STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNIVERSAL FOODS CORPORATION, Complainant, v. RANDY L. SEEMAN, Respondent.	Case 22 No. 42621 Ce-2097 Decision No. 26197-A

Appearances:

Ms. Karen K. Duke and Mr. Frederick A. Muth, Jr., Whyte & Hirschboeck, S.C., Suite 2100, 111 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of the Complainant.

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggemann, S.C., PO Box 92099, 788 North Jefferson Street, Milwaukee, WI 53202, appearing on behalf of the Respondent.

FINDINGS Of FACT, CONCLUSIONS OF LAW AND ORDER

On July 28, 1989, the Universal Foods, Inc. filed a complaint with the Wisconsin Employment Relations Commission (herein Commission or WERC) alleging that the Randy Seeman had committed and was committing an unfair labor practice within the meaning of the Wisconsin Employment Peace Act (herein WEPA). Following an unsuccessful conciliation effort during which the formal processing of the complaint was held in abeyance, the Commission, on October 16, 1989, appointed the undersigned Examiner to conduct hearing and to make and issue Findings of Fact, Conclusions of Law and Order in the matter as provided in Sec. 111.07, Stats. Following the prehearing developments set forth in Findings of Fact 12-17, infra, the Examiner conducted a hearing in the matter on October 30, 1989, at the City Hall in Milwaukee, Wisconsin. The parties submitted post-hearing briefs and reply briefs the last of which was received by the Examiner on January 2, 1990.

On the basis of the record developed at the hearing, and upon consideration of the arguments and briefs of Counsel, the Examiner issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant, Universal Foods Corporation (herein Complainant or the Company), is a corporation with headquarters at 433 East Michigan Street, Milwaukee, WI 53202. Its Stella Cheese Division operation is located in Beloit, Wisconsin.

2. Respondent, Randy Seeman, (herein as Respondent or Seeman) is an individual residing at 219 Valley Drive, Janesville, Wisconsin 53545. Seeman was an employee at the Company's Stella Cheese Division until his resignation on May 20, 1989.

3. The Company and Teamsters Local Union No. 579 (referred to herein as Local 579 or the Union) are and have been parties to collective bargaining agreements for employees at the Company's Stella Cheese Division plant. At all material times during his employment at that plant, Seeman was a member of the bargaining unit covered by those agreements, and his employment was subject to the terms and conditions of those agreements.

4. The July 28, 1985 through July 30, 1988 collective bargaining agreement (herein Agreement) between the Company and Local 579 contained a

grievance procedure culminating in final and binding arbitration of grievance disputes as follows:

> 6:01 In case any dispute or misunderstanding relative to the provisions of this Agreement arises, it shall be handled in the following manner:
>
> a. An employee who has a grievance shall report such grievance to the Job Superintendent, who shall thereupon make mutually satisfactory determination within a reasonable length of time, not, however, to exceed five (5) working days.
>
> b. In the event that no mutually satisfactory decision has been reached in said period of time, the employee shall then refer the grievance to the Union on a written form furnished by the Union. The Union shall thereupon bring the issue before the Company representative.
>
> c. Arbitration. If the Company and the Union cannot reach a mutually satisfactory decision within ten (10) days, an arbitrator shall be selected from a list of five (5) arbitrators provided by the Wisconsin Employment Relations Commission. The parties shall equally share the expense of the arbitrator so appointed. Any required filing fee shall be considered as part of the expense of the arbitration. The decision of the arbitrator shall be final and binding on both parties.
>
> The provisions of this Article with respect to filing grievances shall be available to employees, to the Union and to the Company.
>
> 6:02 The arbitrator shall have no authority to modify, change, amend, add to, subtract from, or otherwise alter or supplement this Agreement or any part thereof or any amendment thereto.

In his capacity as Local 579 Chief Steward and Bargaining Committee member, Seeman participated in the negotiation of the Agreement, signed it on October 14, 1985, and was familiar with its terms and with the rights and remedies it affords employes like himself.

5. In February and March 1988, Seeman initiated three grievances under the abovenoted grievance procedure which were processed to arbitration before Arbitrator Frank Zeidler. Zeidler conducted hearing in the matter on July 21, 1988, and issued his award (referred to herein as the Award) on September 29, 1988. In the Award, Zeidler introduced the matters for determination before him as follows:

> THE GRIEVANCE. This matter involves three grievances initiated by Randy Seeman, with the job position of "Cheese Cleaner". The first of these grievances was initiated on February 22, 1988, and is as follows:
>
> "In scheduling overtime the company is overlooking my seniority when they ask people to work

overtime outside of the department. The company states because I'm on light duty I'm not eligible for any overtime outside of my dept. even though I'm able to perform the work when asked to during the week. I'm asking that the company make me whole for all wages lost from any overtime I lost since I've been on light duty and in the future follow the Contract Art. in assigning overtime by seniority."

Contract Article 12:06 was alleged to have been violated.

The second grievance was initiated on March 9, 1988, and is as follows:

"The Company is refusing to pay me full wage rate in the cheese-cleaning department. The language in the attached contract supplement to Art. 4:02 which addresses 'Light Duty Work' the Company has not created a specific light duty job which would enable them to pay me 85% of my normal wage. I am able to perform my normal job duty therefore I am entitled to receive the full wage rate for the department not the reduced 85% rate. I am requesting the Company to make me whole for all lost wages since I was assigned to the cheese cleaning dept. that I bid on, February 15, 1988, and in the future. I also request a copy of the job posting I signed for cheese cleaning."

Contract Article 4:02 was alleged to have been violated.

The third grievance was initiated on March 25, 1988, and the text of it is as follows:

"The Company paid me 85% rate of pay for my vacation pay and my birthday pay. In Art. 4:02 the 'light duty' pay is used on for the hours worked. Vacation pay, holiday pay and sick leave pay is paid at 100% of the employes rate of pay. I am requesting the Company make whole for the lost 15% pay for my vacation and birthday pay and release all copies of correspondence between Beloit and Milwaukee in reference to my rate of pay. I feel the Company is discriminating against me in this matter and request this action to cease immediately."

Contract Article 4:02 was alleged to have been violated.

In each case the grievance was marked "deadlocked to Arbitration."

The remedies sought by the grievant are as follows:

"1. Grievant requests to be made whole by Company for lost 15% of pay for birthday and vacation and for Company to release all correspondence between Beloit and Milwaukee regarding his rate of pay.

"2. Company refuses to pay full wage.

Grievant is able to perform full job duty, and is entitled to full wage rate for department, not reduced 85% rate. Grievant requesting the Company to make him whole for all lost wages since being assigned to cheese cleaning dept. Also request a copy of job posting he signed for cheese cleaning.

"3. Company refuses to assign overtime because of light duty. Grievant requests to be made whole for any overtime lost since being on light duty, and in the future the Company to follow the contract Article in assigning overtime by seniority."

THE ISSUES. The Union poses three issues:

"1. Is the Company violating the collective bargaining agreement by paying 85% of the regular wage to Randy Seeman for hours worked on a regularly posted cheese cleaning job which was not specifically created as a light duty job?

"2. Is the Company violating the collective bargaining agreement by paying 85% for vacation, holiday and birthday pay to Randy Seeman?

"3. Is the Company violating the collective bargaining agreement by refusing Randy Seeman to perform overtime work outside of his department?

The Employer addressed the issues in each grievance as chronologically presented by the grievance. As to the February 22, 1988, grievance alleging a violation of Article 12, Section 6, the Employer states issue to be:

"Is it a violation of the Collective Bargaining Agreement to limit the hours of work which can be worked for an employee who is on light duty?"

As for the grievance of March 4, 1988, alleging a violation of Article 4, Section 2, the Employer states the issue to be:

"Under what conditions can an employee who is on light duty be restored to full job rate?

As for the grievance of March 25, 1988, alleging a violation of Article 4, Section 2, the Employer states the issue to be:

"What is the correct rate of pay to be paid under the Collective Bargaining Agreement for vacation, holidays and sick leave where an employee is on a reduced pay rate due to inability to perform normal job duties.?

The arbitrator, composing the issues as stated, poses them as follows:

"Was the Agreement violated when the grievant while still on light duty allowed to be placed in another assignment after job posting and still kept on

light duty pay and restricted assignment?

"Was the grievant in posted job assignment whether or not on full duty, still entitled to full pay for vacation, holiday and birthday pay under the Agreement?

"Was the Agreement violated when the employer denied the grievant opportunity for overtime assignments outside of his department or inside his department after one eight hour work day?

Arbitrator Zeidler next set forth in the Award various Agreement provisions, summarized the parties' positions and discussed the various issues. He then concluded as follows:

AWARD: As to the grievance of February 22, 1988, concerning the working of overtime within or outside of the grievant's department, the grievance is not sustained as to a violation of Section 12:02 for overtime outside of the department. However, the Company has violated Article 7:01 in denying the grievant overtime on the day shift in his own department, but allowing him overtime at the end of the 40 hour workweek in the department. This is discriminatory and arbitrary. The grievant should be allowed overtime after the day shift in his own department.

As to the grievance of March 9, 1988, that the Company has violated Section 4:02 in not paying the grievant a full wage, because he is able to perform his normal job duty, the grievance is not sustained in that the grievant is under medical restrictions which prevent him from performing the full range of duties associated with cheese cleaning.

As to the grievance of March 25, 1988, that the Company is paying for fringe benefits based on the 85% wage rate which the employe has under his restrictions, the grievance is not sustained. The Collective Bargaining Agreement provides for the fringe benefits on the basis of the current hourly rate or normal day's pay.

6. The Award contains no reference whatever to handicap discrimination or to the Wisconsin Fair Employment Act (herein WFEA). The only Award references to external law were the Arbitrator's recitations of Union's contentions "that if the Company's position prevails, an employe on light duty would receive less benefits than an employee on job-related temporary total disability" and "that under Section 102.43(8) of the Wisconsin Statutes, no employee may receive a temporary total disability benefit during a compulsory vacation period scheduled in accordance with the bargaining agreement, regardless of whether the employee's healing period has ended. . . " and his recitations of the Company's responses to those contentions, e.g., "The Company rejects the Union contention that worker's compensation statutes should be used to resolve the issue here. In this case the arbitrator is confined to the Collective Bargaining Agreement in resolving the matter."

7. The Grievant actively participated in support of the positions taken by the Union by advising Union counsel and in testifying in support of the grievances. After the Award was issued on September 19, 1989, Grievant

received a copy of the Award and reviewed it.

8. As of the date of the complaint hearing in this matter there has been no effort on anyone's part to vacate that Award.

9. While the abovenoted grievances we're pending, Seeman filed and amended a handicap discrimination complaint against the Company before the Equal Rights Division (ERD) of the Wisconsin Department of Industry, Labor and Human Relations. Those ERD complaints have been identified as ERD Case No. 88000779. Specifically, on March 28, 1988 Seeman submitted a complaint to the Equal Rights Division of the Wisconsin Department of Industry, Labor and Human Relations alleging that, as recently as March 25, 1988,

> . . . The Company is refusing to pay my full rate of pay for my job classification. I am able to perform my normal duties required on the job. . . . The Company states because I'm not able to work in other job classifications I will only receive 85%. See attachments. . . . I was discriminated against because of my handicap when I was not being paid 100% of my normal pay rate. I am able to perform the normal duties of the job requested by the Company. I am being discriminated against because I have a permanent partial disability of 5% to my right shoulder only with a weight limit of 55#. My normal job requires lifting of 25#.

On May 9, 1988, Seeman amended his ERD complaint by alleging that as recently as May 9, 1988,

> . . . The Company is refusing to allow me to work voluntary overtime. . . . [The Company gives as its reasons for that action that] My weight restriction does not allow me to do all jobs in the plant. . . . was discriminated against because of my physical handicap when I was not allowed to work voluntary overtime. I am able to perform the work required. The weight involved is below my weight restriction of 50--55#. The boxes of cheese weigh 41.75# and the loaves of cheese weigh 20 to 22#. This is an amendment to my original complaint.

10. Seeman's ERD complaint, as amended, alleges that the same Company conduct as was at issue before Arbitrator Zeidler constituted handicap discrimination violative of the WFEA. The relief sought by Seeman in that ERD proceeding is the same relief that had been requested and denied in the grievance arbitration proceeding culminating in the Zeidler Award.

11. The ERD hearing was begun on August 2, 1989 and was scheduled for further hearing on November 1, 1989 such that it had not been completed as of the WERC hearing in this matter conducted on October 30, 1989. Seeman's exhibit list for the ERD hearing and his testimony concerning the parties' presentations on the first day of hearing indicate that Seeman did not rely on the Agreement during the first day of the ERD hearing but that testimony concerning the Agreement was adduced in questioning by the Company's attorney. Seeman relied, instead, on pay stub/payroll record comparisons between Seeman and other employes.

12. (This Finding is based upon administrative notice hereby taken of correspondence between the WERC and the parties in the instant case.) The Company filed the instant complaint with the WERC on July 28, 1989. In it, the Company basically alleged that Seeman was refusing to accept the Award as final

and binding on him in violation of Sec. 111.06(2)(c), Stats., by pursuing the abovenoted handicap discrimination complaint and that by way of remedy, the Commission should order Seeman to cease and desist from maintaining that discrimination complaint. On August 4, 1989, the WERC, by its General Counsel, served the complaint on Seeman and his Counsel, along with a letter which was also sent to Company Counsel, which did not contain case numbers for the proceeding and which read, in part, as follows:

> . . . Furthermore, this is to advise that William C. Houlihan, Coordinator of Mediation Services will contact you in the near future for the purpose of inquiring whether the parties are interested in resolving the issues herein on an informal basis without the need for a formal hearing. Any such discussions will be held in strict confidence, and they will not be relayed to either the Examiner who will be assigned this case, or the Commissioners, or myself. Lastly, unless either party requests, in writing, at any time that these discussions not delay scheduling hearing on the complaint within 40 days of its receipt by the Commission, no hearing will be scheduled until the above-named Commission representative assigned to explore a possible voluntary settlement between the parties is advised settlement discussions have concluded and a hearing is necessary.

13. Following scheduling discussions between the Examiner and Counsel for the parties in late September, 1989, Seeman, on October 3, 1989, filed an answer. In that answer, Seeman admitted most of the facts alleged in the complaint; denied certain of those facts; denied that Seeman's conduct constituted an unfair labor practice; alleged that the complaint does not state a claim upon which relief can be granted; alleged that Seeman's ERD complaint alleges discrimination in violation of WFEA that is unrelated to the terms of the Agreement; alleged that Seeman is not a party to the Agreement between Local 579 and the Company; and requested that the complaint be dismissed with costs and reasonable attorney's fees awarded to Seeman.

14. On October 5, 1989, the Company filed a Motion for Default Judgment and Motion to Strike Seeman's answer with accompanying affidavit. The Company, in its motion, cited Commission Rules ERB 2.04 and 2.07 and Sec. 806.02, Stats. It asserted that Seeman's answer was untimely because it was not filed an answer within eight days of the Commission's mailing of the complaint to the Seeman and instead had been filed nearly two months later and only after Seeman's Counsel was advised during scheduling discussions that the Company's Motion was imminent. On October 9, 1989, Seeman replied by letter in opposition to the Company's motion. In that letter, Seeman's Counsel asserted that under the Commission's rules the filing of an answer is permissive and that in practice the Commission does not decide cases on the pleadings where a respondent has failed to file an answer but rather specifies a deadline for filing of answer in the formal notice of hearing which is issued after conciliation efforts have been completed and unsuccessful. Seeman also asserted that although state court procedures such as those referenced in Sec. 806.02 are not applicable, had they been a default judgment would be denied because the answer had in fact been filed before the motion to dismiss was.

15. On October 16, 1989, the parties were served with the Commission's formal order appointing the Examiner and with the Examiner's notice of hearing setting the matter for October 30, 1989. That Notice did not establish an answer date inasmuch as an answer had already been filed.

16. On October 17, 1989, the Examiner ruled that the hearing would go forward as scheduled notwithstanding the Company's Motion. The Company renewed

its abovenoted Motion during the hearing.

17. On October 24, 1989, Seeman filed a Motion to Dismiss the complaint without hearing, asserting that the Complaint failed to state a claim upon which relief may be granted under WEPA. The Company opposed that motion and requested that the hearing go forward as scheduled. On October 26, 1989, the Examiner informed Counsel for both parties that the hearing would go forward as scheduled notwithstanding Seeman's Motion. Seeman renewed his Motion during the hearing.

18. The Award contains no order requiring Seeman to cease and desist from pursuing the same relief for the same Company conduct in an WFEA handicap complaint. The parties did not submit to Arbitrator Zeidler and he did not decide in the Award whether the Company's conduct at issue constituted handicap discrimination violative of the WFEA or whether the relief requested should be ordered to remedy such WFEA violation.

19. By continuing to pursue his amended ERD complaint in Case 88000779 after being notified of the contents of the Zeidler Award, Seeman did not violate or fail to accept the Award and did not violate the Agreement provision that grievance awards issued pursuant to it are final and binding.

CONCLUSIONS OF LAW

1. The Company has not shown that waiver of any Commission Rule requirement that Seeman file an answer prior to October 3, 1989 in this matter would prejudice the Company within the meaning of ERB 1.01, Wis. Adm. Code.

2. It is appropriate under ERB 1.01, Wis. Adm. Code and the circumstances of this case for the Examiner to waive any ERB 2.04 requirement that Seeman file an answer in this proceeding prior to October 3, 1989.

3. By continuing to pursue his amended complaint in ERB Case 88000779 after being notified of the contents of the Zeidler Award, Seeman did not violate or fail to accept the Award, did not violate the Agreement provision that grievance awards issued pursuant to it are final and binding, and did not commit an unfair labor practice within the meaning of Sec. 111.06(2)(c), Stats.

ORDER 1/

1. The Examiner, on behalf of the Commission, waives any ERB 2.04 Wis. Adm. Code requirement that Seeman file an answer in this proceeding prior to October 3, 1989. Accordingly, the Company's Motion to Strike Seeman's answer is denied and the Examiner bases his decision on the merits of the complaint and answer.

2. The complaint filed in this matter is dismissed in its entirety.

3. Seeman's request that the Company be ordered to pay Seeman for costs and reasonable attorneys fees is denied.

Dated at Shorewood, Wisconsin this 5th day of March, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

1/ (See Footnote 1/ on the following page)

1/ Any party may file a petition for review with the commission by following the procedures set forth in Sec. 111.07(5), Stats., which reads as follows:

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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

BACKGROUND

The procedural history of this proceeding is described in detail in Findings of Fact 12-17 and need not be repeated here.

In its complaints the Company asserts Seeman has violated Sec. 111.06(2)(c), Stats., by refusing to accept the Award and by thereby violating Local 579's Agreement with the Company that grievance awards would be final and binding. The Company asserts that Seeman is committing that unfair labor practice by pursuing ERB handicap discrimination complaint proceedings under the WFEA with regard to the same Company conduct and relief requests as were involved in the Award.

Seeman basically admits that he is pursuing essentially the same remedies for the same Company conduct in his ERD litigation as had been sought and at issue in the Award. His answer asserts, however, that his ERD litigation involves statutory issues that are different from the exclusively contractual issues dealt with in the Award, such that he is not refusing to accept the Award. Seeman's answer also asserts that he is not a party to the Agreement or to its provision that grievance awards would be final and binding and that the complaint does not state a claim for which relief can be granted under WEPA. Finally, Seeman requests in his answer not only that the complaint be dismissed, but also that the Company be ordered to pay Seeman costs and reasonable attorneys fees.

Threshold procedural issues are whether Seeman's answer should be stricken because it was not filed within eight days of the mailing of the complaint to the Company, and if it is stricken as untimely, whether the Examiner is required to enter findings, conclusions and remedial order consistent in all respects with the complaint.

PERTINENT PORTIONS OF WISCONSIN STATUTES

> Sec. 111.06 What are unfair labor practices . . .
>
> (2) It shall be an unfair labor practice for an employe individually or in concert with others: . . .
>
> (c) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

PERTINENT PORTIONS OF WISCONSIN ADMINISTRATIVE

> Chapter ERB 1
> GENERAL PROVISIONS
>
> ERB 1.01 Purpose. These rules are adopted to aid the commission and interested persons in proceedings under the [Wisconsin Employment Peace] act. The commission may waive any requirement of these rules unless a party shows prejudice thereby.
>
> ERB 1.02 Policy. The policy of the state being primarily to promote peace in labor relations, nothing

in these rules shall be construed to prevent the commission from using its best efforts to adjust any dispute arising between employes and employers.

. . .

ERB 1.05 Construction. These rules and regulations shall be liberally construed to effectuate the purposes and provisions of the act.

. . .

Chapter ERB 2
UNFAIR LABOR PRACTICES
(s. 111.07, Stats..)

. . .

ERB 2.04 Answer. The person or persons complained of may file an answer not later than 8 days after the mailing by the commission of a complaint addressed to their last known post-office address. The answer shall contain a clear and concise statement of the facts which constitute a defense. The answer shall specifically admit, deny, or explain each of the allegations in the complaint unless the person complained of shall be without knowledge, in which case he shall so state, such statement operating as a denial. Any allegation in the complaint not specifically denied in the answer, unless it is stated in the answer that the respondent is without knowledge, shall be deemed to be admitted to be true, and may be so found by the commission.

. . .

POSITION OF COMPLAINANT COMPANY

The Company is entitled to a decision based solely on the complaint allegations due to Seeman's failure to timely answer. The complaint was filed on July 28, 1989 and served on Seeman and his attorney by placement in the mail on August 4. No answer was filed until October 3, 1989, nearly two months later and well beyond the eight day period referred to in ERB 2.04. Seeman's contention that he has the discretion if and when to file an answer because of the use of the term "may" in the language of that Rule is erroneous. That Rule means that Seeman has a choice of whether to file an answer, but if he chooses to file one he must do so within the stated eight day period. Where, as here, the Seeman fails to do so, he waives his right to submit an answer and must be deemed to have admitted the allegations of the complaint. Especially so where, as here, Seeman has asserted no circumstances which would excuse his neglect to submit a timely answer. Citing, Hedtcke v. Sentry Insurance, Co., 109 Wis. 2d 461, 468 (1982) and Martin v. Griffin, 117 Wis. 2d 48, 442-43 (CtApp, 1984). Seeman's untimeliness cannot be excused on the basis of an alleged practice by the Commission of disregarding the time limitation imposed by ERB 2.04 because administrative agencies are bound by the language of their rules. Citing, Beal v. First Federal Savings and Loan Assn., 90 Wis 2d 171, 182-83 (1979); Monroe v. Funeral Directors & Embalmers Examining Board, 119 Wis.2d 385, 390-91 (CtApp, 1984). The Commission cannot, by interpretation, disregard its own requirements. If it desires to amend a rule, it must do so through formal rulemaking. Since all of the complaint allegations must be deemed to be admitted to be true, and since those allegations establish that Seeman committed an unfair labor practice, the Examiner must strike the answer, issue

his decision in accordance with the complaint, and order Seeman to cease and desist from his illegal conduct.

POSITION OF COMPLAINANT COMPANY cont'd

Section 111.06(2)(c), Stats., applies to individual employe conduct, and the WERC, with judicial approval, has previously ordered individuals to cease and desist from violations of that Section on numerous occasions. It is undisputed that the Agreement governed the terms and conditions of Seeman's employment with the Company. Seeman was a beneficiary of the Agreement and exercised his rights as such through the grievance procedure. There is no basis for relieving Seeman of an obligation to comply with the Agreement provision that grievance awards are final merely because he is not the Union or the Company. An arbitration award such as this is binding on individual employes. Citing, Clark v. Hein-Werner Corp., 8 Wis 2d 264 (1959). Especially so where, as here, the employe involved negotiated and signed the Agreement and played an active role in the arbitration of grievances unique to him personally.

The evidence clearly establishes that Seeman violated Sec. 111.06(2)(c). A collective bargaining agreement was in effect, culminating in grievance arbitration which the Agreement specifies is to be final and binding. Arbitrator Zeidler issued the Award with respect to the matters submitted, finding that the 85% wage rate paid Randy Seeman was appropriate because of his light duty work and his inability to perform all the normal duties of his job. For the same reason, the Arbitrator held that Seeman was properly treated with respect to overtime outside his department. Since the arbitrator's award was not appealed, it is final and binding by the terms of the Agreement. Seeman has refused to abide by the Award despite having received and reviewed it, by continuing, in his ERD complaint, to voice the very same complaints that have already been heard and determined in the Award. If Seeman was dissatisfied with the Award, he should have timely petitioned to vacate it. Citing, Le Roi Co., Dec. No. 1465 (WERB, 1947). Since no one has done so, the Award became final as a matter of law. "It is totally inappropriate for Seeman to simply ignore the arbitration award and attempt to proceed de novo in an entirely different proceeding." Company brief at 18. It was, instead, incumbent on him to seek a stay of the arbitration proceeding while pursuing his ERD litigation. Citing, Schramm v. Dotz, 23 Wis.2d 678 (1964) and Romnes v. Bache & Co., 439 F. Supp. 833 (W.D. Wis., 1977). Seeman "seeks a finding that the Company improperly classified him at the 85% wage rate. Yet, the Arbitrator has already determined that the company's actions in so classifying the respondent were appropriate." Company brief at 19. "The Arbitrator held that Seeman is not able to perform all the normal duties of his job and must be considered on light duty pursuant to the contract such that his wage rate is correct and that the Company has properly dealt with him as regards availability for overtime outside his department. Seeman seeks back pay for the same period, calculated in the very same manner, as was denied by the Arbitrator -- when he knew full well that his complaints were denied! Such efforts to undermine the finality of the arbitration process simply cannot be tolerated by the Commission." Id.

When employers refuse to comply with grievance awards they agreed would be final and binding, the WERC with judicial approval has found an unfair labor practice and has fashioned cease and desist and other appropriate relief. Citing, Joseph John Cirkl, Dec. No. 7852-A (WERC, 1969) and Dunphy Boat Corp., v. WERB, 267 Wis 316 (1954). The same result should obtain when an individual employe refuses to abide by a final and binding award as Seeman has done here.

Seeman's suggestion at hearing that ERD proceedings under Sec. 111.34, Stats. should override Sec. 111.06 must be rejected. The WERC lacks

jurisdiction to interpret statutes outside its area of expertise. Citing City of Brookfield v. WERC, 87 Wis.2d 819 (1979); McEwen v. Pierce County, 80 Wis.2d 256, 273 (1979) and Glendale Professional Policemen's Assn. v. City of Glendale, 83 Wis.2d 90, 199-101 (1978). The Commission may, however, find POSITION OF COMPLAINANT COMPANY cont'd

that Seeman's filing of the Sec. 11.34 claim constitutes a refusal to accept an arbitration award because the Commission would be making findings of fact and would not be interpreting a statute outside its area of competence.

If the relationship of Secs. 111.34 and 111.06 is addressed, they can and therefore must be harmonized rather merely treating WFEA claims as superceding the WEPA requirement that final and binding arbitration awards be honored. Specifically, "a Section 111.34 proceeding should be deemed available if and only if the complainant elects not to proceed to arbitration. However, if the employee proceeds to arbitration on the facts which are the basis of a possible Sec. 111.34 claim, then the employee is precluded from pursuing Sec 111.34 remedies." Company brief at 26. Any other construction of these statutes would totally undermine the strong policy in favor of the finality of arbitration awards. Citing, Oshkosh v. Union Local, 7096-A, 99 Wis.2d 95, 103 and Denhart v. Waukesha Brewing Co,. 17 Wis 2d 44, 50-52 (1962). If it is concluded that the two statutes cannot be harmonized, Sec. 111.06(2)(c), as the more specific of the two statutes, should control. Whereas Sec. 111.34 of WFEA applies to all complaints of handicap discrimination, Sec. 111.06 is confined to those disputes where an arbitration award has been rendered. To the same effect, since Section 111.07(1) expressly allows for the pursuit of alternative remedies in "court" proceedings, that necessarily implies that pursuit of alternative remedies before administrative agencies such as ERD is precluded.

Accordingly, the Examiner should conclude that Seeman violated Sec. 111.06(2)(c) and should order Seeman to cease and desist from his illegal conduct.

In its reply brief, the Company acknowledges that WERC may not have had occasion to address the instant issue, but it notes that litigation, including litigation by unions, has in several cases been held to be an unfair labor practice under the National Labor Relations Act. Seeman's clever draftsmanship of his ERD complaint and exhibit list in a way that does not mention the Agreement must not be allowed to hide the fact that Seeman's is pressing the very same claims that were heard and conclusively determined by Arbitrator Zeidler. The 85% rate and the overtime arrangements that Seeman claims are improper are both derived by interpretation of the relevant Agreement. Efforts to secure a second bite of the same apple by changing legal theories while seeking the same relief based on the same facts have been resoundingly rejected by Wisconsin's appellate courts. Citing, Borque v. Wausau Hospital Center, 145 Wis.2d 589, 599 (CtApp, 1988) and Landess v. Schmidt, 115 Wis.2d 186 (CtApp, 1983).

The Company asserts that the cases relied upon by Seeman are inapposite. This is not an issue of res judicata as was addressed in Alexander v. Gardner-Denver, 415 U.S. 36 (1974) (herein Gardner-Denver) and Nielson Iron Works, Inc, v. LIRC, Case No. 81-CV-1530 (CirCt Racine, 3-2382). Nor is there a claim of federal preemption in this proceeding as was addressed in Ackerman v. Western Electric F.2d 129 LRRM 2929 (CA 9, 1988) and Smloarek v. Chrysler Corp., 121 LRRM 3022 (CA 6, 1989). None of the cases relied upon by Seeman mention, much less address a provision such as Sec. 111.06(2)(c) which makes it illegal for an employe to refuse to abide by an arbitration award. The Krueger v. Wisconsin Department of Transportation, ERD Case No. 7700157 (LIRC, 1982) is distinguishable because Krueger's sex discrimination complaint alleged that she was discharged following close scrutiny of her personal life and repeated demands for information about her abortion whereas her discharge

arbitration addressed whether her patrol car accident and subsequent failure to report it and efforts to cover it up constitute just cause for discharge. Given those differences in the facts on which the two claims were based and the fact that Krueger was not challenging any of the arbitrator's findings of POSITION OF COMPLAINANT COMPANY cont'd

fact related to the accident and coverup, Krueger's ERD litigation would not constitute a violation of the discharge award or, therefore, of Sec. 111.06(2)(c), Stats.

While maintaining that interpretation of Sec. 111.34, Stats., is outside the WERC's expertise and jurisdiction, the Company asserts that there is no basis for Seeman's implications that any provision of the Agreement is illegally discriminatory. The instant contractual light work arrangements have never been alleged to be in any way illegal. Rather than discriminating against injured employes, they were designed to return injured employes to work as expeditiously as possible. Nothing prevents an employer and union from agreeing as to what will be a reasonable accommodation in an effort to implement rather than violate the handicap discrimination law.

Finally, the Company emphasizes that it has not raised a claim of federal preemption in this proceeding. Hence Seeman's arguments concerning Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) and its progeny should be disregarded as immaterial. If those cases are focused upon for some reason, the Company notes that they hold that state law claims such as handicapped discrimination would be preempted by federal labor law where, as here, the issues are inextricably intertwined with the collective bargaining agreement.

POSITION OF RESPONDENT SEEMAN

The Company's motion for default judgment and motion to strike answer are groundless and should be denied. The dual use of the term "may" in ERB 2.04 means that the filing of an answer by the Seeman is permissive, not required and that unanswered complaint allegations may, but need not, be found by the Commission to be true. Citing, Flambeau Plastics, Dec. No. 7987 (1967). Especially so in comparison with other Commission Rules that use the term "shall." Citing, ERB 12.03. Moreover, although ERB 2.04 makes reference to permissive filing of an answer eight days after mailing of the complaint, and Seeman has presented evidence to the effect that the Commission's standard operating procedure is to request, in its notice of hearing, that an answer be filed shortly before the hearing date. Such must have been the procedure in the mid-'60's as well since, even in Flambeau Plastics the agency set an answer date in the hearing notice longer than eight days after the date the agency mailed the complaint to the respondent. Where the Commission's long-standing practice has been to establish a later date for the permissive filing of answers and where no prejudice has been shown by complainant, ERB 1.01, 1.02 and 1.05 allow no basis for the Company's motion for default judgment.

Seeman's maintenance of a handicap discrimination complaint against the Company does not violate Sec. 111.06(2)(c) of WEPA. Seeman has not taken any action which constitutes a failure to accept the Award as final and binding with respect to interpretation of the Agreement. The handicap discrimination claim asserts that regardless of the interpretation of the Agreement covering Seeman's employment, his exclusion from certain overtime and from full wage payments received by other employes constitutes a violation of the WFEA, citing, Secs. 111.321, .322 and .34, Stats. The Award dealt with grievances focused solely on the Agreement. Whereas an arbitrator could properly conclude that a labor agreement does not require accommodation to an individual's handicap and that it permits adjustment of hours or wages by reason of the employes ability, those contractual rights may be subject to

restriction by the WFEA. Nothing in Agreement restricts an employes ability to pursue a handicap discrimination claim, nor could an agreement be lawfully interpreted to impose such a restriction. The Company is essentially claiming that the Agreement is to be read to have that effect. There has never been a

POSITION OF RESPONDENT SEEMAN cont'd

case under in which an employe or union has been found to have violated Sec. 111.06 by maintaining a legal action of any sort, let alone for handicap discrimination.

Seeman does not challenge Arbitrator Zeidler's determination that the Agreement permits his exclusion from overtime and his payment at the rate of 85%. Rather, he states that regardless of the proper interpretation of the Agreement, his exclusion from overtime and his reduction in pay constitutes handicap discrimination in violation of Sec. 111.321, et seq.

Although an employes right to maintain a WFEA claim after arbitration has never been addressed under WEPA, the impact of arbitration awards on discrimination claims has been addressed under anti-discrimination legislation including the WFEA. The consistent conclusion of forums addressing the latter issue is that an employe is not precluded from pursuing a claim of employment discrimination because of an arbitration addressing the same facts. Citing, Krueger, supra; Gardner-Denver, supra; Nielson Ironworks, v. LIRC, supra; and Smolarek v. Chrysler Corp., F.2d 131 LRRM 3022 (CA6, 1989). "The issue before Arbitrator Frank Zeidler was whether the company's decision to pay Seeman 85 percent of the contractual wage rate and to exclude him from overtime outside the department violated the labor agreement. He decided it did not. The issue before the Wisconsin Equal Rights Division is whether the company's payment of a lesser wage to Seeman and exclusion of him from overtime outside his department violates state law. The issue in the two cases is different. As the overwhelming case law indicates, claims under the Wisconsin Fair employment Act and a labor agreement may each proceed independently." Seeman brief at 10-11.

If any forum is in a position to decide whether that the Award should have some effect on the WFEA discrimination complaint it is the ERD ALJ who will be cognizant of all of the facts bearing on that complaint.

If the Company relies on Lingle, supra, for the proposition that Seeman's state claim for handicap discrimination is preempted by the federal law governing interpretation of a collective bargaining agreement, that reliance would be misplaced herein because the instant handicap discrimination complaint can be resolved without interpreting the Agreement itself. Citing, Lingle, supra, 108 S.Ct 1877 at 1883; Ackerman Western Electric Co., ____ F.2d ____ 129 LRRM 2929, 2930 (CA9, 1988); and Smolarek, supra.

"Under these circumstances, we must question why the company has commenced a separate action against Seeman before the WERC. Such an action is very costly to an individual. It would certainly be a sad day for the employees of this state if their ability to pursue statutory rights under the [WFEA] or other state statutes was threatened by the assertion of unfounded claims of unfair labor practices which they could not afford to defend against." Seeman brief at 11.

The complaint should be dismissed with the Company ordered to pay Seeman costs and reasonable attorney's fees.

In his reply brief, Seeman asserts that even if every assertion in complainant's complaint is accepted as true there is no basis for a decision in the Company's favor. In any event, contrary to the Company's contention, there is overwhelming evidence and precedent not only excusing but also

justifying Seeman's waiting until WERC conciliation efforts had been concluded and a notice of hearing was issued establishing the date for filing an answer. The answer was filed as soon as the Company's counsel stated that she believed an answer was due before the notice of hearing was issued, and before the

POSITION OF RESPONDENT SEEMAN cont'd

Seeman's motion for default judgment was filed. The Company has not and cannot show prejudice because of the time the answer was filed, since it was earlier in time than it would have been had the Examiner followed the Commission's normal practice of setting an answer date in the notice of hearing. Consideration can also be given to the longstanding Wisconsin principle that default judgments are disfavored and preference is given to litigation on the merits whenever reasonably possible. Citing, Hedtke, supra, and Oostburg Bank v. United Savings, 130 Wis.2d 4 (1986).

The Romnes and Schramm cases, supra, were commercial disputes rather than labor/employment law cases, and neither holds that the litigation being pursued is barred by an arbitration proceeding.

The Company contradicts itself and shows the frivolity of its claim by requesting on the one hand that the WERC should order Seeman to cease maintaining his WFEA handicap discrimination complaint and contending on the other that the Commission lacks jurisdiction to construe the WFEA in the process of comparing the priorities of the two acts.

The Company's theory of election of remedies flies in the face of overwhelming precedents from the U.S. Supreme Court to Wisconsin LIRC to the effect that there is no election of remedies where employment discrimination claims are concerned; rather an individual may pursue a claim for employment discrimination notwithstanding an arbitration award denying remedy on the same facts. "To contend otherwise in the face of such overwhelming precedent is an abuse of process." Seeman reply brief at 7.

DISCUSSION

The Company's Motions to Strike Answer and for Default Judgment

As Seeman has pointed out, this agency (then known as the Wisconsin Employment Relations Board) had occasion in Flambeau Plastics, supra, to interpret and apply the same Rules presently in effect and at issue herein. In that case, the complaint was filed on October 27, 1966. On that same day, the Board issued its notice of hearing stating that the respondent "may make Answer to such complaint . . . on or before November 8, 1966." Prior to the hearing which had been postponed until November 15, 1966, the respondent moved that the Board issue an order granting the relief sought by the complaint on the ground that the Respondent had failed to file an answer. The Board denied that motion and directed that the hearing proceed as scheduled, stating later in its post-hearing decision,

> It is clear from the above quoted language of the Notice of Hearing that the filing of the answer was not mandatory but permissible. ERB 2.04 of the Board's rules provide that "The person or persons complained of may file an answer . . .", and that "Any allegation in the complaint not specifically denied in the answer that the respondent is without knowledge, shall be deemed to be admitted to be true and may be so found by the board." Again, it is clearly not mandatory that an answer be filed or that the failure to do so be considered an admission. Rule ERB 1.01

provides that "The board may waive any requirement of these rules unless a party shows prejudice thereby" and Rule ERB 1.05 provides that "These rules and regulations shall be liberally construed to effectuate the purposes and provisions of the Act." There is no

DISCUSSION cont'd

evidence that the Employer suffered any prejudice in this regard and it is the Board's conclusion that the purposes of the Act were served by allowing the proceeding to advance to hearing.

The hearing was held on November 15, 1966, and at that time Counsel for the Respondent orally interposed its answer to each paragraph of the complaint. The parties' final arguments were submitted in post hearing briefs on February 27, 1967.

Id. at 5-6.

The same result is appropriate in this case for the same reasons. Seeman filed an answer before a Notice of Hearing was ever issued in this matter, whereas (as Seeman has at the hearing in Exhibits 9-12) it is the Commission's practice now (as it was in Flambeau Plastics) to specify in the notice of hearing a date on which an answer may be filed which is ordinarily well in excess of eight days after the date the complaint is mailed to the parties. Thus, the Company had that answer further in advance of hearing than would ordinarily have been the case under the Commission's normal case processing and well in advance of the hearing. In sum, allowing the Seeman to answer as it did on October 3, 1989 has not been shown to prejudice the Company in any way. On the other hand, given the Flambeau Plastics decision and the Commission's longstanding practice, it would do Seeman a manifest injustice and would not effectuate the purposes of WEPA to strike its answer as untimely filed.

Accordingly, the Examiner, on behalf of the Commission, has waived any requirement of ERB 2.04 requirement that Seeman file an answer in this proceeding prior to October 3, 1989.

Even if the answer were stricken, the language of ERB 2.04 would not require that the relief requested in the complaint be ordered. As quoted above, Flambeau Plastics, held that "it is clearly not mandatory that . . . the failure to do so [file an answer] be considered an admission." Because (for reasons set forth below) the Examiner finds no merit in the Company's contention that Seeman has committed a violation Sec. 111.06(2)(c) on the facts as asserted in the complaint, the Examiner would not treat the failure to answer as an admission that the alleged violation has occurred, but rather would conclude that no unfair labor practice was committed in the circumstances and would dismiss the complaint.

Claim That Seeman has Violated Sec. 111.06(2)(c), Stats.

This case appears to be one of first impression under Sec. 111.06, Stats. The WERB did previously hold in Le Roi Co., Dec. No 1465 (WERB, 11/47) that an employer does not violate Sec. 111.06(1)(g)--the employer equivalent of 111.06(2)(c)--by commencing proceedings in circuit court which constitute an appeal from such award because in such circumstances "no final determination has yet been made." Id at 2. Both parties acknowledge, however, that there appear to be no prior cases in which a union's or individuals maintaining WFEA or other litigation claim has been held to be (or not to be) a violation of Sec. 111.06(2)(c), Stats.

In the Examiner's opinion, the language of Sec. 111.06(2)(c), on its face, would prohibit an individual employe from failing to accept as final an arbitration award issued pursuant to a collective bargaining agreement covering his/her employment. If, for example, Seeman, after receiving and reviewing the Award, had filed additional grievances advancing claims that the

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same Company conduct violated the same Agreement provisions as regards the same time period and seeking the same relief as the grievances dealt with in the Award, the filing of those grievances would seem to be a violation of that Section. Similarly, an effort on Seeman's part to induce coworkers to engage in concerted action against the Company in support of his continuing claim that the Company had violated the Agreement in respects that Arbitrator Zeidler decided were not Agreement violations would also seem to be an unfair labor practice violative of that section. Such employe conduct would arguably parallel the clear-cut employer award noncompliance that was involved in the Dunphy Boat and Cirkl cases, supra, cited by the Company.

Here, however, Seeman is not refusing to accept Arbitrator Zeidler's determinations that the Company did not violate the Agreement when it paid him the 85% rate or when it refused him overtime assignments outside his department. Rather, Seeman is claiming that, independent of the collective bargaining agreement, the Company's conduct is violative of his rights under the WFEA handicap discrimination provisions.

The difference between the grievances and Award on the one hand and the amended ERD complaint on the other appears clear to the Examiner.

The grievances and Award spoke exclusively in terms of alleged violations of the Agreement. The parties' and the Arbitrator all framed the issues in terms of whether the Company violated the Agreement in various respects. The Arbitrator's concluding AWARD section makes no reference to the WFEA or to any other external law, but rather addresses itself to whether the Company violated the Agreement in various respects. Indeed, the only reference to external law in the Award was with regard to a Union reference to Worker's Compensation, as to which the Company argued that the Arbitrator was limited to interpreting and applying the terms of the collective bargaining agreement. See Finding of Fact 6, supra. Agreement Sec. 6:02 prohibited the Arbitrator from supplementing or amending the Agreement, and Sec. 6:01 defines grievances as "any dispute or misunderstanding relative to the provisions of this Agreement." There is no contention that the Arbitrator exceeded those limitations. In sum, the grievances and the Award dealt solely with whether the Agreement permitted the Company conduct in question.

In contrast, the amended ERD complaint makes no reference to the Agreement at all, and Seeman's ERD exhibit list and testimony describing the first day of ERD proceedings reflects Seeman's intention not to rely upon that Agreement in pursuing his claim, although references to the Agreement are coming into the record during questioning by the Company's attorney. Instead, it appears that Seeman is claiming in that proceeding that, regardless of what the Agreement permits, the Company conduct in question constitutes handicap discrimination proscribed by the WFEA.

For those reasons, alone, the Examiner would conclude that Seeman is not refusing to accept Arbitrator Zeidler's determinations concerning the proper meaning and application of the Agreement when he pursues the separate and distinct claim that the same Company conduct violated state law regarding handicap discrimination.

Seeman's citations of federal and state employment discrimination case law lend further and quite authoritative support to the general proposition

that final and binding collective bargaining agreement grievance arbitrations agreements on the one hand and employment discrimination complaints on the other are separate and distinct in nature and independently maintainable.

Thus, in Gardner-Denver, supra the U.S. Supreme Court concluded that an employes statutory right to a trial de novo under the Equal Employment DISCUSSION cont'd

provisions of the Civil Rights Act is not foreclosed by prior submission of the claim to final and binding arbitration, even where the collective bargaining agreement in effect contains a nondiscrimination clause. Then, in Krueger, supra, LIRC found the Gardner-Denver rationale persuasive and applicable to a WFEA discrimination complaint proceeding, as well. The Gardner-Denver reasoning expressly adopted by LIRC was summarized in Krueger as follows:

> (1) the doctrine of election of remedies is inapplicable in this context which involves statutory rights distinctly separate from the employes contractual rights under a collective bargaining agreement, regardless of the fact that violation of both rights may have resulted from the same factual occurrence; (2) by merely resorting to the arbitral forum the petitioner has not waived his cause of action under the fair employment law, because the rights conferred thereby cannot be prospectively waived and form no part of the collective bargaining process; (3) an arbitrator's authority is confined to resolution of questions of contractual rights, regardless of whether they resemble the rights conferred by the fair employment statute; (4) in instituting an equal rights action, the employe is not seeking review of the arbitrator's decision but is asserting a right independent of the arbitration process based on the fair employment law; (5) a policy of deferral by the court or agency to arbitral decision would lead to an undue emphasis on the law of the shop rather than the law of the land.

Krueger, supra, at 17. Such federal case law reasoning was also found persuasive by the Circuit Court reviewing a WFEA discrimination complaint case in Nielson, supra, at 3, where Judge Wilbershide stated,

> . . . the reasoning in the federal authority is persuasive on the issue now to be decided. Oliver in proceeding to arbitration, was acting under rights spelled out by the employment contract with the petitioner. In proceeding under the Fair Employment Act he seeks vindication in a dispute arising under protections afforded him by the statutes of this state, rather than that contract. These are two separate issues, and the arbitration award cannot be considered as having controlled the issue raised under the Wisconsin Fair Employment Act. . . .

As noted, the Examiner would conclude that Seeman did not violate Sec. 111.06(2)(c) without even considering the employment discrimination cases noted above. Hence, if Krueger is distinguishable as the Company contends, that would not be outcome determinative herein. It can be noted in that regard, however, that the applicability of Gardner-Denver and related federal cases to Seeman's WFEA complaint is clearly a matter for the ERD ALJ and LIRC to decide. The relief sought herein by the Company would have the WERC

preclude Seeman from proceeding further under the WFEA and would thereby preclude the ERD from making those judgments and from determining the weight, if any, to be given to the Award in adjudicating Seeman's WFEA complaint.

For all of those reasons, the Examiner is persuaded that Seeman has not failed to accept the Award and, hence, has not violated the Agreement

DISCUSSION cont'd

provision that grievance awards are final and binding in violation of Sec. 111.06(2)(c), Stats. This case therefore presents no conflict between WEPA and WFEA for anyone to resolve. Moreover, since he is not attempting to overturn Arbitrator Zeidler's determinations as to his and the Company's rights under the Agreement, it would not be appropriate to require Seeman to attempt to do so before permitting him to pursue his independent claim under the WFEA. None of the other authorities and policy arguments advanced by the Company lead the Examiner to conclude otherwise.

Because the Company has made it quite clear that it is not raising federal preemption issues, the Lingle, Cuffe, Metro, Ackerman and Smolarek cases, supra, need not be discussed in the preemption context.

Seeman's Request for Costs and Reasonable Attorney's Fees

While the Examiner has found no merit in the Company's legal theory, this is, as noted, a case of first impression under Sec. 111.06(2)(c), Stats., such that the Examiner cannot conclude that the complaint was filed wholly without possible legal basis. For that reason and because there is no general statutory or Agreement provision for an awarding of costs or attorney fees in WERC complaint proceedings, the Examiner has denied Seeman's request for same in the instant case.

Dated at Shorewood, Wisconsin, this 5th day of March, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz /s/
Marshall L. Gratz, Examiner