STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RADIO & TELEVISION BROADCASTING ENGINEERS LOCAL NO. 715, IBEW, AFL-CIO

Complainant,

vs.

GAYLORD BROADCASTING CO.,

Respondent.

Case 1
No. 42151 Ce-2079
Decision No. 26231-A

Appearances:

Mr. Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, WI 53703-2594, appearing on behalf of the Complainant.

Mr. Jose' A. Olivieri, Michael, Best & Friedrich, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, WI 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On May 9, 1989, the above-named Complainant filed a complaint with the Wisconsin Employment Relations Commission (herein WERC) alleging that the above-named Respondent had committed and was committing unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act. On November 9, 1989, following extended but unsuccessful conciliation efforts, the Commission appointed the undersigned Examiner, Marshall L. Gratz, to act as examiner in the matter and to make and issue findings of fact, conclusions of law and order.

Pursuant to notice, the Examiner conducted a hearing in the matter at Milwaukee City Hall on December 11, 1989. The parties exchanged initial briefs and the Employer filed a reply brief on March 15, 1990. Following the additional procedural developments described in Finding of Fact 13-14 and 16-20, below, the Examiner, by letter dated August 13, 1990, advised the parties that the case was fully submitted and ready for decision.

The Examiner has considered the record evidence and the arguments submitted by the parties and hereby makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant, Radio & Television Broadcasting Engineers Local No. 715, IBEW, AFL-CIO, (herein Complainant or the Union) is a labor organization with its principal office located at 5006 West Burleigh Street, Milwaukee, Wisconsin. At all material times, the Union's president and business manager has been E. Walter Clare.

2. Respondent, Gaylord Broadcasting Co., (herein Respondent or the Employer) is an employer and a corporation doing business as television station WVTV, Channel 18. The Employer's principal office is located at 4041 North 35th Street, Milwaukee, Wisconsin. At all material times, the Employer's general manager has been Harold E. Protter, and its attorney for employment matters has been John R. Sapp.

3. Since 1966, the Union has been the collective bargaining representative of broadcast engineers employed by the Employer. That collective bargaining relationship is one that affects interstate commerce within the meaning of the National Labor Relations Act (NLRA).

4. The Union and Employer were parties to a September 1, 1984 to August 31, 1987 collective bargaining agreement (herein Agreement). Among the terms of the Agreement were the following:

ARTICLE I

Duration - Scope of Work - Union Membership

> Section 1:01. This agreement shall take effect as of September 1, 1984, and shall remain in effect through August 31, 1987, except that changes in wages and benefits shall be retroactive only to the extent specifically agreed. It shall continue in effect from year to year thereafter from the 1st day of September through the 31st day of August of each succeeding year unless or until terminated as set forth below.
>
> Section 1:02. Either party desiring to change or terminate this agreement must notify the other in writing at least sixty days prior to the 1st day of September, 1987, or prior the 1st day of September of any subsequent year. Whenever notice is given by either party of proposed changes, the exact nature of the changes

desired must be stated in the notice and the parties will promptly enter into negotiations thereof. In the event that as a result of such negotiations this agreement has not been renewed, modified, or extended by the date on which it would otherwise have terminated as a result of such notice, status quo conditions shall continue until either party gives the other written notice terminating such conditions.

Any changes, supplements or amendments made during the term of this agreement must be reduced to writing, signed by the parties hereto, and approved by the International president of the IBEW and then shall become part of this agreement.

Section 1:03 All questions, disputes, or grievances as to the interpretation, application or performance of the terms of this agreement shall be settled and determined solely and exclusively by the conciliation and arbitration procedures provided herein. During the term of this agreement there shall be no strikes, boycotts, picketing, slowdown or any other interference with business or production on the part of the Union or its members and no lockout on the part of the employer, provided conciliation and arbitration procedures provided herein are adhered to.

. . .

Section 1:09. A regular Engineer shall, for the first (3) three months of his or her employment be on probation. The Employer has the right to obtain an additional (3) three months probationary period by sending a letter to Local 715 and the affected employee at least 10 days before the first (3) three month period is concluded. During such probationary period, the Employer may terminate the employment of such Engineer upon (1) one week's notice or one week's pay in lieu thereof. During the period of probationary employment, an Engineer shall work under the conditions and receive not less than the minimum rate of pay provided for in this agreement. During this period he or she may be terminated for any reason. Any Engineer retained in the employ of the employer for more than (3) three or (6) six months respectively, shall be considered employed on a permanent basis.

The employer also has the right to employ temporary full-time Engineers to cover vacations and leaves and/or part-time

Engineers as set forth below, provided that such part-time Engineers shall not be used to replace any full-time Engineer and shall not be used as a substitute for the employment of a full-time Engineer. Temporary Engineers may be employed for up to six (6) months at a time. Temporary and part-time Engineers are employed as needed and may be released at any time with or without cause. . . . [emphasis added].

. . .

ARTICLE II

Grievances - Arbitration - Violation - Inspection

Section 2:01. All questions disputes, or grievances as to the interpretation, application or performance of the terms of this agreement shall first be taken up for adjustment between the Employer and the Steward of the Union. To be considered, a question, dispute, or grievance, including a grievance protesting a discharge, must be submitted within fourteen (14) days after the employee or Union knows or reasonably should have known of the occurrence of the event complained of. In the event no satisfactory settlement of the issue is reached, it shall then be considered by the Employer and an authorized representative or representatives of the Union, and should they fail to adjust the matter, either party may require arbitration of such issue by giving written notice to the other.

Section 2:02. Any matter that is not adjusted by the employer and the Union, as provided in Section 2:01 of this Article, shall be referred to a Board of Arbitration consisting of one representative of the employer, one representative of the Union, and a third member to be selected by these two representatives, who shall be Chairman. In the event the two representatives of the Board of Arbitration fail to select the third member within seven days, the Director of the Federal Mediation and Conciliation Service will be requested to appoint the third member. The majority decision of the Board shall be final and binding on both parties. Each party shall defray the expenses of its representative on the Board, and the fee and expenses of the third member shall be borne equally by the parties.

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ARTICLE V

Leaves of Absence - Layoffs - Discharge

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> Section 5:04. The Employer shall have the right to discharge any Engineer for just cause. [emphasis added]. Except for willful misconduct, the dismissal shall be preceded by two weeks written notice thereof, or two weeks' pay in lieu of notice, stating the reasons for such discharge. If the Union believes any such discharge to be unjustified, the matter shall then be considered as a grievance and shall be handled as stated in Article II of this agreement.
>
> When there is any complaint against any Engineer which the employer deems to be of sufficient importance to be made a permanent part of the record of such Engineer, the Union and the Engineer involved will be notified by the Employer in writing within ten days after the Employer learns of the complaint. Upon the request of the Union, within ten days thereafter, a conference will be arranged to enable the Employer and the Union to discuss the matter. It is understood that unless this procedure is complied with, no such complaint will be recognized as a basis for any discharge.

. . .

5. By letter dated June 17, 1987, the Employer gave written notice to the Union of the Employer's intent and desire to change or terminate the Agreement and of its willingness to meet and negotiate with the Union concerning the Agreement. Negotiations ensued but did not produce agreement by August 31, 1987. On August 31, 1987, the parties agreed in writing "that the agreement between the parties is extended to and including October 15, 1987." Thereafter they agreed in writing "that the agreement between the parties is extended to and including February 5, 1988." The parties exchanged offers dated February 5, 1988, which each identified as its "final offer," but they remained apart on several issues and no settlement was achieved at that time.

6. By letter dated February 10, 1988, the Employer notified the Union as follows:

> This will confirm that the agreement between the parties for the initial period from September 1, 1984 through August 31, 1987 has terminated. This will further confirm our agreement that the Union will not strike unless it has given the Employer at least 48

> hours' notice of its intention to do so and that the Employer will not lock out the Union members unless it gives 48 hours' notice

The Examiner infers that the Union received that notification on or about February 12, 1988.

7. If Agreement Sec. 1.02 "status quo conditions" arose and continued in effect between the parties after February 5, 1988, they were terminated when the Union received the Employer's February 10, 1988 letter on or about February 12, 1988. From and after the Union's receipt of that letter, there was no collective bargaining agreement in effect between the parties until the parties entered into a collective bargaining agreement in 1989.

8. As of February 5, 1988, the parties' bargaining had identified a number of items on which the parties had reached tentative agreement. Some of those items involved tentatively agreed-upon changes in Agreement provisions, and others involved Agreement provisions as to which neither party had proposed any change. In the latter group were Art. II and the portions of Arts. I and V that are underlined in Finding of Fact 4, above. There were other items which remained in dispute. In late March, 1988, the Employer orally informed the Union that it was implementing the first year of its "final offer" to the Union dated February 5, 1988. The Employer confirmed that oral notification by letter dated March 31, 1988, which was and received by the Union in early April, 1988. The implemented first year of the February 5, 1988 offer consisted of a listing of changes in existing arrangements affecting the bargaining unit, expressed as changes in the language of the terminated Agreement. Some of those changes were identified in the offer as "items on which agreement has been reached," others were not. The implemented changes did not relate to Art. II or to the portions of Arts. I and V that are underlined in Finding of Fact 4, above. In other words, the implemented changes did not concern grievance arbitration procedure, just cause standard for discharge of any engineer, or Company right to release part-time employes at any time with or without cause. The employes in the Union's bargaining unit continued to work under the implemented terms and did not strike at any time during the bargaining between the parties. Neither the existence of the abovenoted tentative agreements, nor the Employer's implementation of the abovenoted changes, nor the employes' working under the implemented terms without engaging in a strike, had the effect of establishing a collective bargaining agreement between the parties.

9. On September 2, 1988, the Employer orally notified the Union that effective September 12, 1988, it would implement four additional changes in wages, hours and conditions of employment. The Employer then confirmed that notification in writing by letter dated September 12, 1988, as follows:

> This will confirm our prior notification to you that the employer has implemented items 4, 5, 6 and 7 of its most recent final offer (copy enclosed). Items previously implemented remain implemented except to the extent replaced by these items. All other

> proposals including the proposals for a 2-1/2 percent wage increase remain outstanding.

The newly-implemented items referred to in the the September 12, 1988 letter were expressed in terms of changes in the language of the terminated Agreement as modified by the Employer's previous final offer implementation. The September 12, 1988 implementation did not make any change in Art. II or in any of the portions of Arts. I and V that are underlined in Finding of Fact 4, above, and that implementation did not establish a collective bargaining agreement between the parties.

10. On September 6, 1988, Employer representatives met with and informed Union representatives that it was terminating the employment of Allan Richards, a part-time Engineer who had first been employed by the Employer in July of 1985. On September 8, 1988, Employer Director of Engineering Jim Hall wrote Union Business Manager Clare that Richards "will not be scheduled [for work] any further" and that a memo had gone into Richards' file which read as follows:

> Date: September 6, 1988
> To: Personnel File of Allan Richards
> From: Jim Hall
> Subject: Incident in A-Control on 9/2/88
>
> On September 2, 1988 at approximately 7:00 p.m., Allan Richards was observed in A-Control voicing his opinion regarding the people in the promotion department. He said that they did not know what the hell they were doing. He said that new broad in promotion does not have a fucking clue as to what is going on. That Mark just takes off and leaves us hanging. Mark went home sick that day.
>
> One person he was talking about, Tracey [Blatter], was present in the room at the time unknowingly to Mr. Richards. He was seen apologizing to Tracey after one of his co-workers suggested he do so. His overall attitude was very unprofessional.

The Employer, contrary to the Union, contends that the communications between the parties concerning the termination of Richards employment did not include a timely submission of a grievance challenging the termination. In any event, on November 29, 1988, Clare wrote Protter as follows:

> The Union contends the discharge of Al Richards in September 1988 was without just cause as provided for in the provision of Sec. 5.04 of the implemented agreement.

> To resolve this matter, the Union is requesting that this matter be submitted to arbitration as provided for in Article II.

There followed communications between the Employer and the Union in which the Employer maintained its position that a grievance had not been timely submitted concerning Richards termination, that it would not grant Richards's requests for reinstatement and back pay, and that it would not submit any issues relating to the termination to arbitration. The Union wrote the Federal Mediation and Conciliation Service (herein FMCS) requesting an arbitration panel in the matter. The FMCS responded by mailing both parties a panel of arbitrators. In response to the FMCS panel, the Employer wrote the FMCS, with a copy to the Union and its attorney, as follows:

> We have received a copy of the panel of arbitrators submitted in the above-referenced matter and dated January 5, 1989. We have previously informed the Union that, since the labor agreement expired long ago and since the dispute was triggered by events which occurred long after that expiration, the company has no obligation to and is not willing to arbitrate this matter. Hence the request for a panel was inappropriate and there can be no further action in the matter.

The Employer has at all times refused to arbitrate issues relating to the Richards termination.

11. On May 10, 1989, the Union filed a charge with Region 30 of the National Labor Relations Board (herein NLRB), alleging that the Employer had committed an unfair labor practice within the meaning of NLRA Secs. 8(a)1 and 5, on the following basis:

> Local 715 is the collective bargaining representative for engineers employed by the employer. Mr. Al Richards was an engineer employed in the bargaining unit represented by Local 715. The employer discharged Mr. Richards without just cause. The union grieved the discharge and requested it be submitted to arbitration pursuant to the terms of the agreement implemented by the employer. The employer refuses to submit the grievance to arbitration.

12. Following an ex parte investigation, the NLRB Regional Director sent the parties a letter dated June 30, 1989, wherein he refused to issue a complaint in the matter, explaining his decision in that regard as follows:

> The above-captioned case [Gaylord Broadcast Company, d/b/a WVTV, Case 30-CA-10468] charging a violation under

Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation it does not appear that further proceedings on the charge are warranted inasmuch as the evidence does not establish that the Employer was obligated to arbitrate a grievance alleging that a temporary part-time engineer, Al Richards, was not discharged for cause.

The evidence shows that the Union requested arbitration of Richards' grievance on November 20, 1988. The last collective-bargaining agreement had expired on August 31, 1987 and had been extended twice to February 5, 1988. The incident for which Richard was no longer scheduled occurred on September 2, 1988, at which time the parties were under an Employer's implemented final offer. The evidence does not establish that either the arbitration clause or the no-strike clause of the expired agreement had been implemented. In these circumstances, it appears that the Employer was not obligated to arbitrate the Richards grievance. In Indiana and Michigan Electric Company, 284 NLRB No. 7, Slip Op. pages 21 and 22, (1987), the Board stated:

> We conclude, however, in agreement with the circuit courts that have addressed this issue, that a dispute based on postexpiration events "arises under" the contract within the meaning of Nolde [Nolde Bros. v. Bakery Workers Local 358, 430 U.S. 243 (1977)] only if it concerns contract rights capable of accruing or vesting to some degree during the life of the contract and ripening or remaining enforceable after the contract expires. See Teamsters v. C.R.S.T., 795 F.2d 1400, 1403--1404 (8th Cir. 1986)(right to be discharged for cause does not "arise under" expired agreement); ...

Additionally, in Mid-America Milling Company, 282 NLRB 926 (1987), the board found no violation where an Employer only refused to arbitrate a single grievance, even if the refusal is a contract violation, is not in itself an unfair labor practice.

For all of the above reasons, I am refusing to issue a complaint in this matter.

. . .

13. On May 9, 1989, (the day before its abovenoted charge was filed with the NLRB), the Union filed its complaint in the instant matter with the WERC, alleging that the Employer had committed and was committing unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act by "its discharge of Al Richards and its failure to arbitrate the grievance." As premises for the foregoing allegations, the Union alleged that "Complainant and Respondent were parties to a collective bargaining agreement which expired on August 31, 1987. The agreement was extended and thereafter the respondent implemented all agreed upon provisions of the collective bargaining agreement and its final proposals;" and that, "One of the agreed upon items which was implemented was a grievance procedure which culminated in arbitration."

14. On May 19, 1989, the Employer filed its answer in the instant proceeding, asserting, among other allegations and defenses, that ". . . Respondent has implemented only a portion of its final proposals, [and] said implemented provisions do not include a grievance and arbitration procedure;" that "Mr. Al Richards' employment was terminated after expiration of the collective bargaining agreement and while there was no duty to arbitrate on the part of Respondent;" and that "The facts which give rise to the request for arbitration in question arose after expiration of the collective bargaining agreement and are therefore not subject to arbitration."

15. The Employer and Union entered into a ratified and undisputedly binding collective bargaining agreement on or about December 4, 1989. An earlier agreement signed by Employer representatives and by the Union's International President on or about March 23, 1989 was the subject of a separate Local 715 NLRB charge filed in September of 1989 asserting that that agreement was invalid because it lacked ratification by the Local 715 membership.

16. At the December 13, 1989 hearing herein, the Union, in its arguments, cited Art. II and Secs. 5.04 and 1.09 of the Agreement and made reference to the Employer's March 31, 1988 implementation of "its final proposal in connection with a number of items . . . upon which the parties had reached agreement during the course of bargaining." The Union's hearing arguments made no reference to Sec. 1.02 or to a continuation of the Agreement arising out of that section of the Agreement. However, in his testimony, Clare refused to admit that the Agreement had terminated because the Agreement had "provisions for continuation of status quo conditions." (tr.39). The Employer's arguments as presented at the hearing asserted, among other things, "that there was no duty to arbitrate the matter since the facts which give rise to this claim arose subsequent to the expiration of the collective bargaining agreement and did not arise from the collective bargaining agreement which had previously expired;" and that the WERC does not have jurisdiction to resolve this matter, [but] that the WERC's jurisdiction, if any, can only relate to the question of whether there is a duty to arbitrate." Throughout the proceedings, the Employer has opposed the exercise of WERC jurisdiction to adjudicate any issues relating to the Company's termination of Richards' employment.

17. In its post-hearing brief, the Union argued that the Agreement's grievance arbitration and just cause for discharge of "any Engineer" provisions remained in effect at the time of Richards' termination because those provisions were among "status quo conditions" continued in effect after the February 5, 1988 end date of the last extension agreement by reason of Agreement Sec. 1.02. In its reply brief, the Employer argued that the Union should be precluded from belatedly raising Sec. 1.02 as the basis of its claim, asserting, "The parties have not effectively litigated the issue raised by the Complainant because the Complainant has not raised it before filing its brief in this matter." The Examiner then advised the parties, by letter on June 26, 1990, that he found merit in the Employer's foregoing contention to the extent that

> . . . the Examiner and Commission would be precluded by due process principles of fair play from making any finding or order adverse to the Company on the basis of 1.02 unless the Union amends its complaint to incorporate factual assertions associated with that line of argument and until the Company is provided with an opportunity to be heard regarding same. General Electric Co. v. Wisconsin Employment Relations Board, 3 Wis.2d 277, 88 N.W.2d 691(1958)(agency inappropriately ruled on and remedied wage provision violations where only seniority/transfer provision violations were pleaded and argued at hearing; case remanded with directions that agency provide respondent with full hearing regarding wage provision issues before agency makes findings and orders concerning same.)

The Examiner went on to state in that letter,

> The Wisconsin Employment Peace Act permits complaint amendment at any time prior to the issuance of a final decision in the discretion of the agency. Sec. 111.07(2)(a), Stats.,; see, General Electric Co., supra, 3 Wis.2d at 243.
>
> I find it appropriate in this case to permit the Union to conform its pleadings to the proofs as they were developed at the hearing so that the Union's 1.02 contention can be ruled upon free of the abovenoted procedural limitation. Regardless of what the Examiner may rule on the Union's 1.02 argument, it is preferable that the record be made complete at this point to facilitate the commission and judicial review processes to which this decision is subject.
>
> If the Union chooses to so amend its complaint, the

> Company will have an opportunity to amend its answer and to present any additional evidence it may have on the amended aspects of the pleadings, and the Union will have an opportunity to meet any such additional evidence submitted by the Company.

18. The Union filed an amended complaint on July 5, 1990, expressly alleging the existence of Agreement Sec. 1.02 and further alleging that "[a]t no time following September 1, 1987 did respondent give complainant written notice that it was terminating the grievance procedure or the provision requiring just cause for the discharge of engineers;" and that the Employer's discharge and failure to arbitrate the Richards grievance "violated the status quo clause of the parties' collective bargaining agreement and the agreed upon implemented items and therefore constitutes a violation of Section 111.06(1)(f), Wis. Stats."

19. On July 6, 1990, the Employer filed a motion and supporting statement asking that the Examiner reconsider his ruling permitting the Union's amendment of complaint. The Examiner, by July 11, 1990 letter to the parties, denied the Employer's motion.

20. On July 28, 1990, the Employer filed an amended answer adding, among other things, denials of the allegations quoted in Finding of Fact 18, above, and specific allegations that that Complainant's claim regarding an alleged breach of Sec. 1.02 of the 1984-87 collective bargaining agreement between the parties is time barred under Sec. 111.07(14) . . . [and] has not been the subject of a grievance [such that] Complainant has not exhausted its remedies on this matter before proceeding before the WERC;" that Complainant's delay in stating that claim "was unreasonable and prejudicial to Respondent and should therefore be precluded;" and that "Permitting an amendment of the complaint in this matter is a violation of the Due Process Rights of the Respondent under state and federal law and is contrary to the WERC's administrative practice."

CONCLUSIONS OF LAW

1. The subject matter of the complaint and amended complaint in this matter is not preempted by the National Labor Relations Act.

2. The National Labor Relations Board does not have primary jurisdiction of the subject matter of the complaint and amended complaint in this matter.

3. The June 30, 1989 determination by the NLRB Regional Director is not entitled to res judicata effect herein.

4. The Employer's refusals to arbitrate issues concerning the Richards grievance, based as they were in part on the Employer's assertion that no agreement to arbitrate existed between the parties at the time those issues arise, rendered it futile and unnecessary for the Union to attempt to exhaust grievance and arbitration procedures before pursuing contract enforcement relief under Sec.

111.06(1)(f), Stats.

5. The Union's amended complaint claim concerning Sec. 1.02 relates back to the date of filing of the original complaint in this matter and hence is not time barred under Sec. 111.07(14), Stats.

6. It is not violative of the Employer's due process rights under state or federal Law, nor contrary to WERC's administrative practice, for the Examiner to permit the Union to amend its complaint in this matter as and when it did.

7. There was no collective bargaining agreement in effect between the parties when the Employer terminated Richards's employment on September 6, 1988.

8. Because there was no collective bargaining agreement in effect between the Employer and Union when the Employer terminated Richards' employment on September 6, 1988, the Employer's refusals to arbitrate the Richards grievance did not violate the terms of a collective bargaining agreement and did not constitute an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats.

9. Because there was no collective bargaining agreement in effect between the Employer and Union when the Employer terminated Richards' employment on September 6, 1988, the Employer's termination of Richards' employment did not violate the terms of a collective bargaining agreement and did not constitute an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats.

ORDER 1/

The complaint, as amended, is dismissed in its entirety.

Dated at Madison, Wisconsin, this 27th day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

1/ (see next page for footnote text)

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Sec. 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in party, 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.

GAYLORD BROADCASTING CO.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its original complaint filed on May 9, 1989, the Union alleged that the Employer violated the terms of a collective bargaining agreement and hence Sec. 111.06(1)(f), Stats., by its September 6, 1988 discharge of part-time Engineer Allan Richards and by its refusal to arbitrate a grievance concerning that discharge. The Union's original complaint alleged that the collective bargaining agreement so violated was created by the Employer's March 12, 1988 final offer implementation of items allegedly including provisions requiring arbitration of grievances and just cause for discharge of any Engineer. The Employer answered denying that any collective bargaining agreement was in effect between the parties at the time Richards' employment was terminated. The Employer also alleged several affirmative defenses, including federal preemption, primary jurisdiction residing with the NLRB, untimeliness of grievance submission, and "the facts which give rise to the request for arbitration in question arose after expiration of the collective bargaining agreement and are therefore not subject to arbitration."

The Union's arguments on the record at the hearing made no mention of Agreement Sec. 1.02, though Union President and Business Manager Walter Clare in his testimony, refused to admit that the Agreement had terminated, because "the contract has provisions for continuation of status quo conditions." (tr.39). The Employer's arguments on the record at the hearing were in accord with its answer. As a part of its case, the Employer showed that it sent the February 10, 1988 letter described in Finding of Fact 11, and that its implementations of prior offers to the Union in March and September of 1988 were of changes in existing arrangements affecting the bargaining unit that were unrelated to the subjects of grievance arbitration, just cause or the Employer's right to release part-time Engineers with or without cause.

In its brief, the Union argued that Agreement Sec. 1.02 continued all of the Agreement provisions in effect after the end date of the last of the two extension agreements, and that because the Employer's implementations did not affect the subjects of just cause and grievance arbitration, the Agreement provisions on those subjects remained a collective bargaining agreement in effect between the parties at the time Richards' employment was terminated. The Employer, in its reply brief, objected to consideration of that contention on the grounds that it had not been pleaded in the complaint, that it had not been asserted by the Union at the hearing, and that it therefore had not been fully litigated by the parties. The Examiner agreed with the Employer, but only to the extent that the Employer was entitled to notice and an opportunity to be heard before a determination based on the Union's Sec. 1.02 argument could be made by the Examiner or the Commission. Over the Employer's objections in the form of a motion to the contrary, the Examiner permitted the

Union to amend its complaint, which it did. At the same time, the Examiner offered the Employer an opportunity to amend its answer and to present such additional evidence and arguments as it desired in response to the Union's amendment. The Employer amended its answer as noted in Finding of Fact 20, but stated that it did not desire to submit additional evidence or arguments.

POSITION OF COMPLAINANT UNION

In its brief, the Union argues as follows. The Employer violated the terms of a collective bargaining agreement both by refusing to arbitrate the grievance concerning Richards' discharge and by imposing the discharge in the first place.

The parties' 1984-87 agreement contained, among others, provisions for: grievance arbitration, just cause for discharge of any engineer (Sec. 5.04), release of part-time engineers with or without cause (Sec. 1.09), and duration/reopener language (Sec. 1.02) which put status quo conditions into effect following the agreement termination date if negotiations were not resolved by that time, until those status quo conditions were terminated in writing by one of the parties.

The termination date of the 1984-87 Agreement was August 31, 1987. After mutual agreement extensions to February 5, 1988, the termination date was finally reached but negotiations were not resolved as of that time. At no time prior to the discharge of Richards on September 6, 1988 did the Employer give the Union the 1.02 required written notice terminating the status quo conditions that went into effect after the termination date. The Employer sent the Union a February 10, 1988 letter confirming, "that the agreement between the parties for the initial period from September 1, 1984 through August 31, 1987 has terminated." However, that letter was merely a confirmation that the expiration date as extended by the parties had passed. It triggered the effectiveness of the 1.02 status quo clause, but it did not identify any status quo conditions that were being terminated. The Employer also implemented various offers previously made to the Union, but those implementations did not affect any of the abovenoted portions of the 1984-87 Agreement. Thus, the grievance arbitration and just cause provisions remained in effect as of September 6, 1988 as 1.02 status quo conditions taking effect after the extended expiration date.

The Union's steward advised Employer representatives at the time he was informed of the discharge on the date it was imposed, September 6, 1988, that the Union was grieving the discharge. The grievance procedure language requires only that grievances be submitted, and it does not require that they be submitted in writing. Accordingly, the grievance was timely submitted on September 6, 1988. The Union petitioned FMCS for arbitration, but the Employer has refused to arbitrate the grievance. The Employer's refusal to arbitrate violated the grievance arbitration provision which was among the status quo conditions continued in effect by 1.02 and not terminated in writing by the Employer. Accordingly, the Employer violated the terms of an agreement to submit grievances to arbitration in violation of Sec. 111.06(1)(f), Stats. by refusing to arbitrate the Richards grievance.

The NLRB's refusal to issue a complaint is not a valid defense to that agreement violation. Breach of contract does not constitute an unfair labor practice under the NLRA. The NLRB's administrative decision not to issue a complaint does not have any res judicata effect in this proceeding. In any event, that decision focused on what the Employer had implemented not on the implications of the status quo conditions clause. Moreover, the NLRB based its decision in part on the fact that where an employer refuses to arbitrate a single grievance, such would not be an unfair labor practice under the National Act even if it is a contract violation. Citing, Mid-America Milling Co, 282 NLRB 926 (1987).

On the merits, the discharge violated the just cause requirement of 5.04 of the contractual 1.02 status quo conditions in effect on September 6, 1988. Section 5.04 makes just cause applicable to "any Engineer" without exceptions, thereby including part-time engineer Richards. Section 1.09 also makes all but a listed set of Agreement provisions applicable to part-time engineers, and the 5.04 just cause provision is not among the listed exceptions. Section 1.09 does provide that temporary and part-time engineers are "employed as needed" and that they may be "released at any time with or without cause." However, the use of the differing terms "release" and "discharge" in 1.09 and 5.04 reveals an ambiguity. If the parties had intended 1.09 to apply to discharges for disciplinary reasons, they would have used the term "discharge" there as they did in 5.04. The use of the different term, "release" appears intended to make it clear that part-time engineers were employed on an as needed basis, rather than to make an exception to the theretofore existing universal just cause standard for discharge of any engineer.

The bargaining history evidence confirms that when the right to release language was first included in the contract, the Employer explained that it needed to be free to release part-time or temporary engineers with or without cause in the event the program they were working on was discontinued. The language should be interpreted narrowly to achieve that stated Employer purpose.

Once the "release" language was in the contract, the Employer discharged part-time engineer Steve Hans and asserted that the "release" language authorized the discharge of the employe without just cause. The Union grieved the Hans discharge and that grievance was settled without a resolution of the underlying dispute as to the applicability of the "release" clause to discharges for disciplinary reasons. James Hall's testimony, that in an internal Union discussion about the Hans grievance someone said that the Union made a mistake by allowing the "with or without cause" language to be in the contract, does not constitute an admission that the language of 1.09 gave the Employer the right to discharge part-time and temporary engineers without cause. Rather it reflects that the Union had made a mistake in accepting the Employer's representation that the "release" language was simply to permit the release of part-time or temporary engineers who were no longer needed.

In the subsequent round of bargaining, the Union sought to resolve the ambiguity and dispute by proposing inclusion of language that would make it clear that the release language did not apply to discharges for disciplinary reasons. The Employer's unwillingness to resolve the

dispute in that way and the Union's ultimate withdrawal of its proposal left the parties with a continuing dispute over the scope of release clause applicability. It did not represent Union acquiescence in the Employer's right to discharge part-time and temporary engineers without just cause.

The discharge of Richards was clearly without just cause. He was guilty of nothing more than an imprudent statement made out of frustration in response to a question by his supervisor and without knowledge that Blatter was present when he uttered it. Richards had no intent to hurt Blatter's feelings, and he apologized to her twice. He had never before been disciplined.

For the foregoing reasons, the Examiner should conclude that the Employer violated its agreement with the Union by refusing to arbitrate the Richards grievance and by discharging Richards without just cause. The Employer should be ordered to reinstate Richards to his former position and to make him whole for all lost wages and benefits.

POSITION OF RESPONDENT EMPLOYER

In its initial brief, the Employer argues as follows. The Union's claims relate to conduct arguably prohibited by the National Labor Relations Act, and they require consideration of the identical fundamental issues presented to the NLRB in the Union's charges. The Union filed a charge with the NLRB alleging violations of NLRA Secs. 8(a)(1) and (5), on the basis of the same facts alleged herein, to wit, that the Employer discharged Richards without just cause and refused to submit a grievance to that effect to arbitration when the Union requested that it do so "pursuant to the terms of the agreement implemented by the employer." The NLRB investigated and concluded that "the evidence does not establish that the Employer was obligated to arbitrate a grievance alleging that a temporary part-time engineer was not discharged for cause." A state law case must be preempted where the same fundamental question presented therein as in an unfair labor practice case before the NLRB. Citing, inter alia, San Diego Building Trades Council v. Garmon, 359 U.S. 236, 43 LRRM 2838 (1959)(herein Garmon) and Operating Engineers Local 926 v. Jones, 460 U.S. 669, 112 LRRM 3273 (1983). Furthermore, because the Union's claims are based on post-expiration unilateral implementations by the Employer, they can only involve an alleged violation of the Employer's NLRA obligations concerning maintenance of the status quo, rather than any contractual obligations. Citing, inter alia, Derrico v. Sheehan Emergency Hospital, __ F.2d __, 127 LRRM 3201 (CA 2, 1988). For those reasons, the WERC's jurisdiction is pre-empted by the NLRA.

Even if WERC jurisdiction is not pre-empted, the Union has failed to prove that there was a contract in effect between the parties at the time of the discharge. Under federal law applicable to Commerce employers such as the Employer, a contract-enforcement forum has no jurisdiction to hear a breach of contract claim where the contract involved has expired, Citing, Johnson v. Pullman, __ F.2d __, 128 LRRM 2361 (CA 11, 1988) and Derrico, supra, such that a discharge which occurs after expiration of an agreement does not arise under the contract. Citing, C.R.S.T.,

Inc., 795 F.2d 1400, 1404, 122 LRRM 2993 (CA 8, 1986). Here, the evidence is clear and beyond doubt that no contract was in effect for a significant time before the discharge and the incident giving rise to it. Union representative Clare testified that from February 5, 1988 until approximately November of 1989, the Union's position was that there was no collective bargaining agreement in effect, citing, tr.39, 40 and 45, and the Union argued in September of 1989 that there was no agreement in effect between the parties, citing, tr.45. Tentative agreements reached between the parties do not constitute a collective bargaining agreement in effect between the parties. Citing, Racine Unified School District, Dec. No. 25283-B (WERC, 5/89). The Union has therefore failed to sustain its burden of proving by a clear and satisfactory preponderance of the evidence that a collective bargaining agreement was in effect between the parties at the time of the discharge.

In any event, the WERC should defer to the NLRB's determinations of the issues presented herein rather than allow the Union to relitigate them with duplicative and potentially inconsistent litigation results. Citing, Oconomowoc Plumbing, Inc., Dec. No. 20214-B (WERC, 3/84).

Even if the WERC were somehow to find that an agreement to arbitrate grievances was in effect between the parties at the time of the discharge, its remedy would be limited to ordering the Employer to submit the matter to arbitration. Where, as here, the Employer has timely objected to the WERC exercising jurisdiction to decide the merits of the grievance, the WERC defers to the agreed-upon arbitration process in effect between the parties. Citing, Bay Shipbuilding Corp., Dec. No. 19957-B (Shaw, 4/83), aff'd, -C (WERC, 2/84).

If the merits of the grievance and its procedural arbitrability were somehow reached, there is no basis on which to require the Employer to meet a cause or just cause standard for its discharge of Richards. Section 1.02 of the expired agreement states that part-time and temporary employes "may be released at any time with or without cause." The clear and unmistakable meaning of that provision is that the Employer is authorized to discharge part-time engineers with or without cause. That language was placed in the same section as that permitting the Employer to terminate probationary employes for any reason. The Union has offered no bargaining notes in support of its position, and it is undisputed that the Union's representatives recognized in discussing the Hans grievance that the Union should not have allowed the "with or without cause" language into the agreement. Significantly, the Union unsuccessfully sought to change Sec. 1.09 to impose a just cause discharge standard for temporary and part time engineers. The Employer resisted, and the change was not made.

Furthermore, the Union's failure to timely file a written grievance should preclude ordering the Employer to submit the grievance to arbitration. No written grievance form was ever filed. The evidence shows that the Union Steward told Employer representatives that the Union "will" file a grievance about the discharge some time in the future, but it has never done so. In practice, the Union has grievance initiation forms and uses them, yet none has ever been filed regarding the Richards discharge. The grievance was first discussed by the parties' representatives on October 13, 1988, whereas Sec. 2.01 of the expired agreement language provides that "grievances are to be

submitted within 14 days of the contested incident."

In any event, the Employer had just cause for the discharge. Richards used sexist and vulgar statements against a fellow employe in a work environment requiring employes to work in close proximity and close cooperation. It appears Richards must have known that Blatter would hear his comments about her since she was in the same room and within six or seven feet of him when he uttered them and since he was looking in the general direction of the part of the room she was in when he uttered the comments. Whether he knew of her presence or not, his statements to his supervisor in the presence of other co-workers of his and Blatter's is unacceptable and constituted just cause for Richards' termination.

In its reply brief, the Employer argues that the Union's arguments based on Sec. 1.02 of the 1984-87 Agreement as the source of a contractual obligation cannot be considered by the Examiner because it was raised for the first time in the Union's brief. In its Complaint and at the hearing the Union had based its claim that a contract existed at the time of the discharge exclusively on the notion that the Employer had somehow created an agreement by its unilateral implementation of items on which tentative agreement had been reached during the negotiations. The Employer met those arguments at the hearing and in its initial brief. To consider the Union's belated reliance on a new and different factual basis for a contractual obligation in this case would be unfair and contrary to the Commission Rule ERB 2.02, Wis. Adm. Code, requirement that a complaint set forth a "clear and concise statement of the facts constituting the alleged unfair labor practice."

In its statement in support of its motion in opposition to permitting amendment of the complaint, the Employer argues as follows. Permitting the Union to amend its complaint is contrary to WERC precedent and administrative practice, citing, Racine Unified School District, Dec. No. 20941-B (WERC, 1/85); and City of Prairie Du Chien, Dec. No. 21619-A (Schiavoni, 7/84), aff'd by operation of law, -B (WERC 8/84). It is also without a reasonable basis since it would give Complainant an opportunity to litigate a new issue, rather than merely allowing the Union to "conform the pleading to the proofs." It would also "allow Complainant to litigate an alleged unfair labor practice which occurred more than a year before assertion of the alleged violation."

In the balance of its reply brief, the employer argues as follows regarding other points. Even if considered, Sec. 1.02 of the 1984-87 agreement does not constitute a basis for an agreement in effect between the parties on on September 6, 1988 when the discharge occurred. The reference to "status quo conditions" in Sec. 1.02 appears to be to the statutorily recognized status quo rather than to a contractual obligation, whereas a duty to arbitrate can arise only from contract and not from a statutory obligation to maintain the status quo. Citing, Indiana & Michigan Electric Co., 248 NLRB No. 7, 125 LRRM 1097 (1987). In any event, the Employer gave the Union written notice on February 10, 1988--after the 1984-87 agreement and the parties' extensions thereof had expired--that the parties no longer had a contract. The Employer's subsequent written implementations of offers previously made to the Union further communicated that the Employer

was not abiding by the status quo as it existed at the time of expiration of the 1984-87 agreement. Thus, the Employer terminated the Sec. 1.02 status quo conditions months before the Richards discharge.

Finally, contrary to the Union's contentions, there is no contradiction or ambiguity when Secs. 5.04 and 1.09 are read together. Each provides that engineers may be discharged for cause. Section 1.09 simply goes on to state, in effect, that part-time and temporary engineers may also be discharged without cause.

Even if there were an ambiguity, the "release" language at issue was placed in Sec. 1.09 which deals specifically with part-time engineers, so that it appropriately controls over the more general language of Sec. 5.04. Notably, Sec. 1.09 also permits termination of probationary employes for any reason. Moreover, the Union witnesses' claims that at the bargaining table the Employer stated a limited purpose for the "release with or without cause" language of 1.09 must be rejected in light of their inability to corroborate their claim with bargaining notes and their inability to state when such alleged statement was made. By contrast, the Employer presented John Sapp's date-specific recollections concerning the discussions of that provision, supported in each instance by bargaining notes, all of which evidence indicates that the provision meant what it said: that part-time and temporary engineers are subject to release with or without cause.

For all of those reasons, the Employer requests that the complaint be dismissed.

DISCUSSION

Claimed Federal Preemption

WEPA complaints that an employer in a relationship affecting Interstate Commerce has committed a Sec. 111.06(1)(f), Stats., violation of the terms of a collective bargaining agreement are claims that are justiciable under Sec. 301 of the Labor Management Relations Act by both federal and state tribunals. See, Charles Dowd Box Co. v. Courtney, 368 U.S. 502 (1962); and Seaman-Andwall Corp., Dec. No. 5910 (WERB, 1/62). The Commission has been held to be a competent state tribunal with concurrent jurisdiction with state and federal courts to adjudicate such matters. E.g., Tecumseh Products Co. v. WERB, 23 Wis.2d 118, 126 N.W.2d 520 (1964). However, the Commission and all other state tribunals must apply federal substantive law in resolving such matters. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); and Tecumseh Products Co. v. WERB, supra. The U.S. Supreme Court has also held that Sec. 301 claims are not subject to pre-emption doctrines reflected in the Garmon, supra line of cases cited by the Employer. Vaca v. Sipes, 386 US 171, 184 (1967)("Garmon and like cases have no application to 301 suits. . . . [T]he fact that the employer's conduct may be an unfair labor practice does not preclude a suit by the union against the employer to compel arbitration of the employee's grievance. . . ."); see generally, Morris, The Developing Labor Law (BNA, 1983) at 1316-17 and esp. n.150. The Employer's reliance on Operating Engineers Local 926 v. Jones, supra is misplaced since the

state tribunal in that case was not hearing a case justiciable under LMRA Sec. 301.

Thus, to the extent that a violation of an agreement to arbitrate grievances arising under a collective bargaining agreement is arguably prohibited by the NLRA, the NLRB's jurisdiction is nontheless concurrent and not exclusive as compared with the jurisdiction of the various federal and state Sec. 301 forums, the Commission included. The Employer's pre-emption contention is therefore rejected.

Claimed Primary NLRB Jurisdiction

The Employer further asserts that even if the NLRB does not have exclusive jurisdiction, the NLRB's jurisdiction should be deemed primary as compared to the Commission's. This seems a doubtful proposition in light of the fact that, as the Regional Director's decision expressly notes, the NLRB has held that a single instance of refusal to arbitrate a grievance does not constitute an unfair labor practice under the NLRA. In any event, the question of whether the Commission should, on that basis, stay its hand until the NLRB charge was disposed of, is moot since the Regional Director refused to issue a complaint in the matter well before the WERC's efforts at informal settlement of this case ended unsuccessfully leading to the appointment of the Examiner and the issuance of a formal notice of hearing.

For those reasons, the Employer's contention that the NLRB has primary jurisdiction of this matter is also rejected.

Claimed Res Judicata Effect of
NLRB Regional Director's Refusal to Issue Complaint

The NLRB Regional Director's decision not to issue a complaint was reached on the basis of an ex parte investigation, rather than an evidentiary hearing. For that reason, decisions of the NLRB General Counsel and Regional Directors not to issue complaints have been held not to be entitled res judicata effect in claims justiciable under LMRA Sec. 301. Smith v. Hussman Refrigerator Co., 619 F.2d 1229, 103 LRRM 2321 and 2976 (CA 8, 1980)(trial court in Sec. 301 action properly excluded evidence that General Counsel had refused to issue complaint concerning charge alleging breach of duty of fair representation); see generally, Morris, supra at 1317 and cases cited at n.153. The same is true in cases involving LMRA Sec. 303 claims. E.g., Clark Engineering & Construction Co., 510 F.2d 1075, 88 LRRM 2865 (CA 6, 1975); see generally, Morris, supra, at 1183 and cases cited at n.281.

Because the parties herein did not have a full opportunity to litigate the subject matters dealt with in the Regional Director's letter, the interest in avoiding re-litigation of issues underlying the principle of res judicata is not present here.

The Employer's reliance on Oconomowoc Plumbing, supra, is misplaced because the claims

involved in that case were refusal to bargain, discrimination, threats and interference. Dec. No. 20214-B at 7. As to such claims, the NLRB's jurisdiction preempts the Commission's under Garmon, supra. In contrast, the instant case does not involve such conventional unfair labor practices, but rather a violation of collective bargaining agreement claim justiciable under Sec. 301, as to which Garmon preemption does not apply, and as to which NLRB General Counsel's refusals to issue have been authoritatively held not to have res judicata effect.

For those reasons, the Employer's res judicata contention is rejected.

Propriety of Permitting Union Complaint Amendment

The Examiner's June 26, 1990 letter (quoted in Finding of Fact 17) states his rationale for allowing the Complainant to amend its complaint as it has. As that letter indicates, the Examiner finds the instant situation closely parallel to General Electric v. WERB, 3 Wis.2d 227, 88 N.W.2d 691 (1958), in which the Court remanded with directions that the agency conduct "a full hearing" as regards a claim that the employer violated a different contract provision than had been initially relied upon by the complainant as regards its complaint alleging a violation of Sec. 111.06(1)(f). 3 Wis.2d at 227. In doing so, the Court stated, "A board is not entitled to make a finding with respect to a situation that is not in issue. The complaint may be amended and hearing granted on the new issue. . . . [citation omitted] Sec. 111.07 (2)(a), Wis. Stats., provides for amendment of the complaint in unfair-labor-practice proceedings at any time before the issuance of the final order." 3 Wis.2d at 243. That Section provides now, as then, in pertinent part, "Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon." Since the Court expressly stated that the complaint could be amended in that case despite the passage of time well in excess of one year since the alleged violation of agreement occurred, it must be that the Court considered the amendment to relate back to the original filing date of the claim that the employer's conduct violated Sec. 111.06(1)(f), Stats.

Here, in both its initial complaint and its amended complaint, the Union has alleged that the Employer's termination of Richards' employment and its refusal to submit a grievance concerning that termination to arbitration violated the terms of a collective bargaining agreement in effect between the parties at the time Richards was terminated, and thereby committed a Sec. 111.06(1)(f), Stats., unfair labor practice. The Union initially based that claim on a violation of implemented terms previously agreed upon between the parties at the bargaining table. In its brief and amended complaint, the Union based that claim on a violation of unterminated Agreement Sec. 1.02 status quo conditions. The Examiner has attempted to take the same approach as was required of the agency by the Supreme Court in General Electric, supra. The Examiner has therefore concluded that the amendment relates back to the original filing date of the complaint just as the Supreme Court must have concluded was the case in General Electric.

The Employer's reliance on Racine Unified School District, Dec. No. 20941-B (WERC,

1/85), supra, is misplaced because in that case the Commission refused to consider the complainant's post-hearing reliance on a different statutory section than was pleaded and relied upon by the complainant at the hearing. While the same cannot be said about the Employer's citation City of Prairie du Chien, Dec. No. 21619-A, supra, the Examiner nonetheless concludes that the discretion afforded by Sec. 111.07(2)(a) and the approach taken by the Supreme Court in General Electric, supra, support the parallel approach selected by the Examiner herein. The fact that the examiner in Prairie du Chien chose to exercise that statutory discretion differently, in a case in which no petition for review was filed and no Commission review decision was issued, does not establish a WERC administrative practice that precludes the instant Examiner from exercising such discretion as he has herein.

For those reasons, the Examiner rejects the Employer's contentions that it is contrary to the one year Sec. 111.07(14) statute of limitations or otherwise improper to permit the Union to amend its complaint as it has done herein.

Alleged Union Failure to Exhaust Grievance Procedure
Regarding Agreement 1.02 Claim

The Employer's amended answer asserts as a further affirmative defense that the claim in the Union's amended complaint that the Employer has breached Agreement 1.02 ought not be considered by the Examiner and Commission because the Union has failed to comply with agreed-upon methods of dispute resolution. In the face of the Employer's clearly stated position was that it had no agreement in effect with the Union, it would obviously have been futile to file a grievance in an attempt to cause the Employer to recant that viewpoint. For that reason, the Examiner finds no merit in the Employer's failure to exhaust contention.

Claimed Continuation of Sec. 1.02
Status Quo Conditions as of September 6, 1988

The Agreement, by the terms of Sec. 1.01, was to "remain in effect through August 31, 1987, . . . [and to] continue in effect from year to year thereafter from the 1st day of September through the 31st day of August of each succeeding year unless or until terminated as set forth below."

Section 1.02 required that either party desiring to change or terminate the agreement had to notify the other in writing at least sixty days prior to the 1st day of September. Here, the Employer gave such a timely notice in writing to the Union by letter dated July 17, 1987. Therefore, Agreement Sec. 1.01 did not continue the Agreement for a full additional year after August 31, 1987.

However, Sec. 1.02 further provides that when a notice such as the Employer's July 17, 1987 letter is given, the parties will promptly enter into negotiations, and negotiations did in fact

ensue between the parties prior to August 31, 1987. The concluding sentence of Sec. 1.02 then provides,

> In the event that as a result of such negotiations this agreement has not been renewed, modified, or extended by the date on which it would otherwise have terminated as a result of such notice, status quo conditions shall continue until either party gives the other written notice terminating such conditions.

Under those terms, if the Agreement were not renewed, modified or extended by August 31, 1987, status quo conditions would nonetheless continue in effect between the parties until either party gave the other written notice terminating such conditions. The passage of time and the absence of a renewed, modified or extended Agreement were not enough to extinguish part or all of the collective bargaining agreement in effect between them. A written termination notice was also required.

As things developed in their negotiations, the parties entered into two written extension agreements, each specifying that it would be effective through and including a stated end date: October 15, 1987 for the first extension agreement (which was signed on August 31, 1987) and February 5, 1988 for the second. Because the Agreement was extended "by the [August 31, 1988] date on which it would otherwise have terminated as a result of [the July 17, 1987] notice," it is questionable whether the Sec. 1.02 condition precedent for status quo conditions was met in the first place. If it was not met, then no status quo conditions came into existence at any time after August 31, 1987. Assuming arguendo that the Sec. 1.02 condition precedent for status quo conditions continuing in effect was met--on the theory that "the date on which [the Agreement] would otherwise have terminated as a result of [the July 17, 1987] notice" was changed by each of the extension agreements to the respective end date thereof--the question would then become whether the Employer gave the written notice of termination required to terminate the status quo conditions.

In the Examiner's opinion, the February 10, 1988 letter sufficed as a written notice of termination of any status quo conditions continuing in effect at the time the Union received that letter. That letter from Sapp to Clare reads as follows:

> This will confirm that the agreement between the parties for the initial period from September 1, 1984 through August 31, 1987 has terminated. This will further confirm our agreement that the Union will not strike unless it has given the Employer at least 48 hours' notice of its intention to do so and that the Employer will not lock out the Union members unless it gives 48 hours' notice.

Sapp identified that document and testified about it as follows (tr.104):

> Exhibit 22 is a letter dated February 10, 1988 from myself to Wally Clare confirming understandings reached at the table. I don't know if it was that day or a day or two earlier, but basically, the contract at that point in time had already expired. It had not been extended, but we had agreed between ourselves that we would give 48 hours' notice before a strike or a lock out, and this letter was designed to confirm that agreement.

The evidence shows that the letter was sent after the parties had exchanged what each had identifed on February 5, 1988 as its "final offer." (Exhibits 24 and 27). The parties' final positions were different in a number of subject areas. The parties had also discussed between them the possibility of a strike or lock out at least to the extent that they specifically agreed that each would give 48 hours' notice before engaging in such an action against the other.

The letter's first sentence would have served no purpose if, as the Union argues, it was confirming the fact that the last of the parties' extension agreements had come to an end. The extension agreement itself had already identified in writing a specific end date of February 5, 1988.

Furthermore, the letter is, of course, in writing, and it uses the term, "terminated," both of which are suitable for a Sec. 1.02 "written notice terminating such conditions." While the letter makes no specific reference to status quo conditions, it does state that it is the "Agreement" that "has terminated," without excepting any provisions.

Finally, the second sentence of the letter seems to treat the Agreement Sec. 1.03 no strike/no lockout clause (which by its terms is tied to the arbitration clause of the Agreement) as terminated rather than as continuing in effect subject to termination by subsequent Sec. 1.02 written notice.

For those reasons, the Examiner finds that if any status quo conditions continued after August 31, 1987, they were terminated by the Union's receipt of the Employer's February 10, 1988 letter. There is no Union contention that it did not receive the letter shortly after February 10, 1988, and the Examiner has inferred that the Union received it within a couple of days of the date on the face of the letter.

It follows that that there was no collective bargaining agreement in effect between the parties once the Union received that letter on or about February 12, 1988.

The Employer has further contended that aspects of Clare's testimony and the positions taken by the Union before the NLRB in each of its charges, reflect a Union understanding that there was no agreement in effect between the parties at various times after February 5, 1988. The Examiner has not focused on those aspects of the evidence and has not attempted to analyze them

along with such other indications of possible Union understanding in that regard as Clare's refusal to admit that the Agreement terminated in light of the Agreement's status quo provisions (tr.39) or the fact that the document Clare created in an attempt to set forth the wages, hours and conditions of employment in effect after the March 31, 1988 implementation contained Sec. 1.03 and all of Art. II, intact. (Exhibit 4). For, the language of Agreement 1.02 focuses attention not so much on the Union's understandings or intentions, but rather on whether the Company's actions were sufficient to terminate the Agreement, including any Sec. 1.02 status quo conditions. As noted above, the Examiner is persuaded that if any status quo conditions continued in effect after February 5, 1988, the Employer's letter was sufficient to terminate them.

Unilateral Implementations and Tentative Agreements
As Alleged Collective Agreements

Section 111.06(1)(f), Stats., prohibits violations of collective bargaining agreements. Unilateral implementations simply do not constitute collective bargaining agreements. Milwaukee Typographical Union v. Madison Newspapers, Inc., 444 F.Supp 1223, 1227 (E.D.Wis., 1978), aff'd, 622 F.2d 590 (CA 7, 1980). In any event the evidence shows that the Employer's implementations in this case were of changes in the existing wages, hours and conditions of employment that did not refer to (and hence did not purport to implement) either the Art. II grievance and arbitration procedure or the just cause standard for discharge of "any Engineer."

As the Employer argues, tentative agreements that are subject to conditions such as agreement on other items, ratification by principals, etc., also do not constitute collective bargaining agreements entitled to Commission enforcement unless the parties have specifically so agreed. See, Racine Unified School District, Dec. No. 25283-B (WERC 5/89) at 7. Here, the evidence establishes that the items on which the parties had reached agreement were tentative agreements (tr. 119), and there is no evidence that the parties unconditionally agreed upon those or any other contract terms until they reached an overall agreement in 1989.

For those reasons, the Examiner has found that neither the parties' tentative agreements nor the Employer's unilateral implementations created a collective bargaining agreement enforceable under Sec. 111.06(1)(f), Stats.

Termination of Richards' Employment and Refusals to Arbitrate
as Alleged Violations of Sec. 111.06(1)(f), Stats.

Since there was no collective bargaining agreement in effect at the time the Employer terminated Richards' employment on September 6, 1988, it necessarily follows that the Employer did not violate the terms of a collective bargaining agreement within the meaning of Sec. 111.06(1)(f), Stats., by terminating Richards' employment or by refusing to arbitrate issues arising out of that termination of Richards' employment.

The complaint, as amended, has therefore been dismissed in its entirety, and the Examiner has not found it necessary or appropriate to make detailed findings of fact concerning either the termination of Richards' employment or the related procedural question as to the timeliness of submission of a grievance challenging it.

Dated at Madison, Wisconsin, this 27th day of August, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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