STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS, LOCAL UNION NO. 383, Complainant, vs. HENNES ERECTING COMPANY, INC. Respondent.	Case III No. 28356 Ce-1916 Decision No. 18844-B

Appearances:
Kelly, Haus and Katz, Attorneys at Law, 302 East Washington Avenue, Madison, Wisconsin, 53703, by Robert C. Kelly, for Complainant.
Melli, Shiels, Walker & Pease, Attorneys at Law, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin, 53701, by John H. Zawadski, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 383, having filed a complaint with the Wisconsin Employment Relations Commission on July 14, 1981, alleging that Hennes Erecting Company, Inc. had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Douglas V. Knudson, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5) Wis. Stats.; and hearing on said complaint having been held before the Examiner in Madison, Wisconsin, on January 5, 1982; and the parties having filed briefs by February 5, 1982; and the Examiner, having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 383, hereinafter Complainant-Union, is a labor organization, having its principal offices at 1602 South Park Street, Madison, Wisconsin, 53715, and represents, for purposes of collective bargaining, certain iron workers employed by Hennes Erecting Company, Inc.

2. That Hennes Erecting Company, Inc., hereinafter Respondent, is a Wisconsin employer whose business address is 1600 West Haskell Street, Appleton, Wisconsin, 54911.

3. That at all times material herein Complainant-Union and Respondent were parties to a collective bargaining agreement, containing the following pertinent provisions:

CRAFT JURISDICTION

> Section 1. It is agreed that the jurisdiction of work covered by this agreement is that provided for in the charter grant issued by the American Federation of Labor to the International Association of Bridge, Structural and Ornamental Iron Workers.
>
> In the event of a jurisdictional dispute, it is agreed by the parties that there shall be no strike, work stoppage, slow down or other coercive activity by the Union or its members while a dispute is pending and the craft assigned to and doing the work shall continue with the assignment until the jurisdictional dispute is resolved.

For a claim of improper assignment to merit consideration for assignment of members of the claiming craft, the claim of improper assignment must be made in writing within 24 hours from the time of or discovery of the claimed item award. The claim must be made to the Employer. When such a claim is made, the local Representative of the Local Unions involved in the jurisdictional dispute shall make every effort to settle the dispute. If these local Representatives of the Local Unions fail to resolve the jurisdictional dispute within twenty-four hours after the dispute has been referred to them, it is further agreed that the proper Representatives of the International Unions of the Local Unions involved shall be informed and requested to act to settle the jurisdictional dispute.

If the Representatives of the International Unions fail to settle or resolve the jurisdictional dispute within seven (7) days after the dispute has been referred to them then the dispute shall be referred to the Impartial Jurisdictional Disputes Board for the Construction Industry for settlement and adjudication in accordance with the rules and regulations issued by such impartial Board and approved by the Board and Construction Trades Department of the AFL-CIO.

It is further agreed and understood that completion of the disputed work by the craft assigned to it shall not render the dispute moot or prevent any party from referring the dispute to the Impartial Jurisdictional Disputes Board for the Construction Industry.

SUBCONTRACTORS

Section 45(a). The Employer agrees not to subcontract or sublet any work covered by this Agreement to any person, firm or corporation which is not in contractual relationship with the International Association of Bridge, Structural and Ornamental Iron Workers or any of its affiliated local unions.

(b) When situations arise wherein it is claimed that no subcontractor is available for the proposed work who will comply with subparagraph (a) of this Section, the Contractor and the Union shall meet and agree upon an equitable solution. In the absence of mutual agreement, either party may submit the issue to arbitration as provided in Section 46A and B.

SETTLEMENT OF DISPUTES

Section 46A. Any dispute as to the proper interpretation of this Agreement shall be handled in the first instance by a representative of the Union and the Employer, and if they fail to reach a settlement within five (5) days it shall be referred to a Board of Arbitration composed of one (1) person appointed by each party, the two (2) so appointed to select a third member. In the event that the two (2) so-appointed arbitrators are unable within two (2) days to agree upon the third arbitrator, they shall jointly request the Federal Mediation and Conciliation Service to furnish a panel of five (5) names from which the third member shall be selected. The decision of the Board of Arbitration shall be handed down within two (2) days after the selection of the third member and the decision of the Board of Arbitration shall be final and binding upon both parties.

The Board of Arbitration shall have jurisdiction over all questions involving the interpretation and application of any section of this Agreement. It shall not, however, be empowered to handle negotiations for a new Agreement, change in the wage scale, or jurisdictional disputes. Each party shall individually pay the expenses of the arbitrator it appoints and the two parties shall jointly share the expense of the third arbitrator.

SAVING CLAUSE

> Section 49. Should any part of or any provision herein contained be rendered or declared invalid by reason of any existing or subsequently enacted legislation, or by any decree of a court of competent jurisdiction such invalidation of such part or portion of this Agreement shall not invalidate the remaining portions thereof, provided, however, upon such invalidation the parties signatory hereto agree to immediately meet to re-negotiate such parts or provisions affected. The remaining parts or provisions shall remain in full force and effect.

4. That in the spring of 1981 the Respondent became involved in the construction of a crane shed at the Waupaca Foundry in Waupaca, Wisconsin; that Waupaca, Wisconsin, is within the geographical jurisdiction of the Complainant-Union; and that the Respondent obtained ironworkers through the Complainant-Union to erect the structural steel for the crane shed.

5. That on or about May 15, 1981, the Respondent subcontracted the siding and roofing work on the crane shed at the Waupaca Foundry job site to Siding and Deck Erectors, Inc.

6. That Siding and Deck Erectors, Inc., hereinafter Siding and Deck, is a Wisconsin employer whose post office address is 2661 West Mill Road, Glendale, Wisconsin; that Siding and Deck used sheet metal workers provided by the International Sheet Metal Workers Union, Local No. 33, hereinafter Local 33, to perform the siding and roofing work on the crane shed; and, that Waupaca, Wisconsin, is within the georgraphical jurisdiction of Local 33.

7. That although Siding and Deck did not have a collective bargaining agreement with Local 33, it had entered into a collective bargaining agreement with the International Sheet Metal Workers Union, Local No. 24, hereinafter Local 24; and that the geographical jurisdiction for Local 24 does not include Waupaca, Wisconsin, but that the collective bargaining agreement between Local 24 and Siding and Deck applied to the work performed at the Waupaca Foundry site by the sheet metal workers from Local 33.

8. That on June 25, 1981, Tom Powers, business agent for the Complainant-Union, filed a grievance with John Barta, Respondent's project superintendent for the Waupaca job site, alleging that the subcontracting clause, Section 45, of the contract had been violated; that on June 30, 1981, Powers requested arbitration of the grievance, pursuant to section 46A of the contract; and, that on July 3, 1981, Barta informed Powers that Richard Ohme would be the Respondent's representative on the Board of Arbitration.

9. That on July 2, 1981, Barta informed Tom Brunette, business manager of Local 33, of the Complainant-Union's demand for arbitration; and, that, under cover of a letter dated July 6, 1981, Brunette sent to Barta a number of previous decisions by the Impartial Jurisdictions Disputes Board which had resulted in the award of similar work to sheet metal workers, rather than to ironworkers.

10. That by letter dated July 9, 1981, Ohme informed Powers in part as follows:

> "In researching subject matter, I have been unable to find any information to substantiate your claim that this work belongs to the Ironworkers. I have found information that indicates our subcontractor, Siding & Deck Erectors, is correct in using Sheetmetal Workers to erect both the roof deck and the siding.
>
> I have enclosed copies of a number of recent decisions by the Impartial Jurisdictional Disputes board concerning metal roof decking of the type being erected at Waupaca Foundry. . . .
>
> Based on this information, we feel HENNES Erecting Company, Inc. has not violated Article 45 of the Collective Bargaining Agreement. Therefore, HENNES will not participate in any Board of Arbitration, per Article 46A pertaining to this matter.
>
> If you still have questions concerning this, I suggest you deal with it as a Jurisdictional matter between Ironworkers Local #383 and Sheetmetal

Workers Local #33."

12. That Brunette contacted Powers with respect to the jurisdictional disputes procedure; and that Powers would not discuss the situation on the basis that the dispute was with the Respondent, rather than Local 33.

13. That, through Ohme's letter of July 9, 1981, the Respondent refused to proceed to arbitration; and, that the Respondent has continued to so refuse since that date.

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

CONCLUSIONS OF LAW

1. That the grievance, filed by the Complainant-Union with respect to the subcontracting of certain siding and roofing work on a crane shed by the Respondent to Siding and Deck Erectors, Inc., is not on its face covered by the final and binding arbitration provision, Section 46A, of the collective bargaining agreement.

2. That Respondent, Hennes Erecting Company, Inc., by refusing to proceed to arbitration on the subcontracting grievance, did not commit an unfair labor practice within the meaning of Section 111.06(1)(f), or any other provision, of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 27th day of April, 1982.

By Douglas V. Knudson
Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In the spring of 1981 the Respondent subcontracted certain siding and roofing work on a crane shed at the Waupaca Foundry to Siding and Deck. The Complainant-Union believes that said work was covered under its agreement with the Respondent and therefore could not be subcontracted to anyone without a contractual relationship with the Complainant-Union. Since Siding and Deck did not have a contractual arrangement with the Complainant-Union, it is argued that the Respondent violated Sections 1 and 45(a) of the contract by subcontracting work to Siding and Deck. The Complainant-Union contends that the instant dispute involves an interpretation and application of certain contractual provisions. Such disputes are matters to be determined by a Board of Arbitration under Section 46A of the contract.

The Respondent does not agree with the Complainant-Union that a subcontracting violation occurred. The Respondent maintains that the instant dispute is not arbitrable because it is a jurisdictional dispute over whether members of the Complainant-Union or the sheet metal workers should have received the siding and roofing work. The Respondent points to Section 46A of the contract which specifically excludes jurisdictional disputes from arbitration and asserts that the dispute should be resolved by the Jurisdictional Disputes Board under Section 1 of the contract.

In response to that argument the Complainant-Union contends that the instant dispute is not a jurisdictional dispute. Neither union has engaged in conduct which is proscribed by Section 8(6)(4)(D) of the LMRA. Moreover, the Respondent has no contractual relationship with any local of the Sheet Metal Workers Union. Thus, said Union has no valid basis on which to make a claim for the disputed work, and further, it is not bound, on a contractual basis, to the resolution procedures of the Jurisdictional Disputes Board.

The Commission herein functions as a Section 301 Court. In such a capacity it must decide the question of substantive arbitrability and must determine whether the dispute is arbitrable under Section 46A of the contract. The Complainant-Union argues that the dispute is arbitrable, while the Respondent claims that the dispute is jurisdictional and should be resolved by the Jurisdictional Disputes Board. The central issue is therefore which disputes settlement forum should be used.

The Complainant-Union essentially claims that its members should have performed the work which was performed by members of Local 33 for subcontractor Siding and Deck. Section 45(a), the subcontracting clause of the contract, states that a subcontracting dispute is to be resolved by the Board of Arbitration. It is then arguable, as the Complainant-Union does here, that the instant dispute should be arbitrated. However, Section 45(a) only applies to "work covered by the agreement." Thus, in order to determine whether the subcontract was proper, the Board of Arbitration initially would have to determine if the work was covered by the contract. The Board of Arbitration would have to consider the conflicting claims to the subcontracted work in reaching a decision on whether said work was covered by the contract. Inasmuch as Local 33 is claiming the same work for its members, the Board of Arbitration would be resolving a jurisdictional dispute, not a subcontracting dispute, as is contended by the Complainant-Union.

Section 46A clearly and specifically excludes jurisdictional disputes from the authority of the Board of Arbitration. Section 1 of the contract explicitly

deals with the procedure for resolving jurisdictional disputes. 1/ Said procedure terminates with the Jurisdictional Disputes Board. Thus, adoption of the Complainant-Union's argument would circumvent the contractual procedures agreed to by the parties. Numerous courts have ruled that where such an exclusion exists, then jurisdictional disputes are not subject to contractual arbitration provisions, but rather, properly must be submitted to the Jurisdictional Disputes Board. 2/ Clearly, the instant dispute is a jurisdictional dispute since two groups of employes are claiming the same work. The NLRB has found that the two groups of employes do not have to have the same employer. 3/ Further, the performance of the contested work by a subcontractor's employes does not alter the nature of the dispute. Local 33 is obligated to accept a decision by the Jurisdictional Disputes Board through its parent international union. Moreover, the key fact is not whether the two competing unions are bound to the jurisdiction of the Jurisdictional Disputes Board, but rather, whether the employer is so bound, as is the case herein.

It is well settled that the arbitrability of labor disputes is a federally favored policy. 4/ However, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. 5/ Based on the standard established by the U.S. Supreme Court in the Steelworkers Trilogy, 6/ the instant dispute is not arbitrable because of the express exclusion of jurisdictional disputes from the contractual arbitration procedure.

1/ The Complainant-Union points out in its brief that the Impartial Jurisdictional Disputes board ceased functioning on June 1, 1980. However, Section 49, the Savings Clause in the contract, states that if part of the agreement becomes invalid then "the parties signatory hereto agree to immediately meet to renegotiate such parts or provisions so affected." The Examiner is satisfied that said provision makes available to the parties adequate recourse for the resolution of the instant dispute. This situation differs from that faced by the NLRB in the case of Laborers, Local 449, 260 NLRB No. 112 (1982) wherein the NLRB asserted jurisdiction of the merits of a dispute because of the inoperative status of the Jurisdictional Disputes Board. In this case the Commission is not being asked to assert jurisdiction over the merits of the dispute, but rather, to direct the parties to utilize arbitration to resolve a jurisdictional dispute which is specifically excluded from the contractual arbitration procedure. Even though the Jurisdictional Disputes Board may be inoperative, the Representatives of the International Unions may be able to resolve the dispute. If such efforts are unsuccessful, the parties may find it necessary to re-negotiate Section 1 so as to create an operative replacement method for resolving jurisdictional disputes.

2/ See, for example, Local 49 v. Los Alamos, 550F 2d 1258, 94 LRRM 2869 (10th Cir. 1977); Local 416 v. Helgesteel Corp., 507 F. 2d 1053, 88 LRRM 2254 (7th Cir. 1974); Local 644, Carpenters v. Walsh Constr. Co., 335 F Supp. 711, 79 LRRM 2150 (S. Ill. 1972).

3/ Local No. 85, Teamsters, 224 NLRB 801, 807, 93 LRRM 1405 (1976).

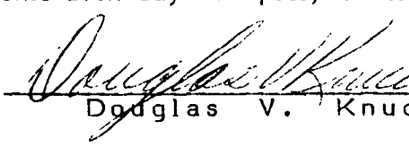
4/ Gateway Coal Company v. United Mine Workers, 414 U.S. 368, 85 LRRM 2049 (1974).

5/ United Steelworkers of America v. Warrior and Gulf Naviation Company, 363 U.S. 574, 46 LRRM 2416 (1960).

6/ In addition to the Warrior and Gulf case, supra, see also United Steelworkers of America v. Enterprise Wheel and Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960) and United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564, 46 LRRM 2414 (1960).

In light of the foregoing, the Examiner finds that the Respondent did not violate Section 111.06(1)(f) of the Wisconsin Employment Peace Act by refusing to process the subcontracting grievance to arbitration.

Dated at Madison, Wisconsin this 27th day of April, 1982.

By 
Douglas V. Knudson, Examiner