STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 140, affiliated with the AFL-CIO, Complainant, vs. SPARTA MANUFACTURING COMPANY, INC., Respondent.	Case VI No. 31624 Ce-1977 Decision No. 20787-A

Appearances:

Mr. Scott D. Soldon, Goldberg, Previant, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law 788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of Laborers' International Union of North America, Local 140, affiliated with the AFL-CIO.

Mr. John J. Romann, Petrie, Stocking, Meixner and Zeisig, S.C., Attorneys at Law, 850 Marine Plaza, 111 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Sparta Manufacturing Company, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Laborers' International Union of North America, Local 140, AFL-CIO, having, on May 25, 1983, filed a complaint with the Wisconsin Employment Relations Commission in which the Union alleged that the Sparta Manufacturing Company had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA); and the Commission, having, on June 29, 1983, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07 of the Wisconsin Statutes; and a hearing having been conducted on the complaint in Sparta, Wisconsin, on July 27, 1983; and a transcript of that hearing having been provided to the Examiner on August 2, 1983; and the parties having filed briefs and reply briefs by September 6, 1983; and the Examiner having considered the evidence and 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 the Laborer's International Union of North America, Local 140, affiliated with the AFL-CIO, hereinafter referred to as the Union, is a labor organization which has its offices located at 1920 Ward Avenue, LaCrosse, Wisconsin 54601.

2. That the Sparta Manufacturing Company, Inc., hereinafter referred to as the Company, is an employer which has its offices located c/o P.O. Box 251, Sparta, Wisconsin 54656.

3. That the Company and the Union are parties to a collective bargaining agreement which was entered into on September 22, 1980; that at the time of the execution of this agreement, the Company operated a machine shop and a foundry in Sparta, Wisconsin; that the Union was recognized in that collective bargaining agreement as the exclusive bargaining representative of certain employes in both the machine shop and the foundry; that, in addition, this collective bargaining agreement contains the following provisions:

ARTICLE III

UNION REPRESENTATIVES

. . .

Section 3. The purpose of a shop steward and departmental stewards is to promote a better understanding between the company and the employees and to make every effort to settle grievances quickly and amicably with the least amount of friction.

(a) A grievance is defined to be any controversy between the parties or between the company and any employee or employees as to:

1. Any matter involving the interpretation of this Agreement.

2. Any matter involving alleged violation of this Agreement in which an employee or group of employees maintains that his or their rights or privileges have been impaired in violation of this Agreement.

(b) Grievances not reported to the company or the union, as the case may be, in writing within ten (10) days after the event which generated the grievance need not be recognized.

(c) If the company or any of the employees or group of employees has a grievance, the following procedure shall be used:

1. If the company has a grievance, it may take it up with the employee or employees involved in the presence of their respective stewards or directly with the shop steward of the union, or directly with the business manager of the union.

2. Any aggrieved employee must present his grievance first to the departmental steward, if not resolved, then to the shop steward. If the shop steward cannot resolve the grievance, it must be reported to the business manager of the Local Union who shall determine the outcome.

3. If the grievance is not settled satisfactorily, it shall be the duty of the business manager along with the bargaining committee to present the grievance to the management in writing. The aggrieved employee or employees departmental steward and shop steward may be present when grievance is presented.

4. If a grievance is not settled satisfactorily upon meeting with the company, it shall be the responsibility of the business manager to determine if an arbitration shall be filed.

5. The union and the company agree the Wisconsin Employment Relations Board shall appoint an arbitrator from their commission to arbitrate such grievances. The decision of the arbitrator shall be final and binding upon both parties.

. . .

ARTICLE V

SENIORITY

1. Seniority shall prevail on the date of employment except where other provisions are specifically made in the

terms of this Agreement. Seniority is the relative status of employees with respect to their length of service during employment.

2. The seniority of an employee shall be within his department, namely, the machine ship (sic) and foundry. If a layoff is necessary, employees who are qualified in working in special classifications shall not be laid off in favor of an employee with greater seniority. If there is more than one employee working in a special classificiation (sic) the one with the least seniority shall be laid off first. Special classifications are defined as follows:

Foundry: Cupola operator, laboratory technician, pattern room and maintenance.

Machine Shop: Setup men, tool grinders and tool room.

3. When it is necessary for the Company to lay off employees, the first to be laid off shall be the probationary employees, then those with the least seniority and shall continue laying off on the seniority list in reverse order. Exceptions to this lay-off procedure may be made by mutual consent of the Union and the Company, and in accordance with paragraph 2 above.

4. Before any additional employees are hired when additional personnel is needed, the laid off employees who have retained their seniority rights shall be the first to be offered employment in the reverse order to that in which they were laid off. Employees who have been laid off from one job classification shall be called back to work in another job classification in their reverse order to that in which they have been laid off if they possess the ability and qualifications to perform the work of the other job classification.

5. An employee shall lose his seniority for the following reasons:

(a) If he resigns.
(b) If he is discharged for proper cause.
(c) If he fails to notify the Company after being absent more than three (3) consecutive days.
(d) If he has been laid off for a period exceeding his seniority, not to exceed two (2) years of seniority.

6. When laid off employees are recalled to work, they shall be given five (5) days notice by registered mail, return receipt requested. If it is impossible for such employees to return to work within five (5) days, they shall report to the Company within that time to advise them of their circumstances and the date upon which they shall be available for work and, in that event, they shall be given additional time to report for work not to exceed ten (10) days from the date of such report. During this time the Company may fill their positions temporarily from available employees. Any employee not complying with these requirements shall be determined as having voluntarily resigned.

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ARTICLE XI

DURATION OF AGREEMENT

. . .

This Agreement shall be binding upon the parties, their successors, and assigns, and shall continue in full force and effect until September 30, 1983, and from year to year thereafter, and shall be subject to amendment or termination only

if either party notifies the other party in writing of its desire to amend or terminate the same ninety (90) days prior to September 30, 1983, or on the same day and month of any subsequent year.

4. That on March 24, 1983, Kenneth J. Heintz, the Company's Vice-President, sent a letter to Mr. Darrel Lee, the Union's Business Manager, which stated:

> As a result of continuing adverse business conditions, the Sparta Manufacturing Co., Inc. has announced a decision by its Board of Directors to permanently close its machining division, formerly located in the company's Sparta Plant. The machining division has not operated for the past year.
>
> The company's foundry division, comprising the main body of the Sparta Plant, currently employs approximately 70 people and expects to continue to operate on a regular basis.
>
> Individuals affected by this action are being notified by certified mail. A copy of this letter is enclosed.

and that the notification letter referred to in Mr. Heintz' letter stated:

> The Company regrets to inform you that the machine shop has been permanently closed and all machine shop operations have been discontinued by Sparta Manufacturing Co., Inc. Our decision is based upon the adverse economic climate and lack of promise of any near term improvement in our industry.
>
> Therefore, you are hereby notified that your employment with Sparta Manufacturing Co., Inc. is terminated as of this date. With the permanent closing of the machine shop, your former job has been eliminated, and your name has been removed from the Company's employee rolls.
>
> If you have any company tools or equipment of any kind, please deliver the same to the company within one week from date. Any personal property or possessions you might have in your locker should be removed, and the locker emptied, likewise within one week from date.
>
> We wish you well in your search for new employment.

5. That on March 31, 1983, Mr. Scott D. Soldon, the Union's attorney, sent a letter to Mr. Heintz which stated in relevant part:

> The undersigned is responding to your March 24, 1983 letter to Mr. Darrel Lee of Laborers Local 140. Local 140 does not believe that you have the right to "terminate" employees in the machining division. In fact, Article V of the contract specifies that an employee loses his seniority upon discharge for proper cause. Of course, there is not proper cause for discharging these individuals at all. The fact of the matter is that they remain laid off employees with recall rights and additional rights under the contract until such time as their seniority rights expire under Article V. In the event that you disagree with this position,

to permanently close the machine shop is not subject to the grievance procedure of our labor contract"; that on April 25, 1983, Mr. Lee sent a letter to Mr. Heintz, the body of which read as follows:

> This is a follow up on a letter from our attorney, Mr. Scott D. Soldon, to you dated March 1, (sic) 1983. It is Local 140's belief that Sparta Manufacturing Company cannot terminate the machine shop employees.
>
> As per our agreement, these employees will retain their seniority until such time that it is terminated in accordance with the procedures set forth in the agreement. We take the stand that seniority in this agreement pertaining to the machine shop and foundry was for the purpose of lay-off only. Which protects the company from interruption of production in the foundry or the machine shop on temporary lay-off. This does not allow the company to terminate the machine shop employees and their seniority.
>
> Our agreement with the Sparta Manufacturing Company covers all facets of the operation. Under the existing agreement, it states that the company may call laid-off employees back in other than their classification. We have one agreement with Sparta Manufacturing Company which covers all classifications of work both in the foundry and the machine shop. As the letter from our attorney stated, March 31, 1983, we consider this a grievance and will meet with the company at their earliest convience (sic) to try and resolve this problem. If we do not hear from you, we will be forced to file for arbitration on this grievance.

that on April 28, 1983, the Company's President, Daniel A. Holtan, responded to Mr. Lee's April 25 letter as follows: "In reply to your letter of April 25, 1983, we must again advise you that our decision to permanently close the machine shop and terminate the machine shop employes is not subject to the grievance procedure of our labor contract."; and that the Company has not taken any action to comply with the Union's request to process the March 31, 1983 grievance in accordance with the provisions of Article III of the grievance procedure set forth in Finding of Fact 3.

6. That on March 7, 1983, Mr. David E. Shaw, an Arbitrator on the Commission's staff, issued a written decision in which he addressed the following issue and in which he made the following Award:

> ISSUE:
>
> The parties agreed that the undersigned should set forth the issue in his award. The arbitrator believes that the issue may be appropriately stated as follows:
>
> > 1. Did the Employer violate the parties' labor Agreement when it failed to pay laid off employes vacation pay as provided in Article VI of the Agreement? If so, what is the appropriate remedy?
>
> . . .
>
> AWARD
>
> The Employer violated the collective bargaining agreement when it failed to pay vacation pay to employes who were on layoff as of July 1, 1982. The appropriate remedy is payment to such employes in the amount of the vacation pay to which they were entitled on the basis of their continuous service up to the date of their current layoffs. The Employer is ordered to make such payments.
>
> . . .

that on March 23, 1983, the Company's President sent a letter to Mr. Lee which stated: "It was resolved today by the management of Sparta Mfg. Co., Inc. to

request your presence at the Companies (sic) offices to discuss a payment plan of the vacation pay due for 1982, as decided by Arbitration. Please advise a time convenient to you."; that as requested by the Company, Mr. Lee met with Company representatives at the Company's offices to discuss compliance with Arbitrator Shaw's Award; that at this meeting the Company representatives informed Mr. Lee that the Company had established a payment schedule by which it proposed to fulfill its obligations under Arbitrator Shaw's Award; and that the Union did not agree to any payment schedule proposed by the Company, and informed the Company that the debt created by the Arbitration Award was payable immediately, and that any extended period of time for payment would have to include interest or some other provision for the delay in payment.

7. That on March 25, 1983, Mr. Soldon sent a letter to Mr. Morris Holtan which stated in relevant part:

> Darrel Lee of Local 140 has informed me that you have refused to pay the vacation pay due and owing pursuant to Arbitrator Shaw's award. Your excuse is that the Company does not have the money. While that is a most unfortunate circumstance, if true, it does not relieve you of the obligation to pay immediately. The fact of the matter is that the arbitrator has ordered payment and that means payment right now.
>
> We understand that you have proposed a payment schedule of 10 percent over 10 months and that you have been advised that this is entirely unacceptable. The only alternative to immediate payment is to provide a concrete guarantee of payment in the future, perhaps by giving the employees a mortgage or a lien on the property owned by the Company. If you did that, and paid the amounts over a few months, of course with interest at the prime rate, we might be willing to consider this type of arrangement.

that on April 11, 1983, the Company's President sent Mr. Lee the following letter:

> The 1982 vacation pay awarded by Mr. David E. Shaw, the arbitrator, will be paid by us in the following manner:
>
> > On or before April 30, 1983 we will pay one week of the 1982 vacation pay to all the affected people, which amounts to 41 people who had worked in the foundry and 43 former employees of the machine shop, for a total of 84 people receiving vacation checks.
> >
> > On or before June 30, 1983 we will pay the 2nd week of the vacation pay awarded, which would be to 2 laid off employees in the foundry and to 42 former employees in the machine shop.
> >
> > On or before August 31, 1983 we will pay the 3rd week of the vacation pay awarded, which would be to 22 former employees of the machine shop.
> >
> > On of (sic) before October 31, 1983 we will pay the 4th and 5th weeks of the vacation pay awarded, which would be to 8 former employees of the machine shop.
> >
> > This will complete the payment of the 1982 vacation pay awarded, which totals $43,320.80.
>
> We trust that you will agree with our method of paying everyone one week of the awarded vacation pay in the first payment and completing the balance in subsequent two-month intervals.

that the Company's Vice-President, in a letter to Mr. Lee dated April 15, 1983, supplemented the Company's April 11 letter in the following manner: "Reference to Dan Holtan letter of April 11, 1983. Please note that the correct total vacation pay awarded should be $42,774.80."; that on April 18, 1983, Mr. Soldon sent the Company President a letter which informed the Company that the Union rejected the payment schedule proposed by the Company in its letter of April 11, 1983; that on April 20, 1983, the Company's President sent a letter to Mr. Lee which stated in relevant part:

> We are writing to you in response to the April 18, 1983 letter of Attorney Scott D. Soldon.
>
> Please advise us on or before April 27, 1983 whether you refuse to permit us to make a payment of $21,820.40 on or before April 30, 1983 toward the 1982 vacation pay awarded by Mr. David E. Shaw. This represents the maximum sum of money we are able to raise at this time to make a payment to the affected individuals. We are making every attempt to show our good faith by sending one week of the 1982 vacation pay to 41 people who had worked in the foundry and to 43 former employees of the machine shop. The balance due to be paid as outlined in our April 11th letter.

that the Union has not at any time agreed that the payment schedule proposed by the Company will fully discharge the Company's obligation under Arbitrator Shaw's Award; that the Company, without the consent of the Union, implemented a payment schedule which it contended would comply fully with Arbitrator Shaw's Award, by which the sums of $21,820.40, and of $12,164.40 were paid to the affected employes on or before April 30, 1983 and June 30, 1983, respectively, and by which the balance of the principal amount due under the Award was to be paid in two installments projected to occur on August 31, 1983 and October 31, 1983; and that the Company does not challenge the validity of Arbitrator Shaw's Award, but does contend that the payments as paid and as scheduled to be paid under the Company's payment schedule are the maximum payments possible in light of the Company's financial condition.

8. That the Commission appointed Arbitrator Shaw pursuant to the Union's request and the Company's concurrence for the appointment of an arbitrator under Article III, Section 3(c)5 of the collective bargaining agreement noted in Finding of Fact 3 above, to resolve a controversy between the parties concerning Article VI of that agreement; that the Company has not challenged Arbitrator Shaw's jurisdiction over this controversy, or the validity of Arbitrator Shaw's resolution of that controversy in his decision of March 7, 1983; that the Award issued by Arbitrator Shaw on March 7, 1983, does not contain any provision regarding an extended payment schedule to discharge the obligation created by that Award; that the collective bargaining agreement noted in Finding of Fact 3 does not contain any provision regarding the assessment of attorney's fees and costs in the event an arbitration award must be enforced; and that the parties have not otherwise agreed that such costs should be awarded.

CONCLUSIONS OF LAW

1. That the grievance asserted by the Union in Mr. Soldon's letter of March 31, 1983, regarding the seniority and the recall rights of certain machine shop employes under Article V of the collective bargaining agreement noted in Finding of Fact 3 states a claim which, on its face, is covered by the parties' collective bargaining agreement; and that the Company's refusal to process that grievance under the provisions of Article III of that collective bargaining agreement constitutes a violation of Sec. 111.06(1)(f), Wis. Stats.

2. That the Company's implementation of an extended payment schedule to comply with Arbitrator Shaw's March 7, 1983, Arbitration Award, without the express consent of the Union, without any express provision for such a payment schedule in the Arbitration Award, and without an appropriate provision for interest, constitutes a refusal to accept Arbitrator Shaw's Arbitration decision as final and binding, in violation of Secs. 111.06(1)(f) and (g), Wis. Stats.

ORDER 1/

That the Sparta Manufacturing Company shall immediately:

1. Cease and desist from refusing to process the grievance asserted by the Union in Mr. Soldon's letter of March 31, 1983.

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.
(Continued on Page 8)

2. Cease and desist from refusing to comply with the Arbitration decision issued by Arbitrator Shaw on March 7, 1983.

3. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   (a) Comply with the provisions of Article III, Section 3 of the collective bargaining agreement existing between it and the Laborers' International Union of North America, Local 140, AFL-CIO, with respect to the Union's March 31, 1983 grievance.

   (b) Notify the Laborers' International Union of North America, Local 140, AFL-CIO, that it will proceed to arbitration, if necessary, on the grievance set forth in (a) above.

   (c) Participate with the Laborers' International Union of North America, Local 140, AFL-CIO, in arbitration proceedings, if necessary, before an arbitrator with respect to the grievance set forth in (a) above.

   (d) Calculate the precise principal amount 2/ due each employe covered by Arbitrator Shaw's March 7, 1983 Award and offer each of those employes the principal amount so calculated and not yet paid, together with interest at a rate of 12% per year on the principal amount calculated from March 7, 1983 until the date of payment of the principal amount.

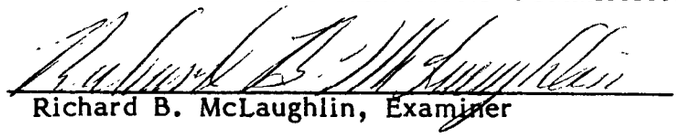
1/ (Continued)

(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 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 prejudiced because of exceptional delay in the receipt of a copy of any

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

Dated at Madison, Wisconsin this 10th day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions:

The first count of the Union's complaint turns on the Union's contention that: "The Company's refusal to arbitrate the March 31, 1983 grievance violates the collective bargaining agreement between the parties and section 111.06(1)(f) of the Wisconsin Employment Peace Act." That grievance, according to the Union, does not challenge the Company's right to close the machine shop, but does challenge the Company's asserted right to "unilaterally terminate" the machine shop employes. The Union argues that the Company's "termination" of these employes constitutes "simply an extention of a pre-existing layoff," which is governed by the parties' collective bargaining agreement. Thus, "the Company's unilateral termination of the machine shop employes violated Article V of the agreement and . . . the refusal to recall these employes to foundry operations constituted a further violation of Article V." Citing the Steelworkers Trilogy 3/, which embodies the federal substantive law the Commission must apply in this case, the Union asserts that the Examiner must not weigh the merits of the Union's grievance, but must compel the Company to arbitrate "unless he can say with positive assurance" that the grievance and arbitration clause of the parties' labor agreement does not cover it. Asserting the closing of the machine shop cannot be considered to have automatically terminated the parties' labor agreement, the Union contends that its March 31, 1983 grievance demands an arbitrator's interpretation of Article V, and is clearly arbitrable under the parties' agreement which does not expire until September 30, 1983. Regarding the remaining count of its complaint, the Union argues that: "Arbitrator Shaw's Award created a debt relationship between the Company and the employes, thereby making the Company immediately (sic) liable for the whole award or (sic) liable for the Award with interest." Citing cases from both districts of Wisconsin's federal courts 4/, the Union argues that the only way it can be made whole for the Company's failure to abide by Arbitrator Shaw's Award is for the Examiner to award the Union interest from the date of the Award. Because, in the Union's estimation, "the Company's asserted defense is entirely frivolous," the Union argues that it is entitled to attorney's fees and costs arising from its attempt to enforce Arbitrator Shaw's Award.

The Company urges, as a threshold issue, that "Complainants' grievances may well have been rendered moot by the plant closing under the holding of the Textile Workers Union 5/ case." Even if the March 31, 1983 grievance is not moot, the Company urges that it is not arbitrable because: "The contract contains no provision pertaining to the effects of a plant closing. What does not appear in the contract cannot be read into the contract under the guise of interpreting it." 6/ In this case, the Company urges that Article V grants seniority only to employes "during the existence of their positions with the Company," and "(w)ith

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3/ United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 593 (1960).

4/ Teamsters Local 446 v. Marathon County Farmer's Union Cooperative, 83 LRRM 2995 (W.D. Wis. 1973); Dieringer v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 278 F. Supp. 211 (E.D. Wis. 1968); Local Union 494 I.B.E.W. v. Art Kraft, Inc., 375 F. Supp. 129 (E.D. Wis. 1974); Meat & Allied Food Workers v. Packerland Packing Co., 411 F. Supp. 1280 (E.D. Wis. 1976); Peter Cooper Corp. v. United Electrical, Radio and Machine Workers of America, Local 1132, 472 F. Supp. 692 (E.D. Wis. 1979).

5/ Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448 (1957).

6/ Citing Briggs v. Electric Auto-Lite Company, 37 Wis. 2d 275 (1967).

the permanent closing of the machine shop, the positions which could be held by machine shop employes were obviously eliminated." Since, according to the Company, each section of Article V clearly delineates a complete separation between machine shop and foundry employes, it follows that "(a)ny applicable seniority rights do not flow between the machine shop and foundry under any reasonable interpretation of the seniority provisions." Regarding the remaining count of the Union's complaint, the Company asserts that it has not failed or refused to accept the conclusiveness of Arbitrator Shaw's Award. The testimony of the Company's President, in the Company's estimation, establishes that the Company "has made every reasonable effort within its financial capacity to make full payment of the sums due under the Award." Because there has been no showing of bad faith in this case, the Company contends that there is no basis for the imposition of the sanctions of attorney's fees or interest. In the alternative, the Company contends that any award of interest must be at the 5 percent annual rate established by Sec. 138.04, Wis. Stats.

Discussion:

The first count of the Union's two count complaint alleges that the Company violated Sec. 111.06(1)(f) of the WEPA by refusing to arbitrate a grievance filed by the Union on March 31, 1983. The second count alleges the Company violated Sec. 111.06(1)(f) and (g) of the WEPA by failing to immediately pay the amounts due under an Arbitration Award and by failing to pay interest from the date of that Award on any amounts not immediately paid. Each count is governed by federal substantive law. 7/

The federal law governing count one is traceable to the federal labor policy enacted in the National Labor Relations Act, and discussed by the Supreme Court in the Steelworkers Trilogy. These decisions were expressly incorporated into Commission law in Seaman-Andwall Corp., in which the Commission stated:

> In actions to enforce agreements to arbitrate, we shall give arbitration provisions in collective bargaining agreements their fullest meaning and we shall confine our function in such cases to ascertaining whether the party seeking arbitration is making a claim, which on its face, is governed by the contract. We will resolve doubts in favor of coverage. 8/

Before applying the Seaman-Andwall rule to the present case, it is necessary to address a threshold issue. The Company has alleged that the grievance the Union seeks to assert may have been mooted by the Company's closing of its machine shop. Mootness is a term applied to cases which raise purely abstract issues. Typically, the reference is made to cases which do not raise presently existing rights because events have rendered the asserted rights not susceptible of a remedy. In the Lincoln Mills case cited by the Company, the Supreme Court addressed a number of grievances regarding work assignment and workload, which were considered moot in part. The Court addressed the issues raised by those grievances in June of 1957, while the employer in that case had ceased all mill operations in March of 1957. The Court determined that insofar as the grievances sought restoration of job assignments and workloads they were moot, but that insofar as they sought backpay for the alleged contractual violations which had occurred before the mill closing, they were not. The distinction turned on the fact that the employes did not enjoy a presently existing right to certain work because all work in the mill had ceased, while the employes arguably did have a presently existing right to payment for past contractual violations by the employer.

7/ Charles Dowd Box Co., Inc. v. Courtney, 368 U.S. 502 (1962); Tecumseh Products Co. v. Wisconsin Employment Relations Board, 23 Wis. 2d 118 (1964); American Motors Corp. v. Wisconsin Employment Relations Board, 32 Wis. 2d 237 (1966). The parties stipulated that the Company's present operations fall within the jurisdiction of the National Labor Relations Board.

8/ Seaman-Andwall Corp., (5910) 1/62, at 18.

The present case is analagous to the grievances that sought backpay in the Lincoln Mills case, because the present grievance seeks to assert a presently existing right. The Company has not asserted that its closing of the machine shop automatically terminated the parties' collective bargaining agreement which, arguably, remained in effect at the time the March 31 grievance was asserted. Thus, the rights asserted by the Union cannot be considered to have been mooted by the closing of the machine shop since the rights, as argued, arose because of that closing and involve a presently existing right of machine shop employes to employment in the foundry which the Company continues to operate. Whether or not the machine shop employes in fact possess the asserted right is the issue the Union seeks to arbitrate, and the issue which must now be examined.

An order to arbitrate must be granted if the Union's grievance makes a claim which on its face is covered by the parties' collective bargaining agreement. The grievance would state such a claim if the arbitration clause is broad enough to cover the grievance, and if the collective bargaining agreement contains no specific bars to the arbitration of the grievance. 9/

Article III, Section 3(a) of the parties' agreement broadly defines a grievance as "any controversy between the parties" regarding "any matter involving the interpretation of this agreement, or any matter involving alleged violation of this agreement in which an employe or group of employes maintains that his or their rights or privileges have been impaired in violation of this agreement." The Union characterizes the Company's March 24, 1983, letter as an extension of a previously existing layoff, and claims that the employes of the machine shop have certain seniority rights under Article V which are being impaired by the Company's refusal to recognize the seniority rights of machine shop employes to employment in the foundry. The Union's contention states a controversy regarding the interpretation of Article V, and is arbitrable under Article III unless the parties' collective bargaining agreement contains a specific bar to the arbitration of the dispute.

Although none of the first five sections to Article V are specifically phrased to restrict the scope of the arbitration clause of Article III, the Company urges that each of those sections bars arbitration of the Union's grievance. Section 1 of Article V defines seniority as "the relative status of employes with respect to their length of service during employment." According to the Company, imparting this definition to machine shop employes violates this definition by granting rights which exist "during employment" to former employes. The Union counters that the definition defines rights which machine shop employes accrued "during employment" in the machine shop, and which can now be asserted because of the shop's closing. These conflicting contentions are each plausible, and demand an interpretation of Article V, Section 1. Since that section cannot be read as a specific bar to the arbitration of disputes under Article III, the resolution of these conflicting contentions must be left to an arbitrator.

Similar considerations apply to the Company's contentions regarding Section 5 of Article V. Both the Company and the Union note that this section covers an employe's loss of seniority rights. The Company characterizes its March 24, 1983 actions as a plant closing not addressed by Section 5, while the Union characterizes those actions as an extention of a layoff clearly governed by Section 5. If the Company's assessment of its March 24 actions is accurate, then the rule of interpretation employed in the Briggs case cited by the Company may prove to be persuasive. However, if the Union's assessment of the Company's actions is accurate, the Briggs approach is inapplicable. As the Company's citation to the rule of interpretation employed in the Briggs case implicitly acknowledges, a problem of the interpretation of Article V, Section 5 is present in this case, and the parties' collective bargaining agreement expressly reserves problems of contractual interpretation to an arbitrator. Since it cannot be said that either party's view of Article V, Section 5 is not plausible, a resolution of the appropriate assessment of the Company's March 24, 1983 actions in light of Article V of the parties' agreement must be reserved to an arbitrator.

9/ Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis. 2d 94, 111 (1977). The Wisconsin Supreme Court adopted the Steelworkers Trilogy in Dehnart v. Waukesha Brewing Co., Inc., 17 Wis. 2d 44 (1962).

The Company's remaining arguments regarding a specific bar to the Union's grievance concern Sections 2, 3 and 4 of Article V. The Company urges that these sections, read together and in conjunction with Section 1, "unequivocally" separate the Company's workforce into two separate categories of employes who possess no contractual rights against each other. The Union has not expressly addressed these three sections, but even the absence of such argument does not establish that any of these sections constitute a specific bar to the arbitration of the present grievance. Section 2 refers to departmental seniority and layoff, but Section 3, on its face, recognizes "exceptions to this layoff procedure . . . by mutual consent," and Section 4 deals with the hire of "additional employes" and does not expressly incorporate either Section 2 or Section 3. While it can be said that if the Company's reading of these sections is correct, a machine shop employe would not possess any transfer rights versus foundry employes, it cannot be said with positive assurance that this is the only plausible interpretation of those sections. Even if the Company's interpretation of Section 2 is accepted to define two separate categories of employes, it is arguably possible that transfer rights of machine shop employes could have been recognized by mutual consent under Section 3, or could be recognized against new hires into the foundry under Section 4. Because conflicting and plausible interpretations of these sections exist, the interrelationship and interpretation of Sections 2, 3 and 4 present questions for an arbitrator.

In sum, the definition of grievance at Article III, Section 3 of the parties' agreement is broad enough to encompass the Union's claim that machine shop employes have transfer rights against foundry employes. Since none of the provisions of Article V can be considered to specifically bar the Union's grievance without impermissibly drawing the Examiner into the contractual merits of the parties' contentions, the present grievance must be considered arbitrable.

Count two of the Union's complaint concerns the Company's compliance with an Arbitration decision issued on March 7, 1983 which awarded vacation payments to certain Company employes. The Company, in a meeting with the Union regarding compliance with this decision, proposed a payment schedule for the discharge of the obligation created by the Award. The Union did not agree to this payment schedule, but the Company ultimately implemented the payment schedule noted above in the Findings of Fact. The Union's grievance regarding vacation pay created a disputed liability which was resolved by the March 7, 1983 Award. 10/ The issuance of that Award created a debtor/creditor relationship between the Company and the Union. The Company has not disputed the existence of this relationship, and has not disputed the propriety of the Arbitration Award, but has asserted that it was financially incapable of making payments in any other fashion than that reflected in the payment schedule noted above.

For reasons which will be further discussed below, the Company's argument of its inability to pay cannot be accepted as defense to its liability under the March 7 Arbitration Award. Before addressing these reasons, however, a threshold issue should be addressed. The Company attempted to establish its inability to pay based solely on the uncorroborated testimony of its President. While the President was a credible witness, a defense as complex as the inability to pay should not, in any event, turn solely on an Examiner's perception of witness credibility without corroborative data.

As noted above, however, the Company's inability to pay the liability created by the Arbitration decision should not be considered a defense. This proposition is supported by some prior cases of the Commission, and of the National Labor Relations Board. 11/ Because the prior Commission cases have not placed an employer's claimed inability to pay squarely before the Commission, some discussion on the point is necessary.

10/ See Madison Metropolitan School District, (16471-D) 5/81 at 11. The review of that decision by the Court of Appeals District IV (No. 82-579, 10/83) does not affect the impact of that case on the present matter.

11/ Typography Unlimited and Kenosha Typographers, Inc., (19218-A) 11/82; F. Taff Company, Inc., (12478) 2/74; Food Queen Stores, Inc., (13860-A) 1/76; Oak Cliff-Golman Baking Company and Bakery & Confectionary Workers International Union of America, AFL-CIO, Local No. 111, 202 NLRB 614 (1973); Second Decision and Order 207 NLRB 1062 (1973), Board Order enforced 90 LRRM 2615 (Fifth Cir. 1974); Certiorari denied 90 LRRM 2614.

Under the WEPA, the Commission is not an appropriate forum for the resolution of an employer's claimed inability to pay a contractual obligation. The WEPA was enacted to encourage "voluntary agreement between employer and employes," 12/ and "to provide a convenient, expeditious and impartial tribunal" 13/ by which employer/employe rights and obligations can be ajudicated. Incorporating the Company's ability to pay into the present litigation of Secs. 111.06(1)(f) and (g) of the WEPA would only frustrate these purposes. Accepting the defense would introduce a complex and inevitably time-consuming area of litigation into the Commission's administration of the WEPA. The effect of this would delay the ajudication of WEPA cases, and thus would frustrate the "expeditious" resolution of such matters.

While the delay attendant to this area of litigation could be accepted if it would further the other purposes of the WEPA, recognizing the inability to pay as a defense would not. The WEPA was enacted to foster consensual means for the resolution of employer/employe disputes wherever possible, and to provide expeditious and final resolution of those controversies which cannot be voluntarily resolved. Whether, or at what rate, the Company has the ability to pay a contractual obligation to its employes is a complex business decision best left to the parties most immediately concerned with that issue to address in the negotiations process. In this case collective bargaining regarding the Company's ability to pay the vacation compensation occurred at the time the parties entered into the collective bargaining agreement, and after the receipt of the Arbitrator's Award. An Examiner's decision regarding the Company's ability to comply with the Arbitrator's decision could serve to reduce the incentive for meaningful collective bargaining, since the Company's contractual obligation could be forestalled or avoided by the unbargained expedient of the Examiner's decision. Thus, recognizing the ability to pay defense would not further the negotiations processes the WEPA seeks to foster.

Even when, as in this case, collective bargaining does not produce a resolution of the ability to pay issue, the Commission does not become an appropriate forum to resolve the issue. Under Secs. 111.06(1)(f) and (g) of the WEPA, the Commission is empowered to make and to enforce decisions resolving employment relations disputes. The issue regarding the Company's ability to pay, however, raises questions which are most accurately characterized not as employment relations controversies, but as controversies regarding debtor/creditor relations. Questions regarding the appropriate allocation of a Company's limited resources to its creditors are not addressed by the WEPA, and are best reserved to the forums statutorily empowered to oversee the rescheduling of debts or the partial or full discharge of conflicting creditor's claims. For an Examiner to hazard an opinion regarding an appropriate debt repayment schedule would take the Commission far beyond the area of expertise created for it by the WEPA. In sum, the Company's ability to pay the obligation created by the Arbitrator's Award should not be considered a defense under the WEPA.

The Union's request for interest has been addressed by various forums. In actions to compel compliance with an arbitrator's award, the federal courts for both the Eastern and Western Districts of Wisconsin 14/ have included interest from the date of the issuance of the award. The Commission, in an analagous setting, stated that it would grant interest "(i)n complaint cases seeking enforcement of arbitration awards . . . on the sum of money due and owing under the award, from the date on which the award was received by the parties owing said monies." 15/ In light of the federal court decisions, and because those decisions do not raise a question of fact regarding the date of an award's receipt, interest in this case has been awarded from the date of the issuance of the Arbitration

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12/ Sec. 111.01(3), Wis. Stats.

13/ Sec. 111.01(4), Wis. Stats.

14/ Supra, footnote 4. See also Stroh Diecasting Co., Inc. v. International Association of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 10, 553 Fed. Supp. 68 (E.D. Wis. 1982).

15/ Madison Metropolitan School District, (16471-D) 5/81, at 11.

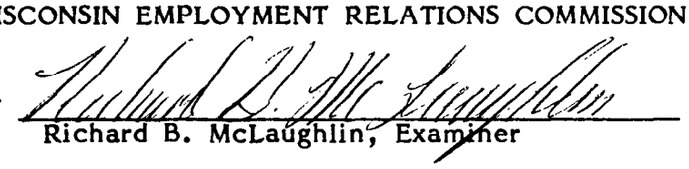
Award. The question regarding the appropriate rate of interest is addressed by the Stroh case, in which the court awarded interest on an arbitration award at a rate of 12 percent per year. This approach is consistent with the Commission's approach in Madison Metropolitan School District. 16/

In both forums, the award of interest was not considered a punitive measure, but an essential feature of a make whole remedy by which the injured party was to be restored as closely as possible to the position that party would have been in had the award been complied with.

The final matter in dispute concerns the Union's request for the attorney fees and costs necessitated by its enforcement action. As with the issue regarding interest, this issue is governed by prior cases. In Madison Metropolitan School District, the Commission set forth its policy regarding the award of attorney's fees and costs thus: "No attorney's fees nor costs will be granted unless the parties have agreed otherwise or unless the Commission is required to do so by specific statutory language." 17/ The Madison case drew upon United Contractors, Inc., 18/ in which this policy was discussed at length regarding Section 301 actions such as the present matter. The Union has cited various cases including Local No. 149, International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America (UAW, AFL-CIO) v. America Brake Shoe Company, 298 F. 2d 212 (1962), to indicate that the federal courts follow a different policy which the Commission should adopt. The cases cited by the Union all draw on the principles expressed in American Brake Shoe. That case was cited to the Examiner in the United Contractors, Inc. case, and the Examiner extensively examined the principles expressed in American Brake Shoe in light of the Commission's policy against the award of attorney's fees and costs. As noted above, that analysis was expressly approved by the Commission in Madison Metropolitan School District. Since the Union has contended that the rule in American Brake Shoe and subsequent cases is preferable to Commission policy, and since the Commission, in Madison Metropolitan School District and in United Contractors, Inc., has expressly declined to adopt that rule, this issue cannot be considered in doubt. Since neither the WEPA nor the parties agreement contains any provision for the award of attorney's fees and costs, and since the parties have not otherwise agreed to such an award of the attorney's fees and costs, no award of such costs has been made.

Dated at Madison, Wisconsin this 10th day of November, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

16/ Ibid. The Commission, in that case, looked to Chapter 815, Wis. Stats., for guidance regarding the issue of interest in a complaint case seeking enforcement of an arbitration award. Section 815.05, Wis. Stats., provides for an annual interest rate of 12 percent.

17/ Ibid at 10.

18/ United Contractors, Inc., (12053-A) 12/73.