STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

NORTHLAND COLLEGE EMPLOYEES LOCAL 216-G, AFSCME, AFL-CIO, Complainant, vs. NORTHLAND COLLEGE, Respondent.	Case 7 No. 33713 Ce-2005 Decision No. 22094-B

Appearances:

Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, 110 East Main Street, Madison, Wisconsin 53707-3354, appearing on behalf of the Complainant.

Clark & Clark, Attorneys at Law, by Mr. Scott W. Clark, 214 West Second Street, P. O. Box 389, Ashland, Wisconsin 54806-0389, and DeWitt, Sundby, Huggett, Schumacher & Morgan, S.C., Attorneys at Law, by Mr. Fred Gants, 121 South Pinckney Street, P. O. Box 2509, Madison, Wisconsin 53701, appearing on behalf of the Respondent.

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

Examiner Sharon A. Gallagher having, on September 26, 1985, issued Findings of Fact, Conclusions of Law and Order in the above matter, wherein she concluded Respondent's refusal to arbitrate a grievance violated Sec. 111.06(1)(f), Stats., and therefore ordered Respondent to take certain remedial action; and Respondent having, on October 7 and 16, 1985, timely filed petitions with the Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats.; and the parties thereafter having filed written argument, the last of which was received February 7, 1986; the Commission, having reviewed the record, the Examiner's decision, and the parties' briefs, has concluded that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified as follows and, as modified, adopted as the Commission's Findings of Fact, Conclusions of Law and Order.

MODIFIED FINDINGS OF FACT

1. That Northland College Employees Local 216-G, AFSCME, AFL-CIO, herein the Complainant, is a labor organization which functions as the exclusive collective bargaining representative of certain employes of Northland College and has its principal offices at Route 1, Box 2, Brule, Wisconsin 54820; and that, at all times material herein, James Ellingson was Complainant's principal representative.

2. That Northland College, herein the Respondent or the College, is an employer and has its principal offices at 1411 Ellis Avenue, Ashland,

Step I The aggrieved employee and Union Steward will discuss the problem with the immediate Supervisor.

Step II. If not settled in Step I, the grievance shall be submitted to the Business Manager/Treasurer of the College.

Step III. If not settled in Step II, the grievances shall be the subject of mediation, unless both parties agree to waive mediation and go directly to Step IV.

Step IV. If not settled in Step III, the grievance shall be submitted to Arbitration.

Arbitration: Any dispute or grievance arising out of or relating to this Agreement shall be submitted to an Arbitration Board. The arbitration board shall consist of three (3) members - one to be named by the College, the second member to be named by the Union, and the third member, who shall act as chairperson of the arbitration board, shall be appointed by the Wisconsin Employment Relations Commission from their staff. The College and the Union agree that the decision of the arbitration board shall be considered final and binding. Each party shall bear the cost of members named by them, and share equally the cost of the third member.

. . .

ARTICLE XXIV

. . .

2. Termination. This agreement will remain in effect from July 1, 1982 through June 30, 1984. Either party may terminate this Agreement, provided that such termination is transmitted through the U.S. mails to the responsible signatories to this Agreement. In no case may termination notice be sent less than thirty (30) days prior to the termination date.

3. Renewal. Should neither party to this Agreement send a notice of termination as described in Section 2 of this Article, this Agreement will be considered to have been automatically renewed for another calendar year.

4. Negotiations may be conducted at any time upon thirty (30) days written notice but the effective date of such negotiation will be June 30 of any such year.

5. Changes. Should either party to this Agreement wish to inaugurate collective bargaining discussions over changes they may wish to introduce into this Agreement, it is agreed that notice of the substance of the changes and the language with which said desired changes are to be expressed, shall be mailed to the authorized parties signatory to this Agreement prior to thirty (30) days before the termination date of this Agreement. The parties receiving such notice of desired changes shall forthwith seek establishment of a meeting of the parties for the purpose of discussion and amicable accommodation for the desired changes. Should no amicable settlement be forthcoming with (sic) the thirty (30) day period to the termination date, the parties shall jointly submit the disputed section of the Agreement to mediation and, if necessary, arbitration. Decision of the Arbitration Board shall be binding upon the parties as described in Article VIII on Grievance Procedure.

6. Through the process of the Arbitration Board's effort, this Agreement shall remain in full force and effect.

4. That during the term of the parties' 1982-1984 contract, a dispute arose between the Complainant and Respondent over Respondent's desire to subcontract certain custodial work being performed by employes of Respondent who were covered

by the 1982-1984 contract; that the parties were unable to reach a mutually satisfactory resolution of the subcontracting dispute; that the parties were also unable to reach agreement on a successor to the 1982-1984 contract; that in June 1984, Complainant representative Ellingson sought to invoke the interest arbitration proceedings outlined in Article XXIV of the 1982-1984 contract by submitting Complainant's final offer regarding the terms of a successor agreement to Respondent and asking the Wisconsin Employment Relations Commission to send the parties a panel of arbitrators; that Respondent representative Clark responded by directing the following letters dated June 27, 1984, to Complainant representative Ellingson and the Wisconsin Employment Relations Commission, respectively.

Mr. James A. Ellingson
District Representative
Wisconsin Council 40
AFSCME, AFL-CIO
Route 1, Box 2
Brule, Wisconsin 54820

Re: Custodial Termination - Local 216-G

Dear Mr. Ellingson:

I have received your letters of June 25, 1984.

Enclosed you will find a copy of the letter I have written to the Wisconsin Employment Relations Commission in response to yours of June 25, 1984.

As was stated to you on June 19, 1984, the college will not arbitrate the issue of termination of the custodians. We have attempted in good faith to sit down with you and rationally discuss the contract which will exist for the maintenance/watchmen beginning July 1, 1984, and the impact of the custodial termination on those affected college employees. We do not believe that you have given any good faith effort to negotiate the maintenance/watchmen contract or impact on the custodians.

Northland College urges you to take a realistic view of the state of affairs including the severe financial constraints under which the college is operating which resulted in the custodial termination among other cutbacks. You should know that the situation is not within the jurisdiction of the Wisconsin Employment Relations Commission and that you may not "shoehorn" Northland College into public sector labor law.

Your June 25, 1984 "final offer" is, of course, rejected. If you wish, the college will implement its last offer to the maintenance/watchmen as of July 1, 1984. If you do not wish that to take place, I would urge you to contact either myself or Mr. Haukaas to arrange for a meeting at which time we can have some meaningful and hopefully productive discussion on the relevant issues.

. . .

Mr. Herman Torosian, Chairman
Wisconsin Employment Relations Commission
14 West Mifflin Street
Post Office Box 7870
Madison, Wisconsin 53707-7870

Re: AFSCME Local 216G - Northland College Custodial and Maintenance Employees

Subject: Letter of Mr. James Ellingson dated June 25, 1984

Dear Mr. Torosian:

I have received a copy of Mr. Ellingson's June 25, 1984 letter to you.

Please be advised that Northland College formally objects to the attempt on the part of AFSCME Local 216G to attempt to have the Wisconsin Employment Relations Commission take jurisdiction over this matter.

There is no question that the parties are not governed by the Wisconsin Employment Relation (sic) Act or the arbitration procedures set forth therein. The parties are under the jurisdiciton of the National Labor Relations Board.

Previously, one of your staff mediators, Robert McCormick, was invited to assist the parties in their efforts to mediate their differences. You may obtain further details regarding Mr. McCormick's involvement by speaking with him and reviewing my letter to him dated April 12, 1984, with its extensive enclosures. Unfortunately, and in spite of Mr. McCormick's good efforts, the parties have been unable to resolve their differences.

No disrespect intended, Northland College will decline any attempt on the part of the Wisconsin Employment Relations Commission to exercise jurisdiction over the interest arbitration proposed by Mr. Ellingson. Mr. Ellingson is clearly in the wrong forum when dealing with the Wisconsin Employment Relations Commission.

If you have any further questions or need any additional information, please feel free to contact me.

. . .

5. That in response to Clark's June 27, 1984 letter to the Wisconsin Employment Relations Commission, the Complainant sent the following letter dated June 29, 1984, to Respondent:

Harvey Haukaas
Administrator
Northland College
Ashland, Wisconsin 54806

Dear Mr. Haukaas:

I am in receipt of the enclosed letter from Scott Clark to Herman Torosian, Commissioner of the Wisconsin Employment Relations Commission. Mr. Scott has refused as representative of Northland College to go to arbitration under ARTICLE XXIV (3) (5) (6).

Therefore this letter will serve as a grievance of the refusal of the College to proceed to interest arbitration. Since Mr. Wick has been fired by the College, I am submitting the grievance to you at Step II of the Grievance Procedure.

. . .

and that in response to Ellingson's June 29, 1984 letter to Respondent, Clark sent Ellingson the following letter:

. . .

Your letter of June 29, 1984, directed to Mr. Haukaas regarding your purported grievance, has been referred to my office for response.

Your so called grievance is, of course, denied.

Your attempt to indirectly have the issue of the termination of the college custodian arbitrated when it may not be done directly, will not be successful.

As both myself and college representatives have repeatedly informed you, we have all intentions of complying with our obligations under the law and the collective bargaining agreement, however, as far as the college is concerned the issue of the termination of the custodian is

closed for all purposes. It would seem that before any arbitration or other dispute resolution procedures would be applicable, the parties must negotiate to impass (sic) on the issues of the maintenance workers' contract, beginning July 1, 1984 and impact of the custodial termination. As we have mentioned in prior correspondence to you, no meaningful discussions have ever been held on those points.

If you have any desire of negotiating on those issues only, please contact either myself or Mr. Haukaas to arrange for a bargaining session.

. . .

6. That Respondent refuses to process Ellingson's June 29, 1984 claim that Respondent improperly refused to proceed to interest arbitration through the Article VIII grievance procedure in the 1982-1984 contract or to proceed to grievance arbitration of said claim under Article VIII of said contract.

Based upon the above and foregoing Modified Findings of Fact, the Commission makes and issues the following

MODIFIED CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission has concurrent jurisdiction with federal district courts to enforce collective bargaining agreements covering employes in industry affecting commerce.

2. That Ellingson's June 29, 1984 letter asserting that Respondent improperly refused to proceed to interest arbitration raises a claim which, on its face, constitutes a "misunderstanding or dispute . . . as to the interpretation of any provision of this Agreement to any given situation" under Article VIII (1) of the parties' 1982-1984 contract; that said claim is not clearly excluded from arbitration under Article VIII (Step IV) of the parties' 1982-1984 contract; and that the claim is therefore substantively arbitrable.

3. That by refusing to process Ellingson's June 29, 1984 claim that Respondent improperly refused to proceed to interest arbitration through the Article VIII contractual grievance procedure contained in the parties' 1982-1984 contract, and by refusing to arbitrate said claim under Article VIII of said contract, Respondent has committed and is committing an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats.

4. That, given the presence of grievance arbitration provisions in the parties' 1982-1984 contract which the parties have established for resolution of issues regarding contractual compliance, the Commission will not exercise its jurisdiction over the merits of Complainant's allegation that Respondent committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to proceed to interest arbitration.

Based upon the above and foregoing Modified Findings of Fact and Modified Conclusions of Law, the Commission makes and issues the following

MODIFIED ORDER 1/

That Respondent, Northland College, its officers and agents, shall immediately.

1. Cease and desist from violating a collective bargaining agreement

1/ (Footnote continued from Page 5)

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.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

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.

2. Take the following affirmative action which the Commission finds will effectuate the purposes of the Wisconsin Employment Peace Act:

   (a) Notify the Northland College Employees Local 216-G, AFSCME, AFL-CIO, that Respondent, Northland College, will proceed to process the June 29, 1984 Ellingson claim through the contractual grievance procedure including the arbitration of said claim, as specified in Article VIII of the parties' 1982-1984 contract.

   (b) Upon the request of Northland College Employees Local 216-G, AFSCME, AFL-CIO, proceed to process the June 29, 1984 Ellingson claim through the contractual grievance procedure, including, if necessary, the arbitration of said claim, as specified in Article VIII of the parties' 1982-1984 contract.

   (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order as to the steps Respondent, Northland College, has taken to comply with this Order.

Given under our hands and seal at the City of Madison, Wisconsin this 23rd day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By
Herman Torosian, Chairman

Marshall L. Gratz, Commissioner

Danae Davis Gordon, Commissioner

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

BACKGROUND:

The complaint alleges that Respondent Northland College violated its 1982-1984 collective bargaining agreement with Complainant, and thus violated Sec. 111.06(1)(f), Stats., by refusing to proceed to grievance arbitration over a claim that Respondent violated the agreement by refusing to proceed to interest arbitration over the terms of a successor agreement. The complaint also asserts that Sec. 111.06(1)(f) was violated by Respondent's refusal to proceed to interest arbitration. Complainant requested that an order be issued requiring Respondent to submit the grievance to arbitration and/or to submit the proposed contract changes to interest arbitration as required by the contract.

Respondent filed an Answer denying that it had violated Sec. 111.06(1)(f), Stats., and a Motion to Dismiss asserting that the Commission lacked jurisdiction over the dispute and that actions of the National Labor Relations Board (NLRB) were, in any event, res judicata as to Complainant's allegations.

The Examiner concluded that the Commission had jurisdiction over Complainant's allegations; that proceedings before the NLRB were irrelevant to the proceedings before the Commission; and that Respondent's refusal to process Complainant's grievance regarding interest arbitration was violative of Sec. 111.06(1)(f), Stats. She ordered Respondent to take certain remedial action.

Respondent timely sought Commission review of the Examiner's decision. Respondent argues that the Examiner should be reversed because:

1. Respondent's right to subcontract is a matter of federal labor policy and any exercise of Commission jurisdiction over the instant complaint is pre-empted because it restricts and interferes with said right.

2. Respondent has met its obligation under federal labor policy to bargain over the subcontracting of custodial work, and the Commission lacks jurisdiction to restrict the Respondent's right to subcontract through enforcement of an interest arbitration provision.

3. Even if the Commission has jurisdiction over the complaint, the Respondent is not obligated to proceed to arbitration because it had acquired the right to subcontract under the provisions of the 1982-1984 contract and met any bargaining obligation imposed by federal labor law. Complainant's grievance is not arbitrable because Respondent cannot be compelled to submit to arbitration its previously earned right to subcontract.

4. Complainant waived any right to arbitrate the subcontracting issue by failing to bargain over said matter with Respondent.

5. Complainant has not bargained in good faith over the terms of a successor agreement and therefore has not satisfied the condition precedent to the exercise of the right to proceed to interest arbitration.

Complainant asserts that the Commission should affirm the Examiner's decision.

DISCUSSION:

In our view, the issues actually raised by the complaint filed in this matter are quite limited. Said issues are whether Respondent College violated Sec. 111.06(1)(f), Stats., by (1) refusing to proceed to grievance arbitration over a claim that the College was violating the parties' contract by refusing to proceed to interest arbitration, and (2) by refusing to proceed to interest arbitration.

When litigating these issues the parties presented substantial amounts of evidence regarding the underlying subcontracting dispute and ancillary litigation before the NLRB. The Examiner properly concluded that such evidence was essentially irrelevant to the disposition of the legal issues before her. We have modified her Findings to delete those which are not relevant so that our decision properly reflects the very limited nature of the dispute before us. We turn now to the matters raised by the College in its Petition and supporting briefs.

In our view the College's jurisdictional arguments seek to overturn certain long-established labor law. Section 301(a) of the Labor Management Relations Act of 1947 confers jurisdiction upon federal district courts over suits for violation of contract between employers in industries affecting commerce and labor organizations representing such an employer's employes for the purposes of collective bargaining. In Dowd Box v. Courtney, 368 U.S. 52 (1962), the United States Supreme Court held that Section 301(a) does not divest state courts of jurisdiction over such suits. However, state courts are obligated to apply legal standards which are consistent with federal case law developed in Section 301 actions. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Local 174, Teamsters Union v. Lucas Flour, 369 U.S. 95 (1962). In Tecumseh Products Co. v. WERB, 32 Wis.2d 118 (1963), the Wisconsin Supreme Court concluded that Sec. 111.06(1)(f), Stats., gives this agency concurrent jurisdiction with state courts to resolve Section 301 disputes in Wisconsin. Given the foregoing and the absence of a timely removal to federal district court, it is clear to us that we have jurisdiction over the Union's Sec. 111.06(1)(f) allegations. Nothing in Machinists and Aerospace Workers v. WERC, 427 U.S. 132 (1976), suggests or requires a contrary conclusion.

The United States Supreme Court has also rejected the same argument raised by the College herein regarding the jurisdictonal impact upon Section 301(a) suits of the involvement of the National Labor Relations Board in some aspects of the parties' overall dispute. In Smith v. Evening News Assn., 371 U.S. 195 (1962), the Court held that the Board's jurisdiction does not displace that of a competent Section 301 tribunal. We also note that the issue properly before this agency is whether the College's refusal to arbitrate the grievance alleging failure to proceed to interest arbitration is violative of Sec. 111.06(1)(f), Stats. As the Examiner correctly noted, the Board has no jurisdiction to dispose of that issue. Having addressed Respondent's arguments regarding our jurisdiction, we turn to Respondent's contentions regarding the duty to process and arbitrate the Ellingson claim.

We affirm the Examiner's determination that the College's refusal to arbitrate the Ellingson claim is violative of Sec. 111.06(1)(f), Stats. Applying Section 301 law, she properly cited the following language from United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582-83 (1960).

> . . . the judicial inquiry under Section 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. All doubts should be resolved in favor of coverage.

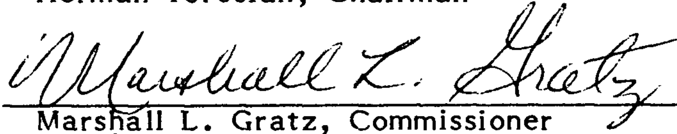
The continuing validity of the foregoing principles of law was recently affirmed by the United States Supreme Court in AT & T Technologies, Inc. v. Communication

process the Ellingson claim through the grievance procedure including arbitration, if necessary, and violated Sec. 111.06(1)(f), Stats., by failing to do so. 2/ While we hereby find the grievance substantively arbitrable, consistent with our obligation under Section 301 law, we, of course, leave the issue of whether Respondent's refusal to proceed to interest arbitration was improper to the grievance arbitrator for resolution. Thus, we do not resolve Respondent's arguments herein that Complainant has not met the conditions precedent to interest arbitration or is not otherwise entitled to proceed to interest arbitration as such arguments are properly addressed to the grievance arbitration forum.

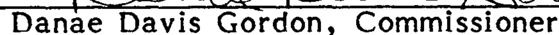
The Examiner was somewhat ambivalent in her handling of the merits of the Complainant's allegation that the College violated Sec. 111.06(1)(f), Stats., by refusing to proceed to interest arbitration. While addressed in her Finding of Fact 18 and paragraph 2(d) of her Order, and page 11 of her Memorandum, no Conclusion of Law addresses the merits of this allegation. We have made a Conclusion of Law holding that, given the presence of the contractual grievance arbitration procedure set forth in Finding of Fact 4, the Commission will not exert its jurisdiction over this allegation. Where the labor organization has bargained an agreement with the employer which contains a procedure for final impartial resolution of disputes over contractual compliance, the Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims 3/ because of the presumed exclusivity of the contractual procedure and a desire to honor the parties' agreement. Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974); United States Motors Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55). Such a conclusion is, in our view, consistent with the Section 301 law we are obligated to apply in this proceeding. See, Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962); Drake Bakeries v. Bakery Workers, 370 U.S. 254 (1962); Smith v. Evening News Assn., 371 U.S. 195 (1962).

Dated at Madison, Wisconsin this 23rd day of May, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Herman Torosian, Chairman

Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

2/ We have substantively modified the Examiner's Order only to remove paragraph 2(d) thereof which is premature because the Respondent's obligation, if any, to proceed to interest arbitration will be determined through the grievance arbitration proceedings ordered herein.

3/ Exceptions to this policy include instances where (1) the employe alleges denial of fair representation, Wonder Rest Corp., 275 Wis. 273, (1957); (2) the parties have waived the arbitration provision, Allis Chalmers Mfg. Co., Dec. No. 8227 (WERB, 10/67); and (3) a party ignores and rejects the arbitration provisions in the contract, Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).