STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEE BODOH Complainant, vs. G & H PRODUCTS, INC. Respondent.	:	Case VI No. 25805 Ce-1854 Decision No. 17630-A

Apppearances:
Joling, Rizzo & Willems S.C. by Mr. John L. Caviale, for the Complainant
Melli, Shiels, Walker & Pease S.C. by Mr. Joseph A. Melli for the Respondent

ORDER DENYING MOTION TO DISMISS AND HOLDING PROCEEDING IN ABEYANCE

The above-named Respondent having on February 25, 1980 filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission; and the Commission having appointed Stuart S. Mukamal, a member of its staff, to act as Examiner with respect to said complaint, and the Respondent, by its counsel, having on March 31, 1980 filed an Answer to said complaint and a Motion for Summary Judgment dismissing said complaint on the grounds that the Complainant lacked standing to bring same before the Commission, that the Commission lacks jurisdiction to grant the relief requested by the Complainant and that the Complainant's cause of action abated for the reason that a court of record was exercising its jurisdiction over a proceeding concerning the same parties, subject matter and requested relief involved herein; and the Examiner having determined that the Respondent's Motion should be regarded as a Motion to Dismiss; and the parties having subsequently agreed to address the issues raised by the Respondent's Motion prior to hearing in the matter on the basis of briefs; and the parties having filed briefs and reply briefs in the matter, the last of which was received on May 20, 1980; and the Examiner, being fully advised in the premises and being satisfied that the Complainant does possess standing to bring the instant proceeding, that the Commission does possess jurisdiction over the instant proceeding, that this proceeding is not abated due to the parallel action filed by the Complainant and presently pending in the Circuit Court of Kenosha County, Wisconsin; and being further satisfied that the instant proceeding should be held in abeyance pending adjudication in said Court of those issues identical to those involved in the instant case, which adjudication is expected within a reasonable period of time; and being further satisfied that the Respondent's Motion to Dismiss should be denied;

NOW THEREFORE it is

ORDERED

1. That the Respondent's Motion to Dismiss is hereby denied.

2. That the instant proceeding shall be held in abeyance until either:

(a) The Circuit Court of Kenosha County finally adjudicates the issues now pending before it which are common with those raised by the complaint filed in this proceeding or

(b) The Circuit Court of Kenosha County refers the issues raised by the complaint to the Commission for determination or

(c) The Examiner is shown and is satisfied that the adjudication of the issues involved herein by the Circuit Court of Kenosha Count will not be forthcoming within a reasonable period of time.

In the event that any of the three aforementioned events occurs, either party may, at that time, request that the stay of these proceedings be lifted and that hearing be scheduled to determine those issues that remain in this matter.

Dated at Milwaukee, Wisconsin this 13th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal /s/
Stuart S. Mukamal, Examiner

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS AND
HOLDING PROCEEDINGS IN ABEYANCE

BACKGROUND

Lee Bodoh (hereinafter referred to as the "Complainant") filed a complaint with the Wisconsin Employment Relations Commission (hereinafter referred to as the "Commission") on February 25, 1980, alleging, inter alia, that G & H Products, Inc. (hereinafter referred to as the "Respondent") had failed to comply with an award of Arbitrator George Jacobs in the case entitled Matter of G & H Products, Inc., and International Association of Machinists and Aerospace Workers Lodge 34 (AAA Case #51-30-0451-78, 2/26/1979; hereinafter referred to as the "Award"). The gravamen of said complaint was related to the fact that the Award sustained a grievance filed by Lodge 34 (hereinafter referred to as the "Union") concerning the Respondent's change of incentive pay rates for certain of its employes. It further alleged that such change of incentive rates adversely affected the Complainant, among other employes, in that it subjected the Complainant to wage losses in excess of $18,800.00 and that the Arbitrator found that the change of incentive rates was in violation of the collective bargaining agreement then in effect between the Respondent and the Union. It alleged that the Award by its terms required that the Respondent restore its old incentive rates and particularly its old GC 14R-2 inch rate retroactive to March 1, 1977, which would require that the Complainant be made whole for all wages that he may have lost as a result of the Respondent's change of incentive rates, and that the Respondent has failed and refused to do so. As a result, the Complainant filed the instant action with the Commission, seeking an order mandating the retroactive application of the Respondent's GC 14R-2 inch rate to March 1, 1977, the award of full back pay from March 2, 1977 in an amount equal to the wages allegedly lost by him as a result of the Respondent's change of incentive rates, with interest thereon and such further relief as may be deemed proper, including, without limitation, costs, disbursements and reasonable attorney's fees.

The Respondent filed its Answer, together with a Motion to Dismiss, 1/ in which it stated as follows:

1. As a nonparty to the Award, the Complainant lacks standing to bring suit for its enforcement.

2. The Complainant has failed to exhaust his contractual remedies under the applicable collective bargaining agreement.

3. The Commission lacks authority to grant the remedy requested by the Complainant and/or to award back pay to the Complainant.

4. The instant matter should be dismissed under the doctrine of abatement, inasmuch as the Complainant has filed an action based on the

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1/ The Respondent entitled its Motion as a Motion for Summary Judgment on its first, second, and third Affirmative Defenses in its answer. As noted in my letter of April 8, 1980, the Commission does not possess legal authority to entertain or rule upon a motion for summary judgment contrary to the allegations of the Respondent as raised by its Motion to the Commission, dated April 10, 1980. The parties subsequently agreed to treat the Respondent's Motion as a Motion to Dismiss (and said motion shall hereinafter be referred to as such) and to the disposition of those issues raised by that Motion on the basis of briefs. See Racine Unified School Dist. No. 1 (15915-B) 12/77.

identical facts and requesting the identical remedy with the Circuit Court of and for Kenosha County, Wisconsin, which action is currently pending.

The parties have had full opportunity to submit briefs and reply briefs in support of their respective positions on said issues. The following Memorandum as well as my Order herein will address only those issues raised by the Respondent's Motion to Dismiss, as enumerated above, and will not deal with any other issues raised by the complaint.

POSITIONS OF THE PARTIES

The Respondent claims in its Motion and accompanying briefs that the complaint must be dismissed as a matter of law. It argues that only the parties to the applicable collective bargaining agreement 2/ and to the original arbitration proceeding culminating in the Award (i.e. the Respondent and the Union) possess standing to enforce the arbitration award. Therefore, according to its argument, an individual employe-complainant not a party to the Agreement or to the Award lacks standing to enforce the Award. It further argues that the Complainant has failed to exhaust his remedies under the Agreement by failing to utilize the contractual procedure for the purpose of determining the issues entitlement to back pay and to reinstitution of the GC 14R-2 inch rate retroactive to March 1, 1977. The Respondent cites in this regard cases to the effect that a dispute concerning the interpretation of an arbitration award is in itself subject to the contractual grievance-arbitration procedure including the duty on the part of an aggrieved party to exhaust that procedure prior to institution of an action for confirmation of the award.

The Respondent contends further that the complaint seeks a remedy that would require the Commission to consider the merits of the Complainant's grievance and/or to interfere with the Award in excess of the proper scope of its authority. In particular, it states that the Award did not order the Respondent to pay back pay or to retroactively restore pre-existing incentive wage rates, that the Complainant is bound by the terms of the Award and that the Complainant is thus barred from seeking a modification of the Award as set forth in the complaint. The Respondent further contends that the issues in front of Arbitrator Jacobs were limited to the question of whether the Respondent's change of incentive wage rates violated the Agreement, that the Award was properly limited to that issue and that issues relating to potential remedies were neither submitted to Arbitrator Jacobs nor were they discussed in the Award. It concludes that on the basis of the above, the Examiner lacks the jurisdiction to grant the remedy requested by the Complainant.

Finally, the Respondent notes that on February 22, 1980, the Complainant filed a motion to confirm the Award with the Circuit Court for Kenosha County, Wisconsin and contends that as a matter of law the instant complaint filed with the Commission must be abated and dismissed.

The Complainant claims that the allegations raised in support of the Respondent's Motion to Dismiss are without merit. At the outset, he argues that a Motion to Dismiss under the circumstances is inappropriate inasmuch as material factual issues exist with respect to the

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2/ The applicable collective bargaining agreement and that relied upon by Arbitrator Jacobs in rendering his Award is the 1977-1980 collective bargaining agreement entered into between the Respondent and the Union (hereinafter referred to as the "Agreement").

allegations raised by the Respondent's motion. He further claims that he clearly possesses standing under Federal and State law to confirm the Award as a "real party in interest" regardless of whether the Union participates in these proceedings. This view is based upon the fact that the Complainant's rights were determined by the proceedings before Arbitrator Jacobs and the Award resulting therefrom and that the Award is therefore personal to him. He contends further that he has exhausted his contractual grievance-arbitration remedies and that to require an alleged failure on the part of the Respondent to abide by the terms of the Award to be processed as a separate grievance would leave him without remedy and would be contrary to the Wisconsin statutes and the policy of the Federal and State labor laws.

The Complainant states that the Commission has the authority to grant the relief requested by him including the award of back pay. He notes that the relief sought from the Commission is identical to that sought by the Union during the arbitration phase of these proceedings, that issues of remedy were argued before Arbitrator Jacobs and that it is a gross misinterpretation of the Award to deem the issue of remedy to have been excluded from consideration during the arbitration phase. He further claims that under the law he is entitled to receive back pay under an award sustaining his grievance concerning the Respondent's change of incentive rates even though the Award did not specifically mention back pay. He claims that this is particularly the case in a situation where the losing party (in this instance, the Respondent) has blocked all attempts at clarification of the underlying award. The Complainant concludes that, when viewed in this light, he is not seeking herein to change or modify the Award but only to confirm it and to obtain those remedies necessarily implicit therefrom.

The Complainant finally argues that the pending Circuit Court action is not identical to this action in terms of subject matter and relief sought, and that the doctrine of abatement is thus inapplicable. He further claims that the terms of the Wisconsin Employment Peace Act (and, in particular, Section 111.07, Wis. Stats.) clearly permit the maintenance of this action independently of his action now pending in Circuit Court.

DISCUSSION

A. Standing

The issues relating to standing involve the questions of whether the Complainant can, as an individual, bring suit to enforce the Award and whether he has, in this instance, exhausted the Agreement's grievance-arbitration provisions prior to instituting this action.

There is authority to the effect that where the contractual grievance procedure provides that only the certified exclusive bargaining representative may invoke the arbitration process, only that representative would have standing to appeal an arbitration award rendered as a result of that process. Under these circumstances, an individual employe would not have standing to obtain review of the award. 3/

3/ See e.g. McCluskey v. Pennsylvania, 99 LRRM 2720 (Pa. Cmwlth. Ct. 1978) Goldberg v. Hotel Dixie, S4LRRM 2201 (N.Y. Sup. Ct. 1963) (Only the Union can obtain vacatur of an award; court relied upon provisions of the New York Civil Practice Law and Rules providing that only parties to an arbitration may move thereunder but see fn. 7 infra) see also Moruzzi v. Dynamics Corp of America, 443 F. Supp. 332, 97 LRRM 2523 (S.D.N.Y., 1977) (action to compel arbitration may not be invoked by individual employes where the agreement stated they could be initiated by "the Union or the Employer"); Woody v. Sterling (Action to compel arbitration may not be invoked by individual employes over opposition of a union where only the "Company and the Unions" could do so pursuant to the agreement) Black Clawson Co. v. Machinists, 313 F.2d. 179, 52 LRRM 2038 (2 Cir., 1963) (Same)

The reasoning of those cases is analagous to those dealing with the issue of the standing of an individual employe to invoke or compel arbitration when not authorized to do so by the collective bargaining agreement - i.e. that where the agreement provides for arbitration by the union, the employe must look to the union initially for the vindication of his rights. 4/ However such does not describe the circumstance of the case at hand. The Complainant here seeks to enforce pursuant to Section 111.06(1)(f) Wis. Stats. a claim for back wages, allegedly arisi from the terms of an already-rendered arbitration award. He does not seek to compel the invocation of the arbitration process, nor does he seek an adjudication of the merits of his claim outside of the contractu grievance-arbitration procedure. Furthermore, this action is one in the nature of confirmation of the Award rather than an attempt to appeal from it or vacate it.

This action is best described as one in which an employe seeks to enforce a monetary claim arising out of the Agreement (as interpreted by Arbitrator Jacobs). The courts have held that an individual employe does possess standing to initiate proceedings to enforce a claim arising from an arbitration award. The basis for this result is that an employe whose personal rights were adjudicated by an arbitrator and determined by an award is a real party in interest to a proceeding to confirm that award and that such an employe would thus have standing to initate such proceedings irrespective of the participation (or lack thereof) of the employe's union. 5/

The instant circumstances involve a Complainant who was the named grievant in an arbitration proceeding and whose rights (including his right to a possible claim of back pay from his employer) were determined by an arbitration award. There is no doubt that the Union initiated and processed his grievance through the contractual grievance-arbitration procedure as per the Agreement resulting in an Award by which the grieva was sustained. It is also clear that the Award did not specifically provide for a remedy to be afforded to the Complainant and that the Unic attempted to obtain clarification of the Award concerning the issue of remedy from Arbitrator Jacobs, which attempt was stymied by the Respondent's refusal to consent to such clarification. 6/ The Complainant thereupon filed the instant complaint with the Commission with the apparent sanction of the Union but without its active participation. 7/

4/ See Transcontinental & Western Air Inc. v. Koppal 345 US 653, 32 LRRM 2157 (1953), Ostrofsky v. United Steelworkers 171 f. Supp 782, 43LRRM 2744 (D. Md. 1959).

5/ See Dudash v. Rockwell Standard Co. 79 LRRM 2779 (Pa. Ct. of Com. Pl 1971), Textile Workers v. Cone Mills Corp. 43 LRRM 2013 (M.D.N.C. 19 In Smith v. Evening News Assn. 371 US 195,51 LRRM 2646 (1962) it was held that Section 301 of the Labor-Management Relations Act conferre standing upon individual employes to bring actions in state courts t vindicate individual rights arising under collective bargaining agre ments. See also 48 A Am. Jur. 2d "Labor and Labor Relations" Sec. at pp. 350-351

On the basis of the above, it is clear that the Complainant is indeed a real party in interest to these proceedings and possesses a substantial individual claim which may be adjudicated before the Commission by way of a proceeding to confirm the Award pursuant to applicable statutory authority contained in Chapter 111 Wis. Stats. This is not a situation in which the Complainant seeks to circumvent the remedies available to him under the Agreement or to compel invocation of those remedies over the opposition of his exclusive bargaining representative, as was the situation in those cases cited by the Respondent in support of its Motion to Dismiss. Rather it is a case in which the Union on the Complainant's behalf pursued and exhausted all possible remedies under the Agreement and in which the Complainant seeks to recover a monetary claim allegedly based upon an Award sustaining his grievance only after the Respondent blocked resort to any further remedies that may have been available to him under the Agreement. Section 111.06(1)(f) Wis. Stats. as well as settled case law confers standing upon the Complainant to bring this particular action in his individual capacity.

To rule that the Complainant lacks standing to bring this action would deny the Complainant the opportunity to be heard on a substantial claim based upon a right which he alleges is individual to himself. It would contravene applicable precedent and the dictates of Smith v. Evening News Assn. and subsequent cases decided thereunder. 8/ Furthermore, the circumstances of this case are clearly distinguishable from those prevailing in those cases in which employes were precluded from pursuing remedies in their individual capacity. There is also no public policy or purpose associated with the collective bargaining process that would be served by precluding the Complainant at this point from proceeding in his individual capacity or by requiring the Union to be joined as a formal party to these proceedings.

Thus, the Respondent's contention that the Complainant, as an individual, lacks standing to maintain this action is without merit and is therefore rejected.

The Respondent's view that the Complainant has not exhausted the remedies available to him under the Agreement's grievance-arbitration procedure must similarly be rejected. The Union processed the Complainant's grievance through the entire contractual grievance procedure up to and including the arbitration phase. The Respondent blocked the Union's attempt to further resolve the issue of remedy by way of clarification of the Award. The situation presented by the Respondent's Motion is thus quite distinquishable from that prevailing in the cases of Aircraft Lodge No. 703, IAM v. Curtiss-Wright Corp. 9/ and IAM Local 1893 v. Aerojet-General Corp. 10/ which cases were relied upon by the Respondent. In those cases, the courts held that disputes as to whether the Employer had complied with the terms of an arbitration award were in themselves issues that were collateral to the earlier arbitration proceeding and were properly referable to the Arbitrator for further determination. The unions in those cases had attempted to obtain the desired remedy by way of judicial proceedings under Section 301 of the Labor-Management Relations Act to enforce the awards in question without having ever attempted further resort to the arbitrators involved. The courts thereupon remanded the cases to arbitration. In this case, the Union did attempt to obtain its desired remedy by way of a request that Arbitrator Jacobs clarify his Award, which was blocked due to the Respondent's objections. The Respondent now seeks the complete dismissal of the Complainant's attempt to obtain those same remedies from the Commission,

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8/ See fn. 5, supra.

9/ 169 F. Supp. 837, 43 LRRM 2525 (D.C.N.J. 1965).

10/ 263 F. Supp. 343, 65 LRRM 2421 (D. Cal., 1966).

on the grounds that the Complainant's proper course was to resort once again to the same grievance-arbitration procedure that it earlier prevented the Union from invoking. This reasoning is without basis and would effectively deny the existence of Wis. Stats. Section 111.06(1)(f), which permits a complaint alleging "violation of a collective bargaining agreement, including an agreement to accept an arbitration award" to be brought and heard before the Commission.

It may well be that, just as in the Curtiss-Wright Corp. and Aerojet-General Corp. cases, the proper course of action herein may be to remand this matter to the arbitrator for further determination. However, this is a conclusion that may be reached (or rejected) only after a full hearing on the merits of this matter. I hold that the Complainant and the Union have fulfilled their duty to exhaust the Agreement's grievance-arbitration procedure prior to instituting this action.

On the basis of the above, it is clear that the Complainant has standing to pursue this action before the Commission and that the Respondent's allegations to the contrary must be rejected.

B. Jurisdiction of the Commission

A review of the record, and more particularly, the Award, indicates that the question of the remedy if any, to which the Complainant may have been entitled, was presented to Arbitrator Jacobs but that he failed to make a ruling on that issue. The Respondent alleges that the issue of remedy cannot be litigated before the Commission inasmuch as the Complainant is bound by the terms of the Award. This position is without merit and is rejected.

There is no doubt that the issue of remedy was before Arbitrator Jacobs. It is true that the original grievance in this matter and the Statement of Issues set forth on page 2 of the Award did not make any mention of the issue of remedy, and that Arbitrator Jacobs confined his award to the existence of a violation of the Agreement. However, numerous references are contained throughout the Award regarding the possible entitlement of the Complainant to back pay and or to other remedies. Thus, for example, on page 4 of the Award, Arbitrator Jacobs stated:

> "It is the Union's position that the Employer's changing of the incentive rates for the jobs covered in Department 96-Wrapper-Packer was in error. It is seeking an Award which would order the employer to re-institute the rates which were in effect prior to March 2, 1977, and that all employes in Department 96 who were affected by the improper change in rates be made whole for any wages lost back to March 2, 1977 by the same method of calculation contained in Union Exhibit 2, the Record of Loss for Lee Bodoh . . ."

Arbitrator Jacobs further noted on Page 7 of the Award that the Union had introduced specific evidence concerning the extent of wages lost by the Complainant as a result of the Respondent's alleged violation of the Agreement:

> "11. That the employee, Mr. Bodoh, has suffered a loss in wages as a result of the changed rates. Union Exhibit 2 is a compilation made by Mr. Bodoh, which was to show that his earnings had suffered as a result of this change. This was offered in rebuttle (sic) to Company Exhibit 6, which indicated that Bodoh has suffered no wage loss because of the changes, and that he has maintained his consistent average in excess of 200% over base."

On page 12 of the Award, Arbitrator Jacobs again acknowledged that the issue of remedy was before him:

> "There is some dispute that the result of the changed rates resulted in a loss of earnings for the Grievant, Bodoh - he claims that he has lost earnings, and the Company claims that he hasn't. That determination would go only to remedy."

What occurred was simply that Arbitrator Jacobs failed to rule on an issue submitted to him. A ruling on the issue of remedy would apparently follow from a finding that the grievance was meritorious - a finding made by Arbitrator Jacobs. However, the Arbitrator failed to follow up on his finding by making a further finding as to what remedy, if any, would be afforded to the Complainant, Mr. Bodoh.

It is true that the role of courts and administrative agencies in the process of review of arbitration awards is rather narrow. In Steelworkers v. American Manufacturing Co. 11/ The U. S. Supreme Court stated:

> "The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator, it is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. In these circumstances, the moving party should not be deprived of the arbitrator's judgment when it was his judgment and all that it connotes that was bargained for."

It is a maxim of the law of labor-management relations that a reviewing court or agency must take care not to substitute its judgment for that of the arbitrator concerning the merits of a grievance. 12/ However, this is not an instance in which the Complainant seeks to relitigate an issue determined before Arbitrator Jacobs. The Complainant instead is seeking a remedy to which his entitlement, if any, was left undetermined by the incomplete Award of Arbitrator Jacobs. 13/ This does

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11/ 363 U.S. 564, 46 LRRM 2414 (1960).

12/ See e.g. Madison Metropolitan School Dist. v. W.E.R.C. 86 Wis. 2d 249, 271 NW 2d 314 (Ct. App. 1978).

13/ This distinquishes this instance from the cases of IAM Local 1893 v. Aerojet-General Corp. 263 F. Supp 343, 65 LRRM 2421 (D.C. Cal. 1966), in which the parties agreed that the award was clear, final and unambiguous. The other cases cited by the Respondent are similarly without application to the instant situtation. In Chambers v. Beaunit Corp. 404 F. 2d 128, 69 LRRM 2732 (6 Cir.,1968), the court merely refused to overturn an arbitrator's ruling that a grievance was untimely filed. In Howerton v. J. Christenson Co., 76 LRRM 2937 (N.D.Cal. 1971), the applicable collective bargaining agreement specifically barred appeal from an arbitration award, and the court refused to review the remedy ordered by the arbitrator in that case on the basis of that contractual provision. No equivalent to that provision exists in this case. White v. Chemical Leaman Tank Lines 490 F. 2d 1267, 85 LRRM 2401 (4Cir. 1974) and in Miller v. Spector Freight Systems 366 F. 2d 92, 63 LRRM 2222 (1st Cir., 1966) the courts merely refused to redetermine the merits of arbitration awards concerning the discharge of an employe. In Deener v. Midwest Haulers Inc. 97 LRRM 3223 (E.D. Wis. 1978) and Floeter v. C. W. Transport Inc. 97 LRRM 3168 (W.D. Wis. 1978) the courts merely refused to overturn decisions of a joint labor-management committee on the merits in the absence of evidence supporting a finding that the union had breached its duty of fair representation. None of the above cases apply to a situation in which a grievance is sustained in the context of an award incomplete on its face and where the grievant seeks a remedy allegedly in conformance with the award.

not in any way amount to an attempt to review the Complainant's original grievance on the merits or to impeach the Award; nor would consideration of the Complainant's grievance circumvent the settled policy favoring arbitration of disputes arising under collective bargaining agreements.

Arbitrators have consistently held that a finding sustaining a grievance may, if appropriate, imply a concomitant remedy even though an award upholding a grievance may not make specific reference to the issue. Thus Arbitrator Arthur M. Ross in handling a situation quite similar to that presented herein stated as follows:

> "It is very common in arbitration practice that the decision may not set forth in full detail the remedial action clearly indicated under the circumstances. For example, the grievance may allege a particular violation and demand back pay as a remedy. If the decision states "the grievance is granted", there is no real doubt that the appropriate financial relief is implied. If the contract provides that "employes discharged without proper cause shall be reinstated with full back pay" and if the arbitrator rules that "John Doe was discharged without proper cause" the arbitrator has done more than merely state a legal conclusion. Without saying so explicitly, he has directed that John Doe be reinstated with full back pay." 14/

Arbitrator Ross thereupon held that the issue of back pay and/or other appropriate remedies in circumstances resembling those prevailing herein is implicit in an award sustaining a finding of a contractual violation.

Other courts and arbitrators have held that an arbitrator has the power to hold a second hearing on the question of appropriate remedy following issuance of an award finding a contractual violation. 15/ The theory of these rulings has been that the issue of remedy has been considered to be integrally related to the underlying issue of contractual violation and may be subsequently determined if left open by the original arbitrator. This reasoning is persuasive as applied to this situation. Although it is generally the case that once an arbitrator renders an award, he or she is "functus officio", possessing no power to proceed further in the absence of the mutual consent of the parties, 16/ this rule clearly does not apply to an instance in which the arbitrator fails

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14/ California Metal Trades Assn. 41 LA 1204 at 1207. Arbitrator Ross then proceeded to reject the claims of the employer that the union was attempting to relitigate its original grievance and that the union had somehow waived its right to press a back pay issue. California Metal Trades Assn. is particularly persuasive inasmuch as the factual circumstances of that case are almost identical to those of this case. Arbitrator Ross cited Bethlehem Steel Co. 17 LA 295, Vanette Hosiery Mills 17 LA 349 and Dayton Malleable Iron Company 11 LA 1175 in support of his decision.

15/ See e.g. District 50. UMW v. James Julian Inc. 80 LRRM 2260 (M.D.Pa., 1972), Honeywell Inc. v. Local 116, IUE 73 LRRM 2210 (E.D.Pa. 1970), Beaunit Corp. 64 LA 917 (Mathews, 1975) (arbitrator modified remedial portion of award following second hearing in which it was determined that the original remedy ordered was inappropriate). See also G & H Products Inc. (13225-A) 5/75 involving the very same employer as is involved herein, where the Commission's Examiner remanded a back pay dispute to the original arbitrator for redetermination.

16/ See Elkouri and Elkouri How Arbitration Works (3d ed., 1973) at p. 239, Expedient Services Inc. 68 LA 1082 (Dworkin, 1977).

to rule upon a central facet of the matter submitted to him or her for decision. 17/

Given that a dispute still exists over the issue of the remedy, if any, to be afforded to the Complainant, which dispute goes to the scope and effect of the Award, it is clearly inappropriate to foreclose said issue by way of a grant of a Motion to Dismiss. The Commission clearly possesses jurisdiction to determine the method by which such a dispute may be resolved 18/ and the Respondent's allegations to the contrary are thus rejected.

C. Abatement

Section 111.07(1) of the Wisconsin Employment Peace Act states as follows:

> "Any controversy concerning unfair labor practices may be submitted to the Commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal and equitable relief in courts of competent jurisdiction."

This statute clearly indicates that the jurisdiction of the Commission to hear and adjust allegations of unfair labor practices shall not be affected by pending actions in the courts of the State of Wisconsin. The directive of the statute is clear in that it sanctions the pursuit of relief in both a judicial and an administrative forum. The Commission has ruled that it is not ousted of jurisdiction when a party concurrently seeks redress of an unfair labor practice or a prohibited practice complaint either in a court of competent jurisdiction or before a different administrative agency. 19/ Thus the Respondent's argument to the effect that this action must abate due to the Complainant's parallel action currently pending in the Circuit Court of Kenosha County is without merit.

Nevertheless, it is the settled policy of the Commission to hold complaints of unfair labor or prohibited practices in abeyance and not to assert its jurisdiction over issues that are identical to those submitted to a court of competent jurisdiction, pending resolution of those issues by the court. 20/ This is particularly the case in an action to review and/or confirm an arbitration award and in which the action in court antedates the proceedings before the Commission. 21/

17/ Note that Section 298.10(1)(d) provides that an arbitration award may be vacated where the arbitrators "so imperfectly executed (their powers) that a mutual, final and definite award upon the subject matter submitted was not made."

18/ G & H Products Inc. supra n. 15

19/ See e.g. Alma Center School Dist. No. 3 (11628) 2/73, Melrose-Mindoro Jt. School Dist. No. 1 (11627) 2/73, North Shore Publishing Co. (11310-A) 10/72. Note that Section 111.07 Wis. Stats. is incorporated into the Municipal Employment Relations Act by virtue of Section 111.70(4)(a) Wis. Stats.

20/ North Shore Publishing Co. supra n. 19, Jefferson Joint School Dist. No. 10 (13698-A) 1/76, Racine Unified School Dist. No. 1 (15915-B) 12/77.

21/ Jefferson Joint School Dist. No. 10, supra n. 20.

The reasoning behind this approach is based upon the fact that the Commission's jurisdiction over these matters is concurrent with the jurisdiction of the courts and not plenary. This policy was stated in Racine Unified School District No. 1 22/ as follows:

> "It is the Commission's policy not to assert its jurisdiction over issues which also have been submitted to a court, notwithstanding the Commission has primary jurisdiction. The reason is that whether to honor the Commission's primary jurisdiction rests in the discretion of the court. For the Commission to proceed might appear as calculated to embarrass a court or to encroach on its jurisdiction whether to honor the primary jurisdiction doctrine. Thus the Commission's policy is borne out of respect for the courts."

A comparison of the Complainant's complaint in this action and of his Notice of Motion and Motion to Confirm Arbitration Award and supporting Petition, which was filed with and is pending before the Circuit Court for Kenosha County reveals that the Complainant's cause of action, the facts supporting his cause of action and the issues raised by the Complainant's pleadings and the remedy sought are virtually identical in both actions. 23/ Thus, the two actions must be deemed in all practical respects to be identical in nature and the policy of deferral to the jurisdiction of the courts, as outlined above, must apply in this instance.

D. The Order

All of the Respondent's contentions in support of its Motion to Dismiss have been rejected herein. Therefore, the Respondent's Motion is denied.

The Commission possesses jurisdiction over this matter and the Complainant has standing to bring this matter and to obtain the remedy requested if he is found to be entitled to said remedy. However, in accordance with settled Commission policy as noted hereinabove, this matter shall be held in abeyance pending resolution of the issues presented herein by the Circuit Court of Kenosha County.

The Examiner notes that the Respondent has claimed as a defense to the action pending in Circuit Court that the Commission possesses primary jurisdiction over this matter. Should the Circuit Court uphold the Respondent's contention in this regard or should the Circuit Court refer this matter to the Commission in whole or in part or otherwise fail within a reasonable period of time to determine the issues raised

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22/ supra n. 20.

23/ The sole distinction between the two actions appears to be that in this action, the Complainant seeks a finding that the Respondent committed an unfair labor practice pursuant to Section 111.06(1)(f) Wis. Stats. while in the Circuit Court action, he seeks confirmation of the Award and judgment against the Respondent pursuant to Section 298.12 Wis. Stats. for the immediate purpose of effectuating the Commission's policy as stated herein, this distinction is deemed not to be material.

by the complaint, the stay of this proceeding will be lifted and hearing on the merits of this matter will be scheduled at the request of either party. 24/

Dated at Milwaukee, Wisconsin this 13th day of August, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal /s/
Stuart S. Mukamal, Examiner

24/ See North Shore Publishing Co. supra n. 19.