STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BOILERMAKERS, IRON SHIPBUILDERS, BLACKSMITHS, FORGERS AND HELPERS LOCAL 124, AFL-CIO, Complainant, vs. AQUA-CHEM, INC., Respondent.	Case 3 No. 42224 Ce-2081 Decision No. 26102-A

Appearances:
Mr. Matthew R. Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of International Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 124, AFL-CIO.
Mr. Thomas W. Mackenzie, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Aqua-Chem, Inc.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

International Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 124, AFL-CIO (hereinafter Complainant or Union), having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission (hereinafter Commission) on May 22, 1989, alleging that Aqua-Chem, Inc. (hereinafter Respondent or Company), had committed unfair labor practices by refusing to arbitrate grievances 1988 and 2088, thereby violating Sec. 111.06(1)(f), Stats.; and on July 26, 1989, the Commission having appointed James W. Engmann, 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, Stats.; and on August 14, 1989, the Respondent having filed an answer to said complaint, denying it had violated Sec. 111.06(1)(f), Stats., and alleging several affirmative defenses; and hearing on said complaint having been held on August 31, 1989, in Milwaukee, Wisconsin, at which time the parties were afforded the opportunity to enter evidence and to make arguments as they wished; and said hearing having been transcribed, the transcript of which was received on September 18, 1989; and the parties having filed briefs and reply briefs, the last of which was received on November 22, 1989; and the Examiner having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That International Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 124, AFL-CIO (hereinafter Complainant or Union), is a collective bargaining representative within the meaning of Sec. 111.02(11), Stats.; and that the Union maintains its principal office at 1201 South 48th Street, West Milwaukee, Wisconsin 53214.

2. That Aqua-Chem, Inc. (hereinafter Respondent or Company), is an employer within the meaning of Sec. 111.02(7), Stats.; and that the Company maintains its principal office at 240 West Capitol Drive, Milwaukee, Wisconsin 53201.

3. That from July 28, 1986, through July 28, 1988, the Union and the Company were parties to a collective bargaining agreement; and that said agreement included the following provisions:

ARTICLE X--GRIEVANCE AND ARBITRATION PROCEDURE

52. Step 1

Should a complaint or dispute arise between an employee and the Company, within two (2) working days following the occurrence of the problem or after the employee becomes aware of the problem, an earnest effort shall be made to settle such complaint or dispute. In no event shall this period exceed sixty (60) working days. The Foreman shall make an honest effort to settle such differences within two (2) working days, within which period an answer to the complaint or dispute shall be given to the employee and/or the Steward involved.

. . .

Step 4

In the event that no satisfactory settlement is reached in Step 3 of the grievance procedure, the matter in dispute may be referred to arbitration. The party which desires to arbitrate the matter in dispute shall give the other party written notice of such desire. The Union shall give such notice of its desire to arbitrate the matter in dispute within five (5) calendar days following Local 124's next monthly meeting which is scheduled the fourth (4th) Sunday of each month. However, there shall not be a lapse of more than two (2) months.

. . .

55. The parties, after receipt of notice to arbitrate, shall meet immediately for the purpose of selecting an arbitrator to hear the matter in dispute. If they should be unable to agree on an arbitrator within five (5) days after receipt of notice to arbitrate, a request shall be sent by either party to the Federal Mediation and Conciliation Service asking that it provide them with a list of seven (7) arbitrators, from which they shall select one, by alternately striking names until only one remains and this remaining one shall arbitrate the case.

. . .

58. The arbitrator, in rendering a decision on the matter in dispute referred to him, shall not add to, subtract from, or alter in any way, the provisions of this Agreement. He shall render his decision within thirty (30) days of the date of the arbitration hearing and it shall be final and binding upon all parties concerned.

. . .

ARTICLE XX--SEVERANCE PAY

92. The company will pay severance pay of two (2) days for each year of service up to a maximum of 20 years service. Severance pay shall be paid when a department is permanently closed and if an employee of that department is terminated by such action.

4. That during the spring and summer of 1988, the Union and the Company met approximately 20 times to negotiate a successor agreement; that during said negotiations, the Company sought substantial language changes and significant wage reductions; that during said negotiations, the Company secured an option to purchase an existing facility in Knoxville, Tennessee; that on May 20, 1988, the Company informed the Union of the potential for relocation of work from Milwaukee to the Knoxville plant; that on July 27, 1988, the Company presented to the Union a final offer for settlement of the contract; that said final offer included the following provisions:

FINAL COMPANY OFFER FOR CONTRACT SETTLEMENT

July 27, 1988

The Company informed the Union of the potential of work relocation on May 20, 1988, and has, since that time, offered the Union a full and complete opportunity to bargain over that decision.

Any representations made by the Company, whether expressed or implied, that the Company will not purchase a new facility in Knoxville, Tennessee are expressly contingent upon the ratification of a new Agreement on or before 12:01 A.M., July 28, 1988.

This proposal represents the final, complete and last offer of the Company for settlement of all outstanding issues. If it is not ratified by the Union an impasse in negotiations will exist.

The Company's Final Offer is as follows:

. . .

4.Delete existing language in Section 92 and substitute the following:

"If through the unilateral exercise of the rights contained in Article III entitled "Management," jobs are permanently eliminated, the Company shall so notify the Union and the parties shall meet to discuss what severance shall be paid to employees terminated as a result of such action."

5.Renumber old Article XXVI entitled "Duration of Agreement" as Article XXVII which shall provide as follows:

"This agreement shall be in effect from July 28, 1988, through July 27, 1991, and from year to year thereafter unless either party gives written notice of its desire to terminate this Agreement at least sixty (60) days prior to July 27, 1991, or sixty (60) days prior to any subsequent anniversary date thereof. In the event such notice is given, the parties shall meet no later than fifteen (15) days after receipt of such notice."

. . .

and that said final offer also included the following provisions:

. . .

2.Amend Section 52 to provide as follows:

"The Company and the Union agree that the grievance procedure provided herein shall be the sole and ex-clusive means of resolving grievances arising under the terms of this Agreement. For the purpose of this Agreement, a grievance shall be defined as any dispute or difference between the Company and an employee or a group of employees, or between the Company and the Union with respect to the meaning, interpretation or application of the written terms and provisions of this Agreement.

Recognizing that grievances should be raised and settled promptly, grievances must be raised and processed within the specified time limits. The specified time limits may be extended by mutual agreement.

Step 1: The aggrieved employee, with a steward or committeeman if he/she desires, shall present the grievance to the supervisor involved within five (5) working days from the event giving rise to the grievance or within five (5) working days from the date the matter became known or should have become known to the employee, but in no event longer than thirty (30) calendar days after the event."

3. All other steps and current Sections 53-57 and 59 shall remain unchanged (subject to appropriate renumbering), except the following sentence shall be added to current Section 55:

"The time elapsed between receipt of notice to arbitrate and a written request to FMCS for a panel shall not exceed thirty (30) calendar days and the

selection from the panel shall be made no more than thirty (30) calendar days from receipt of the panel by the parties."

4.The following language shall be substituted for that contained in Section 58:

"58. The arbitrator shall be bound by the written terms and provisions of this Agreement and shall have authority to consider only a grievance presenting an arbitrable issue under this Agreement. The arbitrator shall have no authority, directly or indirectly, to add to, subtract rom, modify or amend any provisions of this Agreement. A decision of the arbitrator on any grievance within the authority herein outlined shall be final and binding on the individual, the Company and the Union."

. . .

5. That the Union rejected said final offer; that subsequent to the rejection of its final offer, the Company exercised its option and purchased the Knoxville plant; that the Union and the Company continued to meet; that on September 13, 1988, the Company presented to the Union a revised final offer for contract settlement; that said revised final offer included the provisions listed above without modification; that the Union rejected said revised final offer; that the Company began proceeding with its plans to transfer work to the Knoxville plant; that subsequent to the rejection of the final offer, the Union and the Company met on three occasions to bargain over the effects of the Company's decision to relocate work to Knoxville; that a number of proposals were exchanged including proposals regarding Paragraph 92: Article XX--Severance Pay; that throughout negotiations, the Company did not change its position regarding Paragraph 92; that the Union and the Company did not reach agreement; and that on December 22, 1988, the Company informed the Union that it was implementing its final position on the disputed issues.

6. That the Company implemented its final position on the disputed issues, including the issue of severance pay; that the Company terminated employes who were actively working as of November 29, 1988; that the Company gave severance pay to those employes if their jobs were eliminated during the phase down; that the Company did not terminate employes who were on layoff as of November 29, 1988; and that employes on layoff were not given severance pay by the Company.

7. That on December 27, 1988, the Union filed a grievance with the Company; that the statement of the grievance is as follows:

On or about December 22, 1988 the Aqua Chem Inc. Management informed the Union Committee that it will not issue severance pay to all employees on the Seniority list, clearly in violation of Article XX par. 92 of the Labor Agreement. The Union is demanding all affected employees be issued severance pay.

that the grievance was processed through the grievance procedure; that on January 24, 1989, the Union requested arbitration of the grievance; and that in a letter dated January 25, 1989, from F. Marshall White, Vice President of Operations for the Company, to Alden Harvey, President of the Union Local, the Company stated as follows:

I'm writing in response to your letter of January 24, 1989 requesting arbitration of the above-referenced grievances. As the facts giving rise to these grievances occurred after the expiration of the collective bargaining agreement on July 28, 1988, and as no successor agreement requiring arbitration has been negotiated and agreed to by the parties, please be advised that the Company is refusing to arbitrate these grievances.

8. That subsequently the Union and the Company entered into a successor agreement, effective from July 27, 1989, through July 27, 1992; that said agreement included the following provisions:

ARTICLE XII - GRIEVANCE AND ARBITRATION PROCEDURE

47.The Company and the Union agree that the grievance procedure provided herein shall be the sole and exclusive means of resolving grievances arising under the terms of this Agreement. For the purpose of this Agreement, a grievance shall be defined as any dispute or difference between the Company and the Union with respect to the

meaning, interpretation or application of the written terms and provisions of this Agreement.

Recognizing that grievances should be raised and settled promptly, grievances must be raised and processed within the specified time limits. The specified time limits may be extended by mutual agreement.

Step 1. The aggrieved employee, with a steward or committeeman if he/she desires, shall present the grievance to the supervisor involved within five (5) working days from the event giving rise to the grievance or within five (5) working days from the date the matter became known or should have become known to the employee, but in no event longer than thirty (30) calendar days after the event.

. . .

Step 4. In the event that no satisfactory settlement is reached in Step 3 of the grievance procedure, the matter in dispute may be referred to arbitration. The party which desires to arbitrate the matter in dispute shall give the other party written notice of such desire. The Union shall give such notice of its desire to arbitrate the matter in dispute within five (5) calendar days following Local 124's next monthly meeting which is scheduled the fourth (4th) Sunday of each month. However, there shall not be a lapse of more than two (2) months.

. . .

50. The parties, after receipt of notice to arbitrate, shall meet immediately for the purpose of selecting an arbitrator to hear the matter in dispute. If they should be unable to agree on an arbitrator within five (5) days after receipt of notice to arbitrate, a request shall be sent by either party to the Federal Mediation and Conciliation Service asking that it provide them with a list of seven (7) arbitrators, from which they shall select one, by alternately striking names until only one remains and this remaining one shall arbitrate the case. The time elapsed between receipt of notice to arbitrate and a written request to the Federal Mediation and Conciliation Service for a panel shall not exceed thirty (30) calendar days and the selection from the panel shall be made no more than thirty (30) calendar days from receipt of the panel by the parties.

. . .

53. The arbitrator shall be bound by the written terms and provisions of this Agreement and shall have authority to consider only a grievance presenting an arbitrable issue under this Agreement. The arbitrator shall have no authority, directly or indirectly, to add to, subtract from, modify or amend any provisions of this Agreement. A decision of the arbitrator on any grievance within the authority herein outlined shall be final and binding on the individual, the Company and the Union.

ARTICLE XXII - SEVERANCE PAY

85. If, through the unilateral exercise of the rights contained in Article III entitled "Management," jobs are permanently eliminated, the Company shall so notify the Union and the parties shall meet to discuss what severance shall be paid to employees terminated as a result of such action.

9. That the collective bargaining agreement in effect between the parties from July 28, 1986, through July 27, 1988, contained a clause requiring the submission of complaints or disputes arising between an employe and the Company to arbitration; that the dispute regarding severance pay arose under the agreement but after its termination; that the arbitration clause did not

expressly exclude from its operation a dispute which arose under the contract but which was based on events that occurred after its termination; and that the Company, by refusing to arbitrate the Union's claim that certain employes were entitled to severance pay under the collective bargaining agreement, violated the collective bargaining agreement.

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

CONCLUSION OF LAW

That by its failure to arbitrate the grievance involving severance pay, the Company violated the terms of the collective bargaining agreement in violation of Sec. 111.06(1)(f), Stats.

Based upon the foregoing Findings of Fact and Conclusion of Law, the Examiner makes and renders the following

ORDER 1/

1. IT IS ORDERED that Aqua-Chem, Inc., its officers and agents, shall immediately cease and desist from refusing to arbitrate grievances in violation of the collective bargaining agreement and Sec. 111.06(1)(f), Stats.

2. IT IS FURTHER ORDERED that Aqua-Chem, Inc., take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

a. Immediately proceed to arbitration on Grievance 2088.

b. Notify its employes in the bargaining unit represented by the Union by posting in conspicous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." That Notice shall be signed by an authorized representative of the Respondent 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 to ensure that said notices are not altered, defaced or covered by other material.

c. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this decision what steps it has taken to comply with the above Order.

3. IT IS FURTHER ORDERED that the Union's request for attorneys fees is denied.

Dated at Madison, Wisconsin this 18th day of June, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, 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

(Footnote 1/ continued on page 8)

1/ Continued

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 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 immediately cease and desist from refusing to arbitrate grievances in violation of the collective bargaining agreement with International Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 124, AFL-CIO.

2. We will immediately proceed to arbitration on Grievance 2088.

Dated at _____, Wisconsin this _____ day of _____, 1990.

AQUA-CHEM, INC.

By _____

SAID NOTICE IS TO REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

AQUA-CHEM, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainant

On brief the Complainant asserts that this is an action to compel arbitration; that the Respondent has asserted that this is within the exclusive jurisdiction of the National Labor Relations Board; that it is clear that the courts have jurisdiction over actions to compel arbitration; that a cause of

action under Sec. 301 of the Labor Management Relations Act is within the jurisdiction of state as well as federal courts since their jurisdiction with respect to these causes of action is concurrent; that the Wisconsin Employment Peace Act provides the Commission with jurisdiction over actions for violations of labor agreement under Sec. 111.06(1)(f), Stats.; that as this is an action for violation of the Employer's agreement to submit grievances to arbitration, the Commission as well as state courts have jurisdiction; and that the substantive law to be applied is the federal common law developed under Sec. 301(a) of the NLRA.

The Complainant also argues that in Nolde Brothers, Inc. v. Local 358 Bakery Workers, 430 U.S. 243 (1977) the United States Supreme Court held that the claim for severance pay under the expired contract is subject to resolution under the contract's arbitration terms; that the court determined that the obligation under an arbitration clause survived the termination of the agreement where the obligation is arguably created by an expired agreement; that if the dispute over severance pay in Nolde was arbitrable, a fortiori the dispute here is arbitrable; and that the claim for arbitration is stronger in this case than in Nolde because the Company, by its conduct, has acknowledged its obligation to pay severance pay to employes other than to those on layoff.

On reply brief, the Complainant alleges that the Respondent fails to distinguish between concurrent and exclusive jurisdiction; that while the NLRB may assert jurisdiction over certain refusals to arbitrate, this does not negate the jurisdiction of state forums and federal courts in breach of contract actions; that the NLRB finds a violation only where the refusal to arbitrate is part of a wholesale repudiation of a duty to arbitrate, not where there is a single grievance at issue; that an alleged breach of a contractual duty to arbitrate involves a far different analysis than that in a refusal to bargain case before the NLRB; that the question is not whether the parties bargained to impasse, but whether the Employer had an obligation under the contract to arbitrate this grievance; that the question is one of violation of contract, not of duty to bargain; that since it is clear under Nolde that the Employer had a contractual duty to arbitrate the grievance, the Employer violated Sec. 111.06(1)(f), Stats.; and that since the Respondent's defense is clearly erroneous and has been obviously so since at least 1977, the Commission should award the Union its reasonable attorneys fees in this case.

Respondent

On brief, the Respondent argues that the jurisdiction of the Commission is preempted in this case; that it is well established that where the activity complained of is regulated by both the National Labor Relations Act (NLRA) and the Wisconsin Employment Peace Act and the Employer is subject to the jurisdiction of the NLRB, the jurisdiction of the Commission is preempted; that the complained of conduct in this case -- the alleged failure to arbitrate in a post contract expiration context -- is regulated by the NLRA; that where the alleged failure to arbitrate occurs within a post contract expiration context, the NLRB has held that an employer's refusal to arbitrate may constitute a violation of Sec. 8(a)(5) of the NLRA and has ordered arbitration as a remedy; that such cases apply the same form of analysis as the Supreme Court did in Nolde; and that given the Commission's established precedent that preemption is appropriate where the complained of conduct constitutes a violation of both the NLRA and the WEPA, it is clear that the doctrine of preemption should be invoked in this case.

The Complainant also argues that, assuming the WERC extends jurisdiction to this case, the dispute at issue is not arbitral due to the post contract expiration over the severance question; that subsequent to the contract expiration and the Company's implementation of its decision to transfer a significant portion of bargaining work to another plant, the parties met to bargain over the "effects" of that decision; that when the parties were unable to reach agreement, the Company implemented its position; and that the fact that the parties bargained over the question of severance dispositively distinguishes the facts at bar from those before the court in Nolde.

The Complainant further argues that the Union alleged in a charge before the NLRB that the Company violated Sec. 8(a)(5) by failing to honor super-seniority as provided in the expired contract; that the NLRB dismissed the charge because the Employer had bargained to impasse its proposal to eliminate super-seniority; that an identical form of analysis is warranted here; that the Company bargained to impasse its proposal that only active employes would receive severance; that the Union was aware that this proposal would preclude severance payments to employes on layoff status; and that the Union ultimately accepted and ratified an agreement deleting the language at issue here.

On reply brief the Respondent argues that the Complainant's brief contains several errors in conflict with the record; that no claim for severance occurred until well after the contract's expiration on July 28, 1988; that it was the effects bargaining rather than a term of the expired contract that was ultimately determinative of who would receive severance; and that the Company treated employes on long term disability in the same manner it treated other employes consistent with the distinction it drew in effects bargaining.

In addition the Respondent argued that the legal argument presented by the Complainant constitutes nothing more than a general restatement of relevant law without consideration of the specific defenses raised by the Respondent; that an employer has the right to implement its bargaining proposal after it has fulfilled its bargaining obligation under federal law; that in this case, the Company met with the Union and after impasse was reached, implemented its proposal which provided that no severance would be paid to employes who were not actively employed on November 29, 1987; that the Union attempts to circumvent the collective bargaining process by contending severance entitlement should be determined by a provision of the expired contract rather than effects negotiations; and that the complaint, therefore, should be dismissed.

DISCUSSION

The Employer's defense to the complaint filed by the Union is two-pronged. First, the Employer asserts that the Commission is without subject matter jurisdiction. Second, assuming arguendo that subject matter jurisdiction exists, the Employer asserts that the issue is not arbitrable in light of the post contract expiration bargaining.

1. Jurisdiction

Where an act may constitute a violation of the National Labor Relations Act (NLRA) and the Wisconsin Employment Peace Act (WEPA) and where the National Labor Relations Board (NLRB) has jurisdiction, the jurisdiction of the Commission is preempted. 2/ The Commission does have jurisdiction, however, to determine whether a violation of a collective bargaining agreement has occurred, even though the employer is otherwise subject to the jurisdiction of the NLRB, as such an act does not violate the NLRA. 3/ The Employer asserts however, that where the alleged violation of the collective bargaining agreement by failing to proceed to arbitration occurs within a post contract expiration context, the NLRB has held that an employer's refusal to arbitrate may constitute a violation of Sec. 8(a)(5) of the NLRA and has ordered arbitration as a remedy. Therefore, the Employer argues that the Commission is preempted for deciding this case.

Section 8(a)(5) of the NLRA makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employes. . . ". Said section corresponds to Sec. 111.06(1)(d), Stats., which makes it an unfair labor practice for an employer "(t)o refuse to bargain collectively with the representative of a majority of his employes in any collective bargaining unit . . . ". For 40 years the Commission has held that it has no jurisdiction over an employer engaged in interstate commerce where the complaint alleges an unfair labor practice which is covered by the NLRA. 4/ Thus, it is clear that if the Union in this case was asserting that the Employer committed an unfair labor practice by refusing to bargain, the Commission would be without jurisdiction to hear such an allegation since the Employer in this case is engaged in interstate coverage and since said unfair labor practice is covered by the NLRA.

In the matter before the Commission, however, the Union is not asserting an unfair labor practice which is covered by the NLRA. Under Sec. 111.06(1)(f), Stats., it is an unfair labor practice for an employer "to violate the terms of a collective bargaining agreement. . . ." Such an action by the employer is not prohibited per se by the NLRA. Even though the action of the Employer may be subject to the NLRA, the Commission is not preempted from reviewing said action if it is violative of the WEPA in a way not covered by the NLRA. Thus, even though the action of the Employer in this case may constitute a failure to bargain under the NLRA, the Commission is not preempted from determining if said action also violates the WEPA by constituting a violation of the collective bargaining agreement.

For these reasons, this Examiner concludes that the Commission has subject matter jurisdiction over this complaint.

2. Arbitrability

The Union alleges that the Employer violated the collective bargaining agreement and, therefore, violated Sec. 111.06(1)(f), Stats., by refusing to proceed to arbitration on Grievance 2088. 5/ Section 111.06(1), Stats., make

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2/ See, i.e., Strauss Printing Company, Inc., Dec. No. 20115-A (Schoenfeld, 12/82), affd. by operation of law, Dec. No. 20115-B (WERC, 1/83).

3/ Bay Shipbuilding Corp., Dec. Nos. 19957-B and 19958-B (Shaw, 4/83), affd., Dec. Nos. 19957-C and 19958-C (WERC, 2/84).

4/ River Falls Co-op Creamery, Dec. No. 2311 (WERB, 2/50).

5/ At hearing the Complainant moved to amend its complaint to delete the allegation regarding Grievance 1988. The Respondent did not object to said motion and it was granted by the Examiner.

it an unfair labor practice for an employer:

> (f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

The Employer denies that it violated Sec. 111.06(1)(f), Stats.

At the onset, it must be clarified as to what contract violation is before this Examiner. This is not a case where the collective bargaining agreement does not provide for the final and binding arbitration of grievances, in which case the Commission will determine whether the agreement has been violated with respect to the merits of the dispute. 6/ Neither is this a case where the collective bargaining agreement provides for arbitration of unresolved grievances and where the complaining party has not proceeded in accordance with the grievance procedure contained in said agreement, in which case the Commission will not assert its jurisdiction but will, instead, defer to the arbitration process. 7/ Instead, this is a case where the parties' agreement provides for binding arbitration and the complaining party alleges that the employer refuses to process a grievance to arbitration, in which case the Commission will assert jurisdiction to consider whether said refusal violates the collective bargaining agreement. 8/ But the Company argue that the issue in Grievance 2088 is not subject to arbitration.

The law governing a Commission determination of whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy. 9/ In AT&T Technologies, Inc. v. Communication Worker of America 10/ the U.S. Supreme Court gleaned four guiding principles from the Steelworkers Trilogy. In AT&T the Court said:

> The principles necessary to decide this case are not new. They were set out by this court over 25 years ago in a series of cases known as the Steelworkers Trilogy. . . .
>
> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." . . .
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability--whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance--is undeniably an issue for judicial determination. . . .
>
> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . .
>
> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n 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. Doubts should be resolved in favor of coverage." 11/

6/ See, i.e., J. I. Case Co., Dec. No. 1593 (WERB, 4/48), and Ladish Co. Inc., Tri-Clover Division, Dec. No. 23390-A (WERC, 7/87).

7/ See, i.e., River Falls Coop. Creamery, Dec. No. 2311 (WERC, 1/50), and ESB Wisco, Inc., Dec. Nos. 17217-B and 17217-C (WERC, 4/80).

8/ Modern Poured Walls, Inc., Dec. No. 19102-B (WERC, 4/82).

9/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

10/ 475 US 643, 121 LRRM 3329 (1986).

11/ AT&T, supra, 121 LRRM at 3331-3332 (citations omitted).

Under principles one and two, it is clear that the Examiner's duty in this case is to determine whether the parties agreed in their collective bargaining agreement to arbitrate Grievance 2088. Said grievance alleges that the Company violated the collective bargaining agreement by not paying severance pay to some employes on layoff status. As to principle three, it is clear that the merits of Grievance 2088 are not before this Examiner. Thus, this Examiner will not determine whether all employes on layoff should have received severance pay, as alleged by the Union in Grievance 2088. Since the parties have a provision for the final and binding dispositions of disputes, that determination will be made, if at all, through that process. Instead, this Examiner will determine whether the Company violated Article X--Grievance and Arbitration Procedure by refusing to proceed to arbitration on Grievance 2088 and, thereby, violated Sec. 111.06(1)(f), Stats. If it is found that the Employer is obligated to arbitrate Grievance 2088, the Examiner will so order because Grievance 2088 is not before the Examiner; what is before the Examiner is the contractual obligation to arbitrate Grievance 2088. Under principle four, the Commission will operate under a presumption of arbitrability in determining whether the parties have agreed to submit the underlying dispute to arbitration.

In this case, the parties' collective bargaining agreement does contain an arbitration clause. The arbitration clause at issue here is a broad one, covering "a complaint or dispute aris(ing) between an employee and the Company," Article X, Step 1, and allowing "the matter in dispute (to) be referred to arbitration," Article X, Step 4. On its face, the question of whether employes on layoff should receive severance pay is a complaint or dispute between employes and the Company, which allows the grievance to be referred to arbitration. 12/

The Company argues, however, that this is a case where the contract terminated, the Union and the Employer bargained over the issue of severance pay to impasse, and the Employer implemented its position; and that, therefore, the Commission must not allow the Union, dissatisfied with its inability to achieve its objective through bargaining, to circumvent the bargaining process via reliance on its interpretation of expired contract language.

It is clear that a dispute over severance pay under an expired collective bargaining agreement is arbitrable. 13/ As the Court said in Nolde, the dispute over severance pay, "although arising after the expiration of the collective-bargaining contract, clearly arises under that contract." 14/ Since the parties contracted to submit matters in dispute to arbitration, and since disputes over severance pay survive the expiration of the contract, this would normally end the discussion regarding this issue. The Employer argues, however, that a different result from Nolde must occur because it negotiated the issue of severance pay to impasse and then implemented its last offer, thus settling the entitlement of laid off employes to severance pay.

But the presumption before the Examiner is that 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." 15/ Here the parties agreed to settle matters in dispute through the grievance and arbitration process established in their collective bargaining agreement. In essence, the Company is saying that it did not violate the agreement since it paid severance pay in accordance with the language it implemented after reaching an impasse with the Union on a successor agreement. This argument goes to whether the Employer is right on the merits, not to whether the Employer is required to resolve the dispute over severance pay before an arbitrator.

As the Court noted in Nolde, the parties drafted their broad arbitration clause against a backdrop of well-established federal labor policy favoring arbitration as the means of resolving disputes over the meaning and effect of collective bargaining agreements. "The parties must be deemed to have been conscious of this policy when they agreed to resolve their contractual

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12/ The Company's final offer included a change in the grievance procedure, stating that the Company and the Union agree that for purposes of the agreement, a grievance is defined as "any dispute or difference between the Company and an employee or a group of employees, or between the Company and the Union with respect to the meaning, interpretation or application of the written terms and provisions of this Agreement." This, too, is a broad arbitration clause within which this grievance on its face falls.

13/ John Wiley & Sons v. Livingston, 376 US 543 (1964); Nolde Brothers, Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO 430 US 243 (1977); and Typography Unlimited and Kenosha Typographers, Inc., Dec. No. 19218-A (Malamud, 11/82), affd. by operation of law, Dec. No. 19218-B (WERC, 12/82).

14/ 420 U.S. at 250.

15/ Warrior & Gulf, supra, 363 US at 582-583.

differences through arbitration." 16/ The Company took no action to exclude from the arbitration clause disputes over severance pay, in this or in the successor agreement, which affords a basis for concluding that it intended to arbitrate all such grievances arising out of the contractual relationship. 17/ Doubts as to whether the arbitration clause is susceptible to an interpretation that covers the asserted dispute "should be resolved in favor of coverage." 18/ Presumptions favoring arbitrability "must be negated expressly or by clear implication." 19/ This the Company has not done on the record herein.

For these reasons the Examiner finds that the Company violated the collective bargaining agreement by refusing to proceed to arbitration on the underlying grievance and, therefore, that the Company violated Sec. 111.06(1)(f), Stats.

As the complaint did not cite any contractual language or statutory authority in support of its request for attorneys fees and other costs of litigation, the Complainant's request for same is denied. 20/

Dated at Madison, Wisconsin this 18th day of June, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

16/ 430 U.S. at 254.

17/ Indeed, the language implemented by the Company states, "The Company and the Union agree that the grievance procedure provided herein shall be the sole and exclusive means of resolving grievances arising under the terms of this Agreement."

18/ Warrior & Gulf, supra, 363 U.S. at 582-583.

19/ Nolde, supra, 430 U.S. at 255.

20/ See, i.e., West Allis - West Milwaukee School District, Dec. No. 23805-B (Buffett, 6/87).