STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Appearances:

Mr. Kenneth R. Loebel, Habush, Habush & Davis, S.C., Attorneys at Law, Suite 2200, 777 East Wisconsin Avenue, Milwaukee, WI 53202-5381, appearing on behalf of the Union.

Mr. James E. Braza, Davis & Kuelthau, S.C., Attorneys at Law, 250 East Wisconsin Avenue, Milwaukee, WI 53202-4285, appearing on behalf of the Complainant.

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

Examiner David E. Shaw having, on April 15, 1983, issued Findings of Fact, Conclusions of Law and Order in the above-entitled consolidated matters, wherein he (1) dismissed the complaint filed by Bay Shipbuilding Corp., as he concluded that the actions of Local 449 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, following the execution of the Memorandum of Understanding on August 16, 1982, did not constitute a violation of Sec. 111.06(2)(c) of the Wisconsin Employment Peace Act (WEPA), and (2) found that Bay Shipbuilding Corporation's refusal to implement the August 16, 1982, Memorandum of Understanding, constituted a violation of Sec. 111.06(1)(f) of WEPA; and Bay Shipbuilding Corp. having, on May 3, 1983, timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's Decision; and the parties having filed argument in support of and in opposition to the petition for review, the last of which was filed on July 25, 1983; and the Commission having reviewed the decision of the Examiner, the entire record and the briefs and arguments of the parties, and being fully advised in the premises, and being satisfied that the Examiner's decision be affirmed in its entirety,

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order issued in the above-entitled matters be, and the same hereby are, affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of February, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

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.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

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

Background:

Arbitrator Stephen Schoenfeld settled a grievance-arbitration matter on August 16, 1982, with Bay Shipbuilding Corp. and Local 449 of the International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, involving vacation scheduling. A Memorandum of Understanding was agreed to by Bay Shipbuilding Corp. and the Union as follows:

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

A fews days later the Union circulated the following notice to its members which gave its interpretation of the Memorandum:

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.

The Union subsequently met with Personnel Director Woods from Bay Shipbuilding Corp. and a difference of interpretation emerged as to the August 16, 1982, Memorandum. The Company then reverted to its previous practice for administering vacations. The Union's interpretation of the Memorandum is as stated in the above-quoted notice to its members. The Company contended, on the other hand, that the Memorandum clearly specifies that Paragraph 1 applies to both prearranged vacation days and vacation days which are called in on the day of scheduled work. Paragraph 2, according to the Company, meant that an employe may prearrange vacation days of more than one day. The Company then filed a complaint, claiming the Union violated Sec. 111.06(2)(c) of WEPA by an anticipatory breach of the Memorandum because the above-quoted notice to its members went beyond the clear limits of the Memorandum and because the Union informed the Company that the Union would not adhere to such limits. As a result, the Company claims the Union renunciated the Memorandum. Alternatively, the Company argued that there was never a meeting of the minds as required by general contract law; that the Memorandum was not enforceable; and that the parties should be restored to their status quo ante positions. The Union filed a countercomplaint, claiming the Company violated Sec. 111.06(1)(f) of WEPA by repudiating the Memorandum.

Examiner's Decision:

The Examiner found that, though the Company was subject to the jurisdiction of the National Labor Relations Board, the Commission had jurisdiction because there was a claimed violation of a grievance settlement, which constituted a collective bargaining agreement and which could therefore result in a violation of Sec. 111.06(2)(c) or Sec. 111.06(1)(f) of WEPA. With respect to the merits of the dispute, the Examiner found that the Union did not violate the Memorandum by stating its interpretation, and that such an interpretation did not result in an anticipatory breach of the Memorandum. Moreover, the Examiner held that general contract law does not necessarily control in the collective bargaining arena and that parties in collective bargaining should resort to the grievance-arbitration procedure when the union's interpretation of a contract does not agree with the employer's. The Examiner further found the Union did not violate Sec. 111.06 (2)(c) of WEPA through its actions. The Examiner, however, held that the Company violated Sec. 111.06(1)(f) of the WEPA by its renunciation of the Memorandum. The Examiner also found there was no demonstration the parties lacked a meeting of the minds. Lastly, the Examiner interpreted the Memorandum and, after considering its language and the context in which it was agreed to, he found that the Union's interpretation was correct.

Petition for Review:

The Company seeks reversal of the Examiner's decision, arguing the following:

1. The Commission on review must determine the matter de novo.

2. The Examiner ignored certain facts regarding why the Company repudiated the Memorandum, i.e., it would have been senseless to undergo the costly bookkeeping and computer alterations when the Union had indicated it would not comply with the Memorandum's clear language. Moreover, the Company argues, the employes were better off when the Company did not implement the Memorandum per either interpretation because the employes now, as previously, have no limit on the day-by-day vacation they may take.

3. The Examiner's interpretation of the Memorandum ignored the real issue, which, according to the Company, is whether the Company has a right to deny day-by-day vacation requests. The

previous forty percent limitation of vacation days in the bargaining agreement, according to the Company, was not removed for the reasons the Examiner described, because the Company still has the right under the collective bargaining agreement to deny day-by-day vacations. In fact, the Company argues, it agreed to remove the forty percent limitation because it was an administrative nightmare. The Company maintains that it is reasonable, then, that the Union would have agreed to the Company's interpretation because the Company would no longer have the right to deny day-by-day vacations under its interpretation of the Memorandum. Moreover, the Memorandum is clear and unambiguous, that Paragraph 1 applies to both call-in and prearranged vacation days. The Company had never distinguished call-in with prearranged days in granting such vacation requests, and the Memorandum does not distinguish them either. Paragraph 2 also indicates the five day limit applies to both such requests because a "block" indicates periods of over one day, and the purpose of Paragraph 2 was to allow employes to use up the remainder of his/her vacation with a "block" of days, not single days. The Company maintains Paragraph 2 should not be used to allow day-by-day vacations on a prearranged basis as well.

4. The Union, according to the Company, renunciated the Memorandum by committing an anticipatory breach through its notice to its members and through informing the Company it did not intend to adhere to the Memorandum's limits.

5. There was no mutual intent, the Company argues, so that the Memorandum was never formulated and the parties should therefore be restored to their original positions.

The Union essentially supports the Examiner's decision in its brief and urges the Commission to uphold it.

Discussion:

The Company has correctly stated the appropriate standard of review herein for, in Madison Metropolitan School District, the Commission stated:

> The commission does not sit in an appellate capacity; it is the fact finder. Although the commission frequently defers to the inferences and credibility resolutions of its examiners, particularly on close questions, the commission is not free to disregard the statutory scheme under which the commission shall affirm or reverse an examiner on the basis of its review of the evidence and the absence of any statutory qualification as by the imposition of any standards to govern such review. See sec. 111.07(5), Stats. 2/

Two of the Company's arguments, i.e., the Union committed an anticipatory breach and there was no "mutual intent" of the parties, were the same arguments made before the Examiner and rejected. We have reviewed the Company's arguments in this regard and the Examiner's decision and affirm the Examiner's conclusions and adopt his rationale in support thereof.

We disagree with the Company's argument that the Examiner ignored certain facts regarding why the Company repudiated the Memorandum of Understanding. Respondent argues that "it would have been senseless to undergo the costly bookkeeping and computer alterations when the Union had indicated it would not comply with the Memorandum's clear language." The Examiner, contrary to the Company's

---

2/ 13794-B (6/77).

claim, considered said argument and concluded that "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." 3/

The Company also, in defense of its repudiation of the Memorandum, claims that "the employes were better off when the Company did not implement the Memorandum per either interpretation because the employes, as now, have no limit on the day-by-day vacation they may take." In this regard the Examiner concluded, and we agree, that "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. 4/ We agree with the Examiner that the Company was obligated to administer "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." 5/

Finally, the Company argues that the Examiner's interpretation of the Memorandum ignored the real issue, which, according to the Company, is whether the Company has a right to deny day-by-day vacation requests. It is argued that once one recognizes that the Company retained this right, the language of the Memorandum clearly and unambiguously supports the Company's interpretation and thus it is reasonable that the Union would have agreed to such Memorandum. First, we agree, for reasons stated by the Examiner, that the language is not clear and unambiguous as claimed. Further, based on the parties' previous practice, the context in which the language was agreed upon, the information that the parties exchanged before executing the Memorandum, and the language itself, we agree with the Examiner's analysis and conclusion that the Union's interpretation is more reasonable.

Based upon the above, we have affirmed the Examiner's decision in its entirety.

Dated at Madison, Wisconsin this 14th day of February, 1984.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

_____
Marshall L. Gratz, Commissioner

3/ Examiner decision at p. 11.

4/ Ibid.

5/ Examiner decision at p. 10.