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-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Matthew R. Robbins, 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.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. Thomas W. Mackenzie, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Aqua-Chem, Inc.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Examiner James W. Engmann having on June 18, 1990, issued Findings of Fact, Conclusion of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that Respondent Aqua-Chem, Inc. had committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to arbitrate a grievance filed by International Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers Local 124, AFL-CIO; and Respondent Aqua-Chem, Inc. having on July 5, 1990 filed a petition with the Commission pursuant to Sec. 111.07(5), Stats., seeking review of the Examiner's decision; and the parties having submitted written argument, the last of which was received September 7, 1990; and the Commission, having reviewed the record and the parties argument and being satisfied that the Examiner's decision should be affirmed, makes and issues the following

ORDER 1/

That the Examiner's Findings of Facts, Conclusion of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

_____
William K. Strycker, Commissioner

1/ Please find footnote 1/ on page 2.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s.

17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

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

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

AQUA-CHEM, INC.

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

BACKGROUND

The Pleadings

In its complaint, as amended at hearing, Local 124 asserted that Respondent Aqua-Chem had committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats., by refusing to arbitrate a grievance regarding the accrued vested severance pay entitlement of bargaining unit employes under a 1986-1988 collective bargaining agreement. Respondent Aqua-Chem's answer denied that it had committed the alleged unfair labor practice and also asserted: (1) the Commission lacks subject matter jurisdiction over the matter raised by the complaint; (2) the issues raised by the complaint are preempted by federal law; (3) there was no collective bargaining agreement in effect between the parties at all times material herein and therefore the complaint fails to state a claim under Sec. 111.06(1)(f), Stats.; and (4) Aqua-Chem had lawfully implemented its position on severance pay entitlement following expiration of a collective bargaining agreement and that said unilaterally implemented position superceded any contractual obligation as to severance pay which existed under the expired collective bargaining agreement.

The Examiner's Decision

In his decision, the Examiner initially concluded that the Commission possessed subject matter jurisdiction over the complaint. In reaching this conclusion, he rejected Respondent Aqua-Chem's argument that because the Complainant could have pursued a refusal to bargain complaint under the National Labor Relations Act (NLRA) and therein litigated the propriety of the Respondent's refusal to arbitrate the severance pay grievance, the Commission did not have jurisdiction to decide the violation of collective bargaining agreement claim under Sec. 111.06(1)(f), Stats. The Examiner concluded that because the violation of a collective bargaining agreement is not an unfair labor practice under the NLRA, the Commission is not preempted from reviewing such an allegation under the provisions of the Wisconsin Employment Peace Act (WEPA).

As to the Respondent's argument that the grievance is not subject to arbitration, the Examiner applied the federal law expressed by the United States Supreme Court in AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) and in Nolde Brothers, Inc. v. Local 358 Bakery Workers, 430 U.S. 243 (1977) and concluded that the Respondent was obligated to proceed to arbitration. More specifically the Examiner held:

> 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/

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 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.

. . .

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).

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.

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.

Given the foregoing, the Examiner ordered the Respondent to proceed to arbitration.

POSITIONS OF THE PARTIES ON REVIEW

Respondent Aqua-Chem

Respondent does not quarrel with the Examiner's recitation of the facts underlying this dispute nor with his general discussion of the governing legal principles. Respondent appeals solely with respect to the legal conclusions drawn by the Examiner from his application of the legal principles to the undisputed facts.

Respondent urges the Commission to reverse the Examiner's conclusion that the Commission's jurisdiction over this matter is not preempted by the NLRA. Respondent contends that the Commission has correctly held that where a party's act may constitute a violation of the NLRA and WEPA and where the party is within the jurisdiction of the NLRA, the jurisdiction of the Commission is pre-empted. Because the NLRA could have been invoked by the Complainant herein under a refusal to bargain theory, Respondent asserts that the Commission's pre-emption rulings should apply to the instant complaint.

Respondent argues that the distinction raised by the Examiner between a violation of contract unfair labor practice under Sec. 111.06(1)(f), Stats., and a refusal to bargain allegation under the NLRA is a distinction without a difference. Respondent urges that within the context a post-contract expiration refusal to arbitrate, there is no meaningful difference between a bad faith bargaining charge under the NLRA and a breach of contract complaint under WEPA. In either case, Respondent alleges that the act complained -- refusal to arbitrate -- is the same; that the analysis employed to determine whether a violation exists -- a Nolde analysis -- is the same; and that the remedy available -- an order to arbitrate -- is the same. Therefore, Respondent asserts that the Commission should conclude that its jurisdiction is preempted by the NLRA in this case.

Assuming the Commission concludes that it should exercise jurisdiction over this case, Respondent argues that the grievance in question is not arbitrable due to the bargaining over severance pay rights which occurred after expiration of the contract in question. Contrary to the Examiner's holding, Respondent contends that the result of the post-expiration bargaining is relevant and determinative as to the question of arbitrability. Here, Respondent argues that its severance pay obligations under the expired contract ceased to exist once it implemented its final offer following post-contract expiration bargaining as to severance pay. Because the parties bargained over the very issue the Complainant now asserts it wishes to arbitrate, Respondent argues that this case is factually distinguishable from Nolde. Respondent contends that severance entitlement was determined in this case by the post-contract expiration negotiations and argues that the Commission must not allow the Complainant to attempt to bypass that bargaining process through grievance arbitration. Respondent contends that it would be absurd to order arbitration as to the meaning and effect of expired contract language that has ceased to exist.

Given the foregoing, Respondent asks the Commission to reverse the Examiner.

Complainant Local 124

Complainant urges the Commission to affirm the Examiner's decision. Complainant argues that the NLRA is not the exclusive forum in which actions to compel arbitration may be brought. Complainant notes that Section 301(a) of the Labor Management Relations Act (LMRA) provides federal and state courts, as well as certain state administrative agencies such as the Commission, with jurisdiction over actions to compel arbitration. Thus, Complainant argues that merely because certain facts may constitute a violation of the NLRA, the National Labor Relations Board (NLRB) does not possess exclusive jurisdiction

over such disputes.

Complainant contends that the Examiner properly applied Nolde to the facts of this case when concluding that the Respondent was obligated to arbitrate the severance pay grievance. Contrary to the Respondent, Complainant argues that the bargaining between the parties over the issue of severance pay strengthens the case for the grievance being arbitrable. Complainant asserts that during bargaining, it repeatedly refused to waive the contractual rights possessed by employes under the expired agreement and therefore that the parties never reached agreement during their bargaining. Complainant contends that its refusal to accede to the Respondent's desire that employes waive contractual rights indicates that both parties recognized that a vested contractual right to severance pay existed. Complainant asserts that it now simply seeks to enforce that contractual right through the grievance arbitration procedure.

Given the foregoing, Complainant asks that the Commission affirm the Examiner.

DISCUSSION

We turn first to the Respondent's assertion that the Examiner erred when he concluded that the Commission jurisdiction over the complaint was not pre-empted by the provisions of the NLRA.

It is well settled that when the Commission decides the merits of an unfair labor practice complaint filed under Sec. 111.06(1)(f), Stats., the Commission is functioning as a competent state tribunal having concurrent jurisdiction with the federal courts under Section 301 of the LMRA to enforce collective bargaining agreements covering employes in industry affecting commerce. Tecumseh Products Co. v. WERB, 23 Wis.2d 118 (1963); American Motors Corp. v. WERB, 32 Wis.2d 237 (1966). It is equally well settled that when exercising our jurisdiction under Sec. 111.06(1)(f), Stats., we are obligated to apply legal standards which are consistent with standards developed under Section 301.

Here, the Respondent argues that we are preempted from exercising our jurisdiction because the Complainant could have sought relief under the NLRA for the Respondent's refusal to arbitrate. When making this argument, Respondent correctly acknowledges that despite its NLRA options, Complainant could have filed a Section 301 action in federal court or a breach of contract action in state court. What Respondent fails to acknowledge when making its argument is that under Sec. 111.06(1)(f), Stats., the Commission is functioning as a Section 301 forum with status at least equivalent to the state courts which Respondent acknowledges would have jurisdiction over this dispute. Most importantly, Respondent's argument also fails to acknowledge that where, as here, a party is seeking to enforce a collective bargaining agreement under Sec. 111.06(1)(f), Stats., it seeks to enforce a right which has no parallel under the NLRA and thus is a right which can be pursued before the Commission.

It has been long settled that only where WEPA and the NLRA have parallel provisions is the Commission deprived of jurisdiction to proceed as to a commerce employer. Algoma Plywood v. WERB, 336 U.S. 301 (1949). Where parallel provisions exist, as in the Stranss Printing Company 2/ case cited by the Respondent in which a Sec. 111.06(1)(d) refusal to bargain complaint was dismissed because of the parallel Sec. 8(a)5 provision of the NLRA, we do not exercise our jurisdiction. Where parallel provisions do not exist, as in the Bay Shipbuilding 3/ case also cited by Respondent and as in Algoma Plywood, supra, we proceed to exercise our jurisdiction.

We have long held that Sec. 111.06(1)(f), Stats. has no parallel provision under the NLRA and that we are free to exercise our jurisdiction over such complaints. We so held recently in Bay Shipbuilding, supra, in conformance with our prior decision in American Motors Corp., Dec. No. 7079 (WERC, 3/65) which was affirmed in American Motors Corp. v. WERB, supra. Any doubt about the legitimacy of our exercising jurisdiction to enforce collective bargaining agreements under WEPA because the NLRA does not have a parallel provision is resolved by portions of the Wisconsin Supreme Court's decision in American Motors Corp., supra. The Court held in pertinent part at pages 243-244, 248-249:

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> In the case at bar, a breach of a collective-bargaining contract was alleged and a sec. 301 suit was brought

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2/ Dec. No. 20115-A (Schoenfeld, 12/82), aff'd by operation of law, Dec. No. 20115-B (WERC, 1/83).

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

before the WERB. American Motors, appellant, argues that the concurrent-jurisdiction principle established by Dowd applies only to state courts and does not permit state administrative bodies to assert jurisdiction. We have considered this question before. In Tecumseh Products Co. v. Wisconsin Employment Relations Board a breach of contract suit was brought by a union against the employer pursuant to sec. 301. The employer argued that the WERB was an administrative agency and not empowered to apply federal law in accordance with sec. 301. This court held that states had concurrent jurisdiction over sec. 301 controversies and were free to allocate judicial power within their own boundaries. Hence the WERB could assume jurisdiction over these disputes.

The significant facts of the case at bar are identical with those of the Tecumseh Case, and it would be necessary to overrule Tecumseh to act favorably on appellant's contention that the WERB had no jurisdiction to hear the matter since it was an administrative agency and not a state court. Appellant recognizes this and urges that a vital factor was not considered by the court in deciding Tecumseh, which factor, had the court known about it, would have brought about a different holding. It argues that Congress considered delegating the authority to deal with sec. 301 suits to the National Labor Relations Board via the unfair labor practice procedure. However, this method of handling such suits was explicitly rejected.

"The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective bargaining agree-ment or an agreement to submit a labor dispute to arbitration. The conference agreement omits this pro-vision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

. . .

In substance, appellant's main argument would require us to take the following three steps:

1. The Congress of the United States did not desire to grant control of sec. 301 actions to the NLRB through unfair labor practice proceedings. (Emphasis added.)

2. The NLRB is an administrative agency.

3. Therefore, federal policy prohibits the states from delegating jurisdiction of sec. 301 actions to an administrative agency in unfair labor practice proceedings.

We have already pointed out that the big problem with this reasoning is that Congress may have had no desire to dictate to the states the procedure to be used in handling sec. 301 actions. Moreover, unfair labor practices before the NLRB and before the WERB are not necessarily the same. (Emphasis added.) The United States supreme court has said:

"The term 'unfair labor practice' is not a term of art having an independent significance which transcends its statutory definition. The States are free (apart from pre-emption by Congress) to characterize any wrong of any kind by an employer to an employee, whether statutorily created or known to the common law, as an 'unfair labor practice.'"

Thus, because the Congress chose not to allow the NLRB to have jurisdiction over sec. 301 actions via the unfair labor practice procedure, it does not preclude states from using unfair labor practice proceedings in sec. 301 actions because the two are not the same entity. (Emphasis added.) Appellant is assuming a statutory policy much broader than that intended by Congress.

A further good reason exists for permitting

> jurisdiction of sec. 301 suits in the WERB. In Dowd, a strong argument was made that state courts should not have concurrent jurisdiction because of the effect on federal law which a dual interpretation might evoke. The court rejected this argument reluctantly in reaching its decision, noting that there was a need for uniformity in this area. Arguably, the WERB would be better able to apply and develop the federal law pursuant to sec. 301 cases. The WERB is composed of three commissioners who are experts in the area of labor relations. They are well acquainted with federal labor law and its development. Hence they would be much better able to apply it uniformly than state courts.
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> We conclude, therefore, that on this jurisdictional question this case is governed directly by Tecumseh, and arguments of counsel have not convinced us that the holding in that case should be changed. (Footnotes omitted.)

Given the foregoing, it is clear to us that although the Complainant may have been able to obtain an arbitration order under a refusal to bargain charge filed under the NLRA, the availability of such an option does not serve to deprive Complainant of its right to seek to enforce its rights under the collective bargaining agreement in a Section 301 forum. As our Court noted in American Motors Corp., Congress concluded that "Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board." Thus, we conclude the Examiner correctly rejected the Respondent's preemption argument.

As to Respondent's contention that the Examiner erred when concluding that an obligation to arbitrate continued to exist despite the absence of a contract, we also affirm the Examiner. Respondent acknowledges that under the holding of the United States Supreme Court in Nolde, severance pay disputes which arise under the expired contract are presumed to be subject to arbitration under the expired agreement unless this presumption is "negated expressly or by clear implication" Nolde, supra, at 255. However, Respondent argues that any obligation to arbitrate severance pay issues under the expired contract was extinguished when the Respondent lawfully unilaterally implemented a new severance pay provision following bargaining between the parties. Upon such implementation, Respondent contends that the severance language from the expired agreement ceased to exist as an enforceable obligation.

We are satisfied that Respondent's argument must be rejected under the holding of the Third Circuit United States Court of Appeals in Steelworkers v. Fort Pitt Steel Casting, 635 F.2d 1071 (1980) cert. denied 451 U.S. 985 (1981). In response to the argument the Respondent makes herein, the Court therein held:

> Fort Pitt's final argument that Nolde does not control the disposition of this case centers on its claim that the parties engaged in extensive negotiations and bargained to impasse on the severance-pay provision. First, Fort Pitt argues that the ten-month negotiation period alone creates a different situation from that presented in Nolde. However, in Nolde the parties had engaged in extensive negotiations before the plant was closed. We do not believe that the result in this case should be different because the negotiations between the Union and Fort Pitt lasted longer than those in Nolde. The Union did not delay unreasonably in asserting its claim for arbitration. Although the grievances are based on rights that the Union alleges accrued under the 1975 Agreement, they did not arise until Fort Pitt had closed the plant and subsequently asserted that it had no obligation to comply with certain provisions of the expired Agreement. Therefore, we conclude that the ten-month negotiation period between contract termination and the claim for arbitration does not constitute a sufficient alteration in the relationship between the parties to absolve Fort Pitt of its duty to arbitrate.
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> Second, Fort Pitt argues that because it bargained to impasse over severance pay, the severance-pay provision in the 1975 Agreement is no longer extant. This argument derives from those cases holding that an employer may act unilaterally after it bargains to impasse in good faith over mandatory subjects to be included in a new collective bargaining agreement. See, e.g., American Federation of Television & Radio Workers v. NLRB, 395 F.2d 622, (D.C. Cir. 1968). The

employer may act unilaterally only if its action is reasonably comprehended within its preimpasse bargaining proposals. See, e.g., NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217, (1949). The unilateral action presumably "breaks" the impasse, and the parties must resume bargaining.

At the outset, we note that it appears that Fort Pitt bases its impasse claim, at least in part, on the negotiations between the parties concerning the effects of the shutdown. To support its argument that the parties had bargained to impasse, Fort Pitt states that "(d)uring the negotiations over the effects of the shutdown," the Union refused to engage in further discussions "unless and until Fort Pitt agreed to pay the severance pay under the expired contract." (Emphasis added). This alleged "impasse" appears to be based on the fact that the Union insisted that Fort Pitt comply with the severance-pay provision of the 1975 Agreement -- the very issue that the Union seeks to arbitrate. The Union's insistence, during negotiations concerning the effects of a shutdown, that Fort Pitt give employees certain rights that the Union alleges accrued under the expired agreement should not enable Fort Pitt to avoid arbitrating this issue. Moreover, this "impasse" did not occur in the course of bargaining over mandatory subjects to be included in a collective bargaining agreement; it occurred after the plant was closed. 4 The parties were not attempting to agree on terms to govern their ongoing relationship, but were trying to settle disputes over the effect of the termination of their employment relationship.

Even if we assume that the parties did bargain to impasse during the negotiations for a new collective bargaining agreement before the plant was closed, this fact alone does not absolve Fort Pitt of its duty to arbitrate the Union's grievances. The Union seeks arbitration of these claims because it believes that the applicable provisions of the 1975 Agreement provided for the accrual of certain rights even though they might not be realized until after the Agreement had expired. There is no reason why the parties could not have agreed to such an arrangement. See John Wiley & Sons v. Livingston, 376 U.S. 543, 555, (1964). Although we express no view on the merits of the Union's inter-pretation of the 1975 Agreement, we note that the fact that the parties bargained to impasse over provisions that would have been included in a new collective bargaining agreement does not necessarily deprive employees of rights that have accrued under the expired agreement. Therefore we conclude that the arbitrator should settle the dispute between the Union and Fort Pitt over the meaning of the provisions of the 1975 Agreement and its applicability to the present situation. (Emphasis added.)

Finally, we note that this case does not involve a situation in which the Union, after having been unsuccessful at the bargaining table, attempts to use the surviving arbitration clause either to negotiate a new agreement or to interfere with the employer's right to act unilaterally after bargaining to impasse in good faith in the course of an ongoing employment relationship. 5 In this case, when the parties reached impasse, Fort Pitt lawfully elected to close its plant rather than to impose unilateral terms and continue good faith bargaining. It was this election to close the plant, coupled with Fort Pitt's interpretation of the applicability of the 1975 Agreement, that gave rise to these grievances. Under these circumstances, we hold that the proper forum for the resolution of this dispute over the meaning of the 1975 Agreement is the arbitral forum chosen by the parties under that Agreement. The arbitrator will determine the meaning of the disputed provisions of the 1975 Agreement and the effect of the plant shutdown on then in light of the fully developed facts. See Local 595, International Association of Machinists v. Howe Sound Co., 350 F.2d 508, (3d Cir. 1965).

> 4 We do not mean to imply that it is not mandatory that an employer bargain with a Union over the effects of a shutdown. We merely conclude that an "impasse" reached during these negotiations, which is based on differing interpretations of rights allegedly accrued under an expired agreement, does not allow an employer to impose unilaterally its interpretation of that agreement.
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> 5 This case therefore is distinguishable from Washington-Baltimore Newspaper Guild Local 35 v. Washington Post Co., (D.D.C. April 4, 1979). In Washington-Baltimore Newspaper Guild, the district court had ordered arbitration of certain grievances one year after the contract had expired. At that time, the union did not claim arbitration for other issues, i.e. dues check-off, union security, unilateral interim wage increases made after impasse, and contributions to the health and welfare fund, but elected to "raise these issues at the bargaining table and before the NLRB." Id. at 20,886. The union was unsuccessful in bargaining and before the Board, and sought to invoke the arbitration clause as to these issues three years after the contract had expired. The court denied arbitration, reasoning that "(t)o accept plaintiff's contention that these issues are now a proper subject of arbitration would be to impose a self-perpetuating system of arbitration in place of normal collective bargaining.

We find the facts recited in Fort Pitt sufficiently similar to those herein for us to be bound by the Fort Pitt holding. We acknowledge that unlike Fort Pitt, during the "effects" bargaining herein, the Complainant sought to improve the severance benefits of employes. However, we do not find this distinction sufficient to conclude that Complainant thereby lost its right to seek enforcement of the severance language in the 1986-1988 contract if it could not improve upon same during "effects" bargaining.

We also acknowledge that under Fort Pitt, a union can lose the right to arbitrate if

> . . . after having been unsuccessful at the bargaining table, (it) attempts to use the surviving arbitration clause either to negotiate a new agreement or to interfere with the employer's right to act unilaterally after bargaining to impasse in good faith in the course of an ongoing employment relationship.

We do not find the Complainant's conduct herein to fall within the exceptions quoted above and elaborated upon in footnote 5 of Fort Pitt. Although "unsuccessful at the bargaining table" in its efforts to improve severance benefits, the record establishes that Complainant did not use the right to arbitrate to "negotiate a new agreement" or to "interfere with the employer's right to act unilaterally after bargaining." The parties have a new contract and the Respondent did implement its "effects bargaining" offer.

Given the foregoing, we conclude that under the existing federal 301 law which we are obligated to apply to this dispute, Respondent's implementation of a severance provision following "effects" bargaining does not "expressly or by clear implication" rebut the Nolde presumption of arbitrability of a severance pay grievance arising under an expired contract. 4/

Thus, we have affirmed the Examiner.

Dated at Madison, Wisconsin this 29th day of November, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
A. Henry Hempe, Chairman

_____
Herman Torosian, Commissioner

4/ Unlike the Examiner, we do not rely in any way upon the arbitration language implemented by the Respondent or subsequently agreed upon by the parties as part of a 1989-1992 contract. The arbitration language in the expired agreement is controlling as to the parties' intentions to arbitrate grievances which raise issues arising under the expired agreement.

William K. Strycker, Commissioner