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,	Case XIV No. 28224 Ce-1914 Decision 18796-C
Complainant,	
vs.	
STOUGHTON TRAILERS, INC.,	
Respondent.	

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Sherwood Malamud, having on April 26, 1982 issued his Findings of Fact, Conclusions of Law and Order and on April 30, 1982 having issued an order modifying his order in the aforesaid matter wherein he concluded that Respondent had committed unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Respondent having on May 14, 1982 filed a petition for review by the Commission of said decision pursuant to Sec. 111.07(5), Stats.; and the parties having filed briefs in the matter, the last of which was received on July 14, 1982; and the Commission having reviewed the record in the matter including the petition for review and the briefs filed in support of and in opposition thereto, and being satisfied that the Examiner's decision be affirmed.

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter be, and the same hereby are, affirmed;

Given under our hands and seal at the City of Madison, Wisconsin this 28th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

Footnote 1 appears on Page Two

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

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

BACKGROUND

On May 15, 1981, Arbitrator James D. Lynch issued an arbitration award involving Complainant and Respondent. The gravamen of the dispute centered upon the charge that the Respondent had violated the parties' collective bargaining agreement by not recalling laid off employes before hiring new employes. The arbitrator found that commencing on November 24, 1980, the Respondent hired twelve (12) new employes while thirteen (13) employes were on layoff status. The arbitrator made a finding of fact that assembly work is an unskilled general labor classification which all the laid off employes are capable of performing and concluded that Respondent violated the labor agreement by hiring new employes into the work force to fill bargaining unit vacancies while refusing to recall employes on layoff. Arbitrator Lynch rejected the Respondent's contention that laid off employes may only be recalled to the position within the classification from which they were laid off. Arbitrator Lynch held that Respondent had violated the seniority rights of the laid off employes by replacing them with new hires. In fashioning a remedy, Arbitrator Lynch ordered that a number of the laid off employes be recalled to jobs in their former classifications and that employes Roehl and Hartel be recalled for available work which they were capable of performing, although not necessarily in their former job classification. The arbitrator ordered back pay commencing from the dates on which said employes were improperly replaced by new hires.

In its complaint initiating this proceeding, Complainant alleged that Respondent committed an unfair labor practice within the meaning of Section 111.06 (1)(a), (c), (d), (f) and (g) of the Wisconsin Employment Peace Act by refusing to comply with Arbitrator Lynch's award. The Respondent initially denied there was a collective bargaining agreement in effect, however, it ultimately withdrew that affirmative defense and contended that the Arbitrator exceeded his authority in rendering the award. 2/

THE EXAMINER'S DECISION

In his decision, the Examiner concluded that Arbitrator Lynch's May 15, 1981 decision concerning the recall of bargaining unit employes was not in excess of the Arbitrator's power and was a final and definite award within the meaning of Section 788.10(1)(d), Stats. and that said award is therefore enforceable under Section 111.06(1)(f) of the Wisconsin Employment Peace Act. The Examiner concluded that by its refusal to pay Hartel back pay and benefits for the period from December 4, 1980 to July 8, 1981 and to restore his seniority to December 4, 1980; and by its refusal to recall Roehl, pay him back bay and benefits from December 15, 1980 and to restore his seniority to said date, the Respondent had violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

As a standard for review of the Arbitrator's award, the Examiner utilized federal substantive law and concluded that upon such an analysis, Arbitrator Lynch's award drew its essence from the parties' collective bargaining agreement. The Examiner said, inter alia, that:

> Courts and agencies called upon to review an arbitrator's award are advised by Justice Douglas that:
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> > 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. 3/

2/ At the complaint hearing, Respondent agreed to recall all aggrieved employes except Roehl and Hartel.

3/ Steelworkers v. Enterprise Wheel and Car Corp. 363 U.S. 593, 46 LRRM 2423, (1960).

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 and more specifically, it is the Seventh Circuit's application of the Steelworker Trilogy which must be followed by an agency sitting in Wisconsin within the jurisdiction of the Seventh Circuit.

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. 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: (Footnotes ommitted.)

> An arbitrators 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 context, 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)
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> . . .
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> 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.

Arbitrator Lynch articulated the issue in the case 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." Examiner Malamud, in analyzing the award said:

> The Arbitrator concludes that Article IV requires the Employer to consider seniority and weigh demonstated ability of employes in determining layoff and recall. The Arbitrator reasons that only present employes could have demonstated 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 Examiner pointed out that Respondent took exception to the relief Arbitrator Lynch afforded Roehl and Hartel. In that regard the Examiner said:

> . . . 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.
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> 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 fashioned in a discharge case where the agreement does not specifically set forth reinstatement and back pay as a remedy.

Having concluded that award draws its essence from the agreement and that federal substantive law required that the Examiner look no further and refrain from tampering with the award, the Examiner ordered the Respondent to comply with the award in all respects.

THE PETITION FOR REVIEW

The Respondent's petition for review argues that the Examiner's findings that Arbitrator's Lynch's award draws its essence from the terms and conditions of the parties' collective bargaining agreement is unsupported by substantial evidence on the record as a whole. The Respondent posits that the Examiner's conclusions of law that the award is enforceable under the WEPA, and that Respondent had violated WEPA by its failure to abide by said award, are contrary to prior decisions of the Commission and the courts. The Respondent asserts that the Examiner unduly restricted the applicable scope of review and that the arbitration award is unenforceable. According to the Respondent, the Examiner erred when concluding that the Seventh Circuit's interpretation of the Steelworker's triolgy 4/ reflected the proper standard of review and argues that the Examiner expressed a narrower scope of review than that expressed by the Seventh Circuit. According to the Respondent, the Seventh Circuit has not held, as the Examiner did, that every irrational and arbitrary interpretation of the agreement is mandatorily enforceable. The Respondent contends that under both the federal substantive law and the standard expressed by the Wisconsin Supreme Court, an arbitrator may not dispense his own brand of industrial justice and that his award must reflect a rational interpretation of the agreement. The Respondent argues that because Arbitrator Lynch's award does not reflect a rational interpretation of the agreement and because the Arbitrator dispensed his own brand of industrial justice, the award is not enforceable.

4/ United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

On the other hand, Complainant contends that the Arbitrator's award must be enforced if it can be derived from the agreement in a rational manner. According to the Complainant, the Arbitrator's award is a rational construction of the labor agreement and therefore must be enforced. Complainant renews its request for attorneys fees.

DISCUSSION

The threshold issue to address is what substantive law standard should be applied when an Examiner reviews an arbitration decision for enforcement purposes. Since the instant case involves an employer involved in commerce, the Commission has recognized that it is bound to apply substantive law that is consistent with the federal law established by federal courts pursuant to Section 301. 5/

The Examiner correctly applied the well-established Steelworkers trilogy standard and the Seventh Circuit's application of same in reviewing Arbitrator Lynch's award. Respondent inaccurately characterizes the Examiner as holding that "every irrational and arbitrary interpretation of the agreement is mandatorily enforceable." The record indicates the Examiner relied on the standard that "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 contract." 6/ The Respondent's argument in this regard must therefore be rejected.

In Smith Steelworker's v. A.O. Smith Corp., 62 F.2d 596, 105 LRRM 2044-2046 (7th cir. 1980), the court indicated to the reviewing tribunal of an arbitrator's award 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 this interpretation of the contract is different from his.' Enterprise Wheel, supra. at 599. 7/

In the light of the aforesaid, the record indicates the arbitrator held that the seniority clause of the parties' labor agreement, which mandated consideration of seniority and ability among other factors in recalling employes, applied solely to those who were already employes, and that the Respondent could not grant recall rights to new hires because they didn't possess the requisite seniority or demonstrated ability. The arbitrator's conclusions were predicated upon his interpretation of Article IV of the parties' collective bargaining agreement and the Commission concludes, as did the Examiner, that said decision draws its essence from the labor agreements.

Respondent takes exception to the remedy fashioned by the arbitrator and argues that the arbitrator erred in holding that employes could be recalled to perform available work in a classification other than their classification at the time of layoff. The arbitrator relied upon Article XXII, which permits the Respondent to make temporary and permanent transfers between classifications as the basis upon which he predicated his decision to fashion said remedy. Although

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5/ See Research Products Corp., Dec. No. 10223-A (12/71), citing Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1968) which cites Textile Worker Union v. Lincoln Mills, 353 U.S. 448 (1957) and Local 174, Teamsters Union v. Lucas Flour Co., 36945 95 (1962).

6/ The Examiner cites Amoco Oil Co. v. Atomic Workers, 548 F.2d 1288, 94 LRRM 2518, 2523 (7th cir. 1977).

7/ Also see Jt. School District No. 10 v. Jefferson Education Association, 78 Wis. 2d 94 (1977) where the Wisconsin Supreme Court said, inter alia, that "The court has no business weighing the merits of the grievance. It is the arbitrator's decision for which the parties bargained."

the Commission or another arbitrator may not have fashioned the same remedy, the Commission concurs with the Examiner's conclusion that the award draws its essence from the agreement. 8/

The Commission agrees with the Examiner's finding that:

> 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 the breach. This remedy is no different from a reinstatement or back pay remedy. 9/

The Commission finds that the Examiner adequately addressed the Respondent's contentions in this regard.

Having agreed with the Examiner that the award draws its essence from the agreement, federal substantive law requires that the Commission, like the Examiner, refrain from tampering with the arbitrator's decision. Consequently, the Examiner's Findings of Fact, Conclusions of Law and Order in the instant matter have been affirmed.

The Examiner, in his "Order Modifying Examiner's Order," accurately set forth the Commission's policy with respect to the granting of attorney's fees. Said policy does not permit an award of attorney's fees in the case at bar and therefore the Complainant's request for same in its petition for review is denied.

Dated at Madison, Wisconsin this 28th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

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Gary L. Covelli, Commissioner

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Marshall L. Gratz, Commissioner

8/ "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." See United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 598-599 (1960); also see Smith Steelworkers v. A.O. Smith Corp., 626 F.2d 596, 105 LRRM 2044 (7th cir. 1980).

9/ See Enterprise Wheel, supra.; Mogge v. District 8, Int'l Ass'n of Machinists, 454 F 2d 510, 79 LRRM 2939 (7th cir. 1971); and Campbell Soup Co., 406 F.2d 1223 70 LRRM 2569 (7th cir. 1969), for the proposition that an arbitrator is granted broad latitude in fashioning a remedy.