STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES UNION LOCAL NO. 75, Complainant, vs. CITY OF GREEN BAY, Respondent.	:	Case LXXXII No. 26696 MP-1143 Decision No. 18053-B
CITY OF GREEN BAY, Complainant, vs. DRIVERS, WAREHOUSE AND DAIRY EMPLOYEES UNION LOCAL NO. 75, GLENN TARKOWSKI, DARRELL JOHNSON, JOHN D. MINSTART, and LLEWELLYN POUWELS, Respondents.	:	Case LXXXIV No. 26784 MP-1151 Decision No. 18197-B

Appearances:

Goldberg, Previant, Uelman, Gratz, Miller, Levy & Breuggeman, S.C., by Ms. Marianne Goldstein Robbins, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, on behalf of the Union and the individually named Respondents.

Mr. Mark A. Warpinski, Assistant City Attorney, and Mr. Donald A. VanderKelen, Labor Negotiator, City Hall, 100 North Jefferson Street, Green Bay, Wisconsin 54301, on behalf of the City.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, HEARING EXAMINER: Drivers, Warehouse and Dairy Employees Union Local No. 75, herein the Union, on August 22, 1980, filed a prohibited practices complaint in Case No. LXXXII with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that the City of Green Bay, herein City, had violated Section 111.70 of the Municipal Employment Relations Act, herein MERA, by refusing to proceed to arbitration over a grievance. On September 3, 1980, the Commission appointed Amedeo Greco, a member of its staff, to serve as an examiner in said proceeding and to issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07, Stats. On September 8, 1980, the City filed with the Commission a Notice of Objection to Proceedings and in the alternative Notice of Objection to Appointment of Hearing Examiner. On September 16, 1980, the City filed a prohibited practice complaint in Case No. LXXXIV with the Commission wherein it alleged that the Union and certain named Respondents had committed a prohibited practice by requesting an unlawful remedy in the above noted grievance. On October 29, 1980, the Commission denied the

City's Objections and thereafter on November 4, 1980, appointed the undersigned as examiner in Case LXXXIV. Hearing on the two complaints was held in Green Bay, Wisconsin, on December 19, 1980. 1/ At the conclusion of the hearing, the Examiner granted the Union's Motion to Dismiss the City's complaint. The following Findings of Fact, Conclusion of Law and Order are issued to augment that decision.

FINDINGS OF FACT

1. The Union, a labor organization, has its principal offices at 1546 Main Street, Green Bay, Wisconsin. At all times material herein, Glenn Tarkowski and Darrell Johnson have served as the Union's business representatives and have acted on its behalf.

2. The City, a municipal employer, has its principal offices at City Hall, 100 North Jefferson Street, Green Bay, Wisconsin. As part of its municipal services, the City maintains a Department of Public Works.

3. The Union and the City are privy to a collective bargaining agreement involving the City's Department of Public Works employes. Said contract contains a grievance proceedure which culminates in final and binding arbitration. Schedule A of said contract spells out various unit classifications and accompanying wage rates. The contract does not contain a rate for painting.

4. Page 26 of said contract in part provides:

> "No employee shall suffer a reduction in pay if he is required to take a temporary job causing a lesser rate of pay. Any employee who is required to temporary jobs of higher scale shall receive such scale if such work is performed for one day or more. In the Sanitation Division, the truck helpers with the longest service on the particular crew shall be paid the truck drivers rate when the regular driver is off, for one day or more, due to any reason."

5. John Minstart and Llewellyn Pouwels, are employed in the City's Department of Public Works. On February 25, 1980,Minstart and Pouwels were assigned to paint and plaster the City's Department of Public Works' garage. They performed those painting duties up to March 21, 1980. On that date, they jointly signed a grievance which alleged that the City violated the contract by not paying them the same wages which the City paid its painters. As a remedy, the grievants requested back pay, which was to be computed by the difference between said painter's rate and the regular rate which they received. The Union thereafter requested that said grievance be submitted to arbitration. Although the City initially refused to arbitrate said matter, it ultimately agreed to arbitrate the grievance.

6. Based upon the foregoing Findings of Fact, the Examiner makes the following Conclusion of Law.

CONCLUSION OF LAW

Neither the Union nor the individuals named herein violated

1/ There, the Union withdrew its complaint against the City.

Section 111.70(3)(b)2 and 4, nor any other section of MERA, by requesting arbitration of the instant grievance which requested that the grievants be awarded a painters' rate.

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

ORDER

IT IS ORDERED that the complaint filed by the City be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The City's complaint alleges that the Union and the individuals named herein committed a prohibited practice by requesting that the grievants be paid a painter's rate for their painting work. The City argues that there is no painter's rate in its contract with the Union covering the Department of Public Works employes, and that, as a result, the Union's request for such a rate is unlawful.

The City's complaint is without merit. Thus, arbitrators in some circumstances have awarded wage rates which are not expressly provided for in a contract, 2/ More importantly, even if there were no arbitrable precedent for the Union's requested relief, that request is nonetheless lawful since the Union is free to ask for any request which it deems proper. If the City opposes that request, it is free to make its arguments to the arbitrator. Indeed, the parties herein have jointly selected an arbitrator to resolve that very grievance, thereby indicating that they have full faith and confidence that such an impartial observer would be able to assay the merits of the Union's requested remedy. Furthermore, if the City is unhappy over the arbitrator's decision, it can, of course, seek judicial review of that decision.

In this connection it is apropos to quote the words of Arbitrator Harry Schulman in Ford Motor Co., 3 LA 779. There, Arbitrator Schulman ruled that employes were not free to refuse to follow reasonable work directives. In doing so, he noted that:

> "Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. Neither party can be the final judge as to whether the contract has been violated. The determination of that issue rests in collective negotiation through the grievance procedure. But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment. That procedure is prescribed for all grievances, not merely for doubtful ones. Nothing in the contract even suggests the idea that only doubtful violations need be processed through the grievance procedure and that clear violations can be resisted through individual self-help. The only difference between a "clear" violation and a "doubtful" one is that the former makes a clear grievance and the latter a doubtful one. But both must be handled in the regular prescribed manner." (Emphasis added)

2/ See, for example, City of Green Bay, unpublished, W. Houlihan, (1/81), Paul Mueller Co., 40 LA 780 (Bauder, 1963), and Honolulu Star-Bulletin, 29 LA 391, (Burr, 1957).

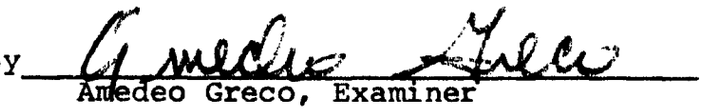
This reasoning forms the basis of one of the most fundamental rules in labor relations, i.e. that, but for a few exceptions, employes must "work now, grieve later".

Well, the corolary to that is that where, as here, the parties have a grievance arbitration proceedure, an employer must agree to arbitrate and to argue later. For, an employer, like an employe, is not free to pick and choose what grievances or remedies are doubtful or clear. Instead, like its employes, the employer must submit the dispute to arbitration, including any disputed remedy sought by the Union. As a result, a union cannot be found guilty of commiting a prohibited practice merely because it requests a remedy which an employer opposes, irrespective of the meris of that request.

The complaint is therefore dismissed in its entirety.

Dated at Madison, Wisconsin this 26th day of February, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Amedeo Greco, Examiner