STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BAY SHIPBUILDING CORP., Complainant, vs. LOCAL 449 OF THE INTER-NATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP-BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, Respondent.	Case XLII No. 30340 Cw-357 Decision No. 19957-B
LOCAL 449 OF THE INTER-NATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP-BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS, AFL-CIO, Complainant, vs. BAY SHIPBUILDING CORP., Respondent.	Case XLIV No. 30389 Ce-1956 Decision No. 19958-B

Appearances:

Mr. Kenneth R. Loebel, Habush, Habush & Davis, S.C., First Wisconsin Center, Suite 2200, 777 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the Union.

Mr. James E. Braza, Davis, Kuelthau, Vergeront, Stover, Werner & Goodland, S.C., 250 E. Wisconsin Avenue, Suite 1800, Milwaukee, WI 53202, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Bay Shipbuilding Corp., having filed a complaint on September 7, 1982 with the Wisconsin Employment Relations Commission, alleging that Local 449 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, has committed an unfair labor practice within the meaning of Section 111.06(2)(c) of the Wisconsin Employment Peace Act; and Local 449 having filed an answer and counter-complaint on September 13, 1982 alleging that Bay Shipbuilding Corp., has committed an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act; and the Commission having appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter; and the Examiner having ordered the proceedings consolidated for the purpose of hearing; and hearing on said complaints having been held at Sturgeon Bay on October 27, 1982; and the parties having filed briefs and reply briefs by January 20, 1983; and the Examiner having considered the evidence and the arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Bay Shipbuilding Corporation, hereinafter the Company, is a Wisconsin corporation which operates a shipyard in Sturgeon Bay, Wisconsin, and has its offices at First Avenue, Sturgeon Bay, Wisconsin 54235.

2. That Local 449 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmithers, Forgers and Helpers, AFL-CIO, hereinafter the Union, is a labor organization which functions as the exclusive bargaining representative for a bargaining unit of employes of the Company, and has a mailing address of P.O. Box L, Sturgeon Bay, Wisconsin 54235.

3. That the Company and the Union are parties to a collective bargaining agreement covering the period from September 1, 1980 through August 31, 1983, which agreement contains under Article VII the following provision:

ARTICLE VII

. . .

> Section 13. Vacation may be taken by the day or week, but not necessarily the calendar week, and two (2) or more weeks of vacation may be taken in non-consecutive weeks, except as hereinafter provided in this section. Vacations will be granted at the time the employee requests and will be taken generally between May 1 and November 1; provided it does not affect the efficient operation of the business. Employees will indicate their individual choices for vacation time off not later than May 1 and by April 15 if their vacation is to commence on May 1. In case of conflict, vacation preference will be based on seniority. Employees who fail to indicate their preference by May 1 shall arrange vacation time off without seniority preference. Final decision as to the time off for vacation rests with the Company. Vacation time off must be arranged in advance with the Company. When an employee does not report to work due to stress of weather, the employee may request this day be paid as vacation day. This request must be made in writing and be made within twenty-four (24) hours after the day in question, excluding Saturdays and Sundays. Day-by-day vacation is permitted provided the Company is notified on the day the vacation is taken.

4. That prior to the current agreement the Company and the Union were parties to a collective bargaining agreement covering the period from October 22, 1977 to August 31, 1980, which agreement contained the following provision:

> Section 13. Vacation must be taken by the week, but not necessarily the calendar week, and two (2) or more weeks of vacation may be taken in non-consecutive weeks, except as hereinafter provided in this section. Vacations will be granted at the time the employee requests and will be taken generally between May 1 and November 1; provided it does not affect the efficient operation of the business. Employees will indicate their individual choices for vacation time off not later than May 1 and by April 15 if their vacation is to commence on May 1. In case of conflict, vacation preference will be based on seniority. Employees who fail to indicate their preference by May 1 shall arrange vacation time off without seniority preference. Final decision as to the time off for vacation rests with the Company. Vacation time off must be arranged in advance with the foreman. When an employee does not report to work due to stress of weather, the employee may request this day be paid as a vacation day. This request must be made in writing and be made within twenty-four (24) hours after the day in question, excluding Saturdays and Sundays. Day-by-day vacation is permitted up to forty (40) percent of an employee's earned vacation for reasons such as accident, bona fide illneess or other reasons subject to the approval of the Company; provided the balance of the employee's earned vacation must be taken by the week or the remaining fraction thereof.

5. That in March of 1982 and again in May of 1982 the Union filed separate grievances alleging that the Company had violated Article VII, Section 13 of the

Agreement by denying day-by-day vacation requests of employes and by issuing a directive in the Welding Department that no more day-by-day vacation requests would be granted; that the parties exhausted the grievance procedure as provided in the collective bargaining agreement with respect to both grievances and were unable to reach any settlement; that the parties agreed to consolidate the grievances since the same issue was presented in both and to proceed to arbitration; that pursuant to the collective bargaining agreement, the Wisconsin Employment Relations Commission appointed a member of its staff to act as arbitrator and resolve the dispute.

6. That an arbitration hearing was scheduled for August 16, 1982 and that prior to the taking of any evidence the Company and the Union, with the assistance of the arbitrator, engaged in discussions which resulted in the execution of the following Memorandum of Understanding (hereinafter, Memorandum) by the Company and the Union:

MEMORANDUM OF UNDERSTANDING

It is hereby agreed by and between Bay Shipbuilding Corporation and Local 449 that in consideration of the Union withdrawing the grievances in the aforesaid matter, the parties agree to the following:

(1) Each employe can utilize up to five (5) vacation days for any reason on a day to day basis if notice of same is given prior to the shift on the day in question.

(2) An employe may utilize any remaining vacation in blocks of a week or more or in smaller blocks if prearranged with the foreman.

(3) This agreement shall continue until the expiration of the present labor agreement (August 31, 1983); however, if 25% of the employes in a sub-occupational group take a day to day vacation on the same day, then this Memorandum of Understanding shall become inoperative.

Dated this 16th day of August, 1982, at Sturgeon Bay, Wisconsin.

James H. Monahan /s/
James H. Monahan

Jordan Woods /s/
Jordan Woods

(Footnote deleted)

That the Memorandum was executed as a grievance settlement; that based upon the apparent settlement of the issues in dispute the arbitrator relinquished his jurisdiction in the matter on August 19, 1982;

7. That within a few days of the execution of the Memorandum, the Union circulated the following notice to its members:

On Monday, 16 August 1982, an Arbitration Hearing was scheduled to arbitrate the Company Policy of refusing "call in" vacation days. The arbitrator mediated a settlement decision as follows:

1. You are allowed to take five days of your vacation by calling time keeping and telling them you want to take vacation that day. You must call time keeping before the start of your shift. There needn't be any reason given and there will be no refusal.

2. The remainder of your vacation may be taken by the day, week, or whatever, but is to be arranged with your foreman in advance.

3. This policy will be in effect until 31 Aug 83. If both parties feel it has worked and request it, it will continue. If not, the issue will be subject to arbitration.

4. If 25% of a group call in for vacation on a given day, and thereby show that the company's fear of large blocks of personnel in an area will call in on the same day has foundation, the policy will be cancelled and again the issue is subject to arbitration.

Because this policy is subject to renewal it is important that you let the Grievace (sic) Committee know of any problems you have with call in, or effects the policy has on you, so these can be documented for later reference.

8. That in a meeting on August 26, 1982 between Jordan Woods, the Company's Director of Personnel, James Monahan, President of Local 449, and Kevin Treptow, Secretary-Treasurer for the Union, and other individuals, the Union repeated its interpretation of the Memorandum, as described above, and informed the Company that it intended to advise employes to take vacation in accordance with its interpretation; that the Company stated its interpretation, i.e. that an employe could take up to five days of vacation on a day-by-day basis by prearrangement or by call-in but no more than five days total, that after the five day limit is reached the employe must take vacation in blocks of one week or more, or in a block of whatever vacation was remaining, and that the five day limit applied on a calendar year basis and not as of August 16.

9. That based upon the Union's statements in the meeting of August 26 and the Union's written notice circulated to employes, the Company filed the present complaint, dated September 2, 1982 and received by the Commission on September 7, 1982, alleging that such acts constituted an unfair labor practice within the meaning of Sec. 111.06(2)(c), Wis. Stats.

10. That immediately after the execution of the Memorandum, the Company instructed its department heads of the change in vacation treatment consistent with its interpretation of the Memorandum; that after meeting with the Union on August 26, the Company decided not to implement the Memorandum and instructed its Department heads to revert back to the previous practice whereby foremen could approve any vacation request whether call-in or prearranged, if there was adequate back-up in the work force.

11. That in a letter dated September 2, 1982 from James Monahan, President of Local 449, to Jordan Woods, Personnel Director, the Union repeated its interpretation of the Memorandum, and alleged that the Company's interpretation and proposed application amounted to a unilateral modification of the Memorandum, bad faith, and discriminatory action for which the Union would file unfair labor practice charges.

12. That on September 13, 1982, the Union filed an answer and counter-complaint with the Wisconsin Employment Relations Commission, alleging that the Company's actions constituted a violation of Sec. 111.06(1)(f), Wis. Stats.

13. That up to the date of the hearing on October 27, 1982, the Company had not implemented any part of the Memorandum of Understanding which it had entered into with the Union.

14. That the Memorandum of Understanding provides, inter alia, that an employe may take up to five days of earned vacation for any reason on a single day basis by calling in prior to the start of the shift, and that the use of any remaining vacation, whether as a single day or in a larger block, must be prearranged with the foreman.

CONCLUSIONS OF LAW

1. That the August 16 Memorandum of Understanding is a legally enforceable collective bargaining agreement under Secs. 111.06(2)(c) and 111.06(1)(f), Wis. Stats.

2. That the actions taken by the Respondent Union following the execution of the Memorandum of Understanding on August 16, 1982 do not constitute a violation of Sec. 111.06(2)(c), Wis. Stats.

3. That the Company's refusal to implement the August 16, 1982 Memorandum of Understanding constitutes a violation of Sec. 111.06(1)(f), Wis. Stats.

ORDER 1/

1. That the complaint of the Company against the Union alleging a violation of Sec. 111.06(2)(c), Wis. Stats., be, and the same hereby is, dismissed.

2. That the Bay Shipbuilding Corporation shall immediately cease and desist from refusing to implement the August 16, 1982 Memorandum of Understanding.

3. That the Bay Shipbuilding Corporation shall take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

a. Immediately comply with the terms of the August 16 Memorandum of Understanding as interpreted herein.

b. Notify all employes by posting in conspicious places on the premises, where notices to all employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". Said notice shall be signed by an officer of the Company and shall be posted immediately upon receipt of a copy of this Order. Said Notice shall be posted for sixty (60) days thereafter. Respondent shall take reasonable steps to insure that the notices are not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order, as to what steps have been taken to comply with this Order.

Dated at Madison, Wisconsin this 15th day of April, 1983.

By 
David E. Shaw, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings
(Continued on Page Six)

1/ (Continued)

or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

Pursuant to the Order of an Examiner appointed by 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 immediately implement and abide by the Memorandum of Understanding agreed to by Bay Shipbuilding Corporation and Local 449 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO on August 16, 1982. That Memorandum of Understanding shall be interpreted to mean that Paragraph 1 of the Memorandum shall apply only to day-by-day vacation taken where the employe, prior to the start of his shift, calls in his notice on the same day he wishes to take as a vacation day. Pursuant to Paragraph 2 of the Memorandum, any remaining vacation, whether taken on a day-by-day basis or in larger blocks, must be prearranged with the employe's foreman.

Dated this _____ day of April, 1983.

Bay Shipbuilding Corporation

By _____

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) 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 ORDER

POSITIONS OF THE PARTIES

In support of its complaint, the Company generally contends that the Union's actions following the execution of the Memorandum of Understanding amounted to an unequivocal renunciation of the terms of the Memorandum and thus constituted an anticipatory breach of a collective bargaining agreement in violation of Sec. 111.06 (2)(c), Wis. Stats.

The Company contends that the Memorandum of Understanding was not a clarification of the collective bargaining agreement, rather, it was intended to govern all rights of the parties with respect to day-by-day vacation. Thus, the paramount issue in this case is one of contractual interpretation and past practice is irrelevant.

The Company also asserts that the language of the Memorandum is clear and unambiguous. The five day limit in Paragraph 1 must apply to both prearranged and call-in day-by-day vacation since there is no language restricting its application to just call-in vacation. The Company notes that in the last two contracts the provision dealing with day-by-day vacation has not in any way distinguished between prearranged and call-in vacation; nor has the Company ever distinguished between the two in administering the day-by-day vacation provisions.

In regard to Paragraph 2 in the Memorandum, the Company argues that the use of the word "block" necessarily implies more than one day, that the use of that term was clearly motivated by the Company's desire to limit the use of single day vacations, and that the phrase "smaller blocks" was only added out of concern for employes who had less than a one week block of vacation time coming.

Beyond the contractual interpretation issue, the Company contends that by informing its membership that it had rights in excess of the clear and unambiguous limitations of the Memorandum, and by unequivocally informing Company personnel that it had no intention of adhering to those limits, the Union committed an anticipatory breach of the Memorandum. Relying on general contract law in Wisconsin 2/, the Company contends that such a breach has the same legal effect as a breach of any other contract and thus is a violation of Sec. 111.06(2)(c).

The Company argues in the alternative that, should the Examiner not find that the Union committed an unfair labor practice by violating clear and unambiguous language, the Examiner should find that there never was a "meeting of the minds" on the material terms of the Memorandum. Since formation of a contract requires mutual assent of the parties with respect to all essential terms, a fundamental prerequisite to contract formulation is missing here and the contract is unenforceable. 3/

In addition to requesting that the Union's complaint be dismissed, the Company requests 1) that the Union to directed to cease and desist from refusing to abide by the terms of the Memorandum of Understanding, or 2) alternatively, should the Examiner find there was no meeting of the minds, to restore the parties to the status quo ante.

2/ The Company cites Morn v. Schalk, 14 Wis. 2d 307 (1961); Long Investment Company v. O'Donnell, 3 Wis. 2d 291 (1957); Menako v. Kassien, 265 Wis. 269 (1953).

3/ The Company cites Witt v. Realist, Inc., 18 Wis. 2d 282 (1962); Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646 (1911).

The Union contends that the Company's complaint is frivolous and in bad faith and has moved several times for dismissal, asserting that Union officers clearly have a lawful protected right to express their opinions and to communicate to their members their interpretations of any agreement. The Union also argues that the very purpose of the Company's complaint was to retaliate for a letter written to the Company by the Union and to interfere with and impede the Union in its access to the National Labor Relations Board (NLRB). As proof of the Company's bad faith, the Union notes that rather than applying the Memorandum as it understood it and permitting any difference to be resolved through the grievance/arbitration process, the Company instead unilaterally terminated the Memorandum. The Union contends that this repudiation of the Memorandum is itself a violation of Sec. 111.06(1)(f), Wis. Stats.

With regard to the issue of contractual interpretation, the Union makes several arguments. It argues that the Company is estopped from claiming that the Union's interpretation is incorrect, or that the Company did not implement the Memorandum because of the Union's communicated interpretation, since the Company repudiated the entire Memorandum from the date of execution. Alternatively, the Union argues that the Memorandum was a clarification of the vacation provision in the collective bargaining agreement, and that the Union's interpretation is consistent with the language of the Memorandum and the past and present practices of the parties. The Union contends that the first provision of the Memorandum only places a maximum of five days on call-in vacation days, and that the second provision merely codifies the present and past practice of allowing unlimited use of vacation on a single day basis as long as such use is prearranged with and approved by the employer's foreman.

In addition to requesting dismissal of the Company's complaint, the Union requests that the Company be directed to cease and desist from refusing to enforce the Memorandum and to affirmatively comply with the Union's interpretation of the Memorandum's provisions. The Union also seeks reimbursement of its costs, including reasonable attorney's fees in that the Company's complaint was frivolous and brought in bad faith.

DISCUSSION

On August 16, 1982, prior to an arbitration hearing, the parties executed a Memorandum of Understanding which lead to the Union's withdrawl of the two grievances scheduled to be heard. In September, the Company initated these proceedings before the Wisconsin Employment Relations Commission by filing a complaint of unfair labor practices against the Union, Local 449, alleging that the Union had engaged in conduct in violation of Sec. 111.06(2)(c), Wis. Stats., which makes it an unfair labor practice "to violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award)." The Union denied any violation on its part and alleged in a counter-complaint that the Company had engaged in conduct in violation of Sec. 111.06(1)(f), Wis. Stats., (which repeats the exact language quoted above). By order of the Examiner, the cases were consolidated.

The matter is properly before the Commission. The Memorandum of Understanding was executed as a grievance settlement in exchange for which the Union withdrew two grievances. It is well established that a grievance settlement constitutes a "collective bargaining agreement" within the meaning of the Wisconsin Employment Peace Act 4/, and thus a violation of such a settlement would constitute a violation of either Sec. 111.06(2)(c) or Sec. 111.06(1)(f), Wis. Stats. The Company herein involved is subject to the jurisdiction of the National Labor Relations Board. However, since a violation of a collective bargaining agreement is an unfair labor practice under the State Law, WEPA, and is not so regulated by the federal act, the Wisconsin Employment Relations Commission has jurisdiction to determine whether such violations occurred even though the employer involved is otherwise subject to the jurisdiction of the NLRB. 5/

4/ Del Kraus, Inc., (16520-A, B) 9/79, (Aff. LaCrosse Co. Cir. Ct., 2/81); Checker Taxi Co., Inc., (16752-A, B) 11/79.

5/ Giraffe Electric, Inc., (16513-A, D, E) 12/80; Oscar Mayer and Co., Inc., (11591-B, C) 10/74; American Motors Corp. (7079) 3/65, affirmed 32 Wis. 2d 327 (1966).

In order to resolve all of the issues raised, Examiner has found it necessary to examine and interpret the Memorandum of Understanding. Although the Commission's usual policy in response to a complaint alleging breach of contract is to defer to the arbitration process if the collective bargaining agreement provides for final and binding arbitration 6/, exceptions to that general rule are made where the party opposing the exercise of jurisdiction by the Commission fails to timely object thereto on the basis of the existence of final and binding arbitration in the parties' agreement. 7/ Here, neither party has objected to the Commission asserting its jurisdiction to determine if either party had breached the agreement, and the issue was fully litigated. Therefore, the Examiner will assert jurisdiction to resolve all issues.

In support of its complaint, the Company argues that the Union breached the Memorandum of Understanding by unequivocally declaring that it would not abide by the Memorandum's clear and unambiguous language. As the basis for its claim that the Union's conduct constituted an anticipatory breach, the Company relies on the Union's actions described in the Findings of Fact 7 and 8.

This argument fails for several reasons. First, it necessarily assumes that the contractual language in question is absolutely clear and unambiguous. Only in a situation where the language is not susceptible to any dispute could the type of Union activities engaged in here arguably constitute a breach of contract rather than the exercise of legitimate Union rights. The Union clearly had the right under Sec. 8(c) of the National Labor Relations Act 8/ to express its interpretation of the Memorandum of Understanding, as long as it was not acting in bad faith. As will be discussed subsequently, the current disputed language is not so clear as to allow a conclusion that the difference in interpretation here was motivated by bad faith on the part of the Union or a deliberate refusal to adhere to the terms of an agreement.

Secondly, the Company's position ignores the fact that an alternative method of resolving such disputes exists, i.e., the grievance and arbitration process, a method that is an integral part of labor relations and strongly favored by both state and federal labor law. 9/ In this instance, the Company could have simply administered the vacation request policy according to its interpretation of the Memorandum and let the Union choose whether to dispute that interpretation through the grievance-arbitration process.

The fact that in labor relations arbitration is the preferred method of resolving contractual disputes also undercuts the company's reliance on principles of general contract law. While general contract law may establish that an anticipatory breach of contract occurs when a party "manifests an unequivocal intent not to comply with the terms of the contract," such an argument not only assumes that there could be no dispute over the contractual terms, but also ignores the contractual dispute resolution process of arbitration. As the Union points out, if one accepts the Company's position on anticipatory breach, then every time a Union did not acquiese in an Employer's interpretation, the Employer could charge the Union with anticipatory breach of contract in violation of Sec. 111.06(2)(c); this would in turn render a grievance and arbitration procedure ineffective.

6/ ESB Wisco, Inc. (17217-B, C) 4/80; Crepaco, Inc. (1512-B) 6/78; St. Regis Paper Co. (12880-C, D) 12/74.

7/ Equipment Installers, Inc. (18372-A, B) 9/81; Zapata Kitchens, Inc. (13229-B) 4/76; B-State Trucking Corp. (9924-A, B) 8/71.

8/ Sec. 8: ". . . (c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

9/ Joint School District, No. 10, City of Jefferson, et al. v. Jefferson Education Association, 78 Wis. 2d 94 (1977); United Steel Workers v. American Manufacturing Co., 363 U.S. 584 (1960); United Steel Workers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960); United Steel Workers v. Enterprise Wheel and Car Corp., 363 U.S., 593 (1960).

The Examiner concludes that the Union's actions did not constitute conduct in violation of Sec. 111.06(2)(c) and, therefore, has dismissed the Company's complaint.

In its counter-complaint the Union originally alleged that the Company had, by implementing the Memorandum of Understanding according to the Company's interpretation, violated the terms of the Memorandum and was thus violating Sec. 111.06(1)(f) of WEPA. In its briefs, however, the Union argued, based on testimony elicited at the hearing, that the Company's violation consisted of its unilateral termination and repudiation of the Memorandum, rather than the Company's implementation according to its interpretation. The Company has responded to the Union's argument in its briefs.

The record indicates that the Company did initially take steps to implement its understanding of the Memorandum, but quickly halted all implementation when it became evident that there existed a fundamental dispute as to the Memorandum's meaning. For the reasons discussed above, the Examiner concludes that a total repudiation of the terms of the Memorandum is an inappropriate method of testing its meaning, and such a repudiation constitutes a violation of Sec. 111.06(1)(f).

The Company's arguments in defense of its actions, while relevant perhaps to remedy, do not negate the fact that it did repudiate the Memorandum by refusing to enforce it in any way. The Examiner has already considered and rejected the Company's argument that the Union's actions constituted an anticipatory breach and prior repudiation of the Memorandum. The mere fact that implementation may have been "cumbersome" and "expensive" does not vitiate the Company's obligation to implement the Memorandum in good faith, be it the Company's or the Union's interpretation. The fact that the Union contested the Company's interpretation and then went so far as to threaten to file an unfair labor practice charge if the Company implemented its interpretation does not relieve the Company of the obligation to either implement in good faith or to attempt to resolve the dispute through further negotiation. That the Union itself chose to threaten to file an unfair labor practice charge, rather than proceed through the grievance and arbitration procedure, indicates only that both parties were being perverse. The fact remains that since it was only within the Company's power, as the employer, to either implement or not implement the Memorandum, the Company must bear the primary responsibility for having repudiated the parties' settlement agreement.

It also remains a fact that the parties did execute a Memorandum of Understanding in regard to single day vacation requests, and a full resolution of the present dispute requires the Examiner to interpret that agreement. Each of the parties has fully argued its interpretation of the Memorandum and neither has contested the Commission's jurisdiction to decide the matter. 10/

Both parties argue that the language of the Memorandum is clear and unambiguous and that it supports their respective positions. The Examiner concludes, however, that the language in the Memorandum is in fact ambiguous, since an examination of the actual language does not clearly reveal whether the parties intended the five day limit in Paragraph 1 to apply only to single day vacation taken on a "call-in" basis or also to single day vacation that is prearranged with the employe's foreman. The Company contends that the absence of express language in Paragraph 1 that limits its application to only "call-in" vacation, along with the use of the term "blocks" in Paragraph 2 of the Memorandum, clearly indicates that the parties intended the five day limit in Paragraph 1 to apply to all vacation taken on a single day basis, be it by "call-in" or by prearrangement.

The Company's contention is rejected for several reasons. First, Paragraph 1 of the Memorandum does not require that the vacation day to be taken be "prearranged," rather, it requires only that the employe give the Company notice prior to the start of his shift that he is taking that day off as a vacation day.

10/ It should be noted that the parties had originally disagreed over whether the terms of Paragraph 1 of the Memorandum were intended to apply on a calendar year basis or only prospectively. In their briefs, the parties stated that with the end of the 1982 calendar year, the dispute over the effective date is moot; therefore the Examiner will not address that issue.

While the term "call-in" is not used, the phraseology that is used is the equivalent of a "call-in" arrangement. Secondly, Paragraph 2 expressly requires that vacation time taken under that subsection must be "prearranged" with the employe's foreman. Also, contrary to the Company's argument, the use of the term "smaller blocks" does not automatically exclude single day vacation from the coverage of Paragraph 2. According to the Company, the word "block" by definition means more than one and cites the following definition of the word as being "any number of persons or things regarded as a unit." Webster's New World Dictionary, Second College Edition. The Examiner does not conclude from that definition that the phrase "any number" must be taken to mean "any number in excess of one." Rather, that phrase demonstrates the flexibility of the term "block" to include any amount of the item in question, i.e., whatever amounts the parties intend the term to cover.

Given the need to go beyond the wording of the Memorandum in order to determine what the parties intended to achieve in their settlement agreement, the Examiner will consider the context in which the Memorandum was agreed to, including the past practice of the parties.

Section 13 of the current agreement contains no express limit on day-by-day vacation. Testimony and exhibits clearly established that the Company's practice under the current agreement, effective September 1, 1980, had been to grant an unlimited number of single day vacation requests, whether of the call-in or prearrangement type, as long as the remaining work force could perform the required work 11/; indeed, some employes apparently took all of their vacation on a single day basis. 12/ Under the prior agreement for 1977-1980, day-by-day vacation was expressly limited to 40% of an employe's earned vacation, but even then that limit was not enforced. 13/ Both agreements state that the final decision as to vacation rests with the Company. When the Company attempted to unilaterally change this practice, the Union filed two separate grievances.

Also deserving of consideration is the information as to their intent that the parties exchanged before executing the Memorandum. The parties initially met jointly and then broke into separate caucuses. No witness could recall any joint discussion of whether the five day limit applied to both types of single day vacation or whether employes could continue to prearrange an unlimited number of single day vacations. There was, however, testimony that the issues which were of known concern to both parties were 1) the Company's dislike for employes calling in on the same day that they were asking to take as a vacation day, sometimes even after the start of the shift; and 2) the continued desire of the employes to take some single day vacation for any reason whatsoever, with fishing being discussed as an example. There was also testimony by Jordan Woods, the Company's Director of Personnel and Industrial Relations, that single day vacations by prearrangement had not caused any problems.

Under the Union's interpretation of the Memorandum the concerns of both parties are met, i.e., employes are still able to use vacation by the day for any reason on a call-in basis and the Company has limited the number of vacation days that can be taken singly on a call-in basis and has obtained an express requirement that an employe call-in prior to the start of his shift on the day in question. Under the Company's interpretation, however, only the Company's concerns are met. In light of the Union's having just achieved in negotiations on the current agreement a removal of the 40% limitation on the amount of vacation that could be taken on a single day basis, it seems highly unlikely that the Union would then turn around and agree to what could well be for many employes an even lower limit on the maximum number of days that could be taken on a single day basis. It also seems unlikely that the Union would agree to such a limitation given the practice that existed under the current agreement and the Union's action in grieving the Company's attempt to halt the use of vacation on a single day basis.

11/ T. 22-24, 35-36, 74-75, 83 and 87.

12/ T. 74-75, and 83.

13/ T. 85.

Based on the gains regarding the taking of single vacation days achieved by the Union in negotiations for the current agreement, the existing practice of the parties, and the Union's interpretation of the Memorandum better meeting the expressed concerns of both parties, it is concluded that the Union's interpretation of the Memorandum accurately expresses the parties' intentions regarding the taking of vacation on a single day basis.

In a final alternative argument, the Company again relies on general contract law 14/ in urging that in the event the Examiner does not find the Union in violation of Sec. 111.06(2)(c), he should set the Memorandum aside and return the parties to the status quo ante since the parties' interpretations are so inapposite as to demonstrate that there was no "meeting of the minds," and hence, no contract formation. The Examiner must again reject the Company's suggestion that the principles of general contract law necessarily apply to a labor agreement reached through collective bargaining.

Given the very strong state and federal policy favoring arbitration as the means of resolving disputes regarding the meaning of collective bargaining agreements 15/, it would be a mistake to mechanically apply general principles of contract law in the field of labor relations. In the federal sector, when confronted with the argument that all or a part of a collective bargaining agreement is void for lack of mutuality of intent, the courts and the National Labor Relations Board have frequently noted that the NLRB is not bound by technical rules of contract law. 16/ Thus, the cases cited by the Company are simply not dispositive. 17/

This is not to say that arbitrator's are not aware that their primary goal is to ascertain and give effect to the mutual intent of the parties; arbitrators do, on occasion, order the parties to negotiate further where they feel there has been no "meeting of the minds." 18/ However, such a position is usually adopted only where there has been no discussion at all of the disputed provision or its meaning, and where neither party knew or had any reason to know of the meaning intended by the other. 19/ Such is not the situation here. In this case a very specific subject was in dispute, rather than an entire collective bargaining agreement, the grievance settlement was reached in the context of a substantially undisputed past practice, and the parties were aware of each other's concerns regarding the subject in dispute when they arrived at their settlement agreement.

REMEDY

While the Union has argued that the Company's filing of its present complaint was motivated by a desire to chill and interfere with Union activity, such

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14/ The Company cites only two cases for its position, Witt v. Realist, Inc., 18 Wis 2d 282 (1962); Wojahn v. National Union Bank of Oshkosh, 144 Wis. 646 (1911).

15/ See the cases cited in footnote 9.

16/ Ellis Tacke Co., 229 NLRB 1296, 96 LRRM 1550 (1977); Lozano Enterprises v. NLRB, (CA 9) 327 F 2d 814, 55 LRRM 2510 (1964). See also Stereotypers v. L.I. Daily Press (E D NY), 79 LRRM 2284 (1971), where the parties were ordered to arbitration despite the Union's claim of misunderstanding and deception.

17/ For example, in Witt v. Realist, Inc., supra, the court was attempting to interpret a contract controlling an international commercial arrangement, and found uncertainty regarding the quantity, type and price of the disputed cameras, and concluded that there existed only the intent to reach an agreement in the future.

18/ See, for example, the arbitration awards cited in footnote 24, page 302 of How Arbitration Works, Elkouri, Frank and Edna Asper Elkouri, 3rd Edition, BNA, 1976.

19/ See, for example, T and M Rubber Specialties, 54 LA 292 (1970); Menasha Joint School District, (17138-C) 4/80.

allegations are not before the Commission. It has, however, requested relief in the form of reimbursement of costs, including reasonable attorneys fees, on the basis that the Company's complaint was frivolous, spurious and filed in bad faith; citing a recent court of appeals decision. 20/ However, in a recent decision, affirmed by the Circuit Court of Dane County 21/, the Commission stated its policy that "in complaint or arbitration proceedings no attorney's fee nor costs will be granted, unless the parties have agreed otherwise, or unless the Commission is required to do so by specific statutory language." The statutory language involved in the case relied upon by the Union is not applicable to the Commission. Therefore, attorney's fees will not be awarded.

Dated at Madison, Wisconsin this 15th day of April, 1983.

By 
David E. Shaw, Examiner

20/ Sommer v. Carr, 95 Wis. 2d 651 (Ct. App. 1980).

21/ Madison Metropolitan School District, (16471-D) 5/81, affirmed Dane Co. Cir. Ct., Case No. 81-CV-2945 (1/82).