STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS UNION LOCAL NO. 8, Complainant,	:	Case 6 No. 46074 Ce-2119 Decision No. 27123-A
vs.	:	
GRUNAU COMPANY, INC., Respondent.	:	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law Mr. Ted J. Angelo, Executive Vice-President, Grunau Company, Inc., 101 West Pleasant Street, Milwaukee, Wisconsin 53212, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Bridge, Structural and Ornamental Iron Workers Union Local No. 8 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Grunau Company, Inc., had committed unfair labor practices in violation of Secs. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act. The Commission appointed a member of its staff, David E. Shaw, to act as Examiner in the matter. A hearing was held before the Examiner on January 23, 1992 in Milwaukee, Wisconsin. A stenographic transcript was made of the hearing and post-hearing briefs were submitted by March 16, 1992. The Examiner, having considered the evidence and arguments of the parties, now makes and issues the following

FINDINGS OF FACT

1. Complainant is a labor organization with its principal offices located at 12034 West Adler Lane, Milwaukee, Wisconsin 53214. At all times material herein, Brent Emons has been the Business Manager and Financial Secretary for the Complainant and Maynard Swoboda and Randall Smith have been business representatives for the Complainant.

2. Respondent is an employer and has its principal offices located at 101 West Pleasant Street, Milwaukee, Wisconsin 53212. At all times material herein, the Respondent has been represented in its labor relations with Complainant by Ted Angelo, Executive Vice-President, and by Carl Moe.

3. The Complainant is party to a collective bargaining agreement between itself and the Allied Construction Employers' Association, Inc., and the Eastern Wisconsin Erectors Association, Inc., for the period June 1, 1990 through May 31, 1993. The Respondent has been signatory to said Agreement at all times material herein. The Agreement contains a provision for final and binding arbitration of a dispute, which provision, in relevant part, reads as follows:

ARTICLE XXII

SETTLEMENT OF DISPUTES

Section 22.1. Both parties hereto agree that in case of trouble or any misunderstanding between the parties to this Agreement, the difference shall be arbitrated. Work shall proceed pending settlement or arbitration, under the conditions of this Agreement. All differences arising between the parties hereto shall be decided by a Board of Arbitration.

Section 22.2. Such Board of Arbitration shall be constituted in the following manner: Two (2) members to be selected by the Association and two (2) members to be selected by the Union within twenty-four (24) hours. In case of disagreement by the four (4) so chosen, they shall select a fifth (5th) member. The decision of a majority of such Board shall be binding upon both parties. Any expense incurred shall be borne equally by both parties.

Section 22.3. None of the definite agreements of this Contract shall be subject to arbitration.

Section 22.4. It is understood and agreed that there shall be no lockout and that there shall be no strike or cessation of work, and the job out of which any controversies may have arisen shall proceed without interruption pending the adjustment, settlement, determination or arbitration of any dispute, problem, controversy or grievance.

. . .

The Agreement also contains the following provision regarding subcontracting:

ARTICLE VI

SUBCONTRACTING

Section 6.1. The Employer agrees that, when subletting or contracting out work covered by this Agreement which is to be performed within the geographical coverage of this Agreement and at the site of construction, alteration, painting, or repair of a building, structure or other work, he will sublet or contract out such work only to a subcontractor who (if he employs employees) has signed or is covered by a written labor agreement entered into with the Union which labor agreement shall provide for economic benefits not less, and contain other terms and conditions not more favorable to an Employer, than those established by this Agreement.

Section 6.2.(a) The Employer further agrees that he will give written notice to all subcontractors that such subcontractors are required to pay their employees the wages and fringe benefits provided for in this Agreement.

(b) The Employer agrees not to enter into any individual Agreement which permits his employees to perform their work on any basis of pay other than an hourly rate which shall not be less than the rate specified in this Agreement. It is further agreed that all forms of compensation related to employee productivity, such as bonus systems, quota systems, piece work systems, lumping labor systems and other incentive type arrangements will not be used.

4. By the following letter of January 3, 1991 from Emons to Angelo, the Complainant notified Respondent of an alleged violation of Article VI, Subcontracting, of the Agreement and the settlement it was demanding:

January 3, 1991

Mr. Ted Angelo
Grunau Company, Inc.
P.O. Box 479
Milwaukee, WI 53201

Dear Sir:

I am writing in regards to Grunau Company violation of the 1990/1993 Labor Agreement.

Grunau Company, Inc. violated Article VI, Subcontracting, when Grunau Company subcontracted work out to L & R Crane & Hoist Corp. who performed work that is covered by this Agreement.

Local No. 8 is looking for a total of thirty-two (32) hours pay at $25.82 an hour for work that was performed by L & R Crane & Hoist Corp. This amount is to be paid to Ironworkers Local Union No. 8 Joint Apprenticeship and Advanced Journeymen Training Trust Fund. If Local No. 8 does not receive payment within seven (7) days of receipt of letter Local No. 8 will then, under Article XXII file a formal grievance.

With best wishes, I remain

Sincerely,

Brent Emons /s/
BRENT EMONS,
Bus. Manager

Prior to sending the above letter Emons had called the Respondent and talked to either Angelo or Moe regarding the matter and was told the Respondent would not pay the money Complainant was demanding.

5. By the following letter of January 30, 1991 Emons notified Henry Hunt, Executive Director of Allied Construction Employees' Association, Inc., hereinafter the ACEA, of Complainant's grievance against Respondent regarding the alleged violation of Article VI, Subcontracting, of the Agreement between Complainant and the ACEA and requested that it be resolved by a Board of

Arbitration:

January 30, 1991

Mr. Henry Hunt, Executive Director
Allied Construction Employers' Assoc. Inc.
180 N. Executive Drive, Suite #306
(P.O. Box #507)
Brookfield, WI 53008-0507

Dear Sir:

I am writing in regards to Grunau Company violation of the 1990/1993 Labor Agreement.

Grunau Company, Inc. violated Article VI, Subcontracting, when Grunau Company subcontracted work out to L & R Crane & Hoist Corp. who performed work that is covered by this Agreement.

Local No. 8 is looking for a total of thirty-two (32) hours pay at $25.82 an hour for work that was performed by L & R Crane & Hoist Corp. This amount is to be paid to Ironworkers Local Union No. 8 Joint Apprenticeship and Advanced Journeymen Training Trust Fund. Local 8 has tried to resolve this matter between Local 8 and Grunau Co. but has been unsuccessful. We are therefore requesting that this be resolved by a Board of Arbitration according to Article XXII of the 1990/1993 Agreement.

Sincerely,

Brent Emons /s/
BRENT EMONS,
Bus. Manager

6. Emons subsequently contacted Hunt and Hunt told Emons he would contact the other members of the Board of Arbitration to arrange a date and time for the arbitration. Hunt subsequently informed Emons that the arbitration would be held on February 21, 1991 at 10:00 a.m. Emons then called Angelo to inform him of when the arbitration would be held. Angelo told Emons that he (Angelo) would not be able to be there, but that Moe would be there for the Respondent. This was the first time a grievance had been filed against the Respondent by the Complainant.

7. On February 21, 1991, the Board of Arbitration, hereinafter the Board, consisting of Hunt and Art Kumm as the employer members and Maynard Swoboda and Randall Smith as the union members, met to hear the grievance. Emons attended the arbitration hearing on behalf of Complainant and no one attended on behalf of the Respondent. The arbitration was scheduled to begin at 10:00 a.m. Emons and the Board waited until 10:25 a.m. for the Respondent and then Emons called Respondent's offices and asked for Angelo. Emons was

told by a secretary at Respondent's offices that Angelo was not there. He then asked if Carl Moe was there and was told that Moe was on vacation. Emons then advised the members of the Board what he had been told. The Board then decided to proceed with the arbitration without the Respondent. Emons presented evidence in support of the Complainant's position on the grievance, including testimony from Smith regarding who performed the work being grieved. No evidence was presented on behalf of the Respondent at the arbitration.

8. After Emons completed the presentation of Complainant's case on the grievance, the Board rendered its decision that the Respondent had violated the subcontracting position in the labor agreement to which it was signatory and awarded Complainant $25.82 per hour for 32 hours of work lost. Pursuant to the normal procedure of the Board of Arbitration, Emons takes the minutes of the proceeding when he presents a case to the Board and he notifies the employer in writing of the Board's decision. Pursuant to that procedure, Emons drafted the Board's decision on the grievance in the form of the following letter of March 4, 1991 to Angelo:

March 4, 1991

Mr. Ted Angelo
Grunau Company, Inc.
P.O. Box 479
Milwaukee, WI 53201

Dear Sir:

I am writing in regards to the decision that was rendered by the Board of Arbitration concerning the grievance filed by Local Union No. 8.

On February 21, 1991 at 10:00 A.M. the Board of Arbitration met. The Board consisted of Henry Hunt and Art Kumm, who represented Eastern Wisconsin Erectors Association and Brent Emons, Randall Smith and Maynard Swoboda, who represented the Iron Workers Local Union No. 8. The Board waited until 10:30 A.M. for a representative from the Grunau Company to appear before proceeding with the grievance.

The Union submitted the following information.

Grunau Company was notified by telephone as to the time and date of the Grievance and that Ted Angelo said that he could not attend but he would have Carl Moe represent Grunau Company.

Grunau Company, Inc. is signatory to the Iron Workers Local Union No. 8 1990/93 Labor Agreement, the erection of overhead cranes falls into the jurisdiction of the Iron Workers Local Union 8 and that Grunau Company subcontracted the overhead crane work to L & R Crane and Hoist Corporation.

The Union submitted the application for the electrical permit that was issued for the building in which the overhead crane was to be erected. The Union noted that the builder, owner and occupant on the permit was Grunau Company.

The Board, after discussion, decided that Grunau Company, Inc. did violate Article VI, Subcontracting of the 1990/93 Agreement and that the Grunau Company, Inc. pay a total of thirty two (32) hours pay at $25.82 per hour. This amount is to be paid to the Iron Workers Local No. 8 Joint Apprenticeship and Advanced Journeymen Training Trust Fund.

If you have any questions regarding the above please feel free to contact the Union Office at 476-9370.

Thanking you in advance for your prompt attention to the above, I remain

Sincerely,

Brent Emons /s/
BRENT EMONS,
Bus. Manager

BE:d
enc.
opeiu #9 afl-cio.

cc Henry Hunt
Art Kumm

9. After Angelo received the March 4th decision of the Board set forth above, he sent the following letter of March 6, 1991 to Emons and copied Hunt and Kumm:

March 6, 1991

Bridge, Structural and Ornamental Iron Workers
Union Local No. 8
12034 West Adler Lane
Milwaukee, Wisconsin 53214

Attention: Brent Emons
Business Manager

Reference: Grievance Letter of 1/30/91

Gentlemen:

In reference to your letter dated March 4, 1991 regarding the above grievance, please note the following:

1. There was a misunderstanding regarding who would attend the meeting on February 21, 1991 regarding grievance. Carl Moe was to attend, however, he was on vacation.

2. The Grunau Company has always responded to grievances in the past, therefore, I hereby request another meeting be scheduled in order for the Grunau Company to present its side of the issue. I appreciate you considering this matter.

If any questions arise concerning the above, please do not hesitate to call my direct number at (414) 223-6975.

Sincerely,

GRUNAU COMPANY, INC.

T.J. Angelo /s/
T.J. Angelo
Executive Vice President

Following the receipt of Angelo's letter of March 6th, Emons spoke to Hunt about Angelo's request for another hearing on the grievance. He and Hunt decided on behalf of the Union and ACEA, respectively, that the Respondent missed the opportunity to present its case through its own fault and that Respondent would therefore not be given another hearing. The Respondent was not given another opportunity by the Arbitration Board to present its case.

10. At all times material herein, Respondent has refused to comply with the Board's award on the grievance. At no time prior to February 21, 1991 did the Respondent contact the Complainant to request a meeting for the purpose of attempting to resolve the grievance. There is no evidence in the record that the Respondent has at any time moved to vacate the subject award, and the time for moving to vacate said award under Sec. 788.13, Stats., had expired prior to the filing of the instant complaint. On August 1, 1991, Complainant filed the instant complaint to enforce the award of the Board of Arbitration.

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

CONCLUSION OF LAW

The Respondent, Grunau Company, Inc., by failing and refusing to comply with the award of the Board of Arbitration pertaining to the issue of subcontracting overhead crane work to L & R Crane and Hoist Corporation, violated Secs. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act.

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

ORDER 2/

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

Section 111.07(5), Stats.

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

It is hereby ordered:

1. That the Respondent Grunau Company, Inc., its officers and agents, shall immediately:

a) Cease and desist from refusing to comply with the award of the Board of Arbitration, as set forth in Emon's letter of March 4, 1991; and

b) Take following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act:

1. Immediately pay to the Complainant the sum of Eight Hundred Twenty-Six Dollars and Twenty-Four Cents ($826.24) (32 hours x $25.82 per hour) as per the award of the Board, plus interest on that amount at the rate of twelve percent (12%) per year from the date of Emon's letter reflecting the award (March 4, 1991) to the date on which the money is paid.

2. Notify all of the employes of Respondent represented by Complainant by posting in conspicuous places where the employes are employed, copies of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by Respondent's Executive Vice-President and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered with other material.

3. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to the steps it has taken to comply with this Order.

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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.

Dated at Madison, Wisconsin this 8th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

GRUNAU COMPANY, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed in this matter alleges a violation of Secs. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act, based upon the Respondent's refusal and failure to comply with the decision of a Board of Arbitration.

Complainant

The Complainant cites the three month time limit to move to vacate an arbitration award set forth in Sec. 788.13, Stats., and takes the position that because the Respondent failed to move to vacate the award in a timely manner, it is precluded from raising any defenses in a subsequent action by Complainant to enforce the award. Citing, Teamsters Local 135 v. Jefferson Trucking, 628 F.2d 1023 (7th Cir. 1980), Cert. denied, 449 U.S. 1125, involving a statute similar to Ch. 788 and similar circumstances. Complainant cites numerous decisions of other federal circuit courts of appeals as reaching the same holding as the Seventh Circuit, as well as two more recent decisions of that court affirming its holding in Jefferson Trucking. 3/ The Complainant also asserts that costs and attorneys fees should be awarded against the Company since it has refused to comply with the award and failed to timely move to vacate the award. Citing, Local Union 494, International Brotherhood of Electrical Workers v. Artkraft, Inc., 375 F. Supp. 12p (E.D. Wis. 1974); and Dreis & Krump Mfg. v. International Association of Machinists, 802 F.2d 247, 254 (7th Cir. 1986). Complainant also requests that it be awarded interest on the money owed pursuant to the award.

Respondent

Respondent asserts that Complainant was unwilling to try and settle the grievance prior to arbitration based on an attitude it perceived from one phone call to Respondent. It also notes that while Complainant made a formal written request for arbitration by Emon's letter of January 30, 1991, no written notice of the time and place of the arbitration was given. Respondent contends that it is customary to receive written notice as to the time and place prior to any hearing. Respondent also notes that within two days of receiving the award it explained to the Complainant and Board of Arbitration that there had been a misunderstanding as to who was to attend the arbitration hearing for the Respondent and requested a meeting in order that Respondent be allowed to present its case. Respondent's request was denied and Joan Braun, on Respondent's behalf, subsequently requested a meeting with Complainant and was advised that the Complainant was not interested in either a compromise or Respondent's response to the claims. Respondent requests that the award be set aside and that it be given the opportunity to present its case before another board of arbitration. With regard to Complainant's request for attorney's fees, Respondent notes that the labor agreement provides that any expense incurred shall be borne equally by both parties. Absent language to the contrary, this provision precludes the payment of all the attorney's fees by one party.

DISCUSSION

3/ International Union of Operating Engineers v. Centor Contractors, 831 F.2d 1309, 1311 (7th Cir. 1987) and Plumbers Pension Fund v. Domas Mechanical Contractors, 778 F. 2d 1266, 1268 (7th Cir., 1985).

The Complainant in this case is seeking enforcement of an arbitration award in alleging a violation of Secs. 111.06(1)(f) and (g), Stats., by the Respondent's refusal to comply with the award. 4/ As the Commission has previously explained, in such a case, it is the law that:

> As a competent state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce, the Commission must apply legal standards which are consistent with federal case law developed in Section 301 actions under the Labor Management Relations Act. Textile Workers Union v. Lehigh Mills 353 U.S. 448 (1957); Local 174, Teamsters v. Lucas Flout 369 U.S. 95 (1962); Dowd Box v. Courtney 368 U.S. 52 (1962); Tecumseh Products Co. v. WERB 23 Wis. 2d 118 (1963); American Motors Corp. v. WERB 32 Wis. 2d 237 (1966). 5/

As the Union notes, our Seventh Circuit Court of Appeals held as follows in Jefferson Trucking Company, Inc., supra:

> The sole issue on appeal is whether the defendant, as the unsuccessful party at arbitration and who did not move to vacate the disfavorable award within the time period prescribed for such motions, may subsequently raise contentions, which it could have raised as grounds to vacate in such a motion, as affirmative defenses in a suit to enforce the award, which suit was filed after the prescribed period for a motion to vacate but within the time limits set for filing a suit to enforce the award. We hold that the defendant's failure to move to vacate the arbitration award within the prescribed time period for such a motion precludes it from seeking affirmative relief in a subsequent action to enforce the award.
> (628 F.2d at 1025)

In this case, the Respondent is requesting that the award be considered invalid and set aside and that it be given an opportunity to present its case to another Board on the basis that it was not given such an opportunity after missing the first arbitration hearing due to a misunderstanding. Respondent's contention is such that it could have been raised as grounds to vacate the

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4/ Those statutory provisions provide that it is an unfair labor practice for an employer

> (f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).
> (g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

5/ J.I. Case Company and United Auto Workers Local 100, Dec. No. 18324-B (WERC, 9/82).

award. 6/ In Jefferson Trucking, the Court noted that since the federal Labor Management Relations Act (LMRA) does not provide a time limit for bringing an action to vacate an arbitration award in a suit to enforce an award under Sec. 301 of the LMRA, "the timeliness of a Section 301 suit is to be determined, as a matter of federal law, 'by reference to the appropriate state statute of limitations.' United Auto Workers v. Hoosier Cardinal Corp., 383 U.S. 696, 704-705 (1966)" 628 F.2d at 1026. In Wisconsin Sec. 788.13, Stats., governs the time for filing a motion to vacate an award and provides as follows:

> **788.13Notice of motion to change award.** Notice of a motion to vacate, modify or correct an award must be served upon the adverse party or attorney within 3 months after the award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

In Teamsters Local No. 579 v. B & M Transit, Inc., 882 F.2d 274 (7th Cir., 1989), the Seventh Circuit Court of Appeals held that Sec. 788.13, Stats., provides the time limits for raising affirmative defenses to awards in such suits in Wisconsin. (At 276-78) The employer in that case was the unsuccessful party in the arbitration and in defending against the union's enforcement suit the employer attempted to challenge the award, although it had not timely moved to vacate the award. Citing the Wisconsin Supreme Court's decision in Milwaukee Police Association v. City of Milwaukee, 92 Wis. 2d 145, 285 N.W.2d 119 (1979), the employer argued that the one year time limit for filing an action to confirm an award in circuit court should apply in deciding whether it could assert such defenses to the award in the suit, while the union argued the three months time limit under Sec. 788.13 should be adopted. In rejecting the employer's contention, the Court stated:

> The Company's position is untenable. We specifically stated in Jefferson Trucking, 628 F.2d at 1025, that "a defendant's failure to move to vacate (an) arbitration award within the prescribed time period for such a motion precludes it from seeking affirmative relief in a subsequent action to enforce the award." This holding is intended to enhance the speed and effectiveness of arbitration, to provide fair review of the arbitrator's decision, and to preclude the losing party from dragging out proceedings in order to dilute the integrity of the arbitration award. Cf. Dreis & Krump Mfg. Co. v. International Association of Machinists, 802 F.2d 247, 249-50 (7th Cir. 1986). Based on this substantive rule of law, we have

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6/ In Wisconsin Sec. 788.10, Stats., provides as a basis for vacating an arbitration award:

> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced;

> repeatedly borrowed the state statute of limitations for the timely filing of motions to vacate arbitration awards when analyzing the timeliness of defenses raised in a confirmation action. See International Union of Operating Eng'rs v. Centor Contractors, Inc., 831 F.2d 1309, 1311 (7th Cir. 1987); Plumbers' Pension Fund v. Domas Mechanical Contractors, Inc., 778 F.2d 1266, 1268 (7th Cir. 1985).
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> The Company insists that the Wisconsin Supreme Court's decision in Milwaukee Police Ass'n v. City of Milwaukee, 92 Wis.2d 145, 285 N.W.2d 119 (1979), controls our decision. In Milwaukee Police the Wisconsin Supreme Court held that a party to an arbitration decision governed by Wisconsin statutes could respond in an enforcement proceeding with affirmative defenses, even though the three-month statutory time period for filing motions to vacate had expired. Although the Company would like us to adopt this position, we are not bound by a state's interpretation of how to apply its statute of limitations when we borrow to fill a statute of limitations gap in federal law. See Centor Contractors, 831 F.2d at 1311 ("As the Domas decision itself indicates, the limitations period only is borrowed, as a matter of federal law.") "(W)hen it is necessary for us to borrow a statute of limitations for a federal cause of action, we borrow no more than necessary." West v. Conrail, 481 U.S. 35, 39-40, 107 S.Ct. 1538, 1542, 95 L.Ed.2d 32 (1987). See Central States, Southeast & Southwest Areas Pension Fund v. Jordan, 873 F.2d 149, 154 (7th Cir. 1989). Section 301 actions are based on federal law. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957). We therefore look to the Wisconsin statutes only to identify the most appropriate time period for raising defenses to the arbitrator's decision.
> (882 F.2d at 277) (Footnotes omitted)

The Court went on to note its disagreement with the Wisconsin Court's holding in City of Milwaukee.

It is well-settled law then in the Seventh Circuit that challenges to the validity of an award advanced by defendants in an action to enforce the award are barred when not made within the applicable time limit for moving to vacate the award. As the Respondent is attempting to raise its affirmative defense for the first time in this action to enforce the award, well after the three months time period under Sec. 788.13, Stats. elapsed, it is concluded that it is barred from now challenging the validity of the award on that basis. It being undisputed that the Respondent has refused to comply with the award of the Board of Arbitration, it is further concluded that Respondent violated Secs. 111.06(1)(f) and (g), Stats.

The Complainant asserts that sanctions in the form of costs and attorney's fees should be awarded against the Respondent because, having not timely moved to vacate the award, its resistance to Complainant's attempt to enforce the award is frivolous.

A review of the decisions of the Seventh Circuit Court of Appeals dealing with enforcement of labor arbitration awards establishes that the Court has imposed sanctions under either Rule 11 of the Federal Rules of Civil Procedure 7/ and/or the "bad faith" exception to the "American Rule" that in this country parties are required to bear the costs of their litigation absent specific contractual or legislative authorization for shifting such costs to the losing party. See, Miller Brewing Company v. Brewery Workers Local Union No. 9, 739 F.2d 1159, 1167 (7th Cir. 1989), cert. denied, 469 U.S. 1160, 105 S. Ct. 912, 83L. Ed. 2d 926 (1985); Dreis & Krump Mfg., supra, 802 F.2d at 254-255. It appears that after Rule 11 was amended in 1987, the Court has relied on that rule as the basis for awarding attorney's fees, rather than the more subjective "bad faith" standard expressed in Miller Brewing. Dreis & Krump Mfg. Co., 802 F.2d at 254-255; B & M Transit, 882 F.2d at 279-280. 8/ Reliance

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7/ 28 U.S.C.A., Sec. 1927. Rule 11 reads as follows:

Rule 11. Singing of Pleadings, Motions, and Other Papers; Sanctions

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

8/ See also, District No. 8, International Association of Machinists, et.al., v. Clearing, 807 F.2d 618, 622 (7th Cir., 1986), where the Court noted that "Rule 11 does not require a showing of bad faith." Rather, it only requires an objective inquiry into whether counsel or the party

on the Federal Rules of Civil Procedure is not available to an examiner acting under authority of state statute for the purpose of awarding sanctions. However, the "bad faith" standard for awarding costs and attorney's fees applied in Sec. 301 actions is also available under Commission law. 9/ The standard under both Commission precedent and federal law in the Seventh Circuit is whether the party's position is "frivolous", i.e., demonstrates "bad faith". Wisconsin Dells at 5; Miller Brewing, 739 F. 2d at 1167; Local 232 Allied Industrial Workers v. Briggs & Stratton, 837 F. 2d 782, 787 (7th Cir., 1988).

In its decision in Wisconsin Dells, the Commission stated the following as to when an award of attorney's fees is available:

> As the Examiner correctly held, where a party's position is found to demonstrate "extraordinary bad faith", attorney's fees and costs are available from the Commission. Hayward Schools, supra. In his concurring opinion in Madison School District, Dec. No. 16471-D (WERC, 5/81), Commissioner Torosian more fully stated our present view on the general availability of attorney fees and on how the "extraordinary bad faith" test can be met. He held:
>
> > While I concur with the majority that attorney fees are not justified in the instant case, I disagree with the iron-clad policy enunciated by the majority of denying attorney fees in all future cases. I agree that, for some of the policy reasons stated in the United Contractors case, the Commission should be reluctant to grant attorney fees. However, I feel the Commission should retain the flexibility, and therefore adopt a policy, which would enable it to grant attorney fees in exceptional cases where an extraordinary remedy is justified. In this regard, I would adopt the reasoning of the National Labor Relations Board stated in Heck's Inc., 88 LRRM 1049, wherein the National Labor Relations Board stated its intention ". . .to refrain from assessing litigation expenses against a respondent, notwithstanding that the respondent may be found to have engaged in 'clearly aggravated and pervasive misconduct' or in the 'flagrant repetition of conduct previously found unlawful' where the defenses raised by that respondent are 'debatable' rather than 'frivolous'."

"should have known that his position is groundless."

9/ Wisconsin Dells School District, Dec. No. 25997-C (WERC, 8/90).

In my opinion, limiting the granting of attorney fees to such cases would best balance some of the policy considerations cited in United Contractors and the interest of the Commission in discouraging frivolous litigation and to protect the integrity of our process. (Emphasis added.)

. . .

> As the above quoted portion of our Madison Schools decision reflects, our test for the availability of attorney's fees is strict. Only in the "exceptional" case is such an "extraordinary remedy" warranted. Here, the Examiner correctly found certain Respondent conduct violated the Municipal Employment Relations Act. In our view, Respondent's misconduct, particularly as to the refusal to reinstate the free lunch benefit, can reasonably be viewed as "clearly aggravated". However, our test does not focus on the degree of misconduct ultimately found to have occurred but rather on whether the defenses raised were "debatable" as opposed to "frivolous".
> (At 5-7) 10/

The Examiner notes the Respondent's attempt to obtain a hearing before the Board so that it could present its case and the lack of positive evidence in the record of bad faith on Respondent's part, and concludes that the Respondent's mere ignorance of the applicable statutory law and case law, resulting in its untimely attempt to raise its defense to enforcement of the award in this proceeding, is not sufficient to meet the "frivolous", i.e., "extraordinary bad faith" test required by the Commission or the "bad faith" standard of the Seventh Circuit.

With regard to interest, under the Wisconsin Supreme Court's decision in Anderson v. State of Wisconsin, Labor and Industry Review Commission, 111 Wis.2d 245 (1983), pre- and post-judgment interest on determinable monetary awards is to be ordered by administrative agencies in this state. In Madison Teachers, Inc. v. WERC, 115 Wis. 2d 663 (1983), the Court of Appeals held that requirement applies to orders issued by this agency under Sec. 111.07(4), Stats. In Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), the Commission held that the interest rate to be applied is that set forth in Sec. 814.04(4), Stats., at the time the complaint is filed, which presently is

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10/ Similarly, in its decision in Briggs & Stratton, supra, the Seventh Circuit Court of Appeals cited the following from its earlier decision in Miller Brewing, 739 F.2d at 1167:

> "Normally when no statute authorizes the award of attorney's fees in a particular class of cases - and none does with respect to suits under Sec. 301 of the Taft-Hartley Act or Sec. 9 of the Arbitration Act, the prevailing party is entitled to attorney's fees only if his opponent's suit or defense was frivolous, which our cases define to mean brought in bad faith - brought to harass rather than to win."
> (837 F.2d at 787)

Subsequently, in Auto Mechanics Local 701 v. Joe Mitchell Buick, Inc., 930 F.2d 576 (7th Cir. 1991), the Court held that costs and attorney's fees were not justified under either Rule 11, Fed. R. Civ. P. or the "bad faith" standard, since the defendant company did not seek "merely to put the Union's feet to the fire." 930 F.2d at 579, citing, Miller Brewing, 739 F.2d at 1168.

interest at the rate of 12% per year. Therefore, interest on monies ordered paid under the arbitration award has been ordered paid at that rate.

Dated at Madison, Wisconsin this 8th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

APPENDIX "A"

NOTICE TO ALL
EMPLOYES OF GRUNAU COMPANY, INC.
REPRESENTED BY
BRIDGE, STRUCTURAL AND ORNAMENTAL
IRON WORKERS UNION LOCAL NO. 8

Pursuant to an order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify the above employes that:

> WE WILL immediately comply with the award of the Board of Arbitration issued March 4, 1991 by immediately paying the monies owing under said award, plus interest, to the Bridge, Structural and Ornamental Iron Workers Union Local No. 8.

By _____
Ted J. Angelo, Executive Vice-President
Grunau Company, Inc.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

-20- No. 27123-A