STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION, LOCAL NO. 695, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, Complainant, vs. STOUGHTON TRAILERS, INC., Respondent.	Case XIV No. 28224 Ce-1914 Decision No. 18796-A

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller, Levy and Brueggeman, S.C., Attorneys at Law, by Mr. Ira S. Epstein, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the Complainant.

Melli, Shiels, Walker and Pease, S.C., Attorneys at Law, by Mr. Thomas R. Crone, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin 53701, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local No. 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter the Union, on June 18, 1981 filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, hereinafter the Commission, against Stoughton Trailers, Inc., hereinafter the Employer. The Commission appointed Sherwood Malamud, Examiner to make and issue Findings of Fact, Conclusions of Law and Orders in the matter. On July 18, 1981 the Employer filed its answer to the complaint, and on July 20, 1981 Complainant filed an amended complaint. Hearing in the matter was held on September 25, 1981 in Stoughton, Wisconsin at which time the parties were afforded an opportunity to present evidence in the matter. The parties submitted written briefs which were exchanged through the Examiner on October 29, 1981. The Examiner considered the evidence and briefs of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter the Union, is a labor organization. It maintains its offices at 1314 North Stoughton Road, Madison, Wisconsin.

2. Stoughton Trailers, Inc., hereinafter the Employer, is a Wisconsin corporation engaged in commerce in the construction of freight trailers. It maintains its principal office at 416 South Academy Street, Stoughton, Wisconsin. The Employer's president and agent is Donald Wahlin.

3. The Union and the Employer are parties to a collective bargaining agreement which is in effect from June 20, 1980 through November 5, 1982 which contains a grievance and arbitration procedure. Article VII of said agreement provides that:

A grievance is defined as a complaint by an employee as to the meaning of (sic) application of this agreement.

4. The Union requested and the Employer concurred in said request to the Wisconsin Employment Relations Commission for the assignment of an Arbitrator. James D. Lynch, a member of the Commission's staff, was assigned to hear and determine the contractual dispute of the parties. The hearing was held on February 18, 1981. It was transcribed. Briefs were received on April 15, 1981 and the Award issued on May 15, 1981. The Union and the Employer could not stipulate to an issue. The Arbitrator framed the issues as follows:

1. Did the Company (Employer) and the Union enter into a collective bargaining agreement?

2. If so, did the Company violate the collective bargaining agreement when it refused to recall employes on layoff and instead hired new employes to fill bargaining unit vacancies?

5. The Arbitrator concluded that the parties entered into a collective bargaining agreement.

6. The Arbitrator concluded that the following individuals, with the dates of hire and classifications indicated, had been laid off effective July 14, 1980:

Employe	Date of Hire	Classification
Roger Roehl	10/28/74	Janitor
Dan Ripp	6/04/79	Assembler
Chris Rauworth	7/23/79	Welder I
Robert Engsberg	8/07/79	Welder I
Gary Wackett	8/08/79	Assembler
David Ross	9/24/79	Electrician
Dennis Anderson	10/23/79	Assembler
Steve Lock	10/23/79	Assembler
Phun Pen	11/08/79	Assembler
Don Swenson	2/25/80	Welder I

Three other employes were laid off on the dates indicated below:

Employe	Date of Hire	Date of Layoff	Classification
John Cone	7/24/78	5/29/80	Assembler
Steve Linderud	10/25/79	5/09/80	Assembler
Don Hartel	11/19/79	8/01/80	Painter

7. The Arbitrator found that beginning on November 24, 1980, the Employer hired the following new employes while all the employes listed in Finding of Fact No. 6 remained on layoff:

Their names, dates of hire, and their classifications are listed hereafter.

Employe	Date of Hire	Classification
Dale Aaberg	11/24/80	Sheet Metal I
Harold Bartz	11/24/80	Welder II
Curtiss Puntney	12/01/80	Assembler
Scott Miller	12/02/80	Assembler
Steve Wedvick	12/04/80	Assembler
Gerlad Mani	12/08/80	Welder I
Jay Manthey	12/08/80	Sheet Metal I
Raymond Altenburg	12/15/80	Assembler
Michael Purcell	12/15/80	Maintenance
Timothy Puckett	12/17/80	Assembler
Charles Keller	1/05/81	Assembler
William Carothers	1/05/81	Assembler

8. The Arbitrator made a finding of fact that:

Assembly work is an unskilled general labor classification which all of the laid off employes are capable of performing.

9. In deciding the merits of the dispute, the Arbitrator noted the crux of the matter to be:

> . . . whether the Company may hire new employes into the work force to fill bargaining unit vacancies while refusing to recall employes on layoff.

The Arbitrator's Award draws its essence from Article IV of the agreement. Said provision and the pertinent portions of the Arbitrator's analysis of that provision follow:

ARTICLE IV - SENIORITY

> SECTION 1. The principle of seniority shall be taken into account concerning layoff and recall from layoff; and then will be considered on a classification basis where the factors of skill, demonstrated ability and other pertinent factors regarding performance of available work are relatively equal.
>
> SECTION 2. Seniority shall accrue from the most recent beginning date of employment by the Employer. Any employee's seniority shall be terminated for any of the following reasons:
>
> a. If the employee quits.
>
> b. If the employee is discharged for just cause.
>
> c. If the employee is laid off for a period equal to accumulated seniority of twelve (12) months, whichever is shorter.

The first clause of Section 1 provides that seniority shall be taken into account in cases of layoff and recall. The second clause enumerates other factors which may be taken into account by the Company in certain circumstances. Reading these clauses together, dictates the conclusion that where ability is not relatively equal prescribed comparisons may be made among existing members of the work force in cases of layoff and recall.

While the Company argues that it may weigh these factors as between employes on layoff and candidates for hire, this argument must be rejected for several reasons. While the second clause allows the Company to weigh factors other than seniority in cases of layoff and recall, the comparison must be made on the basis of 'skill, demonstrated ability and other pertinent factors regarding performance of available work.' Thus, the Company can only comply with this requirement of 'demonstrated ability' as among employes because they are the only individuals whose work performance it has had an opportunity to evaluate. By definition, candidates for hire can not be evaluated for 'demonstrated ability'.

Next, the language of Article IV by its very terms, can only apply to employes, not candidates for hire. Article IV is concerned with 'seniority' - a term defined in Section 2 as accruing from 'the most recent begining date of employment by the Employer.' Thus, prior to hire an individual can not accumulate seniority. Further, the terms 'layoff' and 'recall' by definition can only apply to employes already in the work force - else there could be no 'layoff' (separation from employment) or 'recall' (return to employment). Thus, Article IV does not allow the Company to hire new employes rather than to recall employes from layoff.

Even assuming that Article IV allowed a comparison of relative skills and abilities between employes on layoff and candidates for hire (which it does not for the reasons stated above), the Company presented absolutely no evidence to support its contention that employes on layoff were unqualified to fill the job vacancies or that the new hires possessed <u>any</u> qualifications whatsoever.

The gist of the Company's case, at bottom, is that it can refuse to recall employes from layoff for reasons which are disciplinary in nature. However, Article IV does not purport to speak to discipline.

That topic is addressed by Article VIII 1/ which both by its terms and by incorporating the Company's own work rules prescribed the disciplinary scheme to be followed in case of unsatisfactory employe performance. If the Company had wished to purge itself of employes for disciplinary reasons, it was (and is) obligated to demonstrate that it had cause for its actions - a step it never attempted to take. The Company may not use the layoff and recall procedure to constructively discharge employes thereby avoiding the requirement that it have cause to do so. Viewed in this light, the Company's actions herein apparently are taken with an eye toward avoiding its contractual obligations.

10. In fashioning the appropriate relief to remedy the Employer's violation of the agreement, the Arbitrator looked to Article XXII of the agreement which states in pertinent part as follows:

ARTICLE XXII - JOB OR WORK TRANSFERS

SECTION 1. When an employee is temporarily transferred from one department to another, he shall retain his present classification. In transferring employees, the Company shall select on a seniority basis or an ability basis.

SECTION 2. When the Company transfers an employee permanently to another job, then that employee's classification shall be changed to be consistent with the new job. His pay rate will then be calculated at the new classification pay rate schedule.

Arbitrator Lynch rejected the Employer's argument that laid off employes may only be recalled to the positions within the classification from which they were laid off. The Arbitrator reasoned as follows:

The Company argues that laid off employes may only be recalled to the classification which they occupied prior to layoff. However, by reference to Article XXII which speaks to both temporary and permanent transfers between classifications, we note that movement between classifications is contemplated provided the employe possesses the requisite ability. In this respect, as noted earlier, all laid off employes possess the ability to perform assembler work. Therefore, if there was insufficient work within the classification to which the employes were assigned and other work was available which these employes were capable of performing, they would be entitled to perform that work.

As to four of the five employes identified in the January 21, 1981 letter whom the Company refused to recall, the arbitrator finds:

1. Roehl should have been recalled to the Maintenance position filled by new hire Purcell on 12/15/80;

2. Cone should have been recalled to the Assembly position filled by new hire Puntney on 12/1/80;

1/ Article VIII reads as follows:

ARTICLE VIII - DISCHARGE AND DISCIPLINE

SECTION 1. Stoughton Trailer's Inc. work rules attached to this agreement as Addemdum (sic) C shall become a part of this agreement.

SECTION 2. Discipline (including discharge) imposed consistent with the attached work rules is final, and not subject to review, except as to whether the offenses in fact occurred. Other discipline is subject to a just cause standard of review.

SECTION 3. Any employee desiring investigation of his/her discharge must file a written grievance in accordance with the grievance and arbitration procedure as outlined in Article VII.

3. Ripp should have been recalled to the Welder I position filled by new hire Mani on 12/8/80;

4. Linderud should have been recalled to the Assembly position filled by new hire Miller on 12/1/80.

These laid off employes shall be made whole by requiring the Company to make to them all appropriate contractual wage and fringe benefit payments for all regularly scheduled hours of work since the dates noted above up to the date these employes are returned to employment in the work force. Further, these employes shall suffer no loss of their seniority or any other employment benefit due to them as a result of the Company's actions.

In line with the above reasoning, Hartel should have been recalled to the Assembly position filled by new hire Wedvick on 12/04/80. Similar back pay relief is due him from that date up to his date of return to employment with the Company.

During the course of this complaint hearing, the Employer agreed to comply with the Arbitrator's Award with respect to Cone, Ripp and Linderud. However, with regard to Dan Hartel, on July 8, 1981, the Employer offered to recall Hartel to the first opening in the Painter position, the classification he held prior to layoff. The Employer made no offer of recall to Roger Roehl because there has been no opening in his classification as a janitor.

11. Arbitrator Lynch included in his remedy the following statement:

It is somewhat unclear, on the basis of the instant record, whether other employes who were laid off continue to be refused recall by the Company. If such employes exist, they are entitled to be returned to the work force for all additional vacancies (to be determined by reference to Wahlin's letter to Brugger of January 21, 1981 for such vacancies as were filled by new hires as of their date of hire) and such vacancies as thereafter have occurred and which may occur until all such employes have been returned to the work force. That shall be entitled to reemployment on the basis of their date of hire (1st hired, 1st recalled) for work in their classification or for such other work as they are capable of performing. They shall be entitled to similar back pay relief from the dates such vacancies occurred or occur until the date of their return to employment.

During the course of this prohibited practice complaint hearing, Complainant amended its complaint to bring Dwight Eich and "other employes yet to be identified" within the purview of the award of Arbitrator Lynch. The Union has failed to prove by a clear and satisfactory preponderance of the evidence that Dwight Eich was employed, laid off or recalled by the Employer, and the Union has failed to prove by a clear and satisfactory preponderance of the evidence that there are other employes laid off by the Employer who should be properly included within the scope of the Award of Arbitrator Lynch.

12. That the Award of Arbitrator Lynch draws its essence from the terms and conditions of the parties' collective bargaining agreement; that in fashioning his Award, Arbitrator Lynch acted within the scope of his authority and within the parameters of the jurisdiction ceded to him by the parties; that the remedy provided in the Award is clear and is susceptible to only one interpretation and that under the terms of the parties' agreement, the Award is final and binding.

13. The Employer has not complied with the Arbitrator's Award in that it has not paid Hartel any back pay, benefits or restored his seniority from the date provided in the Award for Hartel's recall, December 4, 1980 to the date on which an offer of recall was made, July 8, 1981, and the Employer continues to refuse to comply with said Award.

14. The Employer has not complied with the Award of Arbitrator Lynch in that it has not offered to recall Roger Roehl and the Employer has refused and it continues to refuse to pay Roehl back pay from the date Arbitrator Lynch found Roehl should have been recalled, December 15, 1980.

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

CONCLUSIONS OF LAW

1. Stoughton Trailers, Inc. is a commerce employer as that term is defined by the Labor Management Relations Act of 1947 as amended. That the Commission has jurisdiction in this matter pursuant to sec. 301 of said federal statute.

2. The May 15, 1981 Arbitration Award of James D. Lynch determining a dispute of the parties concerning the recall of bargaining unit employes as issued was not in excess of the Arbitrator's powers and is a final and definite award within the meaning of Section 788.10(1)(d), Stats., and therefore, it is an award enforceable under Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. By its refusal to pay Hartel back pay and benefits for the period from December 4, 1980 to July 8, 1981 and restore his seniority to December 4, 1980 and by its refusal to recall Roehl, pay him back pay and benefits to December 15, 1980 and restore his seniority to said date, the Employer has violated and continues to violate Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

4. Since the Union has failed to prove by a clear and satisfactory preponderance of the evidence that Dwight Eich comes within the parameters of the Arbitrator's Award or that there are other employes who come within the parameters of the Award, the Employer in this regard has not violated nor is it violating Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDERS

1. The Union's charge that the Employer violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act with regard to Dwight Eich and other employes "yet to be identified" is dismissed.

2. Based upon the representations of counsel that the Employer will comply in all respects with the Lynch Award with regard to employes Cone, Ripp and Linderud, the allegations of the complaint charging non-compliance with the Lynch Award with respect to these three individuals are dismissed.

3. It is ordered that Stoughton Trailers, Inc., its officers, agents, successors and assigns shall immediately:

(a) Cease and desist from refusing to comply with the terms of the May 15, 1981 Award of Arbitrator Lynch with regard to employes Hartel and Roehl.

(b) Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(i) Comply with the May 15, 1981 Arbitration Award issued by James D. Lynch by paying Hartel back pay and benefits from December 4, 1980 to July 8, 1981 and by restoring his seniority to December 4, 1980.

(ii) Comply with the May 15, 1981 Arbitration Award issued by James D. Lynch by recalling Roger Roehl in conformance with said Award and paying to him back pay and benefits from December 15, 1980 to the date Roehl is recalled to work.

(iii) Notify all employes by posting in conspicuous places in its plants where employe notices are posted copies of the attached notice marked as Appendix "A". That notice shall be signed by the President of the Employer and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced or covered by other material.

(iv) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 26th day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. WE WILL implement the terms of the May 15, 1981 Arbitration Award issued by James D. Lynch by complying with the Arbitrator's Award with respect to the employes covered by said Award in accordance with the terms of said Award.

2. WE WILL NOT refuse to comply with the terms of a valid Arbitration Award.

By _____
President, Stoughton Trailers, Inc.

Dated this _____ day of _____ , 1982.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS

Pleadings and Pre-Hearing Agreements:

In its complaint, the Union alleges that the Employer refused to comply with an arbitration award issued by Arbitrator James D. Lynch on May 15, 1981 with respect to the recall of thirteen employes.

In its answer, Respondent denies there was a collective bargaining agreement in effect or any other agreement to arbitrate the grievance underlying the Lynch Award. Respondent asserts that the arbitrator exceeded his authority in rendering the award.

After the answer was filed, Complainant amended its complaint by alleging that the Employer refused to comply with the arbitration award of Arbitrator William C. Houlihan issued on June 15, 1981.

At the hearing on September 25, 1981, the Employer agreed to comply with the Houlihan Award. On that basis, Complainant withdrew the amendment to its complaint. In addition, the Employer agreed to comply with the Lynch Award with respect to employes Cone, Ripp and Linderud.

Furthermore, the Employer withdrew its affirmative defense that there was no collective bargaining agreement in effect, and conceded that the grievance was heard pursuant to the agreement.

The Amendments Made to the Complaint at the Hearing:

At the outset of the hearing, over the objection of the Employer, the Union moved to amend its complaint to include "Dwight Eich and other employees yet to be identified" in this enforcement proceeding of the Lynch award. Under the rules of the Commission, ERB 12.01(5)(a), a complaint may be amended anytime prior to the issuance of a final order by the Examiner. On that basis, Complainant's motion to amend was granted.

With regard to Dwight Eich, Complainant called no witnesses and put in no evidence concerning Eich. He was not named in the arbitration proceeding before Arbitrator Lynch. There is no evidence in the record upon which the Examiner could find that Eich was an employe of the Employer, or that he was laid off and not recalled. Accordingly, the Examiner concludes that Complainant failed to demonstrate by a satisfactory preponderance of the evidence that the Employer did not comply with the Lynch Award with regard to Dwight Eich.

The Union requests the Examiner order the Employer to disclose whether there are other employes covered by this award. This is a proceeding to enforce an arbitration award. The appropriate time to present evidence about other employes covered by the award is at this proceeding. Complainant presented no evidence concerning any "other" employes who were not identified by name in Arbitrator Lynch's Award. Therefore, the Examiner dismissed the allegation with regard to Eich and "other employees yet to be identified".

What remains is the Union's charge that the Employer refuses to implement the Lynch Award with regard to Roehl and Hartel.

Positions of the Parties:

The Union argues that the scope of review of an arbitrator's award is set forth in the U. S. Supreme Court's decision in United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960), where the Court stated that questions concerning construction of the agreement are for the arbitrator. The Union cites several 7th Circuit Court of Appeals decisions which rely on Enterprise Wheel, and which support the Union's position, i.e. Local 7-644, Oil, Chemical & Atomic Workers v. Mobil Oil Co., 350 F.2d 708,711 (7th Cir. 1965), cert. den. 382 U.S. 986; Yellow Cab Co. v. Democratic Union Organizing Committee, Local 777, SIUNO, AFL-CIO, 398 F.2d 510 (7th Cir. 1971). In applying the standard enunciated by the federal courts to the case at hand, the Union notes that: (1) the above seniority clause applies to employes of the employer; (2) the arbitrator found as a matter of fact that all laid off employes could perform assembler work;

(3) under these facts and this seniority clause, the Employer is required to demonstrate that the persons hired off the street had demonstrated ability superior to laid off employes to perform this work; (4) at the arbitration hearing the Employer raved and yelled but did not meet its burden of proof; (5) it did not prove the new hires had demonstrated abilities greater than laid off employes. The Union concludes the award should be enforced, and the Employer's books should be made available to the Union to ascertain if other individuals are subject to the award.

The Union seeks attorneys' fees and interest. It asserts there is no basis for the Employer's refusal to comply with the award. The Union points to Local Union 494, IBEW v. Artkraft, Inc., 375 F. Supp. 129 (E.D. Wis. 1974) in support of its position. In that case the federal court stated:

> It has been recognized that the courts have the equitable power to award attorneys' fees in subsection 301 cases brought to enforce arbitration awards. Local No. 149 International Union, U.A.A. & A.I.W. v. American Brake Shoe Co., 298 F.2d 212 (4th Cir. 1962). This has been justified because it is needed to compensate plaintiffs who must resort to the courts for the enforcement of arbitration awards. Granting attorneys' fees is also an appropriate way to enforce national labor policy. United Steelworkers of America, AFL-CIO v. Butler Mfg. Co., 439 F.2d 1110 (8th Cir. 1971); Belo Corp. v. Typograhical Union, 82 LRRM 2575 (N.D. Texas, 1972). The standard which has been developed in subsection 301 cases is whether the party acted 'without justification' in refusing to abide by the arbitration award.
> 375 F.Supp. at 132-133.

The Union points to the animus of this Employer in labor matters by reference to Stoughton Trailers, Inc., 234 NLRB 1203, and the Union concludes that the award of attorneys' fees is an act which will insure this Employer's future compliance with national labor policy.

The Employer acknowledges the narrow scope employed in the review of arbitration awards. However, the Employer notes that an arbitration award should not be enforced where it is the product of perverse miscontruction of the agreement. The Employer cites extensively from cases decided by the Wisconsin Supreme Court and its interpretation of the United States Supreme Court's Steelworker Trilogy. Those cases cited by the Employer are:

> City of Oshkosh v. Oshkosh Public Library Clerical & Maintenance Employees Union Local 796-A, 99 Wis.2d 95, 106, 299 N.W.2d 210 (1980); Milwaukee v. Milwaukee Police Association, 97 Wis.2d 15, 25, 292 N.W.2d 841 (1980); Milwaukee Board of School Directors v. Milwaukee Teachers' Education Association, 93 Wis.2d 415, 422, 287 N.W.2d 131 (1979); Milwaukee Police Association v. Milwaukee, 92 Wis.2d 145, 154, 285 N.W.2d 119 (1979).

The Employer quotes extensively from the Wisconsin Supreme Court decision in City of Oshkosh, supra. In particular, the Employer notes the following statement from said decision:

> . . . Where an award is based upon a perverse misconstruction of the labor contract, the arbitrator exceeds the authority granted to him by the agreement of the parties.
>
> Such a view is in accord with the supervisory role of this court and its effort to ensure that the parties obtain that which they bargained for. See Milwaukee Professional Firefighters' Local 215 v. Milwaukee, 78 Wis.2d at 22. Two parties who enter into an arbitration agreement have a right to expect that their arbitrator will exercise a measure of rational judgment in resolving disputes submitted for settlement. Such expectations form a part of the agreement and when a court declines to enforce an award on the basis of perverse misconstruction, the court may be viewed as protecting the bargain of the parties and insuring the integrity of the arbitration process.
>
> City of Oshkosh, 99 Wis.2d at 106-107.

. . .

The court has also recognized that the parties may also limit, in the agreement itself, the generally unfettered discretion conferred upon the arbitrator:

> . . . a contract term which denies the arbitrator authority to alter the agreement is a reflection of the parties' legitimate expectation that the contract will govern the resolution of a labor dispute. Such a contract term regulating the authority of the arbitrator must not be ignored. The United States Supreme Court has held an arbitrator is not free to administer his own brand of industrial justice. He must remain faithful to his obligation to fashion an award which draws its essence from the labor contract. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. at 597.

City of Oshkosh, 99 Wis.2d at 105-106.

The Employer argues that the Arbitrator's Award constitutes a perverse misconstruction of the agreement in the following respect. The Arbitrator found that assembly work is unskilled work which all laid off employes are capable of performing. Since this is a finding of fact, the Employer concedes that it is unassailable. The Employer argues that the Arbitrator's Award is perverse in its interpretation of the agreement in the manner in which his remedy calls for the recall of laid off employes "on the basis of their date of hire for work in their classification or for such other work as they are capable of performing." 2/ The Employer's objection is that the parties' agreement provides for layoff and recall by classification without the right to bump between job classifications. The Arbitrator's remedy provides laid off employes with greater rights than is provided by the collective bargaining agreement. Although the Arbitrator relies on Article XXII, which provides for transfers between departments, the Employer argues that under the agreement only the Employer has the authority to transfer employes. Under the agreement, the employe does not possess the right to receive a transfer. The Employer notes that under his remedy, the Arbitrator has established a dual system for the recall of laid off employes. First preference for recall was afforded to laid off employes within classification. Second preference was afforded to laid off employes across classification upon the basis of the Arbitrator's subjective appraisal of qualifications. The Employer believes that this remedy reflects the Arbitrator's own brand of industrial justice.

The Employer argues that the Arbitrator erroneously assumed that the janitorial classification with a pay rate of $5.36 per hour was the same as the maintenance position at $7.05 per hour when he directed the recall of Roehl, the janitor, to a maintenance position. The Employer points to inconsistencies in the award. The Employer argues as well that if the award is enforced it should not be extended to employes not identified in the award.

The Employer argues that under Commission case law, specifically, Madison Metropolitan School District, (16471-D) 5/81 and Fox Point-Bayside School District No. 8 (16000-A) 10/79, Complainant is not entitled to attorneys' fees.

Discussion:

The standard of review of an arbitrator's award is the threshold issue in a proceeding to enforce the award.

The tension inherent in such a case is well stated in the opinions of Justice Douglas in the Steelworker Trilogy. In Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416, (1960), Justice Douglas observed that:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law--the practices of the industry and the shop--is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as

---

2/ As cited from the Arbitrator's Award by the Employer at p. 8 of its brief.

> the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.

This broad statement of confidence in the Arbitrator's ability to interpret the parties' agreement and the concomitant restraint imposed by the U. S. Supreme Court on a reviewing authority to upset that interpretation is further developed in Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423, 2425 (1960), as follows:

> . . . A mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the court to give their reasons for an award. To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement. (Footnotes omitted)

Justice Douglas further defines the parameters for review of an arbitrator's award and limits beyond which an arbitrator may not go without judicial intervention. Again in Enterprise Wheel, supra, Justice Douglas states that:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. (Emphasis added)

Courts and agencies called upon to review an arbitrator's award are advised by Justice Douglas that:

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. Enterprise Wheel, supra, at p. 2425.

Yet, how is a court or reviewing agency to determine if an arbitrator has manifest "fidelity to his obligation" without reviewing the merits of the award. Once the review of the award has commenced substituting one's judgment for the arbitrator's requires great restraint.

Fortunately, Justice Douglas establishes the test for a section 301 reviewing body to apply when called upon to enforce an arbitration award. Succinctly, the test is:

> Does the award draw its essence from the agreement?

This standard for review of arbitration awards has been applied in a different manner by several federal circuits and by state supreme courts. Since this employer is in commerce, it is federal substantive law which must be applied 3/ and more specifically, it is the Seventh Circuit's application of the

---

3/ Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Local 174, Teamsters Union v. Lucas Flour, 369 U.S. 95 (1962); Tecumseh Products v. WERB, 23 Wis.2d 118, (1964).

Steelworker Trilogy which must be followed by an agency sitting in Wisconsin within the jurisdiction of the Seventh Circuit. 4/

The Seventh Circuit's application of the Trilogy analysis has severely circumscribed the role of a reviewing body in a proceeding to enforce an arbitrator's award. 5/ In Amoco Oil Co. v. Atomic Workers, 548 F.2d 1288, 94 LRRM 2518, 2523 (7th cir. 1977) cert. denied, 431 U.S. 905, 95 LRRM 2144 (1977), the majority opinion contains the following guidelines:

> An arbitrator's award does 'draw its essence from the collective bargaining agreement' so long as the interpretation can in some rational manner be derived from the agreement, 'viewed in the light of its language, its conext, and any other indicia of the parties' intention; only where there is a manifest disregard of the agreement, totally unsupported by principles of contract construction and the law of the shop, may a reviewing court disturb the award.' Ludwig Honold Manufacturing Co. v. Fletcher, 405 F.2d 1123, 1128, 70 LRRM 2368, 2371 (3d Cir. 1969). (Emphasis added)
>
> . . .
>
> Neither the correctness of the arbitrator's conclusion nor the propriety of his reasoning is relevant to a reviewing court, so long as his award complies with the aforementioned standards to be applied by the reviewing court in exercising its limited function. Ludwig Honold, supra, at 1132, 70 LRRM at 2374.

In Smith Steelworkers v. A. O. Smith Corp., 626 F.2d 596, 105 LRRM 2044-2046 (7th Cir. 1980) the Seventh Circuit described the function of a court (or agency) reviewing an arbitration award, and cautioned a reviewing court (or agency) that:

> It is the arbitrator's construction that was bargained for, and 'so far as the arbitrator's decision concerns the construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.' Enterprise Wheel, supra at 599.

This admonition has particular significance in Wisconsin. The Wisconsin Employment Peace Act has been in force for over forty years. Under the act it is an unfair labor practice to breach a collective bargaining agreement. That unfair labor practice is not only the source of the Commission's jurisdiction to sit as a section 301 forum in this matter, it is also a forum which is often used by employers and unions as an alternative to grievance arbitration. When parties to an agreement do not provide final and binding arbitration as a basis for resolving disputes, either party may file an unfair labor practice alleging a breach of a collective bargaining agreement and obtain in most cases, a hearing before an Examiner. The unfair labor practice proceeding provides an opportunity for careful and complete review of the Examiner's findings of fact, his interpretation of the agreement and conclusions drawn therefrom by the three Commissioners of the W.E.R.C. Of course, the decision of the W.E.R.C. is subject to review by the courts. The unfair labor practice route provides an opportunity for the opinions of several individuals to consider the matter in dispute. This process may be more cumbersome; it provides greater scope of review of the initial decision (if

---

4/ In its brief, the Employer placed heavy emphasis on the Wisconsin Supreme Court's application of the Trilogy. The Employer cites extensively the Court's decision under the Municipal Employment Relations Act. Since it is federal substantive law that must be applied, the Examiner has followed the Seventh Circuit's analysis.

5/ See Morris, Charles J., Twenty Years of Trilogy: A Celebration in the Proceedings of the 33rd Annual Meeting of the National Academy of Arbitrators titled Decisional Thinking of Arbitrators and Judges, Stern and Dennis, eds., BNA Books, Washington, D.C. 1981.

there is an Examiner decision). The losing party has a greater opportunity to overturn the initial decision. 6/ Because of this greater scope of review, the determination of the Examiner does not have finality.

Instead, the parties here chose grievance arbitration. The hallmark of the arbitration process is finality. The Arbitrator's decision should end the dispute. Since an arbitration award is the opinion of one individual rather than the product of the considered opinions of several individuals, it may contain errors of fact or interpretation. But its primary purpose is to bring a dispute to a conclusion. If an agency reviewing an arbitration award substitutes its judgment for the arbitrator, it therefy eliminates finality from the grievance and arbitration process, which finality the parties bargained into their agreement.

In light of the above principles, the Examiner turns to consider the award issued by Arbitrator Lynch. First, the Arbitrator concludes there was an agreement in effect. The Employer does not dispute that finding.

The Arbitrator phrases the central issue in this case as follows:

> . . . whether the Company may hire new employes into the work force to fill bargaining unit vacancies while refusing to recall employes on layoff.

The Arbitrator concludes that Article IV requires the Employer to consider seniority and weigh demonstrated ability of employes in determining layoff and recall. The Arbitrator reasons that only present employes could have demonstrated their ability. Employes who have not worked for the Employer are not in the position to have demonstrated their ability to perform certain job functions. Furthermore, the Arbitrator concludes that the Employer presented no evidence to support its contention that employes on layoff were unqualified to fill the job vacancies. The Arbitrator finds that the Employer failed to demonstrate that its new hires had any qualifications whatsoever to fill the job vacancies. Based on the record before the Arbitrator, he perceives the Employer's case as an attempt to refuse to recall employes for disciplinary reasons. He concludes that the agreement's disciplinary machinery rather than its layoff provisions is the more appropriate vehicle for purging poor employes from its work force. The Arbitrator concludes that the Employer ". . . failed in its duty to recall employes on layoff prior to hiring new employes . . ." Certainly the above analysis draws its essence from Article IV of the agreement.

The Employer takes exception to the relief formulated by the Arbitrator to address the contractual breach. In that regard, the Employer disputes the relief afforded Roehl and Hartel. The Arbitrator finds as a fact that assembler work is unskilled work which could be performed by all laid off employes. On that basis, the Arbitrator finds that Hartel, a painter, should have been recalled on December 4, 1980 to the assembler position filled by new hire Wedvick. He finds that Roehl, a janitor, should have been recalled to a maintenance position. Article XXII, which permits the Employer to make temporary and permanent transfers between classifications, is the source of the Arbitrator's decision to fashion a remedy which relies heavily on the transfer of employes between classifications. The Employer finds the Arbitrator's reliance on Article XXII misplaced, and it is the reliance on that article in his remedy to which the Employer strenuously objects.

Another arbitrator, this Examiner, the Commission in review of this decision and the courts, if this matter is appealed, each may well have fashioned a remedy which differs substantially from the one directed here. However, the award clearly draws its essence from the agreement. An arbitrator must be granted broad latitude in fashioning a remedy. It is a rare agreement which by its terms anticipates and specifies the remedy for a breach of the agreement. The Arbitrator here perceives that the parties have provided for transfers in the agreement. He concludes that such transfers should be employed to remedy this breach. This remedy is no different from a reinstatement or back pay remedy

---

6/ See Waunakee Public Schools, (14749-A) 2/77; Order Amending Examiner's Findings of Fact, Reversing Conclusions of Law in Part and Affirming Conclusions of Law in Part, and Reversing Order (14749-B) 2/78 where the Commission amended the finding of an Examiner and reversed his conclusions and Order in a case in which the Examiner determined a contractual dispute; Jt. School District No. 2 Lisbon Pewaukee, (13404-A) 11/75 revised by the Commission at (13404-B) 9/76 wherein an Examiner's findings in a prohibited practice case involving a contract violation were reversed by the Commission.

fashioned in a discharge case where the agreement does not specifically set forth reinstatement and back pay as a remedy. In fact, it is the authority of an arbitrator to fashion a back pay remedy which is the basis of the Employer's objection to an award in the Trilogy, Warrior & Gulf case, supra, and the Court's conclusion that the broad latitude afforded arbitrators in the fashioning of a remedy which requires the award be enforced. Having concluded that the award draws its essence from the agreement, federal substantive law dictates that this reviewer of the award look no further and refrain from tampering with this award. Accordingly, the Examiner has ordered that the Employer comply with the award in all respects.

The Union seeks attorneys' fees and interest. Examiner Gratz in United Contractors, Inc. (12053-A) 12/73, a decision which was affirmed by the Commission, (12053-B) 1/74, stated the Commission's policy on attorneys' fees as follows:

> . . . there are good reasons for the Commission to choose its existing practice rather than adopting a policy similar to that followed in the federal courts. For example, the Commission was created by the legislature in order '. . . to provide a convenient, expeditious and impartial tribunal . . .' for the adjudication of rights and obligations in employment relations. Section 111.01 (Declaration of Policy) of the Wisconsin Employment Peace Act. Practice before the Commission, being often more geographically convenient to the parties than federal court and presenting fewer formalities of procedure and practice and a more expeditious hearing procedure than federal court, it seems fair to conclude that the costs of proceeding before the Commission are likely to be lower--considering hours of travel, hours of attorney's time needed, need for witnesses, and the like--than would be the case in proceeding before a federal court on a similar matter. Furthermore, the goal of an expeditious adjudication of an award enforcement proceeding could be significantly hindered by the addition of potentially controversial issues concerning what costs and disbursements were actually incurred, which of those types of costs should be granted, what is a reasonable amount of each type of cost, what constitutes a frivolous defense, did the Respondent have justification for non-compliance, etc. Where the parties have agreed that the extraordinary remedy is appropriate under certain circumstances, the Commission will ordinarily enforce that mutual intent. But Complainant, by choosing to enjoy the convenience, informality and other advantages of the WERC as its enforcement forum must, absent an agreement of the sort described above, accept the disadvantageous aspects of proceeding here as well--one of which would appear to be the Commission's adherence to the policy concerning attorney's fees and costs described hereinabove.

Recently, the Commission affirmed this policy on attorneys' fees and in dicta expanded that policy to interest on the amount due on an award, as well, Madison Metropolitan School District, (16471-D) 5/81, aff'd Dane County Circuit Court.

Agencies such as the Internal Revenue Service and the National Labor Relations Board provide 20% interest on monies owed by operation of their findings. 7/ It is apparent that the W.E.R.C. is opposed to including interest within the scope of a make whole remedy. Therefore, Complainant's request for attorneys' fees and interest is denied.

Dated at Madison, Wisconsin this 26th day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud, Examiner

7/ Wall Street Journal, March 2, 1982 at p. 1.