STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Complainant, vs. GIRAFFE ELECTRIC, INC., Respondent.	Case I No. 23418 Ce-1791 Decision No. 16513-C

ORDER GRANTING MOTIONS TO QUASH SUBPOENAS

On or about December 31, 1979, counsel for the Respondent served four subpoenas upon Dick Pfoertsch, Richard Schmitt, Kenneth Richter and Richard Neimon, all being members of the Labor-Management Committee for the Electrical Contracting Industry (the first two named being employer members and the latter two named being labor members of said Committee), which subpoenas were issued by the Examiner on December 21, 1979 at the request of the Respondent's counsel. Said subpoenas required the presence of Messrs. Pfoertsch, Schmitt, Richter and Niemon at the hearing scheduled in the above-captioned matter for January 3, 1980 for purposes of giving testimony. At or shortly prior to the hearing, the Complainant filed a Petition to Revoke Subpoenas as to Messrs. Niemon and Richter and counsel for the National Electrical Contractors Association Inc., Milwaukee Chapter ("N.E.C.A.") filed a Motion to Quash Subpoenas as to Messrs. Pfoertsch and Schmitt. After hearing arguments of counsel on the matter, the Examiner permitted limited examination of the above-named subpoenaed individuals, reserved ruling as to whether to permit any further examination and requested the parties to file briefs relating to the issue of whether the subpoenas issued at the Respondent's request should or should not be quashed. On January 21, 1980, the Respondent filed a Statement in Opposition to Motions to Quash Subpoenas, urging that further examination of the subpoenaed individuals be permitted relative to matters encompassed by Wis. Stats. Section 298.10. On February 6, 1980, counsel for N.E.C.A. filed a Statement in Support of Motion to Quash Subpoenas. The Complainant did not file a statement in support of its petition.

The Examiner, after having considered the arguments and being fully advised in the premises, makes and files the following

ORDER

That the Complainant's Petition to Revoke Subpoenas and N.E.C.A.'s Motion to Quash Subpoenas relative to the subpoenas issued to Dick Pfoertsch, Richard Schmitt, Kenneth Richter and Richard Neimon be, and the same hereby are, granted.

Dated at Milwaukee, Wisconsin this 22nd day of February, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner

GIRAFFE ELECTRIC, INC., Case I, Dec. No. 16513-C

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTIONS TO QUASH SUBPOENAS

BACKGROUND:

The Motions to Quash Subpoenas which are the subject of this Order were filed with the Examiner during the hearing held in this matter on January 3, 1980 by counsel for the Complainant and by counsel for the National Electrical Contractors' Association-Milwaukee Chapter (hereinafter referred to as "N.E.C.A."). The Motions sought to quash certain subpoenas issued by the Examiner at the request of counsel for the Respondent on December 21, 1979 and directed to four members of the Labor-Management Committee for the Electrical Contracting Industry (hereinafter, the "Labor-Management Committee"), namely, Richard Neimon, Kenneth Richter, Richard Schmidt and Dick Pfoertsch, for the purpose of compelling their testimony.

The above-named members of the Labor-Management Committee, in accordance with the Examiner's Order dated May 16, 1979, held an arbitration hearing on June 15, 1979 to determine the merits of a grievance affecting Paris Tsobanglou, a former employe of the Respondent. On June 21, 1979, the taking of evidence was closed and on July 18, 1979, the Labor-Management Committee issued its award directing the Respondent to pay certain sums to Tsobanglou and to various fringe benefit funds pursuant to the terms of a collective bargaining agreement in effect between the Complainant and the Respondent during the relevant period. The Respondent failed to comply with said award whereupon the Complainant filed an Amended Complaint seeking enforcement of the award and the Respondent filed an Amended Answer seeking vacatur of the award.

Hearing before the Examiner was held on said Amended Complaint on January 3, 1980, during which hearing the four above-named members of the Labor-Management Committee were present pursuant to the subpoenas issued at the instance of the Respondent's counsel. The Examiner received Motions to Quash said subpoenas at the hearing, and after having heard oral agruments on said Motions, permitted the Respondent to question each of the members of the Labor-Management Committee only as to the following matters:

1. Were there any non-Committee members present during Labor-Management Committee deliberations involving the Tsobanglou grievance?

2. Did you (as a Committee member) rely solely upon record evidence in rendering your award in such matter?

The members of the Labor-Management Committee all answered "No" to the first question and "Yes" to the second question. The Examiner reserved judgment at that time as to whether, pursuant to the issued subpoenas, the members of the Labor-Management Committee might be recalled for further questioning. This Order is addressed only to that issue and not to other issues raised at the January 3, 1980 hearing.

DISCUSSION:

The Respondent's purpose in seeking the testimony of the four members of the Labor-Management Committee was to adduce evidence relating to the circumstances under which the subpoenaed individuals rendered their award determining the Tsobanglou grievance. Since the Respondent seeks to vacate said award pursuant to Wis. Stats. Section 298.10, its only purpose in issuing the subpoenas at issue could be to seek evidence to impeach the award. Absent extraordinary circumstances, the law does not permit a party to compel the testimony of arbitrators for that purpose. The general rule is set forth in 5 Am. Jur. 2d "Arbitration and Award" Par. 187 at p. 658 as follows:

> It is the general rule that an arbitrator may not by affadavit or testimony impeach his own award or show fraud or misconduct on the part of the arbitrators.

The courts of Wisconsin are in accord with this principle.[1/]

The rationale for this principle is set forth in the case of Gramling v. Food Machinery Corp. as follows:[2/]

> As in proceedings for enforcement of awards, the award is admissible and is the best evidence of matters purportedly determined by it; it cannot be altered by parol, nor is parol evidence admissible to prove an understanding or meaning of the arbitrators, different from that warranted by the terms of the award. Therefore, the general

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1/ Putterman v. Schmidt 209 Wis. 442 (1932); Koepke v. E. Leithen Grain Co. 205 Wis. 75 (1931); Eau Claire v. Eau Claire Water Co. 137 Wis. 517 (1909); see also, Gramling v. Food Machinery & Chemical Corp. 151 F.Supp. 853 (W.D. S.C., 1957) at p. 861 and cases cited therein.

2/ Supra, fn. 1.

> rule is that the testimony of an arbitrator is not admissible to impeach his own findings, and where the arbitrators recite in the award itself that they have disposed of the matters submitted to them for arbitration as was proper under the provisions of the agreement for submission, the parol testimony of one, or more, or all, of the arbitrators will not be received to impeach their award and its recitals.
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> The parties in this case stipulated for and obtained the judgment of arbitrators. In my opinion, it would be most unfair to the arbitrators to order them to come into court to be subjected to grueling examinations by the attorneys for the disappointed party and to afford the disappointed party a "fishing expedition" in an attempt to set aside the award. To do this would neutralize and negate the strong judicial admonitions that a party who has accepted this form of adjudication must be content with the results. [151 F.Supp. at 861.]

The law is also clear that the testimony of arbitrators is not admissible to show fraud or misconduct in the making of an award or to testify as to what transpired in hearings or deliberations of arbitrators where the purpose is to impeach the award.[3/]

The circumstances present herein call for the application of this rule given that the objectives of the Respondent in issuing its subpoenas to the members of the Labor-Management Committee are precisely those covered by the rule. The Labor-Management Committee possessed clear authorization to hear and determine this matter pursuant to Section 13.03 of the collective bargaining agreement (the so-called 1976-1978 "Inside Wiremen's Agreement") in effect between the Complainant and the Respondent. The submission of issues to the Labor-Management Committee pursuant to the letter of July 13, 1977, signed by James Kruse, Complainant's Business Manager, and relating to the Tsobanglou grievance was quite specific, both as to the definition and scope of the issues submitted and the relief sought. A hearing was held on the submitted grievance on June 15, 1979. Both parties received notice of the hearing and were represented at the hearing (the Respondent was represented by counsel). A transcript of the hearing was prepared--a highly unusual occurrence

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3/ Eau Claire v. Eau Claire Water Co., supra, fn. 1; Koepke v. E. Leithen Grain Co., supra, fn. 1; Giannopulos v. Pappas 80 Utah 442, 15 P.2d 353 (1932); Alexander v. Fletcher 206 Ark. 906, 175 S.W.2d 196 (1943); Stowe v. Mutual Home Builders' Corp. 252 Mich. 492, 233 N.W. 391 (1930); Lauria v. Soriano 180 Cal. App. 2d 163, 4 Cal. Rptr. 328 (1960); Fukaya Trading Co. v. Eastern Marine Corp., infra, fn. 5.

in hearings before the Labor-Management Committee. The award on its face determines precisely those matters submitted to the Labor-Management Committee. On January 3, 1980, a hearing was held concerning precisely the issue of whether or not the award should be enforced or vacated. During said hearing, the parties were permitted to present all relevant testimony and other evidence on this question save for the testimony of members of the arbitration panel rendering the award. The Respondent was permitted to question the members of said panel as to whether outside parties were present during their deliberations leading up to the issuance of their award or whether any of them relied upon evidence not in the record of the arbitration proceeding before the Labor-Management Committee. The parties have the opportunity to submit briefs on the issue of the enforceability of the award involved in this proceeding. In view of the above, the Examiner concludes that there is ample evidence before him to determine the issues raised by the Amended Complaint and the Amended Answer and that no showing has been made as to the necessity for departing from the established rule forbidding the testimony of arbitrators for the purpose of impeaching their award.

Counsel for the Respondent rightly notes that in certain circumstances, exceptions to this rule do apply. However, none of these exceptions are relevant to the circumstances herein. The courts, for example, have permitted a dissenting arbitrator to testify as to bias, partiality or other misconduct of the arbitrators issuing an award,[4/] and they have permitted testimony as to the nature of the matters submitted for decision, and considered by the arbitrators.[5/] Here, of course, there was no dissenting member of the Labor-Management Committee as to this award, and the matters submitted for decision and considered by the arbitrators are clear from the record before the Examiner. Some courts have also permitted testimony as to whether an award issued by an arbitrator was meant to be final,[6/] but there is no contention that the award of July 18, 1979 is not final and binding. Testimony has on occasion also been permitted in extra-

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4/ Griffith Co. v. San Diego College for Women 45 Cal.2d 50, 289 P.2d 476 (1955); Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N.W. 855 (1896).

5/ Griffith Co. v. San Diego College for Women, supra, fn. 4; Gruden Bros. v. Great Western Piping Corp. 297 Minn. 313, 213 N.W.2d 920 (1973); Fukaya Trading Co. v. Eastern Marine Corp. 322 F. Supp. 278 (D. La. 1971); Sapp v. Barenfield 34 Cal.2d 515, 212 P.2d 233 (1949).

6/ Shulte v. Wagner & Hennessy 40 Iowa 352 (1875).

ordinary circumstances when the testimony of an arbitrator is offered for the purpose of imputing misconduct to a party to the arbitration,[7] when such misconduct is indicated by extrinsic evidence, or where there is clear extrinsic evidence of misconduct on the part of the arbitrator or arbitrators.[8] In this case, the Respondent has offered no extrinsic evidence of the sort involved in those situations. In addition, the arbitrators herein have testified that their deliberations were based solely upon the record and the record of the arbitration proceeding appears to be quite complete.

Counsel for the Respondent has cited two recent Wisconsin cases in support of its position, but the cases cited are not applicable to the situation herein. In Manitowoc v. Manitowoc Police Department,[9] the testimony of an arbitrator was admitted in a proceeding to enforce his award but in that case, the arbitrator was testifying in support of the award and there existed definite extrinsic evidence of alleged misconduct on his part--i.e. evidence of an ex parte contact between the arbitrator and a party appearing before him. In addition, there is no indication that the arbitrator in that case was compelled by subpoena to textify. In Richco Structures v. Parkside Village Inc.[10] the court never dealt with the issue in question herein--i.e. whether and under what circumstances an arbitrator's testimony may be compelled. The case instead concerned itself with the meaning of the phrase "evident partiality" under Wis. Stats. Section 298.10(b) and the scope of an arbitrator's responsibility to disclose his or her prior relationships or transactions with parties or their representatives. Although it appears that the arbitrators involved did testify in Richco, there was no indication as to whether such testimony was compelled, or whether such was or was not offered for the purpose of impeaching the award involved.

The Examiner directed that the members of the Labor-Management Committee answer two questions: whether other persons were present

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7/ See, e.g., Griffith Co. v. San Diego College for Women, supra, fn. 4; Shirley Silk Co. v. American Silk Mills Inc. 257 A.D. 375, 13 N.Y.S. 2d 309 (1939).

8/ Fukaya Trading Co. v. Eastern Marine Corp., supra, fn. 5.

9/ 70 Wis.2d 1006 (1975).

10/ 82 Wis.2d 547 (1978).

during their deliberations leading up to their award determining the Tsobanglou grievance and whether they resorted to any evidence outside the record in making their determination. The answers to those questions did not indicate the need for further examination of the arbitrators along those lines. The Examiner, in this connection, takes note of Wis. Stats. Section 906.06(2)[11/] which restricts the permissible scope of inquiry of jurors to questions similar to those asked of the members of the Labor-Management Committee at the hearing on January 3, 1980. Although not binding upon the Examiner, the analogy is of persuasive value.

Were extraordinary circumstances indicated through other evidence contained in the record, the result herein may have been different. For example, if testimony had been received indicating the possibility of a particular type of misconduct by one or more members of the Labor-Management Committee, the testimony of the affected member or members of the Committee as to the type of misconduct alleged may have been called for. If the Labor-Management Committee had acted in a quasi-legislative or other form of non-arbitral capacity, or if types of issues brought before the Labor-Management Committee were such as to indicate a good possibility of bias in its determination of those issues, additional testimony of the Committee members would also have been quite useful. None of these or other similar extraordinary circumstances exist in the situation at hand. Furthermore, an extensive record (including a transcript) of the arbitration proceedings before the Labor-Management Committee is available and should provide sufficient evidence as to whether or not grounds exist for vacating the Committee's award pursuant to Section 298.10.

11/ That Section states as follows:

> (2) INQUIRY INTO VALIDITY OF VERDICT OR INDICTMENT. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received.

Therefore, there does not exist sufficient reason at this time to depart from the established legal precedent and strong policy forbidding a party to an arbitration from compelling the testimony of the arbitrator or arbitrators in order to impeach their award.

On the basis of the foregoing, the Complainant's and N.E.C.A.'s Motions to Quash the subpoenas issued to the four affected members of the Labor-Management Committee is hereby granted.

Dated at Milwaukee, Wisconsin this 22nd day of February, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner