STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,	:	
Complainant,	:	Case V No. 28033 Ce-1912
vs.	:	Decision No. 18722-A
DINGS CO. DYNAMICS GROUP AND MAGNETIC GROUP, A DIVISION OF WEHR CORPORATION,	:	
Respondent.	:	

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, S.C., Attorneys at Law, by Mr. Robert E. Gratz, 788 North Jefferson Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Marshall R. Berkoff, 250 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

District No. 10, International Association of Machinists & Aerospace Workers, AFL-CIO (hereinafter referred to as the "Complainant") filed a complaint on May 15, 1981 with the Wisconsin Employment Relations Commission (hereinafter referred to as the "Commission") alleging that Dings Co. Dynamics Group and Magnetic Group (hereinafter referred to as the "Respondent") committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act. By its Order dated May 28, 1981, the Commission appointed Lionel L. Crowley, a member of the Commission staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) Wis. Stats. Hearing was held on said complaint on July 13, 1981 in Milwaukee, Wisconsin, and the Complainant presented its arguments at the hearing and Respondent submitted a brief on August 4, 1981. The Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant is a labor organization and is the exclusive collective bargaining agent for all production and maintenance employes employed by Respondent; and that Complainant maintains its offices at 624 North 24th Street, Milwaukee, Wisconsin 53233.

2. That Respondent is an employer and maintains its offices at 4740 West Electric Avenue, Milwaukee, Wisconsin 53219.

3. That at all times material herein, Complainant and Respondent have been parties to a collective bargaining agreement effective from March 1, 1980 until March 1, 1982 covering the wages, hours and conditions of employment of said production and maintenance employes and that said agreement provides, in pertinent part, as follows:

ARTICLE III

Grievance Procedure

3.01 It is agreed that if any controversy or dispute arises concerning wages, hours or conditions of employment, such controversy or dispute

shall be regarded as a grievance, and for consideration must be submitted for processing within three (3) working days after discovery in the following manner:

Step 1. An aggrieved employee shall present his grievance to his Shop or Department Foreman. If he so elects, he may be accompanied by his Committeeman or Steward. The foreman shall give his decision to the Steward and the aggrieved employee within two (2) working days after the submission of the complaint.

Step 2. If a satisfactory settlement is not reached as a result of Step 1, the grievance shall be reduced to writing. The Union Committee, thereupon, will submit the written grievance to the Plant Manager who will give his decision, in writing, to the Union Committee within five (5) working days of submission of the grievance.

Step 3. If a satisfactory settlement is not reached as a result of Step 2, the Union Committee and a Union Representative will within five (5) days submit the grievance to management or their designated representative and he shall give his decision to the Union Committee within five (5) working days of submission of the grievance.

Step 4. If a satisfactory settlement is not reached as a result of Steps 1, 2 and 3, the moving party will have a maximum period of twenty (20) working days to present the grievance to arbitration in the following manner:

(a) The Company shall appoint one (1) arbitrator.

(b) The Union shall appoint one (1) arbitrator.

(c) The two (2) arbitrators shall select a third impartial arbitrator within five (5) working days. If the two (2) arbitrators cannot agree upon a third impartial arbitrator within five (5) days, the Wisconsin Employment Relations Commission, or its successor, shall be requested to submit a panel of five (5) arbitrators. Each party shall alternately strike two (2) names from the panel and the remaining arbitrator shall conduct a hearing as soon as possible and decide the dispute. The decision of the arbitrator shall be final and binding on both parties to this Agreement. Each party shall bear the expense of its presentation. The expenses of the arbitrator shall be paid for equally by the Company and the Union. The general wage scale shall not be subject to arbitration.

(d) It is understood that the jurisdiction of the arbitrators shall be limited to the application and interpretation of this Agreement and the arbitrators shall have no jurisdiction to add to, modify, or extend the obligations imposed by this Agreement.

. . .

ARTICLE VI

Hours of Work and Overtime

6.01 For all employees eight (8) hours shall constitute a standard day's work to be performed within nine (9) consecutive hours. Five (5) days, Monday through Friday, both inclusive, shall constitute a standard workweek. Any change in the payday or shift schedules shall be mutually agreed upon between the parties hereto. Payday for the entire plant will be on Thursday.

. . .

6.06 All employees covered by this Agreement shall receive holiday pay for each of the above-mentioned holidays not worked at the rate of eight (8) hours at their current hourly earnings if the employee has worked the last full regularly scheduled workday before the holiday and has also worked the first full regularly scheduled workday immediately following the holiday; provided, however, that employees who are absent during the week in which the holiday falls due to regular scheduled vacations, layoffs during the holiday week, bona fide illness, industrial injury, jury duty, or being subpoenaed as a witness, shall receive holiday pay. Reasonable tardiness at the start of the shift will not be considered as grounds for denial for holiday pay.

4. That on June 6, 1980, Complainant filed a grievance alleging that Respondent violated Article VI, Sections 6.01 and 6.06, by denying holiday pay to certain employes for Memorial Day, May 26, 1980; and that the grievance was processed through the grievance procedure up to arbitration and was denied by Respondent at each step of grievance procedure with the third step answer being dated July 10, 1980.

5. That on October 22, 1980, the Complainant filed a request to proceed to arbitration on said grievance; that the Respondent by a letter dated October 27, 1980 responded as follows:

> We are in receipt of your letter dated October 22, 1980, indicating a desire to proceed to arbitration on a grievance concerning holiday pay.
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> The grievance referred to was originally filed on June 2, 1980. The grievance proceeded through steps 1, 2, and 3, as provided in the contract, and the most recent communication concerning this grievance was the Company's answer to the third step dated July 10, 1980.
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> The Labor Contract, Article III, Grievance Procedure, Section 3.01, Step 4, on page 4 provides:
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> > "If a satisfactory settlement is not reached as a result of Steps 1, 2, and 3, the moving party will have a maximum period of twenty (20) working days to present the grievance to arbitration. . ."
>
> Because of this provision, it appears as if this case is not subject to the arbitration process. Accordingly, the Company will not join in the selection of any arbitrator, or proceed to arbitration regarding this matter.
>
> Sincerely,
>
> DINGS COMPANY

6. That Respondent has not consented to arbitrate the grievance underlying the instant complaint.

7. That the grievance filed by Complainant alleging a violation of Article VI raises a claim which, on its face, is governed by the terms of the collective bargaining agreement existing between the parties; and further, that a dispute exists between Complainant and Respondent as to whether the grievance on holiday pay has been timely appealed to arbitration.

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

CONCLUSION OF LAW

That Respondent, Dings Co. Dynamics Group and Magnetic Group, by refusing to submit the holiday pay grievance, along with any procedual arbitrability issues related thereto, to final and binding arbitration, has violated and continues to violate the terms of a collective bargaining agreement, and has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Dings Co. Dynamics Group and Magnetic Group, A Division of Wehr Corporation, its officers and agents, shall immediately:

1. Cease and desist from refusing to submit the holiday pay grievance, along with all procedural and arbitrability issues related thereto, to final and binding arbitration;

2. Take the following action, which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

   (a) Notify District No. 10, International Association of Machinists & Aerospace Workers that it will proceed to arbitration on said grievance on the issues concerning the same.

   (b) Submit the holiday pay grievance, along with all procedural arbitrability issues related thereto to final and binding arbitration by selecting an arbitrator or arbitrators in the manner provided in the agreement and participating in the proceedings before the arbitrator selected.

   (c) Notify the Commission within twenty (20) days of the date of this order, in writing, of what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 14th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Respondent's refusal to proceed to arbitration on the underlying grievance in this matter, and its defense to the instant complaint in this proceeding, is the Complainant's failure to comply with Section 3.01, Step 4 of the parties collective bargaining agreement. That provision provides as follows:

> "Step 4. If a satisfactory settlement is not reached as a result of Steps 1, 2 and 3, the moving party will have a maximum period of twenty (20) working days to present the grievance to arbitration . . ."

COMPLAINANT'S POSITION

Complainant contends that the Respondent's objection to proceeding to arbitration involves a question of procedural arbitrability and, citing John Wiley & Sons v. Livingston, 84 S. Ct. 909, 505 LRRM 2775 (1964), asserts that procedural objections must be submitted to the arbitrator.

RESPONDENT'S POSITION

The Respondent argues that the dispute on whether the arbitration process can be invoked is not a procedural issue but a question of substantive arbitrability. It contends that questions of substantive arbitrability are not within the province of the arbitrator. The Respondent asserts that the facts demonstrate that the agreement, on its face, does not provide for arbitration, therefore no contract violation occurred and the complaint must be dismissed. It argues to hold otherwise would encourage delay in dispute settlement, question the finality of grievance resolution, risk labor unrest, and undermine the value of the contract itself.

DISCUSSION

The Commission has held, over a long period of time, that in an unfair labor practice proceeding seeking the enforcement of an arbitration provision, the Commission will order arbitration where the party seeking arbitration is making a claim, which on its face, is governed by the terms of the collective bargaining agreement. 1/ The underlying grievance in the instant matter involves an interpretation of the agreement related to holiday pay. No arguments were made as to the substantive arbitrability of the subject matter of this grievance and clearly, on its face, the subject matter of this grievance is governed by the collective bargaining agreement as it falls squarely within the agreement's definition of a grievance.

The sole dispute between the parties is the effect of the Complainant's failure to proceed to arbitration within the time limit specified in the contractual grievance procedure. The Respondent contends this dispute is one of substantive arbitrability. The undersigned concludes that it is not. The alleged failure to meet the time lines of the grievance procedure goes to the procedural arbitrability of the grievance. Had the Complainant filed its request for arbitration on the twenty first or twenty second work day, the issue would clearly be procedural. The mere lapse of additional time cannot convert the procedural issue into a substantive issue. The Commission has consistently held over a long period of time in cases too numerous to cite that if a dispute is arbitrable on its

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1/ Edward Hines Lumber Company, (5854-A) 1/62, Handcraft Company, Inc. (13510-B)

face, any issues as to procedural arbitrability are to be resolved by the arbitrator. 2/ The instant grievance falls within these holdings. The rationale in these cases is that arbitration is the preferred method to resolve contractual disputes and a rule contrary to the above holding, would permit a party to subvert the arbitration procedure and increase delays and costs while seeking a judicial determination preliminary to arbitration. 3/

Additionally, the Agreement provides that "the jurisdiction of the arbitrators shall be limited to the application and interpretation of this Agreement . . ." The interpretation and application of the grievance procedure, which is part of the agreement, therefore is within the jurisidction of the arbitrator. 4/ The undersigned concludes that it is not within his jurisdiction to interpret and apply the grievance procedure to the facts of the complaint, and further concludes that the Respondent by its refusal to proceed to arbitration has and continues to commit a prohbited practice as defined in Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 14th day of September, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley
Lionel L. Crowley, Examiner

2/ Dumphy Boat Corp. vs. WERB, 267 Wis. 316 (1964); Seaman-Andwall Corp. (5910) 1/62; Jt. School District No. 10 v. Jefferson Education Ass'n, 78 Wis. 2d 94 (1977).

3/ Dumphy Boat Corp. v. WERB, 267 Wis. 316 (1964); John Wiley & Sons v. Livingston, 84 S. Ct. 909, 505 LRRM 2775 (1964).

4/ Sauk Prairie Education Association (15282-B) 6/78.