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-B

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Stanley H. Michelstetter II having on August 30, 1979, issued his Findings of Fact, Conclusions of Law and Order in the above-entitled proceeding wherein he dismissed all but one of Complainant's allegations that Respondent had committed unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by violating the parties' bargaining agreement; and Complainant having on September 14, 1979, timely filed a petition for Commission review of said decision; and the parties having filed briefs in the matter, the last of which was received on November 14, 1979; and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's decision should be affirmed,

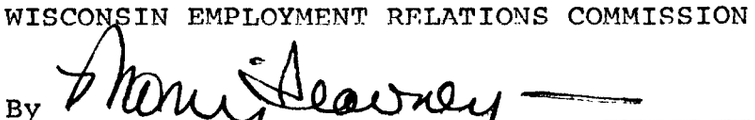
NOW, THEREFORE, it is

ORDERED

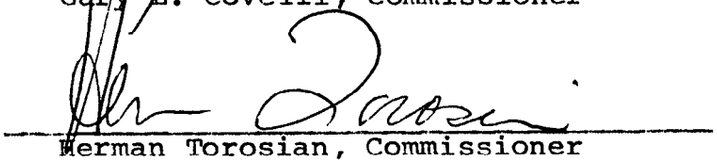
That the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter be, and the same hereby are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 2nd day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Gary L. Covelli, Commissioner


Herman Torosian, Commissioner

LADISH COMPANY, XXXVI, Decision No. 15982-B

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND:

In its complaint the Union alleged that the Employer committed unfair labor practices within the meaning of Section 111.06(1)(f) of WEPA by violating certain provisions of the parties' bargaining agreement which pertain to subcontracting. The Employer denied that it had committed any violation of the agreement and affirmatively asserted that two of the incidents involved in the allegations occurred more than one year prior to the filing of the instant complaint and thus were time barred by Section 111.07(14) WEPA. 1/

The Examiner's Decision:

The Examiner initially concluded that he would assert the Commission's jurisdiction over the alleged contractual violations inasmuch as the Union had exhausted the contractual grievance procedure, which procedure did not provide for final and binding arbitration of unresolved grievances. Turning to the issue of the timeliness of two of the four contractual claims (grievances 238 and 8937), the Examiner found that in Harley-Davidson Motor Co. (7166) 6/65 and Appleton Memorial Hospital (10538-A, B) 12/71, the Commission had established the following standard which was applicable to the dispute before him:

> 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 [Commission] 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.

Applying said standard, the Examiner found that the allegation premised upon grievance 238 was timely, inasmuch as the four step contractual grievance procedure had been exhausted on May 27, 1977 without undue delay and the complaint had been filed on November 30, 1977. However, he found consideration of the merits of grievance 8937 to be time barred because the contractual grievance procedure had been exhausted more than one year prior to the filing of the instant complaint. Although the Examiner noted that grievance 8937 may have moved into a "post-fourth-step negotiation process," after leaving the

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1/ The provision 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."

four step grievance procedure, he rejected the Union's assertion that the one year statute of limitations commenced only after the grievance left this "process."

Turning to the merits of the remaining alleged contractual violations (grievances 238, 9670 and 111), the Examiner concluded that the Employer had not violated the agreement by subcontracting certain work. However, he did conclude that the Employer had, in one instance, failed to give proper notice to the Union regarding said subcontracting and had thereby violated the agreement and Section 111.06(1)(f) of WEPA. The Examiner ordered the Employer to cease and desist from failing to give such notice.

The Petition for Review:

The Union's petition initially focuses upon the Examiner's conclusion that consideration of grievance 8937 was time barred. It contends the parties had agreed that the grievance would be held "in abeyance" in step four of the grievance procedure even though the Employer had given its fourth step answer, and thus that the grievance procedure was not exhausted until the grievance lost its "in abeyance status" in January, 1977. The Union further asserts that, while the grievance was "in abeyance" at the fourth step, the grievance procedure remained the exclusive mechanism for resolution of the parties' dispute and that the Examiner's affirmative finding regarding the Union's contractual right to strike during the "in abeyance" period was therefore erroneous. The Union would have the Commission reverse the Examiner's conclusion that grievance 8937 was untimely and order him to reach the merits of said grievance.

The Union's petition also alleges that the Examiner erred when finding that the subcontracting of certain work by the Employer (grievances 238, 9670 and 111) did not violate the bargaining agreement. It asserts that, as the pertinent contractual language clearly and unambiguously dictates a different result, the Examiner erroneously relied upon parol evidence to reach his decision. The Union further argues that even if the applicable language was ambiguous, the parol evidence in the record does not support the interpretation reached by the Examiner. It therefore requests that the Examiner's Findings of Fact and Conclusions of Law with respect to said grievances be reversed.

DISCUSSION:

The Commission is initially confronted with the Union's assertion that the Examiner erred when finding consideration of grievance 8937 to be time barred by Section 111.07(14). Said assertion must be rejected inasmuch as it is the Commission's judgment that the Examiner correctly applied the standard set forth in Harley-Davidson Motor Co. to the instant dispute. The record does not support the Union's contention that the parties bilaterally considered the grievance as still within the fourth step of the contractual grievance procedure even after receipt of the Employer's fourth step answer. The record does reveal that the Union unilaterally designated the grievance's status as being "in abeyance." However, the Employer took no action which can be deemed to be acquiescence or agreement thereto. Thus the Commission agrees with the Examiner's finding that the contractual grievance procedure was exhausted for the purposes of Section 111.07(14), upon receipt of the Employer's fourth step answer and affirms his conclusion that grievance 8937 was time barred. A contrary result would not only run afoul of the record, but would also permit the Union to unduly delay its decision as to what, if any, remedy it should seek for its grievance.

With respect to the Examiner's conclusion of no contractual violation regarding grievances 238, 9670 and 111, the Commission must affirm said conclusion as being amply supported by the record. The Union's contention that the Examiner erred by admitting parol evidence to aid his interpretive efforts is itself erroneous. In Cutler-Hammer Inc. v. Industrial Commission, 13 Wis. 2d 618 (1960), the Wisconsin Supreme Court indicated that it is proper to look "at the contract in light of the offered evidence in order to determine whether such evidence would not persuade any reasonable man that the writing meant anything other than the normal meaning of its words would indicate." Thus, the Examiner properly admitted such evidence when resolving the subcontracting issues before him and we do not find the resultant interpretation of the parties' contractual language to be unwarranted. Therefore the Examiner's Findings and Conclusions in this regard have been sustained. 2/

Dated at Madison, Wisconsin this 2nd day of April, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Gary L. Covelli, Commissioner

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Herman Torosian, Commissioner

2/ Although the Employer filed no petition for review, in its brief filed in opposition to the Union's petition for review, the Employer expressed disagreement with the Examiner's conclusions that the instant complaint, as it referred to grievance 238, was timely filed, and that it had failed to give proper contractual notice of subcontracting (grievance 8937). The Commission finds ample support in the record for the latter conclusion, and affirms the discussion regarding the continued validity of Harley-Davidson in response to the Employer's first objection.