

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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INTERNATIONAL UNION, UNITED  
AUTOMOBILE, AEROSPACE AND  
AGRICULTURAL IMPLEMENT WORKERS  
OF AMERICA, UAW, and its LOCAL  
1092, UAW, METAL FORMS UNIT,

Complainant,

vs.

METAL FORMS CORPORATION,

Respondent.  
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Case II  
No. 30299 Ce-1953  
Decision No. 19994-A

Appearances:

Mr. Richard Kirby, International Representative, 7435 South Howell Avenue,  
Oak Creek, WI 53212, for Complainant.

Lindner, Honzik, Marsack, Hayman and Walsh, Attorneys at Law, 700 North  
Water Street, Milwaukee, WI 53202, by Mr. Dennis G. Lindner, for  
Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 1092, UAW, Metal Forms Unit, having filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission on August 31, 1982 alleging that Metal Forms Corporation had committed unfair labor practices 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 Sec. 111.70(5), Wis. Stats.; and hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin on October 20, 1982; and the parties having filed briefs by January 21, 1983; 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 Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW, and its Local 1092, UAW, Metal Forms Unit, hereinafter referred to as Complainant, is a labor organization with its offices located at 7435 South Howell, Oak Creek, Wisconsin.

2. That Metal Forms Corporation, hereinafter referred to as Respondent, is an employer having its offices at 3334 North Booth, Milwaukee, Wisconsin and principally is engaged in the production of steel forms for concrete construction of curbs, gutters, streets, highways, sidewalks, parking lots, airport areas and warehouse floors, in addition to products such as steel stakes and a concrete finishing machine called a screed.

3. That Complainant and Respondent were parties to a collective bargaining agreement covering a period from September 29, 1980 to September 25, 1982, which agreement contained the following pertinent provision:

ARTICLE I - RECOGNITION

Section 1. The Company agrees to recognize the Union as the exclusive bargaining agent for all of its production and maintenance employees, including watchman and fireman, and excluding officers of the Company, office employees and supervisors having the authority to hire or discharge employees.

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### ARTICLE III - GRIEVANCE PROCEDURE

Section 1. Any difference or dispute arising between the Company and any of its employees covered by the terms of this Agreement as to the meaning or application or any provision herein stated shall be settled in the following manner:

Employees having a complaint shall report such complaints to the foreman, at which time he must have a committeeman or steward of his shift present

Section 2. A grievance must be filed within THREE (3) working days of the event giving rise to the grievance.

Section 3. If the grievance cannot be settled in the First Step, it shall be reduced to writing and referred to the Shop Committee who shall meet with the Superintendent of the Company in an effort to settle said grievance. The Committee shall present a copy of the written grievance to the Superintendent who, in turn, shall sign the Union copy and write on the grievance form his reply or disposition of it.

Section 4. If the grievance cannot be resolved in the above manner, the Shop Committee shall meet with the authorized representatives of Management for the purpose of settling same. Such meeting of the Shop Committee and Management representatives shall be called promptly.

Either party may call in its outside representatives to participate in such meetings.

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### ARTICLE V - SENIORITY

. . . .

Section 2. Seniority shall prevail on a plant-wide basis and in case it becomes necessary to lay off any employees, those hired last shall be the first to be laid off (sic); and in the case of recall, those last laid off shall be the first to be recalled, providing the senior employee is capable performing (sic) the available work.

. . . .

Section 6. The Shop Committee and stewards shall head the seniority list while holding such Union position.

. . . .

and, that the parties did negotiate a successor agreement covering the period of September 28, 1982 through September 27, 1985.

4. That, prior to June 25, 1982 1/ Respondent went through a series of layoffs which reduced the bargaining unit complement from twenty-eight employees to ten employees; that on Friday, June 25, Respondent notified Complainant that the remaining ten production employees would be laid off effective Monday, June 28; that on June 30, a representative of Complainant, Robert McNatt, met with Respondent's President, Tom Miller, to discuss a grievance concerning employee vacations as a result of the layoff; that on July 2, Respondent sent a letter to McNatt with copies to Willy Varnado, Complainant's Chairman, and to Harold Miller, Complainant's Shop Steward, advising that eight employees were being recalled to work effective Tuesday, July 6; that said eight employees were Willy Varnado, John Zulka, Rick Nerbun, Charles Zlesak, Jerome Sieminski, Jon McConville, Mark Grayburn and Ronald Leonard; and that said eight employees were not the most senior employees on layoff.

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1/ Unless otherwise specified, all other dates herein refer to 1982.

5. That, subsequent to the recall on July 6, three grievances were filed which protested Respondent's failure to recall employees in seniority order; that on July 8, Daniel Tibbits filed a grievance, which was identified as Grievance No. 2 on Union form B-7408, contending that he should have been recalled to punch and bend curb rail rather than a less senior employee; that a grievance which was identified as Grievance No. 3 on Union form B-7411 and which was dated June 28, was filed by Varnado contending both that Respondent failed to recall employees in seniority order and that holiday pay was due to all employees for Monday, July 5; and that on July 29, Harold Miller filed a grievance, which was identified as Grievance No. 4 on Union form DH3809, contending that as the Shop Steward he was number two on the seniority list and should have been recalled to work on July 6.

6. That Grievance No. 3 was incorrectly dated and actually was filed on July 28, rather than June 28, as evidenced by the following facts:

- 1) The grievable events did not occur until July 6;
- 2) Grievance No. 2 was filed on July 8;
- 3) Paychecks for the week covering July 5 were not received by employees until July 23, due to Respondent's practice of withholding payment for two weeks; and
- 4) Respondent's Plant Manager, Leroy Miller, testified he received Grievance No. 3 on the day preceding the day, i.e., July 29, on which he received Grievance No. 4.

7. That, in accordance with the last step of the contractual grievance procedure, on August 6 representatives of Complainant and Respondent met to discuss certain grievances, including Nos. 2, 3 and 4, referred to above; and that, although Respondent made proposals to resolve the grievances, it also informed Complainant of its position that the grievances were not timely filed.

8. That Harold Miller testified he did not receive a copy of Respondent's letter dated July 2 and first learned of the recall of eight employees at a Union meeting on July 29; and that other employees, who were not recalled on July 6, learned of the recall prior to July 29, including one employee who was advised of the recall by Varnado.

9. That Ron Leonard was recalled on July 6 to set up and operate equipment in the Curb Room; that Daniel Tibbits believes he should have been recalled to said position; and, that the uncontradicted testimony of Respondent's Plant Manager was that while Tibbits could do quite a bit of the work in the Curb Room if it was set up, he had not seen Tibbits do any set-up work, whereas Leonard had been doing the set-up work in the Curb Room prior to the layoff on June 28.

10. That Harold Miller does not fix dies, lay out division plates or templates, fill shipping orders, or, set up machines, which are the duties employees were recalled to perform on July 6.

11. That on August 31, Complainant filed the complaint initiating the instant proceeding; and that, prior to the hearing in this matter, the parties resolved the portions of the complaint concerning vacation payments.

12. That Grievance No. 3, which was filed on July 28, was not filed in compliance with the time limits in the contractual grievance procedure; and that Respondent did object to the timeliness of said grievance during the processing of said grievance through the contractual grievance procedure.

13. That Harold Miller did file his grievance within three working days after he learned of the recall, which was the event giving rise to his grievance; and that Miller was not capable of performing the duties for which employees were recalled on July 6.

14. That the record fails to establish Daniel Tibbits was capable of performing the available work in the Curb Room for which work a less senior employee was recalled on July 6.

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

CONCLUSIONS OF LAW

1. That Grievance No. 3 was not filed in compliance with the time limits contained in the grievance procedure as set forth in Article III, Section 2 of the agreement, and, that Respondent did not waive its objections to such non-compliance.

2. That Grievance No. 4 was filed in compliance with the time limits contained in the grievance procedure as set forth in Article III, Section 2 of the agreement.

3. That Respondent did not violate Article V of the agreement by failing to recall Daniel Tibbits and/or Harold Miller on July 6, 1982, and therefore, did not commit an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

4. On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

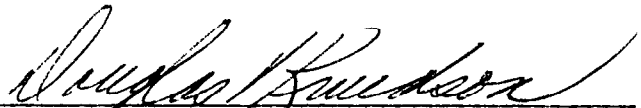
ORDER

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

Dated at Madison, Wisconsin this 8th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

  
Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT  
CONCLUSIONS OF LAW AND ORDER

Respondent contends that Grievances 3 and 4 were procedurally defective, since they were not filed within three working days of the event giving rise to the grievances, i.e., the recall on July 6. Complainant argues that it is contrary to the basic rules of labor relations to allow the forfeiture of meritorious claims based on procedural timeliness questions, and further, that the violation is continuous in nature. Complainant also asserts that Respondent waived its timeliness defense by continuing to deal with Complainant on the possibility of a settlement of the grievances.

The Examiner does not find the recall to be of a continuing nature. Rather, the recall occurred on a specific date, i.e., July 6. Complainant was informed of the individual employees being recalled by letter dated July 2. Therefore, Complainant was obligated to file grievances over the recall in accordance with the three working day time limit set forth in Article III, Section 2 of the agreement. By filing Grievance No. 3 on July 28, Complainant failed to comply with said time limit. Although Grievance No. 3 was dated June 28, it is clear from the facts set forth in Finding of Fact No. 6 that said grievance actually was filed on July 28.

Respondent's Purchasing Manager, who was present at the meeting on August 6, when the parties met and attempted to resolve the grievances arising from the layoff on June 28 and subsequent recall on July 6, testified without contradiction that at said meeting Complainant's representatives were informed of Respondent's position that the grievances were untimely filed. Clearly, Respondent did not waive its procedural defense of timeliness by then seeking to resolve the grievances after having advised Complainant of its position on the timeliness issue. Since Respondent's position that Grievance No. 3 was not filed on a timely basis is found to have merit, the portions of the complaint relating to said grievance are dismissed on that basis. 2/

The Examiner does not dismiss Grievance No. 4, filed by Harold Miller on July 29, as having been untimely filed. Although the grievance was filed as a result of the recall of July 6, Miller claims to have first learned of the recall on July 29 at a Union meeting. The inference that Miller must have learned of the recall at an earlier date through conversations with other employees is premised on the facts that other employees did learn of the recall in a similar fashion and that Miller was the only individual who failed to receive Respondent's letter of July 2. While it does seem unusual that Miller, the Shop Steward, did not either gain knowledge of the recall prior to July 29, or receive the letter dated July 2, the record contains no direct evidence to establish such knowledge or receipt by him. Thus, it is concluded that the event giving rise to Miller's grievance was the meeting on July 29 when he learned of the recall. Accordingly, Miller's grievance was timely filed on July 29.

Eight employees were recalled on July 6 to primarily perform the following duties: to repair dies, to lay out division plates, to lay out templates for curb face forms, to perform shipping clerk duties, and, to set up and operate the brakepress, road rail presses, thetacco stake puller, the angle roller and the Curb Room equipment. Miller's testimony revealed that while he believed he could run most of the machines, he could not do set-up, except on the welding equipment. The record establishes that, in determining which employees to recall, Respondent analyzed several factors, including the anticipated customer orders, the number of employees and essential skills necessary to meet production for such orders, and, the skills of the employees on layoff. Respondent concluded from its analysis that Miller was not capable of performing the available work, and therefore, he would not be recalled on July 6, even though he possessed more seniority, by virtue of his position of Shop Steward, than certain of the recalled employees.

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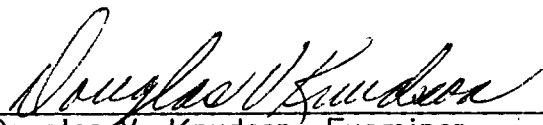
2/ Winter Jt. School District No.1, (17867-C) 5/81.

Similarly, Respondent did not recall Daniel Tibbets on July 6. Tibbets also had more seniority than certain of the employees who were recalled on said date and timely filed Grievance No. 2 on July 8 to protest the recall of Ron Leonard, rather than himself. Respondent's Plant Manager testified, without contradiction that Tibbets could operate the equipment in the Curb Room once it had been set up by Leonard, but he had never seen, nor did he believe, Tibbets was qualified to do the set-up work which Leonard had been performing prior to the layoff on June 28.

The Examiner concludes that the evidence supports Respondent's recall on July 6 of employees with less seniority than Daniel Tibbets and Harold Miller on the basis that Tibbets and Miller were not capable of performing the available work. Article V, Section 2 of the agreement specifically provides that the senior employees must be capable of performing the available work in order to be recalled. Therefore, said actions by Respondent did not violate either the contract or Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin this 8th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By   
Douglas V. Knudson, Examiner