

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-B

Appearances:

Joling, Rizzo & Willems, S.C., Attorneys at Law, 5603 6th Avenue, Kenosha, Wisconsin 53140, by Mr. John L. Caviale, appearing on behalf of the Complainant.

Melli, Shiels, Walker & Pease, S.C., Attorneys at Law, Suite 600, Insurance Building, 119 Monona Avenue, P. O. Box 1664, Madison, Wisconsin 53701, by Mr. Joseph A. Melli, appearing on behalf of the Respondent.

ORDER REVERSING EXAMINER'S ORDER
DENYING MOTION TO DISMISS AND HOLDING
PROCEEDING IN ABEYANCE

Lee Bodoh, an individual, having filed a complaint with the Wisconsin Employment Relations Commission on February 25, 1980 alleging that G & H Products, Inc., committed an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA) by refusing to comply with an arbitration award involving a grievance filed by Bodoh; and the Commission having appointed Stuart S. Mukamal, then a member of its staff, as Examiner with respect to said complaint pursuant to Sec. 111.07(5) of WEPA; and the Employer having on March 31, 1980 filed an Answer to said complaint and a Motion for Summary Judgement seeking dismissal of the complaint inter alia contending that Bodoh lacked standing to seek compliance with said arbitration award in a complaint proceeding before the Commission; and on August 13, 1980, prior to hearing, pursuant to the parties' agreement that the Examiner determine Bodoh's standing to bring the instant proceeding, the Examiner having issued an Order Denying the Employer's Motion to Dismiss and Holding Proceedings in Abeyance, wherein the Examiner concluded, inter alia that Bodoh possessed standing to bring the instant proceeding, but that said proceeding should be held in abeyance pending adjudication of a parallel action filed by Bodoh in the Circuit Court of Kenosha County; and on September 4, 1980 the Employer having appealed the Examiner's Order to the Commission; and the parties having filed briefs with respect to said appeal; and the Commission, being fully advised of the premises and the arguments of the parties, makes and issues the following

ORDER

1. That the Examiner's Order Denying Employer's Motion to Dismiss and Holding Proceeding in Abeyance be, and the same hereby is, reversed.
2. That Employer's Motion to Dismiss is hereby granted.

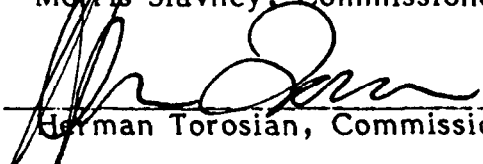
3. That the instant complaint be, and the same hereby is, dismissed.

Given under our hands and seal at the City of
Madison, Wisconsin this 27th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Gary L. Covelli, Chairman


Morris Slavney, Commissioner


Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER REVERSING EXAMINER'S
ORDER DENYING MOTION TO DISMISS AND HOLDING
PROCEEDING IN ABEYANCE

The instant complaint was filed by Lee Bodoh, an individual employee, against G & H Products, the Employer, alleging that the Employer had failed to comply with an arbitration award involving Bodoh, issued pursuant to the terms of a grievance arbitration procedure in a collective bargaining agreement between the Employer and International Association of Machinists and Aerospace Workers, Lodge 34, (the Union), Bodoh's collective bargaining representative. The Employer filed a pre-hearing motion with Examiner Mukamal seeking dismissal of the complaint inter alia contending that Bodoh, as an individual employee, lacked standing to enforce the arbitration award before the Commission. By agreement of the parties, Examiner Mukamal was to rule on the Employer's Motion to Dismiss prior to holding any hearing in the matter. Said ruling, issued on August 13, 1980, denied said Motion to Dismiss, but held hearing in the matter in abeyance pending adjudication of a parallel action brought by Bodoh in the Circuit Court of Kenosha County. As to the issue of Bodoh's standing to enforce an arbitration award, the Examiner stated the following:

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 employee would not have standing to obtain review of the award. 3/ The reasoning of those cases is analagous to those dealing with the issue of the standing of an individual employee 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 employee must look to the union initially for the vindication of his rights. 4/ However such does not describe the circumstances 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 arising from the terms of an already-rendered arbitration award.

3/ See e.g. McCluskey v. Pennsylvania, 99 LRRM 2720 (Pa. Cmwlth. Ct. 1978) Goldberg v. Hotel Dixie, 54LRRM 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 not be invoked by individual employees 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 employees 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)

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

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 contractual 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 employee seeks to enforce a monetary claim arising out of the Agreement (as interpreted by Arbitrator Jacobs). The courts have held that an individual employee does possess standing to initiate proceedings to enforce a claim arising from an arbitration award. The basis for this result is that an employee 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 employee would thus have standing to initiate such proceedings irrespective of the participation (or lack thereof) of the employee'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 grievance 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 Union 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/

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

5/ See Dudash v. Rockwell Standard Co. 79 LRRM 2779 (Pa. Ct. of Com. Pls., 1971), Textile Workers v. Cone Mills Corp. 43 LRRM 2013 (M.D.N.C. 1958). 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 conferred standing upon individual employees to bring actions in state courts to vindicate individual rights arising under collective bargaining agreements. See also 48 A Am. Jur. 2d "Labor and Labor Relations" Sec. 1948 at pp. 350-351.

6/ See letter of Gerhard Roemer, Business Representative, Lodge 34 I.A.M.A.W. to Arbitrator Jacobs dated 5/8/79 and letter of Attorney Joseph A. Melli to Arbitrator Jacobs dated 5/21/79.

7/ See letter of Gerhard Roemer to Attorney John L. Caviale dated 4/15/80.

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 Ass. and subsequent cases decided thereunder.^{8/} Furthermore, the circumstances of this case are clearly distinguishable from those prevailing in those cases in which employees 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 Employer subsequently appealed Examiner Mukamal's denial of its Motion to Dismiss. In its brief the Employer made the following arguments in support of its claim that the Examiner's conclusion be reversed.

1. The Examiner's reliance upon Smith v. Evening News Association was misplaced as the Court therein left open the issue of whether an individual employee has standing to bring an action to vindicate personal rights under a collective bargaining agreement. Moreover, in Smith no grievance arbitration clause was involved, and thus the Court was not confronted with a situation akin to that before the Commission.
2. The development since Smith of the doctrine of exhaustion of grievance-arbitration provisions yields a conclusion that an employee cannot institute an action for breach of contract unless he has attempted to or has in fact exhausted contractual grievance-arbitration procedures and alleged that the Union has breached its duty of fair representation. As Bodoh does not allege a breach of the duty of fair representation by the Union, Bodoh lacks standing to bring the instant action.
3. Federal law which is applicable to the instant proceeding does not grant standing to an individual employee to seek enforcement of an arbitration award where, as here, the bargaining agreement makes the Union and Employer the sole parties to the arbitration proceeding and award. As the decision to seek enforcement of an arbitration award is in essence the last step of the grievance arbitration process, the Union's control over said process extends to the enforcement decision and, absent an alleged breach of the duty of fair representation, the Union's decision not to seek enforcement precludes an individual from independently seeking same.
4. The dispute over the interpretation of Jacob's award creates an issue which itself should be the subject of a new grievance. As Bodoh did not file a grievance over the issue, he has not exhausted the grievance procedure and thus lacks standing to file his complaint.

8/ See fn. 5, supra.

Bodoh opposes the Employer's appeal. Initially he asserts that the Examiner's Order is not appealable as a matter of right, and thus that the Commission should not entertain it. Should the Commission decide to examine the merits of the appeal, Bodoh contends that the Examiner's decision was well reasoned and correct, and therefore Bodoh urges that the Commission affirm the Examiner and proceed to a hearing on the merits of the case.

DISCUSSION

The Commission agrees with Bodoh's assertion that the Employer cannot appeal the Examiner's denial of the Motion to Dismiss as a matter of right. Neither the Commission rules nor Chapter 227, Wis. Stats., create such a right. However, in the instant case, given the peculiar circumstances involved herein, including the Examiner's extensive pre-hearing order on the motion in question, the Commission will exercise its discretion to entertain the merits of the Employer's appeal.

As indicated previously, the Motion to Dismiss was premised in part upon an assertion that Bodoh, an individual employee, lacked standing to enforce an arbitration award under Section 111.06(1)(f) of WEPA. Section 111.07(2)(a) of WEPA restricts the availability of unfair labor practice proceedings to a "party in interest". Thus, if Bodoh is not a "party in interest" for the purposes of a proceeding to enforce an arbitration award under Section 111.06(1)(f) of WEPA, the Examiner should have granted the Motion to Dismiss. We conclude that the Examiner's denial of the Motion to Dismiss must be overturned for the following reasons.

The Examiner's decision correctly characterized Bodoh's cause of action as an attempt to seek enforcement of an arbitration award under Section 111.06(1)(f) of WEPA. While it is undisputed that the Union, as a party to the award, would have standing to pursue such an action, the Commission has not previously been confronted with the question of whether an individual employee has standing to enforce an arbitration award relating to a grievance involving said employee. However, both the Commission and the Wisconsin Supreme Court have consistently held that where, as here, the employee's bargaining representative has the contractual right to invoke the arbitration process, the bargaining representative's decisions as to the utilization of that process are not subject to a successful challenge by an employee absent a showing that the bargaining representative has breached its duty of fair representation in the handling of the employee's grievance. a/ Thus, where, as here, the grievance-arbitration provision of the bargaining agreement is the exclusive method for redressing alleged contractual violations and is controlled by the bargaining representative, the foregoing doctrine granting and recognizing the bargaining representative's exclusive representational rights yields the conclusion that an employee lacks standing to pursue a violation of contract claim under Section 111.06(1)(f) of WEPA unless he alleges that his attempted use of the contractual grievance arbitration process has been thwarted by the bargaining representative's failure to fairly represent him.

The Employer has persuasively argued that the decision to seek enforcement of an arbitration award is essentially the last stage in the grievance-arbitration process. b/ As the bargaining representative, absent a duty of fair representation claim, has exclusive control over contract administration and enforcement, its exclusive representational rights must logically extend to the decision to seek enforcement of an arbitration award. Thus, the decision of the Union not to seek

a/ Mahnke v. WERC 66 Wis. 2d 524 (1975), Coleman v. Outboard Marine Corp. 92 Wis. 2d 565 (1979).

b/ See Anheuser Busch v. Local 133, 102 LRRM 2990, 2994 (E.D. Mo., 1979) wherein the Court stated: "A request for judicial enforcement may be viewed as the final step in the arbitration process." And in Steamship Assn. v. Longshore Workers, 389 F. 2d 369, 67 LRRM 2430, 2432 (5th Cir., 1968), the Court stated with regard to court enforcement of an arbitration award: "(p)ractically, this is the ultimate or last step in the arbitration process."

enforcement of the award must be honored absent a claim that said decision constituted a failure by the representative to fairly represent Complainant Bodoh. A contrary conclusion to the effect that an employee could seek enforcement of an award where his representative elected not to seek same would be contrary to the exclusive representation right granted the bargaining representative. As stated in Acuff v. Papermakers c/

It would be paradoxical in the extreme if the Union, which is authorized to decide whether a grievance is to be pursued to the arbitration state at all, could not be authorized to assume full responsibility for a grievance it did pursue, without the intervention of the Union members immediately concerned.

As Bodoh has not alleged that his bargaining representative's decision not to seek enforcement of the award violated said representative's duty to fairly represent him, it must be concluded that he lacks standing to seek enforcement of the award under Section 111.06(1)(f) of WEPA. d/ Therefore, the Commission has reversed the Examiner's denial of the Motion to Dismiss and we have dismissed the complaint. Having reached our conclusion on the issue of standing, it is unnecessary to discuss or resolve the Employer's remaining arguments in support of its motion.

Dated at Madison, Wisconsin this 29th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Gary L. Covelli
Gary L. Covelli, Chairman

Morris Slavney
Morris Slavney, Commissioner

Herman Torosian
Herman Torosian, Commissioner

c/ 69 LRRM 2828, (5th Cir. 1968).

d/ The Commission finds the authority cited by the Examiner in his footnote 5 to be unpersuasive and inapplicable to the instant dispute. In Smith, the collective bargaining agreement an employee was seeking to enforce did not contain a grievance arbitration procedure and thus cannot constitute authority as to issues of standing where such a procedure is present. Indeed, the Court expressly left the standing question vis-a-vis individual employees unresolved. Cave Mills Corp. involved an action by the bargaining representative to seek enforcement of an award and the decision pre-dated the judicial development of the principles of exclusive representative and exhaustion found controlling herein. Rockwell Standard Co. the decision of the Pennsylvania Court of Common Pleas, Lawrence County, flies in the face of overwhelming contrary precedent by holding that an individual employee may seek judicial review of an arbitration award which was adverse to the employee. Examiner Mukamal properly noted in his decision that individual employees in fact lack standing to vacate unfavorable awards.