STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 1425, AFSCME, AFL-CIO, RUSK COUNTY HIGHWAY DEPARTMENT EMPLOYEES, Complainant, vs. RUSK COUNTY, Respondent.	Case 43 No. 40573 MP-2101 Decision No. 25724-A

Appearances:

Mr. James Ellingson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 68, Rice Lake, Wisconsin 54868-0068, appearing on behalf of Local 1425, AFSCME, AFL-CIO, Rusk County Highway Department Employees.

Mr. Stephen L. Weld, Mulcahy & Wherry, S.C., Attorneys at Law, 21 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Rusk County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER

Local 1425, AFSCME, AFL-CIO, Rusk County Highway Department Employees, filed a complaint with the Wisconsin Employment Relations Commission on May 16, 1988, alleging that Rusk County, had committed prohibited practices within the meaning of "the Wisconsin Statutes, Section 111.70". Scheduling of hearing on the complaint was held in abeyance initially to permit the parties to engage in settlement discussions, and subsequently to permit the parties to attempt to stipulate the facts relevant to a determination of the matter. The parties were unable to resolve the matter, and were unable to stipulate the facts. On October 17, 1988, the Commission 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. 111.70(4)(a), and Sec. 111.07, Stats. Hearing on the matter was conducted in Ladysmith, Wisconsin, on November 8, 1988. Rusk County filed its answer to the complaint at that hearing, and Local 1425, AFSCME, AFL-CIO, alleged that the complained of conduct violated Sec. 111.70(3)(a)5, Stats. A transcript of that hearing was provided to the Commission on November 17, 1988. The parties filed briefs and waived the filing of reply briefs by March 3, 1989.

FINDINGS OF FACT

1. Local 1425, AFSCME, AFL-CIO, Rusk County Highway Department Employees, referred to below as the Union, is a labor organization which maintains its principal offices at 5 Odana Court, Madison, Wisconsin 53719. As of May 16, 1988, the Union's representative was Richard H. Rettke, who then maintained his offices in care of P.O. Box 68, Rice Lake, Wisconsin 54868-0068.

2. Rusk County, referred to below as the County, is a municipal employer which has its offices located at the Rusk County Courthouse, 311 Miner Avenue East, Ladysmith, Wisconsin.

3. Among the various departments utilized by the County to effect the services it offers is a Highway Department. The Union serves as the exclusive collective bargaining representative for certain Highway Department employes, including Steven Balko. The Union and the County have been parties to a number of collective bargaining agreements, including an agreement in effect, by its terms,

from January 1, 1986, to December 31, 1986, and including an agreement in effect, by its terms, from January 1, 1987, to December 31, 1988. Included among the provisions of the 1986 agreement are the following:

Article 6 - Lay-off - Hiring

Section 6.01: For the purposes of lay-off only, the Shop Crew and the Outside Crew will be separate seniority lists.

Section 6.02: In laying off employees, seniority shall prevail and the last person hired shall be the first person laid off.

. . .

Article 19 - Miscellaneous Provisions

. . .

Section 19.07: Employees shall be classified on a year round basis in their position. Whenever an employee works at a lower rated job, he/she shall receive his/her classified rate of pay. If an employee works at a higher rated job, he/she shall receive the higher rate of pay.

. . .

Article 20 - Management Rights

Section 20.01: The rights, powers, duties and authority of management shall not be affected by the terms of this Agreement except in those respects specifically referred to herein or which may reasonably be implied from the language of this Agreement.

. . .

Both the 1986 and the 1987-88 agreements contain a grievance procedure which culminates in final and binding arbitration.

4. On August 21, 1986, Balko filed a grievance alleging the County had violated the collective bargaining agreement then in effect. The Union and the County processed the matter through the contractual grievance procedure, and ultimately placed the matter before Arbitrator Leonard E. Lindquist.

5. Lindquist issued an arbitration award on the Balko grievance on July 10, 1987. The final three paragraphs of that award read as follows:

> It is clear that Employer directed inside employees to perform a substantial amount of outside construction work during the 1986 construction season. The vast majority of this work, driving truck, was a job which grievant was qualified to perform. The arbitrator is satisfied that the two seniority lists, one for the shop crew and the other for the outside crew, were agreed to in order to protect employee job security involved in these respective work assignments as practiced during these many years of the working agreement relationship between the Employer and the Union. If the Employer at-will were permitted to assign work involving the repair and building of roads during the construction season to shop crew employees while outside crew employees are on layoff, not only would the seniority rights of the outside crew employees be denied, but their status as employees might well be terminated, thereby abolishing the need or purpose for two seniority lists. The arbitrator concludes that outside road construction work assigned to shop crew employees during the 1986 construction season while outside crew employees were

on layoff amount to substantially more than temporary or emergency assignments, all in violation of the intent of the working agreement as evidenced by a plain reading of the language, as well as past practice. Accordingly, the grievance is sustained.

Grievant Steven Balko's date of employment is September 7, 1976, whereas, shop crew employee Wundrow was employed on May 3, 1984. The arbitrator recognizes that the remedy here stated may not make Steven Balko whole for outside road work performed by shop crew employees during the 1986 construction season while Balko was on layoff status, nonetheless, it is directed that grievant Steven Balko be compensated for those hours worked by shop crew employee Edward Wundrow on outside construction during the period April 23, through October 25, 1986.

So awarded.

Page two of the award set forth "(t)he grievance and Employer's response." A copy of the grievance form follows which includes the following handwritten response to the printed entry "(The Request for Settlement or corrective action desired):"

> That Steven Balko be recalled to work & that he be compensated all wages & benefits that he lost due to said grievance.

The grievance form also contains the following handwritten response to the entry "(Article or Section of contract which was violated if any)": "Article 6 Section 6.01 & 6.02."

6. Ken Zimmer, the Commissioner of the County's Highway Department, issued a letter to Balko dated July 17, 1987, which reads as follows:

> Today I recieved the answer to the grievance of August 21, 1987.
>
> As a result of the decision by the arbitrator you are hereby notified to return to work at the Rusk County Highway Department.

7. In a letter to Zimmer dated July 24, 1987, Stephen L. Weld, an attorney retained by the County, stated the following:

> This is to confirm our conversations regarding implementation of Arbitrator Lindquist's decision in this matter. As I have already advised, Arbitrator Lindquist, Union Representative Rettke and I conferred following receipt of the decision. I took the position that Balko had no right to recall and merely was entitled to payment for the hours that Ed Wondrow worked on construction during the period April 23 through October 25, 1986. That is a total of 255.5 hours (referring to our delayed Exhibit 5). Mr. Balko was receiving $8.49 per hour as a screed operator and therefore the County payment owed to him is $2,169.20 less taxes and FICA.
>
> Arbitrator Lindquist advised that, in addition to this payment, recall was also required. Hence our conversations and your subsequent communication to Balko regarding his right to return to work on or before July 31, 1987.
>
> In response to inquiries from Mr. Rettke regarding health insurance, holiday pay, and vacation accumulation, I have advised Mr. Rettke that it is our opinion that reinstatement and payment for the 255.5 hours worked by Mr. Wondrow is the total remedy ordered by Arbitrator Lindquist. The Arbitrator stated that the remedy would not make Balko whole. Therefore, Mr. Balko is not entitled to insurance payments for the period he was on layoff, is not entitled to payments for holidays

during that period, and did not earn vacation during the period of layoff. Thus, he resumes employment with full credit for years worked prior to layoff but does not earn benefits while on layoff.

If you have any questions regarding this matter, do not hesitate to contact the undersigned.

8. Weld issued a letter to Rettke dated August 24, 1987, which reads, in relevant part, as follows:

> This is to confirm our various conversations regarding the status of the above-described matter.
>
> It appears that there are several issues which are currently outstanding in this matter:
>
> 1. First, the County believes Arbitrator Lindquist exceeded his authority in interpreting the contract as he has.
>
> 2. Secondly, the parties disagree as to whether or not Arbitrator Linquist ordered reinstatement. Subsequently we have been advised orally by Arbitrator Lindquist that, in fact, his remedy was to include reinstatement and the County has done so. However, the County has done so with the reservation that it reserves the right to challenge that supplemental portion of the award.
>
> 3. The parties also disagree on the nature of the back payment. There are technically two disputes here. The first dispute is the question of whether or not the 255.5 hours of payment ordered by Arbitrator Lindquist is to be supplemented by fringe benefits, i.e. is he entitled to vacation time, is he entitled to sick leave, is he entitled to holiday payments, is he entitled to overtime premium pay for the overtime worked and what is the status of his health insurance?
>
> The second part of this issue is whether Mr. Balko is entitled to additional pay for calendar year 1987. This is a part of a second grievance, a grievance the County considers untimely and which, therefore, the County is unwilling to arbitrate.
>
> Instead the County suggests that this issue, in the interest of economy--judicial economy--be resolved as part of the challenge to the arbitrator's decision.
>
> It is my understanding that Chapter 788 of the Statutes requires that motion for vacation or modification of an arbitration award must be filed within three months of the date of the arbitrator's award. As Arbitrator Lindquist issued his award on July 10, 1987, an action must be filed in this matter by October 10. Accordingly, your expeditious response to this proposed resolution of the various remaining issues in the Balko case is requested.

. . .

9. On October 7, 1987, the County filed a Motion to Vacate Arbitrator's Award with the Rusk County Circuit Court. The Union opposed this motion and, on December 10, 1987, filed with that Court a Motion for Attorneys Fees and Costs. These motions were briefed by the parties, and the matter was heard by the Court which, on December 28, 1987, issued a Judgement which reads as follows:

> IT IS ORDERED AND ADJUDGED That the Motion to Vacate Arbitrator's Award filed with the Court and dated October 7, 1987, shall be, and the same hereby is, denied . . .

IT FURTHER IS ORDERED AND ADJUDGED That the Opinion and Award issued by Arbitrator Leonard Lindquist on July 10, 1987, shall be, and the same hereby is, confirmed, as provided for at Sec. 788.09, Wis. Stat.; and;

IT IS ORDERED That the Motion for Attorneys Fees and Costs filed with the Court and dated December 10, 1987, shall be, and the same hereby is, denied . . .

10. Hearing on the complaint took place in Ladysmith, Wisconsin, on November 8, 1988. At that hearing the parties stipulated that their dispute could be characterized thus:

> (The) Parties dispute whether the County has compensated Steve Balko as required by the arbitrator, specifically the parties dispute whether the arbitrator has required the County to compensate Steve Balko by affording him two vacation days, one and a half sick leave days and 25 hours of overtime. The parties do not dispute that Ed Wundrow worked 255.5 hours as noted in joint exhibit three. The parties dispute whether this 255.5 hours should be the basis for calculating the additional days of vacation, sick leave and hours of overtime noted above.

Joint Exhibit 3 is a handwritten note which reads as follows:

> Steve Balko
>
> Ed Wundrow worked
> From Oct 28th 1985 (Lay-off date)
> Thru Nov. 14th 1986 (Last day Figures Available)
> In shop -- 1695 hrs
> Out of shop -- 313.5 hrs
>
> April 23, 1986 Thru Oct. 25, 1986
> (normal Lay-off dates)
>
> In shop -- 698.5 hrs
> Out of shop -- 255.5 hrs

CONCLUSIONS OF LAW

1. Steven Balko is a "Municipal employe" within the meaning of Sec. 111.70(1)(i), Stats.

2. The Union is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

3. The County is a "Municipal employer" within the meaning of Sec. 111.70(1)(j), Stats.

4. Arbitrator Lindquist's July 10, 1987, award, with respect to the issue of remedy noted in Finding of Fact 10, can not be considered final and definite, even when read in light of the December 28, 1987, Judgement of the Rusk County Circuit Court. Until that award is made final and definite on the issue of remedy noted in Finding of Fact 10, it is impossible to determine whether the County has committed a violation of Sec. 111.70(3)(a)5, Stats.

INTERIM ORDER

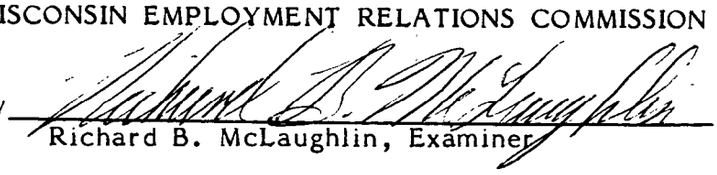
This matter is remanded to Arbitrator Leonard Lindquist for the purpose of obtaining a final and definite award with respect to whether Lindquist's July 10, 1987, award requires the County to use the 255.5 hours worked by Ed Wundrow as the basis to afford Steven Balko two vacation days, one and a half sick leave days and 25 hours of overtime.

The Union and the County shall contact Arbitrator Lindquist within twenty (20) days from the date of this Order to submit to Lindquist the issue of whether his July 10, 1987, award requires the County to use the 255.5 hours worked by Ed Wundrow as the basis to afford Steven Balko two vacation days, one and a half sick leave days and 25 hours of overtime.

This complaint proceeding shall be held in abeyance until the Commission is notified of Arbitrator Lindquist's determination of the issue noted above. Upon such notification, the Examiner will determine whether the County has violated Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin this 23rd day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

RUSK COUNTY
(HIGHWAY DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND INTERIM ORDER

BACKGROUND

The complaint, as originally filed, alleged a County violation of "111.70 Wis. Stats." At the hearing, the Union specified that the complaint focused on Sec. 111.70(3)(a)5, Stats. The County entered its answer to the complaint at the hearing, and included in that answer an affirmative defense requesting "a determination of whether reinstatement is required in this case."

THE PARTIES' POSITIONS

The Union urges that the present complaint is rooted in the County's refusal to implement Lindquist's award, and that the basis of the complaint is well rooted in the final two paragraphs of that award. Specifically, the Union argues that Lindquist sustained the grievance in those final two paragraphs, and set forth the remedial request of the grievance earlier in the award. It follows, according to the Union, that Lindquist ordered the County to reinstate the Grievant and to make him whole for the wages and benefits he had lost due to the County's violation of the parties' labor agreement. Beyond this, the Union asserts that the County's "affirmative defense" turns a dispute which originally concerned roughly $200 in fringe benefits into a dispute which threatens Balko's employment. The Union concludes its argument on the affirmative defense thus:

> It is clear that Arbitrator Lindquist ordered the County to recall the Grievant to his position in the Rusk County Highway Department. The Arbitrator did that in his award when he "sustained" the grievance. The grievance sought as part of the remedy that the Grievant be recalled. The Arbitrator also orally confirmed in a joint telephone call with the parties that the Grievant was to be recalled to work. Equally so when the Arbitrator "sustained" the Grievance he clearly granted the Grievant's request for fringe benefits.

As the remedy appropriate to the County's violation of Sec. 111.70(3)(a)5, Stats., the Union requests that "the County be ordered to award the appropriate fringe benefits to Steven Balko under the award and that the County be ordered to publically post the findings of the Examiner."

The County phrases the issues posed by the present complaint thus:

1. Does the arbitration award of July 10, 1987, require the County to "make whole" Grievant Balko by granting wages, benefits and reinstatement?

2. Did the County violate Sec. 11.70 (3) (a)5 of the Wisconsin Statutes by denying payment of fringe benefits to accompany the wage payment?

3. If the answer to question 1 or 2 above is yes, how should such payments and benefits be calculated?

After a review of the factual and procedural background to this matter, the County asserts that the "July 10, 1987 award is clearly erroneous." Even if this assertion is not accepted, the County argues that "it has, in fact, implemented the arbitrator's order and, indeed, has gone beyond that which the arbitrator ordered", since "all that was required (by the award) were wages for the hours worked by Mr. Wundrow." According to the County, the dispute underlying the arbitration award did not involve the County's right to lay Balko off, but whether Balko "was entitled to be recalled prior to the assignment of "shop crew" personnel to "outside crew" tasks." The County argues that the record before Arbitrator Lindquist demonstrated that the "outside crew" tasks constituted not more than 27% of the shop crew's work load, and thus that the County never replaced any outside crew member. Whatever entitlement Balko has to compensation flows solely from the award, and not from the collective bargaining agreement, which, according to the County, authorizes "the assignment of work outside of

classification as long as the assignment is in compliance with Article 19.07 affecting wage rates." Beyond this, the County "disputes the Union's interpretation of the arbitration award with regard to reinstatement." Specifically, the County contends that arbitral precedent and the parties' collective bargaining agreement establish that the Union's position on reinstatement "will, in effect, mandate the recall of laid off employees and would nullify the express language of the collective bargaining agreement allowing for out-of-classification work." The County summarizes its position thus:

> (T)he County interprets (the) award as an attempt to "split the baby." Give Balko some compensation for stretching beyond "good faith" in the use of "shop crew" in "outside crew" tasks, but allow the County to operate as the contract allows it to operate. Nowhere in the award is reinstatement ordered. Further, the award specifically states that it does not make Balko whole. Hence, the County read the award as not mandating reinstatement.

Acknowledging that the County has not paid Balko for all the fringe benefits traceable to the hours worked by Wundrow, the County argues that:

> The County has not paid fringe benefits for the simple reason that the arbitration opinion . . . not only contains no order to do so, but there is not even any discussion regarding fringe benefits.

The County concludes by asserting that the July 10, 1987, award in itself violates the collective bargaining agreement, but that under any reading of that award, the County is obligated at most to reimburse Balko for lost wages. Balko's reinstatement and compensation for lost benefits represents, according to the County, "an unwarranted escalation of the award." It follows, according to the County, that the complaint must be dismissed.

DISCUSSION

The three issues noted in the County's brief are subsumed in the stipulation reached by the parties at hearing and noted in Finding of Fact 10. In addition to that issue, however, the County has argued both that the award is "clearly erroneous", and that, even if not erroneous, the award does not compel Balko's reinstatement.

The latter argument poses the parties' dispute on whether the County should be permitted to amend its answer to question whether the award requires Balko's reinstatement. It is necessary to address this dispute before examining the merits of the issues noted above. Section ERB 12.03(5) of the Commission's administrative rules governs the amendment of an answer, and provides:

> The respondent may, for good cause shown, amend his answer at any time prior to the hearing. During the hearing and prior to the issuance of the order, he may amend his answer where the complaint has been amended, within such period of time as may be fixed by the commission, or by the commission member or examiner authorized by the commission to conduct the hearing. Whether or not the complaint has been amended, the answer may, upon motion granted, be amended upon such terms and within such period as may be fixed by the commission, commission member or examiner, as the case may be.

The original complaint challenged "Chapter 111.70 of the Wisconsin Statutes." At the hearing, the Union specified that the complaint alleged a violation of Sec. 111.70(3)(a)5, Stats. This change can be considered an amendment, but whether the complaint is considered amended or not is not crucial to the application of the rule. At the hearing, in response to the motion to amend the answer, I requested written argument on the point and stated: "If the affirmative defense states something above and beyond what is fairly stated on the face of the complaint, I am not convinced it will have merit and will be rejected." 1/ The

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1/ Transcript at 15.

complaint specifically refers to a County violation based on "refusing to make Mr. Balko whole for any and all fringe benefits due him as a result of having the grievance sustained by the Arbitrator." Standing alone, this statement does not bring reinstatement into issue. However, the complaint also refers to "not implementing the proper award", and requests "make whole" relief from the Commission including "any other and further relief as may be deemed sufficient". The Union's reference to the "proper award" puts the terms of that award at issue, and its broadly stated remedial request invites broad inquiry into the matter. I can see no persuasive reason under Sec. ERB 12.03(5), to permit the Union to question the remedial scope of "the proper award", while denying the County the same right. The affirmative defense does address matters stated on the face of the complaint and is properly part of the present record.

It is now necessary to address the merits of the issues noted above. Examination of those issues must start with the fact that the Rusk County Circuit Court has confirmed the Lindquist award. The Commission applies the doctrine of res judicata to prohibited practice allegations which have been placed before a court. 2/ The Wisconsin Supreme Court, in Barbian v. Lindner Bros. Trucking Co., Inc., stated the general rule of that doctrine thus:

> Generally, an earlier judgement is res judicata as to all matters which were or might have been litigated in that proceeding. 3/

There are exceptions to that doctrine, one of which was noted in Barbian. In that case, the Court cited the Restatement of Judgements 4/ to establish that "a declaratory judgement is only binding as to matters which were actually decided therein, and is not binding to matters which "might have been litigated" in the proceeding." 5/

In Dehnart v. Waukesha Brewing Co., 6/ the Court cited another section of the Restatement of Judgements to establish a similar exception to the general application of the doctrine of res judicata. The court stated the exception thus:

> Where a court has incidentally determined a matter which it would have had no jurisdiction to determine in an action brought directly to determine it, the judgement is not conclusive in a subsequent action brought to determine the matter directly. 7/

Dehnart concerned "the res judicata effect of an arbitrator's award." 8/

The Court's Dehnart analysis applied to facts analogous to those at issue here, and that analysis is persuasive here regarding the res judicata effect of the Rusk County Circuit Court's confirmation of the Lindquist award. It is not unusual for issues of remedy to be "incidental" to the fundamental dispute on the existence of a contract violation in a labor arbitration case. This point has been addressed by commentators thus:

> A review of arbitration awards indicates that arbitrators generally refrain from specifying the amount due when back-pay awards are made. And with good reason. Rarely do the parties

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2/ County of Waukesha, Dec. No. 24110-B (WERC, 3/88).

3/ 106 Wis. 2d 291, 296 (1982).

4/ "sec. 77, comment b (1942)", cited at 106 Wis. 2d at 296.

5/ 106 Wis. 2d at 297.

6/ 21 Wis. 2d 583 (1963).

7/ Ibid., at 592.

8/ Ibid.

> present relevant data, either at the hearing or in posthearing briefs, that would enable the arbitrator to compute a specific dollar sum. This posture is not unexpected. The parties may not desire to engage in protracted arguments concerning the components and amounts due as a back-pay remedy where the issue may eventually be mooted by an award adverse to the grievants. 9/

It is, then, not unusual that the Rusk County Circuit Court's confirmation of the Lindquist award did not directly address itself to the incidental remedial issues which have become the focus of the parties' dispute here. Against this background, the application of the general rule of the res judicata doctrine would be ill-advised, for it would foreclose the clarification of incidental remedial issues left open in litigation focusing on the merits of alleged contractual violations, or on the propriety of an arbitrator's determination of such alleged violations. The purpose of the general rule of the doctrine of res judicata is to conserve adjudicative resources by promoting the finality of judgements and by discouraging piecemeal litigation. Those purposes are served by foreclosing attempts to relitigate matters posed in the motions before the Rusk County Circuit Court, but not by foreclosing attempts to clarify the scope of that court's judgement. Accordingly, the Dehnart analysis will be applied here, and the Rusk County Circuit Court's judgement will be considered res judicata regarding matters directly placed before the court.

As noted above, the County questions whether the Lindquist award is "clearly erroneous", and whether that award requires it to reinstate Balko and to award him certain benefits based on the hours worked by Wundrow. The County's first assertion was resolved by the Rusk County Circuit Court's confirmation of the Lindquist award. The assertion that the award is "clearly erroneous" essentially states a motion to vacate the award, and the doctrine of res judicata precludes any action in this forum on that assertion, since the Circuit Court's judgement is expressly addressed to "said Motion to Vacate Arbitrator's Award".

Unlike the first assertion, the remaining assertions made by the County do not question whether the Linquist award imposes an obligation on the County, but question the extent of that obligation. These assertions do not seek to relitigate the Rusk County Circuit Court's confirmation of the Lindquist award, but seek to clarify the remedy ordered in that award. That both the Union and the County offer plausible, yet conflicting, views of the requirements of the Circuit Court's confirmation of that award establishes that the Circuit Court did not directly rule on those issues.

The issues thus posed are whether the Lindquist award is ambiguous on the two remedial issues posed, and if so, how the ambiguity should be resolved. The Lindquist award is ambiguous on both of the remedial points raised by the parties. The Union persuasively notes that the award states "the grievance is sustained" after having set forth the Union's request "that Steven Balko be recalled to work & that he be compensated for all wages & benefits that he lost". The County, however, persuasively notes that the reference that "the grievance is sustained" is followed by the specific direction that "Balko be compensated for those hours worked by . . . Wundrow". This specific reference makes no mention of reinstatement, and is prefaced by the enigmatic statement that "the remedy here stated may not make Steven Balko whole". The reference to "here stated" implies the remedy is to be specifically set forth, and not generally incorporated by reference as the Union asserts. The final words of the award also imply that the remedy has been specifically stated by noting "so awarded." The enigmatic reference to not making Balko whole can be accounted for by concluding it notes that the award can not make up for whatever anxiety and non-economic hardship Balko experienced as a result of his loss of work, but the point remains that the award is ambiguous.

Resolving the ambiguity is troublesome, given the existence of the Rusk County Circuit Court's confirmation of the award. That the judgement is not res judicata of the remedial points raised here does not mean the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., can be used as a vehicle to over-

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9/ Hill and Sinicroppi, Remedies In Arbitration, (BNA, 1981) at 59.

turn or modify the result reached by the court. On this point, the present matter implicates the res judicata doctrine less than the doctrine of primary jurisdiction. The Commission's view of the primary jurisdiction doctrine has been explained thus:

> It is the commission's policy not to assert its jurisdiction over issues which also have been submitted to a court, notwithstanding the commission has primary jurisdiction. The reason is that whether to honor the commission's primary jurisdiction rests in the discretion of the court. For the commission to proceed might appear as calculated to embarrass a court or to encroach on its discretion whether to honor the primary jurisdiction doctrine. Thus, the commission's policy is borne out of respect for the courts. 10/

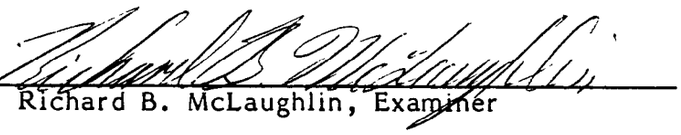
The Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., is concurrent with the court's, although the Commission does not share the court's jurisdiction under Chapter 788. In addition, the present matter does not involve a matter pending before a court. Thus, the primary jurisdiction doctrine is not in dispute here. The considerations noted in the passage cited above do, however, present a relevant note of caution for the present matter, and it is important to note that the exercise of the Commission's jurisdiction under Sec. 111.70(3)(a)5, Stats., must be consistent with the judgement already issued by the Rusk County Circuit Court.

In light of the unique procedural posture of the present matter, the most persuasive method for resolving the ambiguities of the Lindquist award is to remand the matter to Lindquist for clarification. This is consistent with the court's confirmation of the award, and avoids the risk of an Examiner reading the award in a manner the court would not. In addition, this approach is consistent with Commission 11/ and with judicial 12/ precedent.

Past remands by Commission examiners have been entered as interim findings. The order stated above is in that form. No remand of the reinstatement issue has been made because the parties have already put that question before Arbitrator Lindquist, as evidenced by Weld's letters of July 24, and August 24, 1987. This leaves as the sole ambiguity remaining to be resolved the issue stipulated by the parties at the November 8, 1988, hearing, and set forth in Finding of Fact 10. It should be stressed that the remand entered above does not represent a procedure to be preferred to the enforcement or non-enforcement of an award. The remand has, however, been necessitated by the unique procedural posture of this case, and has been entered to resolve the parties' dispute in a manner which effects the Rusk County Circuit Court's confirmation of the Lindquist award.

Dated at Madison, Wisconsin this 23rd day of March, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

10/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra, with final authority from WERC, 12/77) at 13.

11/ See School District of Chetek, Dec. No. 15210-A (Henningsen, 1/78), aff'd by operation of law, Dec. No. 15210-D (WERC, 9/78); Madison Metropolitan School District et. al., Dec. No. 16493-A (Schoenfeld, 6/79). The Commission has itself remanded an award to the arbitrator for further clarification, School District of West Allis-West Milwaukee et. al., Dec. No. 15504-B (WERC, 8/78). That case involves three separate opinions, none of which questioned the general propriety of a remand to an arbitrator.

12/ See Steelworkers v. Enterprise Wheel & Car Corp., 363 US 593 (1960); Young Radiator Co. v. Automobile Workers, Local 37, 734 F.2d 321 (7th Cir., 1984); Local Union No. 494, IBEW, AFL-CIO v. Brewerey Proprietors, 289 F. Supp. 865 (E.D. Wis, 1968); Gallagher v. Schernecker, 60 Wis. 2d 143 (1972).