STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48 AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO and its affiliated LOCAL 366, Complainant, vs. MILWAUKEE METROPOLITAN SEWERAGE DISTRICT 1/ Respondent.	Case CLXVI No. 26613 MP-1134 Decision No. 18018-B

Appearances

Podell, Ugent & Cross, Attorneys at Law, by Mr. Alvin Ugent, 735 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, on behalf of the Union.

Mr. Jeffrey Bassin, Assistant City Attorney, 200 City Hall, 800 East Wells Street, Milwaukee, Wisconsin 53202, on behalf of the Commission.

ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AMENDING EXAMINER'S CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER DISMISSING COMPLAINT

Examiner Amedeo Greco having, on February 26, 1981, issued his Findings of Fact, Conclusion of Law and Order in the above entitled proceeding, wherein he found that the Respondent, Milwaukee Metropolitan Sewerage District, had not committed any prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) and wherein he dismissed the complaint; and the Complainant, Milwaukee County District Council 48, American Federation of State, County and Municipal Employees, AFL-CIO and its affiliated Local 366, having, on March 13, 1981, filed a Petition for Review wherein it requested the Commission to review said decision and to set it aside and order a new hearing before a new Examiner; and said Complainant having, on April 21, 1981, filed a brief in support of said petition; and said Respondent having, on April 23, 1981, filed a brief in opposition thereto; and the Commission, having reviewed the record including the Petition for Review and the arguments of the parties, and being fully advised in the premises, makes and issues the following

ORDER

A. That the Examiner's Findings of Fact be and the same hereby are amended as follows:

FINDINGS OF FACT

1. That Milwaukee District Council 48, American Fedration of State County and Municipal Employees, AFL-CIO, and its affiliated Local 366, hereinafter jointly referred to as the Union, is a labor organization and has its offices at 3427 West St. Paul Avenue, Milwaukee, Wiconsin.

2. That the Milwaukee Metropolitan Sewerage District, hereinafter referred to as the Sewerage District, is a municipal employer, and has its principal offices at 735 North Water Street, Milwaukee, Wisconsin.

1/ A change has been made in the original case caption to reflect the correct name of the Municipal Employer.

3. That at all times material herein the Union has been, and is, the exclusive collective bargaining representative of employes of the Sewerage District in the "plant operation" unit including employes classified as Boat Operator; and that at all times material herein the Union and the Sewerage District have been parties to collective bargaining agreements covering the wages, hours and working conditions of employes represented by the Union; and that said agreements contain, and continue to contain, provisions providing for the final and binding arbitration of grievances arising thereunder.

4. That the Sewerage District maintains and operates a ferry boat between the hours of 6:00 a.m. and 11:30 p.m. for the purpose of transporting employes and others across a narrow body of water between a parking lot and its Jones Island Treatment Plant; that in said regard the Sewerage District employs three regular Boat Operators to man said ferry; that at the time of the hearing herein said Operators consisted of Richard Rupp, Dale Gentilini and Robert Herro; and that on a normal work day one of said operators is scheduled to work from 6:00 a.m. to 3:00 p.m., the second, from 3:00 p.m. to 11:30 p.m., and the third is not scheduled to work and is designated as the "off man".

5. That during the summer of 1978 a dispute arose between the parties when the Sewerage District utilized an employe, other than a Boat Operator, to operate the ferry on August 9, 1978; that a grievance was filed in respect thereto and ultimately proceeded to arbitration before Arbitrator Ellen J. Henningsen, who issued an award on January 22, 1980; and that said award set forth the facts involved, as well as the "award" as follows:

> FACTS
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> The Employer collects and processes sewerage for the City of Milwaukee. As part of its operation, it operates a ferry boat to transport employes across the harbor channel. The regular Boat Operator scheduled to work on that day did not work due to what the parties call "shift access". A plant maintenance worker who was qualified to work as a Relief Boat Operator and who was already scheduled to work that shift, replaced the absent Operator. Herbert Herro, a regular Boat Operator who was not scheduled to work that day, filed a grievance, claiming that he should have replaced the absent Boat Operator. The plant maintenance worker was paid straight time wages, while Herro, had he worked instead of the plant maintenance worker, would have been paid at the rate of time and one-half.
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> AWARD
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> The Employer violated the collective bargaining agreement by refusing to assign Herbert Herro to replace the absent Boat Operator on the 6:00 a.m. to 3:00 p.m. shift on August 9, 1978. The Employer is required to make Herro whole for all wages and any contractual benefits, if any, lost due to the improper assignment.

6. That on January 16, 1980, 2/ a few days prior to the issuance of the above award, the Sewerage District determined to utilize the ferry boat for the purpose of obtaining water samples, and the scheduled Operator, Gentilini, operated the ferry for that purpose from approximtely 8:15 a.m. to 11:00 a.m., a time during which the ferry has few, if any, passengers requiring transportation to and from the Jones Island treatment plant; that during said period neither Rupp, the scheduled Operator, nor Herro, the "off man" was called in to operate a van which is utilized to transport persons to and from the plant when the ferry is out of operation or is being used for purposes other than transporting passengers; and that again, on January 22, the date on which the award was issued, the Sewerage District used the ferry during the same period of time to take water samples, and did not call in either the then scheduled Operator, Gentilini, or the scheduled "off man", Rupp, to operate the van while Herro was operating the boat.

2/ All dates set forth hereinafter refer to the year 1980 unless otherwise noted.

7. That on January 23, Rupp filed a grievance alleging that the Sewerage Commission had not provided transportation "by land or water" on January 16, and that by failing to do so violated the "replacement procedure" set forth in the bargaining agreement; that in said grievance Rupp requested that he be paid four hours of call in pay at overtime rate, since he also worked from 3:00 p.m. to 11:30 p.m. on January 16; and that on January 23, Rupp filed a similar grievance requesting the same pay with respect to January 22 episode.

8. That on January 30, the ferry was again utilized between 9:00 a.m. and 11:30 a.m. to take water samples, with Gentilini operating the ferry, and that neither the "off man, Herro, nor the other scheduled Operator, Rupp, was called in to operate the van; and that on January 31 Rupp filed a grievance seeking the same relief for the previous day's episode when there "was no replacement for land transportation".

9. That all of said grievances were denied by agents of the Sewerage District, the last such denial having occurred with respect to all three grievances on March 20 by Michael Corry, Labor Relations Manager, in the fourth step of the contractual grievance procedure, which step immediately precedes the arbitration step; that in the latter regard the collective bargaining agreement between the parties provided that "no item or issue may be the subject of arbitration unless such arbitration is formally requested within sixty (60) working days following the action or occurrence which gives rise to the issue to be arbitrated"; and that at no time prior to at least August 1, the date on which the instant complaint was filed, had the Union made a request that any of said grievances proceed to arbitration.

10. That the Union did not establish that any of the employes of the Sewerage District were denied transportation to or from the treatment plant as a result of the ferry being "out of service" during the hours relating to the three grievances involved herein.

B. That the Examiner's Conclusion of Law be and the same hereby is amended to read as follows:

CONCLUSIONS OF LAW

1. That the Milwaukee Metropolitan Sewerage District, by denying the grievances of Richard Rupp, set forth in the Findings of Fact, did not fail to abide by the terms of an arbitration award, and in that regard did not commit any prohibited practices within the meaning of Sections 111.70(3)(a)1 or 5 of the Municipal Employment Relations Act.

2. That, because of the failure of Milwaukee District Council 48, AFSCME, AFL-CIO, and its affiliated Local 366, to exhaust the contractual grievance procedure, set forth in the collective bargaining agreement between it and the Milwaukee Metropolitan Sewerage District, which includes a provision for final and binding arbitration, the Wisconsin Employment Relations Commission will not assert its jurisdiction to determine whether the Sewerage District has violated the terms of said collective bargaining agreement by not calling in a second Boat Operator on January 16, 22, and 30, 1980.

3. That the Milwaukee Metropolitan Sewerage District, by its conduct described in the Findings of Fact Fact, has not committed and is not committing any prohibited practices within the meaning of Sections 111.70(3)(a)2 or 4 of the Municipal Employment Relations Act.

C. That the Examiner's Order Dismissing the Complaint herein be and the same hereby is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 19th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

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Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT, AMENDING EXAMINER'S CONCLUSION OF LAW AND AFFIRMING EXAMINER'S ORDER DISMISSING COMPLAINT

The Complaint

The Union alleges that the District committed various prohibited practices within the meaning of the Municipal Employment Relations Act (MERA), by failing to abide by an arbitration award wherein it was found that the District had violated the terms of the collective bargaining agreement existing between the parties relating to the work assignments of Boat Operators. In effect the Union alleges that the three grievances in question are similar to that which was the subject of the arbitration award. The statutory provision relating to failure to comply with such an award is set forth in Section 111.70(3)(a)5 of MERA. The complaint also alleges that the conduct of the District constituted interference, restraint and coercion of employes prohibited by Section 111.70(3)(a)1 of MERA; initiating, creating, dominating and or interfering with the formation or administration of the Union in violation of Section 111.70(3)(a)2 of MERA, and a refusal to bargain collectively in good faith under Section 111.70(3)(a)4 of MERA.

The Answer

The District denies any violation of MERA, and affirmatively alleges that the Union failed to appeal any of the grievances involved to arbitration within the time period required by in the collective bargaining agreement existing between the parties.

The Arguments Before the Examiner

The Union argued that the evidence established that the Sewerage District failed to provide its employes with some form of transportation service to and from Jones Island during certain hours of the day on certain days when its ferry boat was being utilized to take water samples. According to the Union, the Sewerage District was obligated, by its agreement and an arbitration award issued by Arbitrator Fleischli on November 9, 1975, to provide such service during those hours by calling in one of the other Operators to operate the van for the purpose of being available to provide ground transportation to employes who desired such service. The Union contended that this alleged "discontinuance of service" violated "the arbitrator's decision".

Counsel for the Sewerage District noted that the Union's closing argument left him "somewhat perplexed", because it then appeared that the Union was alleging that the Sewerage District had failed to follow the award of Arbitrator Fleischli rather than the award of Arbitrator Henningsen. He further noted his belief that the Union had previously made that claim before Examiner Stephen Schoenfeld in July of 1980. 3/ Finally, he noted that it was nevertheless the Sewerage District's position that the Union's evidence failed to establish that there was a "discontinuance of service".

In its brief, the Sewerage District repeated the affirmative defense raised in its answer, to the effect that the Union was essentially alleging a violation of the terms of the collective bargaining agreement and that since the agreement provides for final and binding arbitration, the Examiner should refuse to assert the jurisdiction of the Commission to find a violation of the agreement or other prohibited practices. Further, since the evidence disclosed that the Union had failed to timely appeal the three grievnces in question to arbitration, the Sewerage District argued that the complaint should be "dismissed in its entirety", rather than to "reward" the Union for its failure to utilize the grievance procedure by deciding the merits of the Union's claims.

3/ This was an apparent reference to Case CLXIII, No. 26345, MP-1119, which case was settled and dismissed by the Examiner on July 24, 1980. Decision No. 17891-A.

With regard to the merits of the Union's complaint, the Sewerage District argued that the fact situation involved in the three grievances herein is quite different than the fact situation in the grievance decided by Arbitrator Henningsen. It contends that for this reason that award should be found to be inapplicable to the situation presented herein. The Sewerage Distric's brief to the Examiner did not address the claim, raised for the first time in Union's closing argument, that it was failing to comply with the award of Arbitrator Fleischli.

The Examiner's Decision

The Examiner made the following Findings of Fact relevant herein:

> 3. The parties are privy to a collective bargaining agreement which provides for binding arbitration.
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> 4. The Commission for many years has provided ferry boat service for employes and visitors between the National Avenue parking lot in Milwaukee and its sewerage treatment plant on Jones Island. When the boat was unavailable, the Commission utilized automotive transportation between the two points. For parts of January 16, 22 and 30, 1980, the ferry boat was unavailable to carry passengers because it was utilized to take water samples. During those times, no employes required either automotive or ferry transportation to carry them between the parking lot and Jones Island. If such transportation were needed, the Commission would have provided automotive transportation.
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> 5. The Union thereafter filed grievances which claimed that the Commission had violated the contract by not calling in a boat operator to sit in a van to carry employes during the time that the boat was taking water samples. After they were denied by the Commission, the Union failed to request arbitration over said grievances.
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> 6. Prior to the instant dispute, the parties were involved in two other arbitration cases involving the ferry boat. 4/ Neither of those two cases involved the question posed in the Union's grievances.

In support of his Conclusion of Law that the Sewerage District did not violate any provision of MERA "when it utilized the ferry boat to take water samples and when it failed to call in a boat operator to operate automotive transportation" on the three days in question, the Examiner reasoned as follows:

> The Union's allegations, which claim that the Commission violated Sections 111.70(3)(a)1, 2, 4, and 5 of MERA, are dismissed in their entirety since: (1) there is no basis for finding either a derivative or independent violation of 111.70(3)(a)1; (2) the Section 111.70(3)(a)2 allegation is so patently ludicrous that it does not deserve any comment; (3) the Section 111.70(3)(a)4 allegation is without merit where, as here, the Union failed to make a timely request for arbitration over the alleged breach of contract; and (4) the 111.70(3)(a)5 allegation, which asserts that the Commission's actions were violative of the Fleischli and Henningsen arbitration awards noted above, is without foundation because those two awards centered on issues not involved herein. Thus, the Fleischli award only involved the question of whether the Commission could totally discontinue the ferry operation. The Henningsen award, in turn, dealt with the Commission's failure to call in a regular boat operator to operate the boat when the boat was in operation. Here, of course, we are not dealing with either of these two

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4/ Milwaukee Metropolitan Sewerage District. Ellen J. Henningsen, (1/1980) and Milwaukee Metropolitan Sewerage District, George Fleischli (1/1975and 3/19/76).

situations, but rather, with the separate question of whether the Commission is required to call in an employe to transport employes when the ferry boat is being utilized for other purposes and when no employes in fact need to be transported either to or from Jones Island. Inasmuch as this latter question is different from the issues raised in the above arbitration cases, it follows that the Commission did not refuse to abide by those awards when it engaged in the conduct herein.

Union's Position on Review

In support of its Petition for Review the Union argues that the Examiner's Findings of Fact are in error. Specifically the Union takes issue with the Examiner's determination in Finding of Fact 4 to the effect that during the times when the ferry boat was being used to take water samples "no employes needed either automotive or ferry transportation to carry them between the parking lot and Jones Island." In support of its position the Union makes the following points:

(1) It is not possible for anyone to know that no employes wanted to use the transportation.

(2) It is possible, even probable that many employes wanted transportation but could not obtain same since none was visible.

(3) Employes didn't know to ask for transportation because they had never been required to do so in the past, when the boat or van was visible and ready to be used.

The Union also takes issue with the relevancy of the Examiner's Finding of Fact 5, to the effect that the Union never requested arbitration of the three grievances. According to the Union "the issue involving boat service for employes has already been arbitrated and won" and therefore it was unnecessary for the Union to "arbitrate the same issue over and over again." Thus, according to the Union, the Sewerage District is committing a prohibited practice by refusing to honor "the previous decisions of an arbitrator".

Finally, the Union takes issue with the Examiner's Finding of Fact 6 that neither the award of Arbitrator Henningsen nor the award of Arbitrator Fleischli involved the question posed in the three grievances here. According to the Union both cases are "exactly on point and cover identical issues."

Sewerage District's Position

The Sewerage District contends that the Examiner's decision should be sustained. It argues that the Examiner correctly relied on the policy of the Wisconsin Employment Relations Commission in not asserting its jurisdiction to determine the merits of an alleged contract violation if the complaining party has failed to exhaust the contractual proceedure, including arbitration when provided. According to the Sewerage District, the Union has offered no reason why we should deviate from this policy.

The Sewerage District argues that the awards of Arbitrator Henningsen and Arbitrator Fleischli are inappliable to the claims presented here, and in that regard points out that the Henningsen award dealt with the failure to call in a regular (off man) Operator when the boat was in need of an Operator for an entire shift and was in fact being operated by another employe. The Fleischli award dealt with the question of whether the Sewerage District could totally discontinue the ferry boat operation unilaterally. Here, it contends, the question is whether it must call in an employe to transport employes by land "when the ferry boat's being utilized for other purposes and when no employes in fact need to be transported either to or from Jones Island." For these reasons, the Sewerage District argues, the Examiner was correct in dismissing the entire complaint.

Finally, the Sewerage District indicates its belief that the Examiner was correct in finding, on the record presented, that during the period when the ferry boat was being used to take water samples, no employe needed transportation. It points out that no evidence was presented to the effect that any employe sought transportation during the hours in question. On the contrary, there was testimony to the effect that if someone wanted transportation they could have requested same

by using the signal horn or telephone (if on the National Avenue side) or by asking their supervisor or the first aid department (if on the Jones Island side). Nevertheless no such requests were made. For these reasons, and because the Union itself admits that its position is based on speculation, the Sewerage District argues that the Examiner's finding should be sustained.

Discussion

The only difficult issues presented by this case are those which are attributable to the Union's decision to change the nature of the alleged violation at the close of the hearing. A fair reading of its complaint discloses that the Union's sole contention was that the three grievances which were filed in January of 1980 and were ultimately denied in March of 1980 presented issues that were identical to the issue which was decided by Arbitrator Henningsen on January 22, 1980 and that the Sewerage Commision was violating the collective bargaining agreement and committing other prohibited practices by denying those grievances. Its presentation of evidence was consistent with that interpretation.

We find no error in the Examiner's decision to admit into evidence the arbitration award and supplemental arbitration award issued by Arbitrator Fleischli for the purpose of providing general background information. However, the Union never sought to amend its complaint for the purpose of alleging that the Sewerage District was, by the conduct alleged, failing to abide by that award. Nevertheless, in its closing argument the Union appeared, for the first time, to make the claim that the Sewerage District was discontinuing service and thereby failing to abide by the November 9, 1975 award of Arbitrator Fleischli.

Because we are satisfied that the Examiner was correct in his finding that neither arbitration award dealt with the question posed in the Union's three grievances, we do not find it necessary to deal with the procedural fair play issue which is presented by the Union's lack of proper notice concerning the claimed violations.

The award of Arbitrator Henningsen dealt with a grievance filed by the "off man" boat operator who was not called in to cover a shift vacancy which was instead covered by the temporary assignment of a plant maintenance employe. It dealt with the application of the parties' procedure for shift replacements "in the event an employe is absent on a shift job and a replacement is necessary" and not the question of whether the Sewerage District is required to call in the other scheduled boat operator early to provide ground transportation during a period of time less then a full shift, when the regular boat operator has taken the boat out into the harbor to take water samples.

We note that one of the grievances does make reference to the possible use of another employe (a gantry crane operator) for this purpose and the Sewerage District's answer alleges that "temporary land transportation service was provided by the gantry crane operator as done in the past." The Union presented no evidence regarding this claim and made no argument concerning how this admitted practice was contrary to the award of Arbitrator Henningsen. We are satisfied that if the District did utilize a gantry crane operator to provide ground transportation on January 22, 1980 while the ferry boat was taking water samples, the question of the propriety of such a practice under the agreement is not covered by the award of Arbitrator Henningsen which applied the five conditions set out therein to an entirely different fact situation.

The Sewerage District correctly notes that the issue in the grievance decided by Arbitrator Fleischli was whether the Sewerage Commission could, under the terms of the agreement, unilaterally terminate the ferry boat transportation it has provided to employes over the years. The grievance here would appear to deal primarily with the lost opportunity for overtime hours on the part of the two ferry boat operators that the Union contends should have been called in on the three days in question. They do not appear to deal with the Sewerage District's obligation to provide transportation to its employes consistent with its past practice. Nevertheless, at the conclusion of the hearing the Union made the argument that they dealt with a "partial discontinuation" of such service. The Examiner's contested finding that no employe needed such service is arguably relevant to the resolution of this issue.

We agree with the Examiner that, on the record presented, it was appropriate to find that no employe required transportation while the boat was out in the harbor and that if any employe needed transportation, it would have been provided.

The unrebutted testimony of the District's witnesses clearly supports such findings. Further, we believe that even if the District's failure to provide an employe waiting in a vehicle with immediate transportation, thereby requiring employes to signal or call for ground transportation, could be viewed as a "partial discontinuation", as argued by the Union, the propriety of such action under the terms of the agreement was not decided by the award of Arbitrator Fleischli.

In addition to alleging that the Sewerage District has refused to abide by the results of an Arbitrator's award, the Union also alleged that the same conduct constituted a violation of the parties' agreement. The Examiner apparently reasoned that the Wisconsin Employment Relations Commission ought not assert its jurisdiction to resolve this allegation in light of the evidence which establishes that the agreement contains a grievance procedure culminating in binding arbitration and that the Union failed to exhaust that procedure. However, we believe that in said regard, the Examiner should have made reference to Section 111.70(3)(a)5 of MERA, rather than Section 111.70(3)(a)4 in his Memorandum and should have made a separate Conclusion of Law to that effect. We have therefore revised his Conclusion of Law to include such a separate conclusion.

We agree with the remaining Conclusions of Law of the Examiner that there existed no basis for concluding that the Sewerage District had committed an independent act of interference, restraint or coercion of employes, or for that matter a derivative violation in said regard. The allegation that the Sewerage Commission's conduct, as expressed in the grievances involved, constituted a prohibited practice within the meaning of Section 111.70(3)(a)2 of MERA is totally without merit.

Dated at Madison, Wisconsin this 19th day of November, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

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Morris Slavney, Commissioner

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Herman Torosian, Commissioner