STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RACINE EDUCATION ASSOCIATION, Complainant, vs. RACINE UNIFIED SCHOOL DISTRICT, Respondent.	Case 100 No. 38135 MP-1921 Decision No. 24272-A

Appearances:

Schwartz, Weber, Tofte & Nielsen, Attorneys at Law, by Mr. Robert K. Weber, 704 Park Avenue, Racine, Wisconsin, 53403, appearing on behalf of Complainant.

Melli, Walker, Pease & Ruhly, S.C., Attorneys at Law, by Ms. JoAnn Hart, Suite 600, 119 Martin Luther King, Jr. Blvd., P. O. Box 1664, Madison, Wisconsin, 53701, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Racine Education Association filed a complaint on January 20, 1987 with the Wisconsin Employment Relations Commission alleging that the Racine Unified School District had violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to arbitrate post-expiration grievances. The Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07(5), Stats. A hearing was held in Racine, Wisconsin, on June 11, 1987 at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs, and the record was closed on July 20, 1987. The Examiner, having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Racine Education Association, hereinafter referred to as the Association, is a labor organization within the meaning of Sec. 111.70(1)(h), Stats., and has its principal office at 701 Grand Avenue, Racine, Wisconsin 53403; and that James J. Ennis is Executive Director of Racine Education Association and is its agent.

2. That Racine Unified School District, hereinafter referred to as the District, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and has it principal office at 2220 Northwestern Avenue, Racine, Wisconsin 53404; and that Frank L. Johnson is Director of Labor Relations of the Racine Unified School District and is its agent.

3. That at all times material to this proceeding, the Association has been the certified exclusive bargaining representative of all regular full-time and regular part-time certified teaching personnel employed by the District, excluding on-call substitute teachers, interns, supervisors, administrators, and directors.

4. That the most recent collective bargaining agreement between the Association and the District expired on August 24, 1985; that the parties have been engaged in bargaining for a successor agreement since December, 1984 and are currently involved in mediation-arbitration proceedings under Sec. 111.70(4)(cm), Stats., for the purpose of obtaining a successor labor agreement; that on January 26, 1987 the Commission issued its Findings of Fact, Conclusions of Law and Order Requiring Mediation-Arbitration in that dispute and certified the parties' final offers; that during negotiations, the parties' reached tentative agreement on a successor grievance and arbitration provision, but it has not been implemented; and that this tentative agreement is included in the final offer of each party.

5. That the expired collective bargaining agreement referred to in Finding of Fact 4 contained, among its provisions, a four step grievance procedure, the fourth step of which provided for final and binding arbitration of unresolved grievances:

. . .

Level Four

b. If the Association decides the grievance is meritorious, it may appeal the grievance to arbitration by notifying the Board in writing of such appeal.

c. The arbitrator will be agreed upon by the Superintendent and the Association. If there is failure to agree on an arbitrator within ten (10) school days after the written notice of appeal, the Wisconsin Employment Relations Commission will be requested by joint letter to submit a list of five (5) persons suitable for selection as arbitrator. If the parties cannot agree to one person named on the list, the parties shall strike a name alternately, beginning with the Association, until one name remains. Such remaining person shall act as arbitrator. In subsequent selections, the parties shall alternate the first striking of a name.

d. The decisions of the arbitrator shall be final and binding on the Board, the Association, and any teachers involved.;

that there is no language in the expired contract which expressly states that grievance arbitration continues during any contract hiatus; and that there was no agreement by the parties to continue or extend parts of their expired agreement beyond the contract's expiration date.

6. That following the expiration of the labor agreement, nine separate events occurred over which the Association filed nine separate grievances; that these grievances were filed between September 11, 1985 and June 17, 1986; that all nine of the grievances at issue in this proceeding are in regard to events occurring after the expiration of the labor agreement; and that these grievances were processed through the fourth step of the parties' grievance procedure.

7. That on November 11, 1986 without previous bargaining or notice, the District formally notified the Association that it was declining to arbitrate post-expiration grievances; and that at the time this notice was given, the parties had already selected arbitrators for all nine of the grievances referred to in Finding of Fact 6 and had scheduled one of those grievances for hearing.

8. That when the District refused to arbitrate the nine grievances referred to in Finding of Fact 6 which arose after the expiration of the parties' labor agreement, it did not individually or in concert with others (1) interfere with, restrain or coerce municipal employes in the exericise of their rights; (2) encourage or discourage membership in a labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment; (3) refuse to bargain collectively with a representative of a majority of its employes; or (4) violate an agreement to arbitrate questions arising as to the meaning or application of the terms of the collective bargaining agreement.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That when the Respondent District refused to arbitrate nine grievances which arose after expiration of the parties' labor agreement, it did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats.

On 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 complaint filed herein be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 8th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Raleigh Jones
Raleigh Jones, 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 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.

RACINE UNIFIED SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER

BACKGROUND

The complaint alleges that the District violated Secs. 111.70(3)(a)1, 3, 4 and 5, Stats., by refusing to arbitrate nine grievances, all of which arose after the expiration of the parties' last collective bargaining agreement. The answer alleges that the District lawfully refused to arbitrate the grievances because they arose after the expiration of the contract, and the District had no contractual or statutory duty to arbitrate them.

THE PARTIES' POSITIONS

It is the position of the Association that the District's failure to arbitrate post-contract expiration grievances should be considered a violation of Secs. 111.70(3)(a)1, 3 and 5, Stats. It argues that for essentially the same public policy reasons as were propounded in Brookfield, 2/ the Examiner should find that a public employer's duty to arbitrate contract grievances (if that was, in fact, a contractual duty under the previous agreement) should continue after the expiration of the labor agreement, at least in situations where the final offers of the parties include arbitration clauses which are identical to one another and to the previous contract. The Association contends arbitration during the hiatus period between labor agreements should not be denied because (1) the Wisconsin mediation/arbitration process can be lengthy and time consuming; (2) the speedy resolution of disputes promotes employment peace as well as the objectives of MERA; and (3) the refusal to arbitrate during the hiatus period serves no legitimate employer purpose. According to the Association, the parties and the public would best be served by applying the Nolde Brothers 3/ decision to the Wisconsin public sector. Finally, the Association submits that the nine grievances for which the parties had selected the arbitrators, if not all others pending, should be arbitrated due to the District's participation in the arbitration process.

The District submits that the duty to arbitrate is wholly contractual in nature. According to the District, its contractual obligation to arbitrate grievances expired with the expiration of the parties' labor agreement. It therefore asserts it has no contractual duty to arbitrate grievances arising after the expiration of the contract and so did not violate Sec. 111.70(3)(a)5. The District further contends that it properly relied on a prior Commission decision between the instant parties 4/ which found no duty to arbitrate after expiration and which interpreted the very contract language at issue herein. It asserts that this decision bars any contrary finding of an intent by the parties to arbitrate post-expiration grievances. The District further contends it is settled law in Wisconsin that refusal to arbitrate during a hiatus is not a refusal to bargain in violation of Sec. 111.70(3)(a)4. In response to the Association's argument regarding the application of Nolde Brothers here, the District argues Nolde Brothers should not be applied to the Wisconsin public sector because of MERA statutory prohibitions against an agreement longer than three years (and mandated two years unless the parties agree otherwise), and the fact that when the legislature recently amended MERA it did not adopt any change reflective of Nolde Brothers. Should the Commission change Wisconsin law though to reflect Nolde

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2/ City of Brookfield, Dec. No. 19822-C (WERC, 11/84).

3/ Nolde Brothers, Inc. vs. Local No. 358, Bakery and Confectionery's Workers Union, AFL-CIO, 430 U.S. 243, 94 LRRM 2753 (1977).

4/ Unified School District No. 1 of Racine County, Dec. No. 11315-B (1/74), aff'd, Dec. No. 11315-D (WERC, 4/74).

Brothers, the District argues it nevertheless has no duty to arbitrate the nine grievances at issue here because several of them are not arbitrable under any circumstance, and none of the nine grievances are arbitrable under a Nolde Brothers analysis because (1) they do not involve rights which vested or accrued (or became due and payable) under the expired agreement; (2) they are too remote in time from the expiration of the agreement; and (3) they involve "future practices" which are not arbitrable under a Nolde Brothers analysis. It therefore asks the Examiner to dismiss the complaint.

DISCUSSION

As noted in paragraphs 6 and 7 of the Findings of Fact, it is undisputed that the District refused to arbitrate nine grievances which arose after the expiration of the parties' last labor agreement. At issue herein is whether this conduct violates MERA.

The Commission has held that in disputes subject to final and binding interest arbitration, the MERA duty to bargain ordinarily requires that the parties maintain the status quo as regards mandatory subjects of bargaining until a settlement or arbitration award is reached in the matter, e.g. City of Brookfield, supra. It is not disputed herein that the arbitration of grievances is a mandatory subject of bargaining. However, prior decisions of the Commission have excluded the arbitration of grievances from the status quo that is ordinarily to be maintained during a contract hiatus as a part of the Sec. 111.70(3)(a)4 duty to bargain. 5/ In Greenfield School District No. 6 the Commission squarely held that "for . . . reasons peculiar to the wholly contractual nature of arbitration," 6/ the status quo that the MERA duty to bargain requires be maintained in effect following expiration of an agreement does not include a previously existing contractual commitment to arbitrate grievances. That holding controls herein and warrants the conclusion that the District did not commit a unilateral change refusal to bargain in violation of Sec. 111.70(3)(a)4 by its refusal to arbitrate the post-expiration grievances.

There are no Commission cases which abrogate the rules of law established by the cases cited above. While those decisions preceded the Brookfield status quo decision, their holdings are not affected by the case law developments as regards maintenance of the status quo in relation to interest arbitration. 7/ Nor are those earlier holdings affected by the case law developments concerning the dynamic status quo. 8/

Having found that the Sec. 111.70(3)(a)4 duty to bargain does not require the District to arbitrate post-expiration grievances during the contract hiatus, the Examiner turns next to the Association's contention that the District's refusal to arbitrate post-expiration grievances violates Sec. 111.70(3)(a)5.

Section 111.70(3)(a)5 provides that it is a prohibited practice for an employer "to violate any collective bargaining agreement previously agreed upon by the parties . . . including an agreement to arbitrate questions arising as to the meaning or application of the terms of the collective bargaining agreement." As previously noted, the arbitration of grievances is a voluntary process that rests entirely upon a contractual basis. This conscentual right to arbitrate should not be extended past a contract's termination date unless the parties mutually agree to do so. 9/ Here, the parties have not mutually agreed to extend the arbitration of grievances past the contract's termination date, so it follows

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5/ See Racine Unified Schools, Dec. No. 19983-C (WERC, 1/85) at 5; Greenfield School District No. 6, Dec. No. 14026-A (10/76), aff'd. in pertinent part - B (WERC, 11/77) at 5-6; Gateway VTAE District, Dec. No. 14142-A (1/77), aff'd. in pertinent part - B (WERC, 2/78) at 5.

6/ Decision No. 14026-B at 7.

7/ Sauk County, Dec. No. 22557-B (WERC, 6/87) at 12.

8/ Ibid.

9/ Greenfield School District No. 6, supra.

that the District did not have a contractual obligation to arbitrate post-expiration grievances. To hold otherwise would turn a voluntary process into an involuntary one and would conflict with the well established concept that arbitration is a voluntary process with a contractual basis. Thus, since there was no agreement to arbitrate grievances in effect during the instant contract hiatus, the District's refusal to arbitrate nine grievances which arose during the hiatus did not violate Sec. 111.70(3)(a)5. 10/

When this case is reduced to its essentials, it involves whether the United States Supreme Court's Nolde Brothers decision should be applied here so that an opposite result is reached from the conclusions set out above. In that case the parties' collective bargaining agreement, containing a provision for severance pay, expired. Four days after expiration, the employer went out of business and refused to pay the severance pay. The Union brought suit against the employer alleging a duty under the parties' expired agreement to arbitrate the severance pay grievance. The Court held that under the language of the agreement at issue, the employer was required to arbitrate the severance pay grievance, stating:

> Any other holding would permit the employer to cut off all arbitration of severance pay claims by terminating an existing contract simultaneously with closing business operations.

Id. at 253. While acknowledging the case law that arbitration is a creature of contract, and that a party cannot be compelled to arbitrate any issue the party has not agreed to submit to arbitration, the Court found in the parties' contract language an implied intent to submit the severance pay claim to arbitration when that severance pay claim arose four days after the contract expired. Thus, the court interpreted the parties' contract language.

The Commission has never applied a Nolde Brothers analysis to a case arising under MERA, although it has decided cases after Nolde Brothers was decided on post-expiration duty to arbitrate. 11/ In Racine Unified Schools, 12/ the Commission raised, but did not resolve, the question of whether Nolde Brothers should be applied to the Wisconsin public sector:

> We are aware of the broad sweep of the United States Supreme Court's Nolde Brothers opinion regarding the scope and nature of post-expiration arbitration obligations flowing from expired arbitration provisions in private sector commerce relationships. Whether a similar approach is warranted in the face of the differences between the public and private sectors, especially where binding interest arbitration is available, is an open question, but one we need not and do not address herein.

10/ Of course, even in the absence of an agreement to arbitrate grievances, employes in Wisconsin can still come before the Commission for the purpose of complaining about certain employer actions which occur after a contract's termination. For example, a union can always file a prohibited practice complaint alleging a breach of the status quo pursuant to Sec. 111.70(3)(a)4 and have an Examiner rule on the merits of the charge. However, it is expressly noted that the Association is not seeking to have the Examiner herein determine the relative merits of the nine grievances in issue. Rather, the Association seeks only to force the District to proceed to grievance arbitration on these grievances so that grievance arbitrators, and not this Examiner, can determine the merits of the claims.

11/ See Racine Unified Schools, supra, and Greenfield School District No. 6, supra.

12/ Decision No. 19983-C (WERC, 1/85).

Racine Unified Schools, supra, at 7. Assuming arguendo that Nolde Brothers should be applied to the Wisconsin public sector, as urged by the Association, it is clear that it can not be applied herein for the following reason. In Greenfield School District No. 6 the Commission discussed Nolde Brothers in footnotes 6 and 10. The discussion therein demonstrates the Commission's understanding that Nolde Brothers was based on the Court's interpretation of the language in the labor agreement between Nolde Brothers and Bakery Workers Local 358. However, such an inquiry here is foreclosed by the fact that a previous Commission decision interpreted the instant parties arbitration language to create no duty to arbitrate post-expiration grievances. In Unified School District No. 1 of Racine County, 13/ it was held that during a hiatus created when the 1971-72 agreement between the Association and the District expired, the District had no obligation under the language of the expired agreement to arbitrate a grievance arising during the hiatus:

> There was no enforceable agreement on August 28, 1972 and the Respondent was clearly not bound on that date to arbitrate a grievance arising during the hiatus. (emphasis in original)

Decision No. 11315-B at 20. The record herein indicates that with the exception of substituting "he/she" for "he", the parties' grievance and arbitration language at issue in the expired agreement 14/ remains identical to the 1971-72 contract. 15/ Thus, the Commission's decision interpreting the same language at issue here as creating no duty to arbitrate post-expiration grievances has stood since 1974. Given the fact that the arbitration language has not been substantively changed since this prior interpretation of the parties' language, there can be no presumption of a different meaning. As a result, there is no basis now to establish a new meaning for the same words by imposing a post-expiration duty to arbitrate even if the Examiner uses a Nolde Brothers analysis. Whereas in Nolde Brothers the Supreme Court had to infer the parties' intent to arbitrate post-expiration grievances, here the parties have known since 1974 that no such duty exists. Therefore, the Examiner has no basis to reinterpret the parties' language to create any post-expiration duty to arbitrate under this contract language. 16/

Next, the Examiner turns to the Association's claim that the District's duty to arbitrate contract grievances should continue after the expiration of the labor agreement because the parties' final offers contain identical grievance and arbitration provisions. The Commission though has previously considered, and rejected, this line of argument:

> Whether one views matching final offers in interest arbitration proceedings as "tentative agreements" or not, we agree with the Examiner that matching final offers, without more, are not enforceable as agreements during the pendency of the interest arbitration proceeding. Rather, they become enforceable only upon the parties' reaching a total agreement either through voluntary settlement of all outstanding issues or through receipt of an arbitration award which resolves disputed issues and incorporates prior tentative agreements into the overall agreement.

13/ Unified School District No. 1 of Racine County, supra

Sauk County, supra, at 14.

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> We generally share the view of the Examiner in Ozaukee County, Dec. No. 18384-A (Knudson, 7/81), aff'd by opertion of law, -B (WERC, 8/81) that absent an agreement to the contrary, individual "items on which tentative agreement has been reached by the parties during their negotiations, do not become enforceable provisions of a labor agreement until the parties have reached an accord on a total agreement incorporating the tentatively agreed-to items." Id. at 7.

. . .

> While the parties' matching offers herein do not modify the fair share and dues checkoff arrangements that were in effect prior to expiration of the predecessor agreements, our treatment of those matching offers as enforceable (retroactively or otherwise) only after the conclusion of the interest arbitration proceeding is the same treatment as would be given a stipulation to retain the same grievance arbitration provision in the new collective bargaining agreement where the employer was unwilling to continue that provision in effect after expiration of the predecessor agreement. See, Racine Schools, Dec. No. 19830-C (WERC, 1/85).
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> In sum, the parties' matching final offers did not constitute an agreement that was enforceable during the period prior to resolution of the ultimate total agreements.

Sauk County supra, at 16. Application of the above principles to the instant case mandates the conclusion that although the parties' final offers contain identical grievance and arbitration provisions, this does not constitute an agreement by the parties to arbitrate post-expiration grievances. If and to the extent the Association suggests than an exception should be made to the general rule concerning enforceability of items not in dispute for the arbitration of grievances, the Examiner finds no persuasive basis either in the arguments presented or in MERA for doing so.

Finally, the Examiner finds no merit to the Association's contention that the nine grievances herein should be arbitrated due to the District's participation in the grievance arbitration process prior to declining to arbitrate said grievances. While it is uncontested that the parties had selected arbitrators for all nine grievances and had even scheduled one of them for hearing before the District availed itself of its right to not arbitrate post-expiration grievances, this participation in the grievance arbitration process does not mean the District waived its right to not arbitrate post-expiration grievances or was somehow obligated to complete the arbitration of these nine grievances. Foremost in reaching this conclusion is the fact that arbitration requires an agreement to arbitrate and here there was no mutual agreement to complete the arbitration of these nine grievances after November 11, 1986. The Examiner also declines to infer an implicit or tacit agreement to arbitrate these nine grievances from the District's actions in light of the District's explicitly stated position to not arbitrate post-expiration grievances. 17/

In sum, it is concluded that the District did not act unlawfully when, following the expiration of the parties' 1982-85 collective bargaining agreement,

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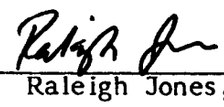
17/ Racine Unified Schools, supra, at 6.

it refused to arbitrate nine grievances which arose after the contract expired. Consequently, the District did not violate Secs. 111.70(3)(a)1, 3, 4 or 5, Stats., and the complaint has therefore been dismissed.

Dated at Madison, Wisconsin this 8th day of October, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Raleigh Jones, Examiner