STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 953, Complainant, vs. WISCONSIN CATV, Respondent.	Case 1 No. 43979 Ce-2100 Decision No. 26515-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Matthew R. Robbins, appearing on behalf of Complainant Union.

Mr. Gregory S. Drake, Associate Counsel, Law Department, American Television and Communications Corporation, 160 Inverness Drive, West, Englewood, Colorado 80112, appearing on behalf of Respondent.

FINDINGS OF FACT , CONCLUSIONS OF LAW AND ORDER

International Brotherhood of Electrical Workers, Local 953 filed a complaint on May 3, 1990 with the Wisconsin Employment Relations Commission, alleging that Wisconsin CATV had violated Sec. 111.06(1)(a), (d) and (f), Stats., by unilaterally changing health insurance and refusing to submit the Union's grievance concerning the change to arbitration. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5). A hearing was held in Eau Claire, Wisconsin on July 20, 1990, at which time all parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs, and the record was closed on October 10, 1990. The Examiner having considered the evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. International Brotherhood of Electrical Workers, Local 953, herein referred to as the Union, is an employe representative within the meaning of Sec. 111.02(11), Wis. Stats., and maintains its principal offices at 226 Highland Avenue, Eau Claire, Wisconsin 54702-3005.

2. Wisconsin CATV, herein referred to as the Company, is an Employer within the meaning of Sec. 111.02(7), Wis. Stats., and maintains its principal offices at 2207 Heimstead Road, Eau Claire, Wisconsin 54702.

3. The Union and Company have been parties to a collective bargaining agreement from January 1, 1987 through December 31, 1989, which among other provisions includes the following:

ARTICLE IV

HOURS - RATES OF PAY - CONDITIONS OF EMPLOYMENT

Section 10.

> (B) The employee insurance plan is outlined in the attached 1983 ATC Insurance Plan labelled Exhibit A. Cost of such plan shall be shared by the employer and employee at the existing participation rate. The employees hereby acknowledge a copy of the health coverage plan description booklet.

4. The Company is a subsidiary of American Television and Communications Corporation of Englewood, Colorado, [herein ATC]. On or about October 1, 1989, ATC made changes in the health insurance plan covering all of its employes, both union and non-union, in a number of divisions and subsidiaries including Wisconsin CATV, including the employes represented by Complainant Union. The Union filed a grievance, protesting changes in the health insurance plan as an alleged violation of the collective bargaining agreement.

5. When the parties were unable to resolve the matter in earlier steps of the grievance procedure, the Union demanded arbitration pursuant to the provisions of the collective bargaining agreement. The Company refused and

continues to refuse to submit the grievance to binding arbitration.

6. On or about February 23, 1990, the Union filed a charge with the National Labor Relations Board against the Company, alleging that the Company had bargained in bad faith by unilaterally implementing a final offer after expiration of the collective bargaining agreement referred to above. On March 29, 1990 the Union amended the charge to include an allegation that the Company had unlawfully unilaterally implemented changes in health insurance on or about October 1, 1989. By letter dated April 9, 1990, the Board's Regional Director declined to issue a complaint against the Company concerning these allegations.

7. The Company has argued that the grievance is untimely, and that the National Labor Relations Board's regional office disposition of the related charge should bar further proceeding on the grievance. Respondent's arguments as to arbitrability relate to whether the grievance is arbitrable for procedural reasons, and there is neither evidence nor argument in the record to the effect that the grievance is not substantively covered by the collective bargaining agreement and its arbitration provision.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. The grievance is substantively arbitrable under the terms of the collective bargaining agreement, and arguments as to procedural arbitrability are not sufficient to justify refusal to submit said arguments to an arbitrator.

2. The Union's demand for an Order compelling arbitration is not res judicata, because the charge before the National Labor Relations Board did not include a component alleging failure to arbitrate; the National Labor Relations Act does not provide that refusal to arbitrate a grievance is a violation of the said Act; and the National Labor Relations Board's Regional Director's refusal to issue a complaint does not make the matter treated therein res judicata for another tribunal.

3. By refusing to submit the underlying issues in the grievance, including issues relating to procedural arbitrability, to arbitration, the Company violated Sec. 111.06(1)(a) and (f), Stats.

Based on the above Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER 1/

IT IS ORDERED that Respondent Wisconsin CATV, its officers and agents shall immediately:

1. Cease and desist from refusing to arbitrate the grievance referred to in Finding of Fact 4.

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

(Footnote 1/ Continued on Page 3)

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

   A. Submit said grievance promptly to arbitration.

   B. Notify the Wisconsin Employment Relations Commission in writing within 20 days from the date of this Order as to what steps it has taken to comply therewith.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

(Footnote 1/ Continued)

1/ Section 111.07(5), Stats.

> (5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the 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
FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The complaint alleges that Respondent Company violated the collective bargaining agreement by refusing to submit the grievance to arbitration, and that it violated Sec. 111.06(1)(d) by making a unilateral change in the health insurance plan.

BACKGROUND

The facts are essentially undisputed. The Company is owned by American Television and Communications Corporation, a multi-state operator of cable television systems with approximately 100 such systems in service. The Company maintains a single health insurance plan for its union and non-union employes, including employes represented by 11 different unions. Company area manager Jan George testified without contradiction that on October 1, 1989 the Company implemented changes in its health insurance plan for all employes, which included changes to both the deductibles and the employe contribution. The latter changed, for an employe with family coverage, from $5.00 per month to $20.00 with one dependent and $30.00 per month with two or more dependents.

During the fall of 1989, the parties were engaged in negotiations for a successor agreement to the one involved in this matter. The Union filed a grievance concerning the health insurance changes, and at one point during the negotiations Jan George told the Union representatives that she thought the issue was dead. George testified that two members of the Union's bargaining committee, Terry Kortness and Dennis McMahon, were present, and that neither of them said anything distinct in response to her assertion. There is no dispute, however, that the grievance was never expressly withdrawn by the Union. After the collective bargaining agreement expired and the Company unilaterally implemented its final offer to the Union, the Union filed first a charge and then an amended charge with the National Labor Relations Board, contending that the Company had violated the National Labor Relations Act by the implementation of the final offer and also by unilaterally changing the health insurance provisions. The National Labor Relations Board's regional director, acting on behalf of the general counsel, declined to issue a formal complaint as to either assertion. Subsequently, the parties signed a new collective bargaining agreement, which provides for health insurance essentially on the same terms as the Company's October 1, 1989 changes.

THE UNION'S POSITION

The Union contends whether or not the grievance was timely is not a defense to a complaint of refusal to arbitrate. The Union contends that it has long been held that issues of procedural arbitrability, including timeliness, are for the arbitrator to decide and are not properly raised in a refusal to arbitrate, citing among other cases Operating Engineers Local 150 vs. Flair Builders 2/ and John Wiley and Sons vs. Livingston. 3/ The Union argues that even if the Examiner were to address the question of timeliness, the grievance was filed timely here. The Union also argues that it did not at any time waive the grievance, contrary to the Employer's contention, and that it is clear that the Union never withdrew the grievance.

With respect to the Company's contention that the National Labor Relations Board's action collaterally estopped the grievance, the Union argues that the decision of the regional director of the National Labor Relations Board not to issue a complaint is merely an exercise of prosecutorial discretion, and is not res judicata, citing among other cases Miller Brewing Company vs. Brewery Workers Local 9. 4/ The Union contends that under both Federal and State precedent there is a strong presumption of arbitrability of grievances, and that nothing the Company has presented has demonstrated lack of arbitrability of the present grievance. The Union requests that the Examiner order the Company to submit the grievance to arbitration.

In a reply brief, the Union addressed the issue of timeliness of filing of the complaint, raised by the Company in its brief. The Union contends that the one year statute of limitations specified in Sec. 111.07(14), Stats. should apply, rather than the six-month period provided by the National Labor Relations Act for violations of that statute.

THE COMPANY'S POSITION

2/ 406 U.S. 487 (1972).

3/ 84 Supreme Court 909, 918-919, 55 LRRM 2769 (1964).

4/ 739 F.2d 1159 (7th CirCt. 1984).

The Company contends that the Union waived further processing of the grievance when its representatives failed to indicate that they intended to continue to process the grievance upon Jan George's fall, 1989 assertion that she thought the grievance was dead. The Company notes that under the contract untimeliness of the grievance is "deemed to be an abandonment of the grievance". The Company points out that when it refused to select an arbitrator on October 2, 1989, the Union took no immediate steps to rectify what it know argues to be a violation of the statute. Thus, the Company contends, the grievance is also untimely.

The Company argues in addition that this matter is properly within the exclusive jurisdiction of the National Labor Relations Board, and that the National Labor Relations Board has ruled against the Union on the parallel issue raised in the charge filed with that agency. The Company contends that the WERC cannot compel the parties to arbitrate absent a finding that an unfair labor practice has been committed, and on that score, the National Labor Relations Board has spoken. The Company argues, therefore, that this matter is res judicata, citing WERB vs. Teamsters 5/ and Lodge 176, IAM vs. WERB. 6/ The Company notes that the Board could have deferred the proceeding initiated by the Union there to arbitration under the principles enunciated in Collyer Insulated Wire. 7/ but that the NLRB elected not to defer the matter to arbitration, suggesting that the NLRB found the underlying issues entirely without merit.

The Company argues also that an order to arbitrate the insurance grievance would be improper because there was no harm done to employes by the change in insurance, citing testimony by Jan George to the effect that she was unaware of any person who filed a claim after October 1 and before the expiration of the collective bargaining agreement on December 31, which would have been covered under the old insurance and was not under the new. Finally, the Company contends that the complaint is barred by the six-month statute of limitations set forth in the National Labor Relations Act, because courts have "almost uniformly" held that the appropriate limitations period for complaints of violation of contract by employers engaged in commerce is the six-month statute of limitations found in the National Labor Relations Act at Section 10(b). The Company also argues that the practice in federal courts should control, because there is no reason why employers in Wisconsin should be subject to Section 3.01 - type suits for a longer period than are employers throughout the rest of the country.

DISCUSSION

It is apparent from the briefs that the Union is not maintaining here a portion of the complaint which appeared to allege that the Company violated the statute directly by a unilateral change in health insurance. There is no question that the Company is engaged in commerce within the National Labor Relations Act's meaning and that it meets the jurisdictional standards set by the NLRB. Thus, the doctrine of federal preemption clearly specifies that the parties' proper venue for disputes over matters covered by both the Wisconsin Employment Peace Act and the National Labor Relations Act is the National Labor Relations Board, as indeed the Union recognized in its initial charge filed with that organization.

The National Labor Relations Act, however, does not make unlawful the routine violation of a labor agreement, while the Wisconsin Employment Peace Act does. 8/ This constitutes an important difference between the two statutes, and numerous cases decided over many years attest to the proposition that the WERC may exercise its Wisconsin Employment Peace Act jurisdiction over a "commerce" employer for this purpose even though for most other purposes the Commission would defer to a parallel proceeding under the National Labor Relations Act. 9/

The Commission has also determined that because the Wisconsin Employment Peace Act contains specific language setting a clear and unambiguous statute of limitations for complaints filed under it, there is no basis for extrapolating a statute of limitations from other sources, as the courts have sometimes been forced to do in Section 301 suits. 10/ Consequently, the Section 111.07(14)

5/ 66 NW 2nd 318 (1954).

6/ 427 u.s. 132 (1976).

7/ 192 NLRB 837 (1971).

8/ Section 111.06(1)(f), Stats. This includes violation of an agreement to arbitrate grievances.

9/ See, for instance, Metcalfe, Inc. d/b/a Sentry Foods, Dec. No. 17660-B (WERC, 2/82).

10/ Ruan Transportation Management Systems, Dec. No. 25074-B (Jones, 7/88), aff'd by operation of law, Dec. No. 25074-C (WERC, 8/88), and cases cited

one-year period controls here.

With respect to the Company's argument that the Union abandoned the grievance, I find that this is subject to two tests. The first is one of waiver; but that test the Company clearly fails. Under Wisconsin long-standing precedent, a waiver of a statutory right must be "clear and unmistakable" if it is to be given effect. 11/ Here, the most the Company has alleged is that Union representatives stood silent when Jan George asserted her belief that the grievance was dead. George, however, admitted that the grievance was never withdrawn; and therefore it is far less than "clear and unmistakable" that the Union intended not to process the grievance further.

The second test relates to the nature of the Company's remaining claim that the Union effectively abandoned the grievance within the meaning of the collective bargaining agreement, by failing to process it to further steps on a timely basis. This test clearly involves an application of the contractual language, the very type of analysis which the parties have contracted to submit to an arbitrator. Such a test can only, under this Agreement, be applied by an arbitrator; and therefore the Company's argument fails this test as well. 12/

The Company next argues that it should not be forced to arbitrate the insurance grievance because no harm was done by the change in insurance. With respect to this argument the Company advances the principle that the law does not compel the performance of a "useless act". If, however, the Union were to prevail in arbitration, at least one form of remedy would presumably be forthcoming - the repayment of insurance premiums over a four-month period during which, according to George's testimony, those premiums were increased at an out-of-pocket expense to employes. Notwithstanding the absence of a claim that was not covered by the new insurance, the other side of the coin (employes' out-of-pocket expense) is also relevant in any judgment of "uselessness."

The Company has additionally argued that it should not be required to pay attorneys' fees, as the Union had initially requested in the complaint. The Commission has previously determined that except in certain specialized or exceptional circumstances such as a union's failure to represent an employe fairly, attorneys' fees are not payable under its proceedings. 13/

The remainder of the Company's contentions are disposed of under the long-standing policies, applied by the Commission and state courts in Wisconsin as well as by the federal courts, of a presumption of arbitrability and of deference to the contractual grievance and arbitration process. The Company's defenses here are procedural in nature, and numerous cases illustrate the difference between such procedural defenses and a defense of substantive non-arbitrability. The Company does not allege, and the facts do not show, that insurance is not a matter covered by the collective bargaining agreement; the standard for initial arbitrability of a dispute is whether the subject matter of the grievance is facially covered by the collective bargaining agreement and its arbitration provision; and I find that in this case the insurance grievance is so covered. The remainder of the Company's defenses, under the cases noted above, must be presented initially to an arbitrator.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

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therein.

11/ See, for instance, State of Wisconsin, Dec. No. 13017-D (WERC, 5/77).

12/ See also Wiley v. Livingston, supra.

13/ See, for instance, Brown Deer School District, Dec. No. 25884-A (McLaughlin, 6/89), aff'd by operation of law, Dec. No. 25884-B (WERC, 7/89).