STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, LODGE 34,	:	
Complainant,	:	Case V No. 23139 Ce-1777
vs.	:	Decision No. 16415-A
G & H PRODUCTS, INC.,	:	
Respondent.	:	

Appearances:
Mr. Gerhard Roemer, Business Representative, appearing on behalf of the Complainant.
Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, by Mr. Joseph A. Melli, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

International Association of Machinists & Aerospace Workers, Local 34, hereinafter Complainant, having filed a complaint on June 13, 1978 with the Wisconsin Employment Relations Commission alleging that G & H Products, Inc., hereinafter Respondent, had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Stephen Pieroni, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) Wisconsin Statutes, and hearing on said complaint having been held at Kenosha, Wisconsin on September 21, 1978, and the parties having filed briefs by November 1, 1978; and the Examiner having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant is a labor organization representing all hourly paid plant production and maintenance employes employed by Respondent.

2. Respondent is a corporation with offices at 5718 52nd Street, Kenosha, Wisconsin and is an Employer within the meaning of Section 111.02(2) of the Wisconsin Statutes.

3. That the Complainant and Respondent are parties to a 1977-1980 collective bargaining agreement which contains the following pertinent provisions:

GRIEVANCE PROCEDURE

> Para. 23. For the purpose of this Agreement, the term "grievance" means a dispute between an employee and the Company or the Union and the Company concerning a claim of breach or violation of the provisions of this agreement.
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> . . .
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> Step 2. The grievance shall be reduced to writing and presented to the foreman within two days of his ver-

bal answer. The Shop Committee may then present and discuss the grievance with the foreman. If no satisfactory settlement is reached between them within two (2) working days after the written grievance is presented to the foreman, the matter shall proceed to Step 3.

Step 3. The Shop Committee will meet with the Plant Superintendent and/or other Company representative at a set time mutually agreeable to both parties. Such agreement as to meeting date must be reached within three (3) working days after the written grievance is presented to the foreman for processing in Step 3. The answer of the Plant Superintendent shall be in writing. If no satisfactory settlement is reached within five (5) days of the meeting date, the grievance shall be processed in Step 4 of the grievance procedure.

Step 4. The Chairman of the Shop Committee must notify the Plant Superintendent in writing three (3) working days of receiving the unsatisfactory answer to the grievance as processed in Step 3 if the grievance is to be processed in Step 4. Upon receipt of such written notification, the Plant Superintendent shall arrange for a meeting at a mutually agreeable time between the Shop Committee and a representative of the International Union and representatives of the Company to discuss and attempt to obtain a satisfactory disposition of the grievance. Either party to this Agreement shall be permitted calling employee witnesses at each and every step of the grievance procedure. The parties will cooperate in submitting information with respect to a grievance and strive diligently to reach a satisfactory settlement.

Step 5. Arbitration

. . .

(c) The function and jurisdiction of the impartial umpire shall be fixed and limited by this agreement, and he shall have no power to alter, add to, or delete from its terms, or to change methods of fixing incentive standards or methods of determining incentive rates, or the methods of manufacture or working rules of the Company which are not inconsistent with this agreement. He shall have jurisdiction only to determine issues based upon the interpretation or application of this agreement; and any matter coming before the impartial umpire which is not within his function and jurisdiction as herein defined, shall be returned to the parties without decision and without recommendation.

. . .

SENIORITY

. . .

Para. 74. The Company will maintain a seniority list, and such list (which shall be kept current) shall contain the names and seniority date of employees in the bargaining unit.

Employees hired for the first time, and former employees rehired after their seniority has terminated,

will be regarded as probationary employees for the first forty-five (45) working days of actual work with the Company. Such period shall be considered as a trial period to permit the Company to determine such probationary employees' fitness and adaptability for the work required and during such probationary period the Company shall have the exclusive right to terminate such employees without such action being subject to review. Probationary employees continued in the service of the Company after the completion of forty-five (45) days of actual work shall receive full continuous service credit from the date of original hiring.

4. That on May 2, 1977 Mr. Fred Brown was discharged for overstaying a leave of absence without permission. A grievance protesting that discharge was filed on May 4, 1977. On January 6, 1978, the Respondent and Complainant entered into a settlement agreement (Joint Exhibit No. 2) concerning Fred Brown's May 2, 1977 discharge. Said agreement provided in relevant part as follows:

> 1. Mr. Brown will be restored to the status of a new full-time employee subject to the contractual 45 day probationary period as a tool crib attendance starting at the minimum base rate for that job on the second shift.
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> 2. If Mr. Brown successfully passes the probationary period, the Company will restore full seniority from his original date of hire of August 2, 1974.
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> 3. Mr. Brown must be capable of performing the full and complete tool crib attendant job with all necessary job description requirements.
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> Should Mr. Brown be unable to perform the full job requirements during his probationary period and as a result not pass his probationary period, the Company will sit down with the Union to explore any other job possibilities of which he might be capable of performing.

5. That pursuant to said settlement agreement (Joint Exhibit 2), Mr. Brown returned to work on January 9, 1978 but was terminated on March 10, 1978 for unsatisfactory performance. Said termination occurred prior to the completion of Brown's 45-day probationary period referred to in the parties' settlement agreement.

6. That on March 14, 1978 a grievance was filed on behalf of Brown alleging that his "termination [was] without just cause." (Joint Exhibit No. 5). Thereafter on the following dates: March 30, 1978; April 18, 1978 and May 5, 1978 representatives of Complainant and Respondent met at grievance meetings to discuss inter alia the Brown grievance. That following Brown's discharge on March 10, 1978 Respondent by its representatives, consistently took the position that the termination of Brown was not subject to review under the contract because he was a probationary employe per Para. 74 of the parties' collective bargaining agreement. Accordingly, Respondent during said meetings consistently refused to discuss the merits of the Brown grievance or to disclose any reason why Brown had not passed his probationary period. That at least during the March 30, 1978 and May 5, 1978 meetings, Respondent and Complainant discussed other job possibilities for which Brown was physically capable of performing. That during

the April 18, 1978 and May 5, 1978 meetings, Respondent stated that Brown's unsatisfactory performance leading to termination was not a result of any physical inability to perform the job.

7. That on May 10, 1978 Complainant by letter advised the Respondent that it was requesting arbitration on the Brown discharge. (Union Exhibit No. 10). After Respondent refused said request, Complainant, on June 13, 1978, filed a complaint with the Wisconsin Employment Relations Commission alleging that Respondent violated the Wisconsin Employment Peace Act by refusing to proceed to arbitration on the Brown grievance and requested inter alia that Respondent be ordered to submit "the grievance of Fred Brown's termination, as per the contract, to final and binding arbitration." Respondent timely answered said complaint and affirmatively alleged that the dispute, as submitted, was not arbitrable under the parties' collective bargaining agreement.

On the basis of the above Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

Respondent's refusal to arbitrate the Brown grievance was not violative of Section 111.06(1)(f) of WEPA.

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

ORDER

IT IS ORDERED that the Complainant allegations be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 11th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The sole issue in this proceeding is whether Respondent's admitted refusal to arbitrate the Brown grievance was unlawful. Complainant, contrary to Respondent, alleges that said refusal to arbitrate the Brown grievance violated the Wisconsin Employment Peace Act.

DISCUSSION:

It is well established that a party must arbitrate a dispute unless it can be shown on the face of the contract that the dispute is not arbitrable as a substantive matter. 1/

Here, the contract at Para. 24, Step 5 Arbitration (c), specifies that:

> (c) The function and jurisdiction of the impartial umpire shall be fixed and limited by this agreement, and he shall have no power to alter, add to or delete from its terms, or to change methods of fixing incentive standards or methods of determining incentive rates, or the methods of manufacture or working rules of the Company which are not inconsistent with this agreement. He shall have jurisdiction only to determine issues based upon the interpretation or application of this agreement; and any matter coming before the impartial umpire which is not within his function and jurisdiction as herein defined, shall be returned to the parties without decision and without recommendation. (Emphasis added).

Further, said collective bargaining agreement provides at Para. 74 that the Company has the "exclusive right to terminate [probationary] employes without such action being subject to review."

The record shows that the parties entered into an Agreement (Joint Exhibit No. 2) dated January 6, 1978 in which the Complainant and Respondent agreed that "Mr. Brown will be restored to the status of a new full-time employee subject to the contractual 45 day probationary period. . ." Said Agreement indicates beyond any question that Brown was returned to work as a probationary employe. Insofar as it is undisputed that Brown was terminated by Respondent within 45 days of his return to work, it therefore follows that said termination is not subject to the arbitration procedure provided for in the parties' collective bargaining agreement.

Complainant raises several arguments which, although deserve discussion, are without merit in the instant matter. Complainant first argues that Respondent's participation in several grievance meetings concerning the Brown grievance qualified same as a valid grievance. In essence, Complainant asserts that Respondent waived its right to contest the arbitrability issue. This argument must fail for two reasons: 1) The Commission has held that participation in the contractual grievance procedure does not estopp an Employer from challenging the arbitrability of a grievance in a proceeding to compel arbitration; 2/ and 2) the evidence of record clearly demon-

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1/ Ashland Unified School District No. 1, (12071-A, B) 3/75; City of West Allis (15226-A, B) 12/77.

2/ City of Adams (Sheriff Department), (14510-A, B) 12/76.

strates that Respondent consistently maintained that the dispute was beyond the scope of the parties' arbitration agreement. (Transcript page 22).

The major focus of Complainant's arguments concern the Respondent's alleged violation of Para. 5 of the January 6 Agreement which states as follows:

> Should Mr. Brown be unable to perform the full job requirements during his probationary period and as a result not pass his probationary period, the Company will sit down with the Union to explore any other job possibilities of which he might be capable of performing.

Complainant asserts in its brief "that at no time after 3-10-78 did the Complainant call a meeting to 'sit down and explore other job possibilities' . . . that Fred Brown could handle." In this regard, Complainant asserts that since Respondent violated the settlement agreement, then the original grievance should be an arbitrable matter.

The undersigned finds Respondent's argument on this point compelling. The difficulty with Complainant's argument is again twofold. First, the complaint filed herein alleges a refusal to arbitrate Brown's grievance pursuant to the parties' collective bargaining agreement. The undersigned finds that no other allegation is set forth in the complaint, nor has the complaint been amended to include the alleged violation of the parties' January 6 Agreement. Hence an allegation of a violation of the settlement agreement is beyond the scope of the Complaint and matters litigated. Further, any claim that there exists a duty to arbitrate disputes over the interpretation or application of the settlement agreement must be rejected. This is so because arbitration is a matter of contract and a party cannot be requested to submit to arbitration any dispute which he has not agreed so to submit. 3/ Here, Complainant failed to prove that the parties agreed to submit to arbitration any disputes over the January 6 settlement agreement.

Secondly, even assuming arguendo that the Commission has jurisdiction to entertain an alleged violation of the January 6 settlement agreement, the record does not contain any substantial evidence that Respondent violated said agreement. The unrebutted testimony of Committeeman Pagliaroni clearly established that the January 6 Agreement was "mainly concerned with [Brown's] physical ability to handle the job." (Transcript page 10). Further the uncontradicted testimony of record reveals that Brown's termination was unrelated to any physical inability to perform the job of tool crib attendant. (Transcript page 20). Hence it could well be argued that since there was no dispute as to Brown's physical ability to perform the job of tool crib attendant, it follows that there was no requirement under the settlement agreement "to explore any other job possibilities of which he might be capable of performing."

In the alternative, assuming Respondent was required to "explore" other job possibilities per the January 6 agreement, and assuming further that the Commission has jurisdiction to decide that issue, the testimony of Union Shop Committee members Pagliaroni and Polentini

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3/ Steelworkers vs. Warrior Navigation Co., 363 U.S. 574, 582, 46 LRRM 2416 (1960); School District No. 6, City of Greenfield (14026 A, B) 11/77.

clearly established that such discussions were in fact held at the various grievance meetings concerning Fred Brown. (Transcript page 22, 25). Thus, Respondent substantially complied with the January 6 settlement agreement in this regard.

Significantly, said Agreement at most required an exploration of other job possibilities, it did not abrogate the more specific provision of the settlement agreement that Brown serve the contractual 45-day probationary period. As stated previously, any contention that Brown's probationary period was abrogated by the reference to exploring other job possibilities (Para. 2, Joint Exhibit No. 2), is beyond the scope of the pleadings and without support in the record. Hence, even assuming the Commission has jurisdiction in the present proceeding to find a violation of the January 6 Agreement, the record fails to establish any such violation.

Returning to the only issue in these proceedings, the fact remains that Complainant alleged in its pleadings that Respondent violated the parties' collective bargaining agreement by refusing to arbitrate Brown's grievance that he was terminated without just cause. The unequivocal evidence of record established that Brown was terminated during the contractual 45-day probationary period. As such, the parties' collective bargaining agreement at Para. 74 specifically excludes said termination for the arbitration procedure.

For the foregoing reasons the instant complaint must be dismissed.

Dated at Madison, Wisconsin this 11th day of April, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Pieroni
Stephen Pieroni, Examiner