STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE 655, Complainant, vs. CONSOLIDATED PAPERS, INC., CONSOWELD CORPORATION, Respondent.	Case 4 No. 36532 Ce-2038 Decision No. 23593-C

Appearances:

Shneidman, Myers, Dowling, Blumenfield & Albert, Attorneys at Law, by Mr. Howard W. Myers, Suite 1200, 735 West Wisconsin Avenue, P.O. Box 442, Milwaukee, Wisconsin 53201-442, appearing on behalf of the Complainant.

Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by Mr. Robert E. Mann, 55 East Monroe Street, Chicago, Illinois 60603, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 655 having, on February 13, 1986, filed a complaint with the Wisconsin Employment Relations Commission, hereinafter the Commission, alleging Consolidated Papers, Inc., Consoweld Corporation, had committed unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act, herein WEPA; and the Commission having, on May 1, 1986, appointed David E. Shaw, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held in Wisconsin Rapids on July 25, 1986; and the parties having filed briefs which were exchanged on October 3, 1986; and the Examiner having considered the evidence and the arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge 655, hereinafter referred to as the Union, is a collective bargaining representative within the meaning of Sec. 111.02, Stats., and its principal offices are located at 8940 South Park Road, Wisconsin Rapids, Wisconsin 54494.

2. That Consolidated Papers, Inc., Consoweld Corporation, hereinafter referred to as the Employer, is an employer within the meaning of Sec. 111.02, Stats., and its principal offices are located at P.O. Box 50, Wisconsin Rapids, Wisconsin 54494.

3. That at all times material hereto, the Union and Employer were parties to a collective bargaining agreement effective May 1, 1984 through April 30, 1987; that said agreement provides for the final and binding arbitration of grievances arising thereunder; that the Union filed a grievance dated April 5, 1983 over the Employer's failure to assign a millwright to change fiber rolls on the Number 77 Supercalendar; and that the grievance was processed through the grievance procedure to arbitration.

4. That Arbitrator James L. Stern issued an award under the date of July 16, 1985, wherein he stated the issue before him as follows:

"Did the Company violate the Agreement by not assigning a Millwright to change fiber rolls on the #77 supercalendar?";

that Arbitrator Stern in rendering his award noted:

> For the reasons explained below, the arbitrator will find that the work of changing fiber rolls on #7 is millwright work. In doing so, however, the arbitrator wishes to make clear that he is not finding that this work is skilled millwright work which in the absence of Side Agreement #1 and the practice interpreting it, would have been found by the arbitrator to be millwright work.
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> . . .
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> Roll change on #s 1 through 6 have in the past been considered millwrights' work. It should be stressed that this includes roll changes in which bearing changes were involved and roll changes in which it was not necessary to change the bearing housing. The Company did not rebut the Union claim that millwrights were involved in roll changes on all supercalendars except the new #7 even though, under the Company argument in its brief, there was no need for the use of a millwright when a bearing housing change was not required. As was brought out in the testimony of Company witness Bergin, there wasn't a need in the strictest sense for the use of a millwright on #4 when a bearing wasn't changed but one was used anyway as a matter of accommodating the Union. (See Tr. 52).
>
> The arbitrator does not dispute the Company claim that the technology has changed since the negotiation of the Side Agreement. However, since the Company has continued to use millwrights on the numbers 1-6 even though a bearing change was not involved, the Company needs to show that the roll change on #7 differed from roll changes on the other supercalendars in some material respect other than the absence of bearing changes. The arbitrator was not persuaded by the evidence presented to him that the #7 supercalendar roll change differed substantially from the roll changes without bearing changes being made on the other six calendars.
>
> The arbitrator therefore will uphold the grievance. In doing so, the arbitrator wishes to note that the Union is not asking for compensation for this violation of the Agreement and further that the Union, by agreeing in its brief that "if the Company intended to change this past practice or change Side Agreement No. 1, they should have negotiated this with the union" implies it recognizes that the technology may have changed sufficiently to warrant a revision in Side Agreement #1.;

and that the Arbitrator made the following award;

AWARD

> After due consideration of the testimony, exhibits and arguments of the Company and the Union, the arbitrator finds for the reasons explained above that the changing of fiber rolls on the #77 supercalendar is Millwright work.

5. That subsequent to the receipt of the Arbitrator's Award, the Employer assigned a millwright to roll changes on the #77 supercalendar; however, the Employer directed that the millwright have no active participation in the roll change; and that since the receipt of the award the entire roll change procedures on #77 supercalendar have been performed by the operator, helper and spare hand assigned to the machine and the millwright has only obsevered their activities and has performed no physical work.

6. That by its failure to assign the Millwright any physical work during a roll change on #77 supercalendar, the Employer has failed and continues to refuse

to comply with the terms of the July 16, 1985 Arbitration Award of Arbitrator Stern.

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

CONCLUSION OF LAW

That the Employer, by its refusal to comply with the terms of the July 16, 1985 Arbitration Award, has committed and is committing an unfair labor practice within the meaning of Sec. 111.06(1)(f) of WEPA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the Employer, its officers and agents, shall immediately:

1. Cease and desist from refusing to comply with the terms of the July 16, 1985 Arbitration Award issued by Arbitrator Stern.

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

   (a) Comply with the July 16, 1985 Arbitration Award by assigning millwrights physical work in connection with roll changes on #77 supercalendar.

   (b) Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked Appendix "A". The notice shall be signed by the Employer, and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Employer to ensure that said notices are not altered, defaced or covered by other material.

   (c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 26th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner

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

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition

(Footnote 1 continued Page 4)

(Footnote 1 continued)

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 submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. We will implement the terms of the July 16, 1985 Arbitration Award issued by Arbitrator Stern by assigning physical work to millwrights on a roll change on #77 supercalendar in accordance with the terms of said Award.

2. WE WILL NOT refuse to comply with the terms of a valid Arbitration Award.

Dated this _____ day of _____, 1987.

By_____
Consolidated Papers, Inc.,
Consoweld Corporation

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

CONSOLIDATED PAPERS, INC.,
CONSOWELD CORPORATION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

In its complaint initiating these proceedings, the Union alleged that the Employer committed an unfair labor practice by refusing to comply with a July 16, 1985 Arbitration Award issued by Arbitrator Stern. The Employer answered the complaint denying that it had refused to comply with the Arbitration Award.

UNION'S POSITION

The Union contends that the Employer's implementation of the Award constitutes bad faith non-compliance with it. It submits that the Award is clear and unambiguous and requires continuation of the practice of having millwrights physically change rolls as required by the historical interpretation of Side Agreement #1. It points out that the Arbitrator stated that the work of changing rolls was millwright work which is susceptible of only one meaning, i.e. to engage in the physical work of changing the rolls. It claims that the Employer's mere assignment of a millwright to the area of a roll change to do nothing is not supported by the language of the Award. It asserts that the Arbitrator's reliance on past practice demonstrates that he intended that the past practice of millwrights physically changing rolls be maintained. It alleges that there is no past practice of having a millwright merely present and Side Agreement #1 requires more than the mere presence of the millwright. The Union argues that the Employer has deliberately circumvented the obvious intent of the Arbitration Award so as to make Side Agreement #1 meaningless.

The Union maintains that the Employer cannot defend its actions on the basis that it is paying the millwright to be present for a roll change as workers find values in their work other that just the money and this factor is supported by the Union's not seeking back pay in its grievance. It takes the position that the Employer is undermining the Union's efforts in having the grievance sustained as the right to perform the work is essential to job security.

The Union contends that the instant proceeding is similar to seeking the enforcement of an award and the Employer has not raised any allegations as set forth Sec. 788.10, Stats. It submits that, instead, the Employer is attempting to relitigate the merits of the dispute which is inappropriate as the Commission lacks authority to review the merits of an award which has not been alleged to be improper. The Union asserts that the Employer is estopped from raising any jurisdictional issues as none were raised before this proceeding, and even if a question of work jurisdiction was present, the parties' contract has a provision for its resolution. It concludes that record shows that the Employer has willfully circumvented the arbitration award in direct violation of Sec. 111.06(1)(f), Stats., and it request that the Employer be ordered to cease and desists from refusing to comply with the award and the Employer be directed to pay the Union's attorney's fees and costs with interest.

EMPLOYER'S POSITION

The Employer contends that it has not violated Sec. 111.06(1)(f), Stats., as it has accepted the Arbitration Award. It points out that prior to the Award it did not assign a millwright to roll changes on supercalendar #77, but since the award, it is assigning a millwright at full pay and benefits. It submits that the millwright does not do any physical work as there is no work to be done because #77 requires an operating crew of only three for a roll change so one of the four man crew contemplated under Side Agreement #1 is passive. It notes that neither Side Agreement #1 nor the Arbitration Award specifies the physical work, if any, that is to be performed by the millwright and neither the contract nor the award specifies that the millwright cannot be designated the passive crew member. Thus, it maintains that it has not refused to accept the Award.

The Employer reiterates that the millwright member of the crew has suffered no monetary loss. The Employer further argues that the Arbitrator did not specify a remedy in the Award as none was sought but simply declared that Side Agreement #1 applied to supercalendar #77. It claims that as the Award did not

direct a remedy, the Employer cannot be found to have failed to comply with the Award by calling a millwright to a roll change but not assigning the millwright any physical work.

The Employer contends that the Union has offered no evidence of bad faith or invidious intent in this matter. It suggests that the dispute is one of interpretation of the Award and there is no unfair labor practice regardless of whose interpretation is correct. It asserts that the dispute as to interpreting the Award should have been submitted to grievance arbitration which the Union failed to do. It insists that the Award is not self-executing because it involves questions of practical application which were never presented to the Arbitrator and should be regarded as a new case which the Union dropped before arbitration. It requests that for the above reasons the complaint be dismissed.

DISCUSSION

The validity of the Arbitration Award is not challenged and no assertion has been made that the Arbitrator exceeded his authority or was guilty of any misconduct. The only issue is whether or not the Employer is complying with the Arbitration Award by its assignment of a millwright to be present for roll changes on the #77 supercalendar but not to perform any physical work. Upon a review of the Arbitration Award, the undersigned concludes that the Employer is not complying with it. The Arbitrator in his Award stated "... the changing of fiber rolls on the #77 supercalendar is Millwright work." In his decision, the Arbitrator stated that "... the work of changing fiber rolls on #7 is millwright work." The term "work" used in ordinary and common usage means "physical or mental effort exerted to do or make something; purposeful activity." 2/ Merely assigning millwrights to the roll change without their performing any activity does not meet the above definition of "work". Had the Arbitrator intended that the millwright be merely assigned to the roll changes, he would have stated so. It is noted that the issue is framed in terms of assignment but the Arbitrator did not say in his discussion or award that millwrights should be assigned to roll changes. He clearly stated that the work of changing rolls was millwright work. (Emphasis added) The Arbitrators choice of the term "work" as opposed to "assignment" establishes that the mere assignment of a millwright to the roll change is not sufficient but actual performance of duties involved in the roll change is what is required.

The Employer's contention that the millwright's assignment to the roll change complies with the Award because there is no physical work to be done is the same argument the Employer made to the Arbitrator and rejected by the Arbitrator. The Arbitrator stated that the evidence presented to him on the technological changes in the #77 supercalendar roll changes did not persuade him that roll change on #77 differed substantially from roll changes on the other six calendars. The parties bargained for and got an agreement to accept the Arbitrator's determination of whether technological changes required that no work be performed by the millwright. The Examiner will not substitute his judgment for that of the Arbitrator. Essentially, the Employer is seeking to relitigate this issue before the Examiner but the Examiner has no authority to review the merits of the Arbitrator's decision as the parties have agreed to accept the Arbitrator's decision on the merits.

The Employer's mere assignment of millwrights to the roll change without allowing them to perform any work allows the Employer to maintain its pre-arbitration assignments while merely paying the cost of the millwright's presence. The Union did not seek any monetary remedy in the arbitration proceeding but a declaration of its right to the work. Since no monetary relief was sought before the Arbitrator, it simply is not logical that the Arbitrator would only require prospective monetary relief for a violation of the contract. Given the clear terms of the Award that the work of changing rolls is millwright work and the absence of a request for monetary relief, it is concluded that the mere assignment for pay without permitting any physical work does not comply with the Arbtration Award.

2/ Webster New Word Dictionary, 2d College Ed. 1974.

The Employer's contention that the Arbitrator did not direct a remedy is not persuasive. The Arbitrator did not specify exactly what work the millwright is to do on supercalendar #77 but that does not mean that he did not direct the Employer to assign the millwright physical work. He stated that changing rolls was millwright work and noted that millwrights were used on numbers 71-76 and that 77 was not shown to be substantially different from the others. It seems clear the Arbitrator was directing that the millwrights do the same kind of physical work on #77 as they do on the other six supercalendars with the details left to the Employer unless and until the parties renegotiated Side Agreement #1. It is clear that the Arbitrator was not directing the Employer to merely assign millwright to roll changes to do no work. Thus, it is concluded that the Arbitrator did direct a remedy.

The Employer's argument that the Award is not self-executing and the implementation dispute must be resolved through the grievance procedure is likewise unpersuasive. There might be some merit to the Employer's argument had it assigned the millwright physical work during a roll change on #77 comparable to the other six supercalendars and a dispute had arisen as to the exact nature of the millwright's duties. But that is not the case here. The Employer has not shown that it could not assign the millwright physical work or that such an assignment was impossible as this argument was specifically rejected by the Arbitrator. It was not impossible to assign the millwright physical work. The Employer simply did not want to assign him work because it wanted to assign others this work. The Award directs that the millwright perform the work and the Employer is obligated to assign the millwright work as any arguments to efficacy were rejected by the Arbitator. The Award was self-executing. Inasmuch as no work was assigned, the dispute is not about the details of the work but is the identical issue the parties took to the Arbitrator and over which the Arbitrator ruled in his Award. There is no further dispute over the general assignment of the work as the Arbitrator has issued his decision and Award which is final and binding on both parties. The Employer's failure to assign any physical work is not a new matter in dispute, it is the same issue. The request for no monetary remedy makes that clear and the Employer's failure to assign any work constitutes a refusal to accept the Arbitrator's Award.

Based on the above, the undersigned finds that the Employer has violated Sec. 111.06(1)(f), Stats. by its failure to comply with the Arbitrator's Award and has issued the appropriate compliance and remedial Orders. The undersigned has not granted the Union's request for attorneys fees and costs based on the Commission's policy which is that 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 authority. 3/ Furthermore, the undersigned does not find the Employer's failure to comply with the Arbitrator's Award is so frivolous, in bad faith or wholly devoid of merit as to warrant the imposition of attorneys fees and costs, and accordingly, the Union's request is denied.

Dated at Madison, Wisconsin this 26th day of March, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
David E. Shaw, Examiner

3/ Madison Metropolitan School District, Dec. No. 16471-D (WERC, 5/81); Sparta Manufacturing Company, Inc., Dec. No. 20787-A (McLaughlin, 11/83), aff'd by operation of law, Dec. No. 20787-B (WERC, 12/83).