed that Complainant would be given notice of the subcontracting of tool room work by Respondent's placing a copy of such orders in a file maintained on Supervisor Mlagan's desk; that although Gagliano was Complainant's authorized representative, Mlagan denied him access to the desk; that at the relevant times, unit tool room employes were fully employed therein but were only infrequently scheduled to work Saturday, an overtime day; that at all relevant times it is the historical practice of the parties to permit Respondent to subcontract Building 64 tool room work without first providing Saturday overtime to employes in the affected classifications; that at the relevant times, Respondent's employes were not available to perform the instant work.

9. That Respondent subcontracted the installation of a conveyor on its premises; that in order to install this conveyor, a men's washroom had to be removed; that Respondent planned the demolition of the men's washroom, which was planned in functionally distinct phases, one of which was the demolition of its walls; that on a two- or three-day period in December, 1976, at least two employes of a subcontractor performed this work; that this work is of a type normally performed by unit employes in the Maintenance Helper classification; that all employes then classified as Maintenance Helpers were fully employed at the relevant times, but that at the relevant times, there were at least two employes whom Respondent had laid off who held the classification of Maintenance Helper when they last worked; that said layoff did not result from a reduction in the number of Maintenance Helper positions; that Respondent's employes were not available to perform said work.

10. That during the negotiations leading to the parties' 1962-1964 agreement, in which the parties first adopted language identical to the first paragraph of Section 17.10 (as described above), Complainant did not seek to require Respondent to recall unit employes who were not then assigned to the relevant classification, as the parties apply the term, who might then be on layoff, before Respondent would be permitted to subcontract unit-type work.

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

CONCLUSIONS OF LAW

1. That since the complaint with respect to Grievance 238 was filed within one year from the date of the completion of the processing of said grievance in the parties' grievance procedure, it is timely within the meaning of Section 111.07(14), Wis. Stats.

2. That since the complaint with respect to Grievance 8937 was

filed more than one year since the completion of the processing of said grievance in the parties' grievance procedure, it is barred by Section 111.07(14), Wis. Stats.

3. That since employes were not available within the meaning of Section 17.10 of the parties' applicable collective bargaining agreement, Respondent did not commit, and is not committing, an unfair labor practice within the meaning of Section 111.06(1)(f), Wis. Stats., when it subcontracted said work.

4. That since Respondent failed to give Complainant notice of its subcontracting of Building 64 tool room work within the meaning of Section 17.10, Respondent committed, and is committing, an unfair labor practice within the meaning of Section 111.06(1)(f), Wis. Stats.

5. That since there is a historical practice within the meaning of Section 17.10 of Respondent's subcontracting Building 64 tool room work without providing relevant unit employes with Saturday overtime work, Respondent did not commit, and is not committing, an unfair labor practice within the meaning of Section 111.06(1)(f), Wis. Stats., when it subcontracted Building 64 tool room work while not providing relevant employes with Saturday overtime work.

6. That since employes were not available to perform the demolition of the walls of the men's room, Respondent did not commit, and is not committing, an unfair labor practice within the meaning of Section 111.06(1)(f), Wis. Stats., when it subcontracted such work.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examines makes and issues the following

ORDER

IT IS ORDERED that Respondent, Ladish Company, shall immediately:

1. Cease and desist from violating the terms of its agreement with Complainant District #10 International Association of Machinists & Aerospace Workers, AFL-CIO, by failing to give notice of its having subcontracted Building 64 tool room work.

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

Dated at Milwaukee, Wisconsin this 30th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

LADISH COMPANY, Case XXXVI, Decision No. 15982-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 20, 1977 Complainant filed a complaint alleging Respondent violated the parties' collective bargaining agreement with respect to grievances 8150, 8432, 8913, 8914, 8977, 9328, 9488 and 9670. Respondent moved to dismiss that complaint with respect to all of the above grievances except 9670 on the basis it was not timely filed within the meaning of Section 111.07(14), Wis. Stats. Thereafter, the parties agreed to permit Complainant to withdraw all of the allegations except those with respect to grievance 9670 of that complaint without prejudice to refile. Thereafter, Complainant filed another complaint (Case XXXVI) concerning grievances 111, 238 and 8937, and repeating the allegations concerning grievance 9670 made in Case XXXV. Those allegations were fully heard in this proceeding. Accordingly, I have by separate cover dismissed the allegations other than those with respect to grievance 9670 made in Case XXXV without prejudice to refile, and ordered the latter to be heard with Case XXXVI.[1/]

TIMELINESS (GRIEVANCES 238 AND 8937)

Respondent takes the position grievances 238 and 8937 are untimely within the meaning of Section 111.07(14),[2/] Wis. Stats. because the incidents constituting the alleged violation occurred more than one year prior to the filing of the complaint.

Complainant alleges that the one year statute of limitations commences with the completion of the parties' processing of the grievances. With respect to grievance 8937 it contends that the grievance was held in abeyance in accordance with the parties' practice therefor until January 13, 1977 following the Employer's fourth step answer. The complaint was filed within one year of that date. Similarly with respect to grievance 238, it alleges it received the Respondent's fourth step answer on May 27, 1977, far less than one year before the complaint was filed. In any case, it alleges the subcontracting, for the most part, occurred within one year of the filing of the complaint.

1/ Decision No. 15837-A.

2/ Section 111.07(14) states:

> "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged."

I. Grievance 238

Grievance 238 relates to subcontracting alleged to have occurred in the period commencing in late October, 1976 and continuing until January 1, 1977. The grievance was filed November 11, 1976 and processed through all four steps of the instant grievance procedure without undue delay. Respondent rendered its fourth step answer on May 27, 1977. Complainant filed the complaint with respect thereto on November 30, 1977.

In Harley-Davidson Motor Co. (7166) 6/65 and Appleton Memorial Hospital (10538-A, -B) 12/71 the Commission has stated its policy with respect to the commencement of the one year statute of limitations period with respect to complaints for violation of contract where there exists an applicable, exclusive grievance procedure:

> "In effectuating the policies of the Wisconsin Employment Peace Act, we conclude that where a collective bargaining agreement contains procedures for the voluntary settlement of disputes arising thereunder and where the parties thereto have attempted to resolve such disputes with such procedures, the cause of action before the Board cannot be said to arise until the grievance procedure has been exhausted, and therefore we shall compute the one-year period of limitation for the filing of complaints of unfair labor practices from the date on which the grievance procedures have been exhausted by the parties to the agreement, provided that the complaining party has not unduly delayed the grievance procedure. The application of this rule shall not preclude any party from pleading equitable or other defenses."[3/]

Under this policy grievance 238 is clearly timely filed.

II. Grievance 8937

Grievance 8937 complains that Respondent should have permitted its employes, rather than a subcontractor, to operate Respondent's equipment in the period February 2 through February 5, 1976. The written grievance was filed February 10, 1976 and promptly processed through all four steps. Respondent's fourth step answer is dated June 28, 1976. Thereafter, it may have been held in abeyance until January 13, 1977. The complaint was filed November 30, 1977.

Under the parties' grievance procedure, when a grievance is appealed to the fourth step, union and employer representatives meet and discuss the grievance. If not resolved at the meeting, the employer makes its fourth step answer. After the fourth step answer the formal grievance procedure ends and Complainant has a reserved right to strike. The

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3/ Harley-Davidson, @ p. 8.

parties have also developed a practice of post-fourth-step negotiation in which Complainant is permitted to make a response to the fourth step answer whereby it may accept, reject, or request modification of Respondent's position. In the latter instance further negotiations may ensue. In addition to the foregoing, the parties have a practice of permitting each other to hold the processing of a grievance in abeyance at any step of the grievance procedure by making a request therefor to the other party. Apparently, such requests are routinely granted. It appears this procedure is also applied to the post-fourth-step negotiation process. Notwithstanding the above post-fourth-step procedures, Complainant may still strike.

The purpose of the Commission's administration of Section 111.07 (14), Wis. Stats. in this area is to coordinate it with our policy of deferral to exclusive grievance procedures by which it declines to process complaints for violation of collective bargaining agreement until such procedures have been exhausted. Since the exclusive procedure ends at Respondent's fourth step response, and the Commission would not thereafter defer to the post-fourth-step negotiation process,[4/] the one year statute of limitations commences with Respondent's fourth step answer. I conclude the complaint, as it relates to grievance 8937, is barred by the one year statute of limitations expressed in Section 111.07(14), Wis. Stats.

MERITS

I. Grievance 238

During the period from late October, 1976 to December, 1976 Respondent had a subcontractor reconstruct and repair the rails for three large overhead cranes in Building 42. The subcontractor made corrections in spring, 1976. The crane rails span two and one-half (2-1/2) city blocks. For purposes of safety, the work could only be performed on third shift. The subcontractor worked its regular (non-overtime) work week, Sunday through Thursday, during Respondent's third shift hours, for eight consecutive weeks. The total project consisted of 3,000 person-hours. Related minor maintenance work was performed by unit employes on the crane rails at this time.

4/ Walls v. American Motors Corporation (7203) 7/65; Evco Plastics (16150-A) 2/79; American Motors v. W.E.R.B. 32 Wis.2d 237 (1966).

It is undisputed that this work is of a type which can be performed by Ladish employes in the classification of Maintenance Mechanic or the classification of Welder. At all relevant times all employes in these classifications were fully employed and working some overtime. Respondent's third shift work week starts on Monday nights. Consequently, Sunday night is a premium pay night. It is conceded by Respondent that none of the employes in the above classifications were working Sunday nights during that period.

It is Complainant's position that qualified employes were available to perform the work done by the subcontractor on Sunday evenings.[5/] It contends that since these employes were available on an overtime basis, they were available within the clear meaning of the second sentence of Section 17.10.[6/] It also contends that Respondent has failed to establish the criteria specified in the first sentence of Section 17.10 to justify subcontracting the Sunday work. Complainant requests that an appropriate number of employes be given back pay for not having been permitted to work the instant Sunday nights.

Respondent asserts the subcontracting of all the runway work was justified because of its urgency, size and complexity. Respondent denies it has any obligation to provide overtime work to appropriate unit employes in lieu of straight time subcontracting. It asserts the second sentence of Section 17.10 is ambiguous on the point and offers evidence of bargaining history to establish its position. It argues two prior grievances had been settled on the basis that Respondent would continue to have subcontractors work on Sundays (straight time) only in unusual situations. It contends that the urgency, safety constraints and length of this project make it an unusual situation.

Respondent's position that there had been a settlement of grievances 8141 and 8494, to the effect that it might schedule subcontractors to start on Sundays under unusual situations, is unsupported in the record. In the only direct testimony on the subject, witness Foley stated he did not remember whether Complainant had actually agreed with that position. Other testimony demonstrates Respondent considers

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5/ Although the issue was not raised in the original grievance, Complainant adduced testimony disputing the propriety of subcontracting the entire job. However, it did not challenge the propriety thereof in its brief. I conclude that issue is abandoned.

6/ During the course of the hearing Complainant objected to the admission of parol evidence to vary the terms of the assertedly clear language of the agreement.

Complainant's failure to press grievance as acceptance of its position. Without a showing of Complainant's actual agreement, I conclude Complainant had not agreed to the principle.[7/]

The resolution of this grievance turns on the meaning of "personnel . . . available" as used in Section 17.10. Since it is ambiguous, a resort to parol evidence as a guide to interpretation is appropriate. The bargaining history behind the creation of the first paragraph of Section 17.10 persuasively demonstrates that Complainant never sought to prevent Respondent from subcontracting unless its employes were employed on substantial overtime. Its initial proposals leading to this language related only to having employes working forty (40) or less hours per week. The first paragraph of the present Section 17.10 first appeared as the entire subcontracting provision of the 1962-1964 agreement.[8/] However, Complainant's initial proposals for the successor to that agreement read, in relevant part:

> "56. Section 17.08 - Modify this section to read as follows: 'In the event the employees covered by this contract are working forty (40) hours or less per week, or there are employees laid off, or inactivated, the Company will not, so long as equipment is available, subcontract work which is customarily performed by employees in the Bargaining unit to any other Company.['] [sic]"

Since it is highly unlikely that a union would initially propose to restrict rather than expand the protections of language of a predecessor agreement, the more reasonable conclusion is that Complainant did not believe that what is now the first paragraph of Section 17.10 prevented Respondent from subcontracting unless its employes were working substantial overtime. Under these circumstances, I conclude personnel were not available within the meaning of Section 17.10.

Respondent has met its burden of establishing the propriety of subcontracting the Sunday work. Complainant has not challenged the

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7/ Respondent and Complainant do have a practice of not assigning subcontractors to work which is to be performed by the subcontractor on its overtime basis, unless related unit employes are working similar overtime. This practice does not apply because the subcontractor's employes were working on the subcontractor's straight time basis. The evidence is insufficient to conclude there exists a practice of not permitting subcontractors to work their non-overtime Sundays unless related unit employes work Sundays as well, except under unusual circumstances.

8/ The third paragraph of present Section 17.10 was then a side letter of agreement.

validity of Respondent's subcontracting the entire job, but merely seeks part of the work (or other work at the same time). The subcontracting of the overall job must, therefore, be deemed valid. Both the nature of the work and former General Superintendent of Maintenance Thompson's testimony suggest the work is sufficiently integrated that a changeover in personnel is unwarranted. I, therefore, conclude Respondent did not violate the agreement when it permitted the instant subcontractor to work Sundays while not permitting related unit employes to work the same day.

II. Grievance 9670

The Building 64 tool room is one of two tool rooms operated by the employer. This tool room is a small machine shop which produces tools, fixtures, gauges and repair parts, and makes repairs to existing equipment. On a day prior to February 11, 1977, Gaulke, head of the Respondent's shop order department, met with Mlagan, tool room department head, to decide whether five or six shop orders should be produced by the Building 64 tool room or whether they should be subcontracted. This is the normal method of making such decisions. In a later discussion with Complainant's representatives, Mlagan conceded that those orders had been subcontracted. Copies of orders of subcontracted tool room type work are placed in a file maintained on supervisor Mlagan's desk. By agreement of the parties this file is open for inspection by authorized union representatives. Although Gagliano was an authorized representative, Mlagan forbade him to touch anything on his desk. At the relevant times unit tool room employes were fully employed during their straight time hours, but only a few were working on occasional Saturdays.

Complainant[9/] takes the position that Respondent failed to give it notice of the subcontracting of the instant five or six orders as required by Section 17.10. In addition, it contends that there exists a past practice of not subcontracting tool room work unless tool room employes were fully employed working on the Saturday premium day. Alternatively, it argues that tool room employes were available within the meaning of the second sentence of Section 17.10 during the period the instant orders were subcontracted because they were available for Saturday work. Complainant limited its requested remedy with respect to both issues to a finding that Respondent violated the agreement.

9/ Complainant's parol evidence objection was discussed earlier.

Respondent asserts that Gagliano knew he could ask Mlagan about subcontracting and, therefore, it did not fail to give Complainant notice of the instant subcontracting. Respondent denied the existence of a practice of subcontracting tool room work only when tool room employes were all working regular Saturday overtime. Instead, it asserted performance of a great deal of Saturday overtime in the 1973-1976 period was unrelated to subcontracting. It argues that there is a past practice of subcontracting even though tool room employes are not working Saturday overtime.

Respondent's second step answer admits that the parties had agreed to have the file system of notification. Under the circumstances, it is clear Respondent denied Complainant's authorized representative access to the file. It is immaterial that he might have learned from other sources or might not have even looked at the file had he been permitted access. I conclude Respondent has violated Section 17.10 by failing to give Complainant notice of the subcontracting of the instant work.

It is undisputed that Respondent has a very long history of subcontracting tool room work. Prior to January, 1973, while this subcontracting occurred, tool room employes worked few Saturdays. I conclude that, at least prior to January, 1973, it was the historical practice within the meaning of Section 17.10 for Respondent to subcontract tool room work even when tool room employes were not working Saturdays.

The tenor of witness Foley's testimony and the exhibits establish that throughout the period prior to January, 1973 dating back to well before the existence of the subcontracting language, Respondent subcontracted project and other work (when the subcontractor worked straight time only) and ordinarily did not schedule unit employes for Saturday or Sunday overtime. The bargaining history leading to the adoption of this language establishes Complainant actually acquiesced in these practices. While in later years Complainant may have become more aggressive, it still continued to acquiesce. Under the circumstances, I conclude the instant practices constitute cornerstone historical practices underlying the interpretation of both the first and third paragraphs of Section 17.10.

By January, 1973 Respondent experienced a large increase in overall customer demand. It therefore expanded its entire operation to include fairly regular Saturday overtime. When this demand slackened in June, 1976, it essentially eliminated the overtime. In the period January, 1973 to June, 1976 Respondent scheduled essentially all Building 64 tool room employes to work approximately eighty-five percent (85%) of

all Saturdays. After June, 1976 until the hearing, only a few Building 64 tool room employes were scheduled on about ten Saturdays. Foley attributed this to unprecedented levels of repair work. Complainant has not established Respondent assigned this overtime to reduce the level of subcontracting below that of January, 1973.

Under the circumstances, I conclude Complainant has not established that the deviation occurring in January, 1973 to June, 1976 constituted the historical practice in effect at the date of the execution of the 1976-1979 agreement. In my judgment, the practice occurring in that period is not of sufficient duration to alter the more fundamental cornerstone practice or, alternatively, relates only to the period of increased business activity. Accordingly, Respondent did not violate Section 17.10 when it subcontracted the instant work without scheduling Building 64 tool room employes to work regular Saturday overtime.

III. Grievance 111

The overall project underlying this grievance involved the installation of a series of conveyors from a forge shop to a cleaning unit three-quarters of a city block away. A men's washroom was located in the path of the project and had to be removed. The demolition of the men's room was planned in separate phases: plugging of the sewer, removal of the plumbing, removal of the electrical equipment, demolition of the walls, and breaking of the concrete floor. Each segment was performed by Ladish employes in different skill groups except for the plugging of the sewer, demolition of the walls and breaking of the concrete floor, which were performed by subcontractors.

The demolition of the walls and ceiling took place on a two or three day period in early December, 1976. Although the work was clearly of a type which is normally performed by Ladish employes in the Maintenance Helper classification, Respondent permitted a subcontractor, using at least two of its employes, to do this work. At the relevant times there were at least two employes who had last held the classification of Maintenance Helper on layoff. They had been bumped from this classification by more senior employes. There had been no reduction in the total number of Maintenance Helper positions and no employes then classified as Maintenance Helper were on layoff. Complainant had offered at the relevant times to permit Respondent to recall the former Maintenance Helpers without regard to the seniority of other workers.

Complainant[10/] takes the position that the former Maintenance

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10/ Complainant's parol evidence objection was discussed earlier.

Helpers were available to do the instant work within the meaning of Section 17.10 and, therefore, should have been allowed to perform the work. It requests a remedy of back pay to the most senior of the former Maintenance Helpers on layoff at that time.

Respondent denied that there were any employes in the classification of Maintenance Helper on layoff, only employes who had been bumped from the classification. Thus, it argues that employes were not available within the meaning of Section 17.10. It argues that the instant project was a small, integrated part of the overall project. Further, it argues that it should not be required to search for employes not in the relevant classification who might be qualified to perform the work nonetheless.

Bargaining history with respect to Section 17.10 suggests employe availability thereunder is limited solely to employes in the relevant classifications. The parties' agreements prior to 1959 contained no restrictions on subcontracting. In 1959 Complainant proposed that the 1959-1962 agreement contain the following provision:

> "ARTICLE I, Section 1, add the following paragraph -- In the event employees covered by this contract are working forty (40) hours or less per week, the Company will not, so long as equipment is available, sub-contract work which is customarily performed by employees in the bargaining unit, to any other Company."

The foregoing somewhat ambiguously forbids subcontracting when any employe is on layoff. As a result of those negotiations the parties added no new language to the agreement, but did enter into the following supplemental memorandum of understanding:

> "(The fol. [sic] will be a supplemental memo of understanding & will not be incorporated in the contract.) [Emphasis theirs]
>
> 'The purpose of subcontracting is to better service our customers in the fastest, most economical & efficient way possible so as to preserve our jobs. It is never done to deprive our people of their jobs, but only as a means of staying & remaining competitive.
>
> In the event employees covered by this contract in a particular classification are scheduled to work less than forty (40) hours per week or are on layoff, the Company will not, so long as equipment is available & customer commitments can be met, subcontract work (which is customarily performed by employees in the above mentioned classifications) to a subcontractor to be performed on the Company's premises.'" [Emphasis supplied]

This clearly limits subcontracting protection to employes in the affected classifications.

In the parties' 1962 negotiations, Complainant requested the inclusion of the above memorandum in the agreement with unspecified

modifications in the 1962-1964 agreement. Complainant did not adduce any testimony to establish it sought to expand protections for employes on layoff. The negotiations resulted in the parties' substituting what is now the first paragraph of Section 17.10 for the theretofore existing language. The first paragraph of Section 17.10 reads:

> "The Company shall, in exercise of Management's functions, subcontract work if it decides such subcontracting necessary for economic reasons, for the benefit of customer requirements and the overall betterment of our employees and the Company. The Company will make a reasonable attempt to have its employees perform the work so long as personnel and equipment are available. Company will keep Committee informed of such subcontracting."

In addition, the parties entered into a memorandum of understanding which is identical to the last paragraph of Section 17.10.

Thus, the clear and satisfactory preponderance of the evidence establishes that Complainant did not seek to expand the layoff protection for employes not actually in the affected classifications. Further, although Complainant attempted to do so, it could not demonstrate one instance in the period since the first adoption of this language in which Respondent did attempt to recall an employe not then assigned the relevant classification to perform subcontracted work. Based upon the foregoing, I conclude that Respondent did not violate Section 17.10 when it subcontracted the instant work.

Dated at Milwaukee, Wisconsin this 30th day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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