STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2033, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA,		
Complainant,	:	Case I No. 22669 Ce-1766
vs.	:	Decision No. 16150-A
EVCO PLASTICS,		
Respondent.		

Appearances:
Zubrensky, Padden, Graf & Bratt, by Mr. George F. Graf, for Complainant.
Ela, Esch, Hart & Clark, by Mr. Ronald J. Kotnik, for Respondent.[1/]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local 2033, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, herein referred to as Complainant, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, herein referred to as the Commission, alleging that Evco Plastics, herein referred to as Respondent, had 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, as Examiner 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 hearing on said complaint having been held on April 6, 1978, after which the parties having filed briefs, the last of which was received on May 22, 1978, 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. Complainant, Local 2033, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, is a labor organization with its principal offices located at 1118 High Avenue, Oshkosh, Wisconsin. At all relevant times Bernard

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1/ Mr. Kotnik having substituted for Mr. Paul Hahn as attorney of record for the Respondent per motion dated April 2, 1978.

Lepianka was an agent of Complainant.

2. Respondent, Evco Plastics, is a corporation engaged in manufacturing plastic products, and operates plants at various locations, one of which is located at 1803 Bowen Street, Oshkosh, Wisconsin. At all relevant times, Dean Bartelt and Attorney Paul Hahn were agents of Respondent.

3. At all relevant times, Barbara Samps and Vernalda Felbob were employes of Respondent.

4. At all relevant times, Respondent recognized Complainant as the exclusive representative for all production and maintenance employes located at its Oshkosh plant.

5. Complainant and Respondent executed a collective bargaining agreement, herein agreement, on April 28, 1977 which agreement was in effect at all relevant times and provides, in relevant part, as follows:

". . .

ARTICLE IV

GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Any employee having a grievance may report the grievance to the chief steward. The employee shall first obtain permission from the grievant's foreman to leave the job. Permission to leave will be granted to the employee and the steward as soon as is reasonably possible.

Step 1. The aggrieved employee and the chief steward will present the grievance verbally to the grievant's foreman. If the grievance is not satisfactorily adjusted through this discussion, it shall be reduced to writing by the chief steward and the aggrieved employee and signed by each. The grievant's foreman shall answer the grievance in writing no later than twelve (12) hours after the start of the same shift on the following workday. The grievance may then be referred to Step 2. All grievances must be presented by the aggrieved employee and the chief steward to the foreman in writing within five (5) working days from the date the aggrieved employee first became aware of the cause of the grievance.

Step 2. The bargaining committee of not less than three (3) members will present the written grievance and meet with the plant manager within five (5) working days from the denial of the grievance in Step 1 or the conclusion of the Step 1 time period. If the grievance is not satisfactorily resolved in writing within seven (7) working days following such a meeting, the grievance may then be referred to Step 3.

Step 3. The International Representative may request a meeting on grievances referred to Step 3 of the grievance procedure. Such request must be made within ten (10) working days following the conclusion of the Step 2 time periods.

If such request is made, the Company shall meet with the Union within ten (10) working days of such request. The bargaining committee and the International Representative shall be present for the Union at such a meeting.

Section 2. If such grievance is not satisfactorily adjusted in writing within ten (10) working days after the meeting between the Union representatives and Company representatives, then the grievance procedure will be considered as having been exhausted and the Company may authorize a lockout and the Union may authorize and declare a strike except as limited by Article V and the arbitration procedures.

Section 3. It is hereby agreed that a grievance may not be disposed of except in the presence of a Union representative.

Section 4. When a grievance has exhausted the grievance procedure without settlement, the Company and the Union may mutually agree to invoke arbitration as its final means of resolving such a grievance. All aspects of the procedure for resolving the grievance through arbitration shall also be upon mutual agreement of the parties. If such procedure is invoked by the Company and the Union, the Company agrees that it will not lockout and the Union and its members and employees agree that they will waive their right to strike under this Article and the provisions of Article V of this agreement. The arbitrator and arbitration shall have no power to add to or subtract from or modify any of the terms of this agreement or any agreement made supplementary hereto or to establish or change any wage. The arbitrator shall not have any authority to overrule any determination or decision within management's prerogatives, except on the only ground that such decision is a violation of the provisions of this agreement. It is further agreed that nothing in this Article or in this agreement shall be construed so as to require either the Company or the Union as a substitute for collective bargaining to arbitrate a wage rate or to arbitrate any provision proposed for inclusion in a labor agreement in the process of negotiation. The decision of the arbitrator shall be final and binding on the parties.

. . .

Section 6. Any grievance not appealed from an answer at one step of the grievance procedure to the next step as provided in the grievance procedure shall be considered settled on the basis of the last answer and shall not be subject to further review. Time limits mentioned in this Article are maximum. Disputes shall be settled immediately whenever possible. However, the time limits may be extended by mutual written agreement. Waiver by the Company or the Union of any such time limit in any case shall not constitute a waiver by the Company or the Union of any such time limit or its right to insist on adherence thereto in any subsequent case.

ARTICLE V

LIMITATIONS OF STRIKES, WORK STOPPAGES AND LOCKOUTS

Section 1. The Union and its members, individually and collectively, agree that during the term of this agreement and any extension thereof, there shall be no strikes or work stoppages. It is further agreed that the Union will not take any strike action in respect to any controversy, dispute or grievance,

which has as its objective the obtaining of a change in or addition to this agreement or any supplements mutually agreed upon.

Section 2. It is agreed that the Union will not authorize any strike or picket the Company's plant or premises in respect to any controversy, dispute or grievance until the grievance procedure provided herein has been completely exhausted and not then unless sanctioned by the International Union and until fifteen (15) working days after the grievance procedure has been exhausted and the parties have failed to agree to arbitration of the grievance.

. . .

Section 5. In the event of a strike in violation of this agreement, the Company shall have the right to discipline by way of discharge or otherwise, any member of the Union who participates therein, furthers or agitates such strike action. The Union may review such disciplinary action in the grievance procedure and in the event the final grievance step does not resolve such dispute, the International Union and the local Union may authorize a strike only in accordance with section 2 of this Article.

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ARTICLE XV

HEALTH INSURANCE

Section 1. The parties have agreed that the current health insurance program will be replaced by a new health insurance program, as outlined during the course of negotiations on March 30, 1977. The details of this plan shall be made known to the employees and placed into effect by June 1, 1977. If the employees do not approve of the plan, the contract may be reopened by either party following written notice to the other party for negotiation on the health insurance program only.

Section 2. The employee who requests and is covered by the family or single coverage shall at the commencement of the new health insurance plan pay toward the plan premium a maximum of $30.00 for family coverage and $15.00 for single coverage per month for the term of this agreement.

. . ."

6. At all times relevant prior to September 1, 1977 Respondent maintained a health insurance plan for all participating unit employes of which Wisconsin Physicians Service was the insurer, herein W.P.S. plan. During the collective bargaining session referred to as the March 30, 1977 session in Article XV, Section 1 of the agreement, Complainant accepted Respondent's offer to replace the W.P.S. plan with a program, herein new plan, which Respondent stated would be partially insured by Respondent, itself, and which Respondent then stated would provide a greater range of benefits at lower cost than the W.P.S. plan. At that time neither Respondent nor Complainant had made arrangements for said new plan.

7. Thereafter, but prior to May 23, 1977, Respondent concluded the aforementioned new plan would be prohibitively expensive and/or unlawful. On May 23, 1977, Hahn telephoned Lepianka and stated that because of its aforementioned beliefs it would not implement the new plan.

8. Thereafter, but prior to June 2, 1977, Complainant and Respondent agreed to discuss alternative health insurance programs. On June 2, 1977 and July 11, 1977 Complainant and Respondent met to consider alternative health insurance programs, during the latter of which meetings Complainant tentatively accepted, subject to ratification by unit employes, a health insurance plan with Blue Cross/Blue Shield as the insurer, herein Blue Cross plan. The Blue Cross plan provides both a death benefit and disability income benefit. On or about July 16, 1977 said employes ratified the acceptance of said Blue Cross plan, and on July 18, 1977 Lepianka telephoned Bartelt and informed him of said ratification and stated that he wanted the Blue Cross plan to be implemented immediately, to which statement Bartelt replied, "Okay."

9. Respondent submitted the nonrefundable premium for W.P.S. plan for the calendar month of August, 1977 on its due date, July 15, 1977. Solely because it had paid such premium, Respondent delayed implementation (effective date for coverage) of the death benefit coverage and disability income coverage from August 1, 1977 to September 1, 1977.

10. Samps was killed in an accident on August 6, 1977. Had the Blue Cross plan been effective, Samps' beneficiaries would have been entitled to receive double indemnity death benefit in the total amount of $6,000.00.

11. Since August 11, 1977 and at all relevant times thereafter, Felbob has been absent from her employment with Respondent on the basis of purported disability within the meaning of the Blue Cross plan (disability income benefit). If she was in fact disabled within the meaning of the Blue Cross plan (disability income benefit) she would have qualified for the payment of $50.00 per week for each such week of disability up to and including 26 weeks.

12. In August or early September, 1977, Respondent had the agreement printed in which printing it changed the language of Article XV from that specified above. Lepianka first became cognizant of the change in Article XV after October 12, 1977. Complainant did not expressly or implicitly agree to any change in the language of Article XV as specified in Finding of Fact 5 above.

13. On or about August 23, 1977, Lepianka asked Bartelt and Hahn for the reasons behind the failure of Samps' beneficiaries to receive life insurance benefits and Felbob to receive disability income benefits, pursuant to the terms of the Blue Cross plan, and was then informed that the Blue Cross plan would not become effective until September 1, 1977 and that no benefits would be paid to Samps' beneficiaries or to Felbob.

14. Upon receiving this response, Lepianka asked Bartelt to investigate the matter and did not file a grievance or take any further action at that time, and Bartelt agreed to do so. Bartelt later confirmed to Lepianka that neither Samps' beneficiaries nor Felbob would receive any benefits from the Blue Cross plan or from any other source. On October 12, 1977 Felbob filed a grievance seeking payment of the disability income benefit for the aforementioned purported disability, and Complainant filed a grievance on behalf of Samps' beneficiaries for the death benefit for her death.

15. Thereafter, said grievances were processed through all of the preliminary steps of the grievance procedure specified in the agreement, without resolution thereof. By letter dated January 10, 1978, Hahn informed Lepianka that Respondent refused Complainant's request to arbitrate either of the two grievances. At all relevant times thereafter Respondent continues to refuse to arbitrate either of said grievances.

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

CONCLUSIONS OF LAW

1. That since the instant complaint alleges that Respondent Evco Plastics violated the terms of a collective bargaining agreement then in effect within the meaning of Section 111.06(1)(f), Wis. Stats., the Wisconsin Employment Relations Commission has jurisdiction to decide the merits of said complaint.

2. That since Complainant Local 2033, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America has timely filed grievances with respect to the allegations of its complaint and exhausted all applicable, exclusive procedures specified in said agreement without resolution thereof, the examiner will assert the jurisdiction of the Wisconsin Employment Relations Commission to decide the merits of said complaint.

3. That Respondent, by having failed to timely implement the Blue Cross plan, has committed, and is 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 conclusion of law, the examiner makes and issues the following

ORDER

IT IS ORDERED that Evco Plastics shall immediately take the following affirmative action which the examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

1. Pay to the designated beneficiary or beneficiaries of Barbara Samps the sum of Six Thousand and 00/100 Dollars ($6,000.00), representing term life insurance benefits with double indemnity for accidental death to which such beneficiary or beneficiaries would be entitled pursuant to the terms of the Blue Cross plan had such been in effect on July 18, 1977.

2. Make Vernalda Felbob whole for those disability income benefits to which she would have been entitled, if any, had the Blue Cross plan been in effect on July 18, 1977.

3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days of the date of this order of the steps which it has taken to comply herewith.

Dated at Milwaukee, Wisconsin this 16th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed in the instant matter alleges Respondent committed an unfair labor practice within the meaning of Section 111.06(1)(f), Wis. Stats., when it failed to promptly implement the Blue Cross plan life and disability income benefits. It alleges exhaustion of the grievance procedure without resolution and seeks payment to Samps' beneficiaries and Felbob. At hearing Respondent moved to dismiss on the basis the foregoing grievances were not timely filed and Complainant failed to exhaust its remedies (the strike-lockout method of resolution of grievances). I reserved determination of the motion to dismiss for the final decision. By Answer, Respondent denied untimely implementation of the benefits, alleged amendment of the agreement and reiterated its defenses raised in its motion to dismiss.

Positions of the Parties

Complainant contends Respondent violated Article XV, Section 1 when it failed to implement the agreed upon plan by June 1. Alternatively, it contends Respondent and Complainant agreed to the immediate implementation of the Blue Cross plan on July 18, 1978 which admittedly was not done.

Complainant's view is that the grievance/arbitration procedure contained in Article IV of the agreement and the limited right to strike over grievances set forth in Article V, Sections 2 and 5 of the agreement do not deprive the Commission of jurisdiction under Section 111.06(1)(f). In particular, it states that deferral to the grievance/arbitration procedure is inapplicable inasmuch as Respondent has explicitly refused to agree to arbitration of this matter. Furthermore, it disputes Respondent's view that the contractual right to strike provides a method for the compulsory final and binding resolution of this matter sufficient to oust the Commission of jurisdiction.

Complainant claims that the grievances involved herein were timely filed within the five day limitation set forth in Article XV, Section 1 of the agreement. It states that these grievances were filed within two days after Respondent gave its final confirmation that the benefits at issue were not to be paid. Although Complainant may have been made aware of the existence of possible problems with regard to these benefits, it was not until the date that such confirmation was received that the disputes involving them were ripe for grievance and

that the contractual time limit began to run. Alternatively, Complainant argues that this sort of contractual time limitation is inapplicable to an instance where a party to the contract refuses to arbitrate a dispute inasmuch as procedural defenses to the processing of a grievance (including a defense of untimeliness) are properly raised only before the arbitrator.

Respondent contends the Commission lacks jurisdiction because Complainant failed to exhaust its strike option under the agreement. It contends the strike option was intended to be the exclusive method of final disposition of grievances which, for policy reasons, ought not be undermined by the Commission's assertion of jurisdiction. Respondent further argues the grievances were not timely filed within the meaning of Article IV, Section 1, Step 1 because by its view Complainant's representative Lepianka knew of the failure to implement insurance as early as July 25, 1977 and learned of the denial of benefits approximately August 23, 1977.

Respondent contends it did not violate the agreement by implementing the Blue Cross plan as of September 1, 1977. Respondent claims that, although Article XV, Section 1 of the original agreement called for implementation as of June 1, 1977, the plan envisioned by that provision of the agreement could not be obtained and implemented, and that as a result, it requested the reopening of that provision. By consenting to meet with Respondent subsequent to June 1, Complainant agreed to such a reopening, thereby relieving Respondent of its obligations under the original contract provision. Respondent further claims that, as part of a general revision of several portions of the agreement, Article XV, Section 1 was changed to require only that the Blue Cross plan "be placed into effect during the term of the agreement," which change was not at any time challenged by Complainant.

It is Respondent's view that Complainant never received any guarantee that the Blue Cross plan would be placed into effect on any particular date, and that Respondent's failure to object to Mr. Lepianka's July 18, 1977 request to implement that plan "immediately" did not amount to an agreement to do so. Respondent further justifies its September 1 implementation of the plan on the grounds that, as of the date it received notice of ratification of that plan by Complainant's membership (i.e., July 18, 1977), it had, as required, paid the premium under the W.P.S. plan for August, 1977 coverage and that to have implemented the Blue Cross plan on any earlier date would have involved a double premium payment by it and by its employes.

Respondent finally argues that no evidence has been adduced as to Felbob's disability or as to her eligibility to receive benefits under the Blue Cross plan, that Complainant bears the burden of proof in this regard, which burden it has not sustained, and that therefore Felbob's claim should be denied.

Discussion

a. Jurisdiction

Where there exist applicable, exclusive grievance procedures, it is the Commission's policy to defer the processing of allegations of violation of collective bargaining agreement until such procedures have been exhausted or the matter resolved. It is undisputed that the Complainant exhausted all of the preliminary steps of the instant grievance procedure and requested arbitration. Thereafter, Respondent exercised its contractual right to refuse arbitration. By the terms of Article IV, Section 4, the grievance procedure has been exhausted with respect to these two grievances, and Complainant had the right to strike with respect thereto.

Although the agreement reserves the right of Complainant to strike over such grievances and Respondent the right to lockout, it does not in any way indicate that this mere reservation is an exclusive procedure for the resolution of grievances. Further, that the agreement specifies the grievance procedure is exhausted prior to the strike/voluntary arbitration provision strongly suggests the strike reservation was not intended to be exclusive. For these reasons I conclude the policy considerations underlying American Motors v. W.E.R.B. 32 Wis.2d 237 (1966) @ pp. 249-53 dictate the conclusion the Commission ought not defer to this "procedure."

b. Timeliness

Step 1 of the agreement's grievance procedure states:

> "All grievances must be presented by the aggrieved employee and the chief steward to the foreman in writing within five (5) working days from the date the aggrieved employee first became aware of the cause of the grievance." [Emphasis added.]

Because the Samps' grievance relates to the claim of individuals who are beneficiaries of the employe, I conclude the time limits with respect to this grievance commence with the date her beneficiaries first became aware of the cause of their grievance. In the case of claims of non-employes as heirs, beneficiaries, etc., of employes, the better view is to broadly construe time limits. For example, there is no basis for presuming their knowledge of the terms of the collective bargaining agreement as is ordinarily the case with employes. Accordingly, I find there is no evidence of any of Samps' beneficiaries'

knowledge of the existence of the cause of the grievance prior to the filing of the instant grievance. The Samps' grievance is, therefore, timely within the meaning of Step 1.

With respect to the Felbob grievance, it is clear she was first aware of her purported illness/disability, if any, on August 11, 1977. However, other than the long period of time from onset of illness to filing,and, possibly, Complainant's earlier knowledge of the grievance, there is no evidence suggesting she learned she would not be paid under the Blue Cross plan prior to five days before filing her grievance. Because there could be no history of claims handling with respect to this new benefit, the length of time does not satisfactorily support the inference of earlier knowledge. Respondent has failed to demonstrate Complainant ever communicated its knowledge, if any,to Felbob. Respondent has, therefore, failed to establish by a clear and satisfactory preponderance of the evidence that Felbob knew of the cause of her grievance more than five days before her grievance was filed.

c. Effective Date

Complainant never agreed to amend the original language of Article XV. It is undisputed Complainant never expressly agreed to Respondent's change in the text of Article XV. Although Respondent unilaterally amended the text of, inter alia, Article XV when it had the contract printed, Respondent failed to show Complainant was cognizant of the change prior to the printing. Hahn testified he told Lepianka on July 18, 1977 he would amend the agreement and, thereafter, drafted the change. He asserts he mailed a copy of the amended language to Lepianka. It is unclear whether Lepianka received a copy of the amended language, but he unequivocally testified, in effect, he did not see the amended language until he received a copy of the printed agreement which was some time after the grievances were filed on October 12, 1977. There is no reason to doubt Lepianka's crediblity insofar as it relates to when he first became cognizant of the specific change in Article XV. Thus, Respondent has failed to demonstrate by a clear and satisfactory preponderance of the evidence that Complainant implicitly agreed by acquiescence to the amendment in Article XV.

It is further undisputed that Complainant agreed to permit Respondent to substitute the Blue Cross plan for the new plan in July while insisting on immediate implementation thereof. The better view of these discussions is that the parties agreed to substitute the Blue Cross plan for the new plan, but did not specifically agree to modify the June 1, 1977 effective date specified in Article XV. It is clear

Complainant insisted on having the Blue Cross plan effective immediately. It is unclear whether Bartelt meant to accept these terms, but, if he did, Respondent must bear the risks of delay. The only other acceptable alternative is the parties did not agree.

However, even if the parties did not agree on a substitute implementation date, I am satisfied the better approach is still to allocate the risks of failure to promptly implement in accordance with the parties' original agreement in Article XV. Article XV, as originally agreed by the parties, specified the new plan was to be implemented by June 1 and established a fixed dollar amount of contribution by employes for a "new health insurance program, as outlined during the course of negotiations on March 30, 1977. . . ." The evidence of negotiations establishes the Respondent had put forth its idea for a new plan of benefits equal to, or better than, the then existing plan at what it then had hoped would be lower cost. Under the facts surrounding the negotiation of the provision and the language agreed upon by the parties, I conclude the purpose of the foregoing provision was to allocate the risks of inability to establish the contemplated insurance program, particularly, but not only the risks of excessive cost to Respondent.

Solely because it faced additional cost in the form of payment of its share of the premium for both the W.P.S. plan and Blue Cross plan for the month of August, 1977,[2/] Respondent delayed implementation of the Blue Cross plan from the month of August to September, 1977. I find Respondent violated Article XV, by not bearing the risk of increased cost and implementing the Blue Cross plan at least by the month of August, 1977.

d. Remedy

I conclude the appropriate remedy, in addition to the usual remedies, is to require Respondent to pay beneficiaries the benefits they would have received had Respondent properly implemented the plan. It is undisputed that Samps' beneficiaries are entitled to receive the $6,000 death benefit. There remains a dispute with respect to whether Felbob was disabled at the relevant time such that she would have been able to collect disability income benefits for all or part of the 26 weeks permitted by the Blue Cross plan. No determination is made as to whether Felbob was thus disabled and the order made herein merely

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2/ Respondent had paid the nonrefundable W.P.S. plan premium prior to agreement on substituting the Blue Cross plan.

requires Respondent to make her whole for any benefits she would have thus been able to receive.

Dated at Milwaukee, Wisconsin this 16th day of February, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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