STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED FURNITURE WORKERS, Complainant, vs. WRICO STAMPING COMPANY OF WISCONSIN, Respondent.	Case 1 No. 48207 Ce-2133 Decision No. 27525-A

Appearances:

Katz, Friedman, Schur & Eagle Law Offices, by Mr. Stanley Eisenstein, 77 West Washington Street - 20th Floor, Chicago, Illinois 60602-2803, on behalf of the Complainant.

Doherty, Rumble & Butler, P.A., by Mr. John McGirl, 3500 Fifth Street Towers, 150 South Fifth Street, Minneapolis, Minnesota 55402-4235, on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

United Furniture Workers, herein Complainant, or Complainant Union, having on October 20, 1992, filed a complaint with the Wisconsin Employment Relations Commission, alleging that Wrico Stamping Company of Wisconsin, herein Respondent or Respondent Employer, had violated Section 111.06 (1) (f) and (a), Stats., by failing and refusing to arbitrate a grievances pursuant to the parties collective bargaining agreement; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in this matter as provided in Section 111.07(5), Stats., and hearing on said complaint having been held on April 15, 1993 in Menomonee Falls, Wisconsin; and the transcript having been received on April 27, 1993; and the parties having completed their briefing schedule on June 10, 1993; and the Examiner, having considered the evidence and arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant United Furniture Workers is a labor organization having its business offices 1104 Wisconsin Avenue, Sheboygan, Wisconsin 53081. Bruce Van Ess and Randy Tayloe are President and Business Agent of Complainant's Local 800, respectively, and at all times material herein have been representatives and agents of Complainant.

2. Respondent Wrico Stamping Company of Wisconsin is a private employer engaged in the production of metal stampings. Its principal place of business is N50 W13471 Overview Drive, Menomonee Falls, Wisconsin 53051. At all times, Keith Griffiths, Michael San Filippo, and John McGirl, Jr. occupied the positions of Owner/President, Manager, and Attorney respectively, and have been representatives and agents of the Respondent Employer.

3. Respondent voluntarily recognized the Complainant as the collective bargaining agent for its employes in or around January of 1991. The parties then commenced negotiation over the terms and conditions of an initial collective bargaining agreement. They arrived at an agreement in October of 1991 with representatives from both sides executing the collective bargaining agreement which is effective August 1, 1991 through July 31, 1993.

4. The collective bargaining agreement contained the following relevant provisions:

> ARTICLE I.
> Union Recognition
>
> 1.01 The Company recognized the Union as the sole collective bargaining agency for all full time and regular part time production, maintenance and tool room employees Appendage at its Menomonee Falls, Wisconsin location, excluding all office employees, professional employees, managerial employees, guards and supervisors as defined in the Act, as amended.
>
> . . .
>
> ARTICLE XII.
> Pension
>
> 12.01 The Agreement between the parties regarding pension is set forth in the "Pension Plan Appendage" which is attached to this Agreement and made a part hereof.
>
> . . .
>
> ARTICLE XIV.
> Grievance Procedure
>
> 14.01 The Company and the Shop Committee, consisting of not more than three (3) members designated by the Union from the regular employees of the Company, shall be recognized as the proper parties to settle disputes arising over the interpretation of/or adherence to the terms of this Agreement. For the purpose of this Agreement, a grievance shall mean a dispute or difference of opinion on the part of the Union or employees concerning the interpretation and application of this Agreement.
>
> . . .
>
> 14.03 In the event of their failure to effect settlement as above provided, either party may demand arbitration, provided he serves upon the other party written notice of his demand for arbitration within fifteen (15) days after receiving an answer in writing

from the other party. The fifteen (15) day period may be extended by agreement of the Company and the Union.

14.04 The Arbitration Panel shall consist of three (3) members, one appointed by the Company and one appointed by the Union. If the parties fail to agree upon a neutral arbitrator within five (5) days, then either party may request the Director of Federal Mediation and Conciliation Service to provide a panel of seven (7) arbitrators. Within five (5) days after receipt of the names of such panel, representatives of the parties shall alternately strike a name from the list until one remains.

14.05 The parties shall then inform the said Director of the results and the remaining nominee shall be designated by the Director as the neutral arbitrator.

14.06 The decision of the Arbitration Panel shall be final and binding on all parties concerned. The fee and expense of the neutral arbitrator so selected shall be shared equally.

14.07 The Arbitration Panel shall have jurisdiction and authority to interpret and apply the provisions of this Agreement insofar as shall be necessary to the determination of such grievance, but they shall not have jurisdiction or authority to alter in any way the provisions of this Agreement.

. . .

PENSION PLAN APPENDAGE

WRICO STAMPING CO. OF WISCONSIN

1. Effective August 1, 1991, an agreement is hereby made between the LOCAL NO. 800, UNITED FURNITURE WORKERS OF AMERICA, AFL-CIO (hereafter "Union") and WRICO STAMPING CO. OF WISCONSIN, a division of GRIFFITHS CORPORATION (hereafter "Employer") to provide retirement benefits from contributions to the IUE AFL-CIO Pension Fund.

   The Company will deliver its contribution to said fund, but it is understood that the Employer's obligation shall be fulfilled at the time the Employer makes the contribution in the amount provided herein, and upon making said contribution the Employer shall be relieved and discharged from any further obligation to said pension fund.

   The obligation of the Employer to this agreement shall continue only as long as there is in existence an effective Collective Bargaining Agreement between the Employer and the Union.

   It is understood and agreed that the pension fund to which the Employer will contribute is qualified for approval by the Internal Revenue Service and allows the Employer an income tax

deduction.

2. The Company will contribute 10 cents per hour for all worked hours including overtime hours, vacation hours taken and holiday hours. All other hours are excluded.

   The remittance by the Company will be made on or before the 10th day following the 4th or 5th week of the Company work month.

   Contribution for newly hired employees will not be made until the employee passes his/her probation period. At that time and at the next payment period, contribution for the newly hired employees will be made retroactive to the date of hire on the qualified hours described above.

3. Employees shall receive credit for service with the Company from the date of their most recent hire.

5. Thereafter, Complainant pursuant to paragraph 1. of the Pension Plan Appendage, designated the IUE Multi-Employer Pensions Plan as its retirement fund. This plan was in effect and operating in Respondent's Minnesota plant for another collective bargaining unit.

6. On March 25, 1992, Bruce Van Ess, President of Complainant, forwarded the following Standard Memorandum of Agreement required by the IUE AFL-CIO Pension Fund to John J. McGirl, Jr. for signature by corporate officers:

MEMORANDUM OF AGREEMENT

PENSION PLAN

Agreement made and entered into this 1st day of August, 1991, by and between Wrico Stamping of Wisconsin (hereinafter referred to as the "Employer") and Local No. 800, International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (hereinafter referred to as the "Union").

Section 1.

A. By an Agreement and Declaration of Trust made as of the 30th day of April, 1958, between the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO and various employers who are or may become parties thereto, a Trust Fund designated as the "IUE AFL-CIO Pension Fund" (hereinafter referred to as the "Pension Fund") was established.

B. To provide retirement benefits from contributions to said Pension Fund, the Trustees established the IUE AFL-CIO Pension Plan (hereinafter referred to as the "Pension Plan").

C. Such Pension Fund and Pension Plan is now in full force and effect and is in full and complete compliance with the Labor Management Relations Act of 1947, as amended; the Employee Retirement Income Security Act of 1974, as amended, and regulations promulgated thereunder; and qualified as an exempt trust pursuant to the applicable provisions of the Internal Revenue Code of 1986.

Section 2.

A. The Employer agrees to pay to the Pension Fund on behalf of each employee covered by this Agreement, for each hour for which said employee receives pay:

(i) effective August 1, 1991 the sum of 10 cents
(ii) effective ---------- the sum of -- cents
(iii) effective July 31, 1993 the sum of -- cents

Pay is hereby defined to include all hours of work, including such hours for which wages are paid regardless of whether actual work is performed or not, including but not limited to holidays, vacations, paid sick leave and the like. The payments shall be made monthly and shall be due on or before the 10th day of the month following the calendar month in which the employee receives said hourly pay; however, with respect to newly-hired employees, the Employer shall commence payment of contributions to the Pension Fund at the conclusion of said employee's probationary period, as defined in the collective bargaining agreement, or 60 calendar days from said employee's date of hire, whichever is earlier, provided that the

initial contribution payment is retroactive to said employee's date of hire. The Employer shall complete and file remittance reports prescribed by the Pension Fund and shall furnish the Union with a copy of each remittance report submitted to the Pension Fund.

B. It is understood that the aforesaid payments shall not be increased because of overtime pay differentials elsewhere provided in the collective bargaining agreement.

C. The payments shall be used by the Pension Fund to provide benefits for eligible employees in accordance with the Pension Plan of said Pension Fund, as may be amended by the Pension Fund's Trustees, and as is or may be determined by the Trustees, to be applied to eligible employees based on the amount of Employer contribution. Increases in the Monthly Benefit Rate attributable to increases in the Employer's hourly contribution rate shall be applicable to each year of each Participant's Continuous Credited Service under the Pension Plan.

D. The Employer agrees to become a party to the said Agreement and Declaration of Trust establishing the said Pension Fund and agrees to be bound by all the terms and provisions of said Agreement and Declaration of Trust and designates as its representatives such Trustees as are named in said Agreement and Declaration of Trust as Employer Trustees, together with their successors selected in the manner provided in said Agreement. A copy of said Agreement and Declaration of Trust is to be annexed to the collective bargaining agreement upon execution thereof.

E. The Employer, on behalf of itself, and the Union, on behalf of the employees on whose behalf contributions are made to the Pension Fund, including Participants as defined in the Plan and their beneficiaries, hereby agree that the arbitration provisions contained in the Pension Plan shall be final and binding.

F. It is understood and agreed that the Pension Plan referred to herein shall at all times qualify for approval by the Internal Revenue Bureau of the U.S. Treasury Department so as to allow the Employer an income tax deduction for the contributions paid herein.

G. For the purpose of this Memorandum of Agreement, all employees coming under the work classifications covered by this Agreement shall be considered covered by the collective bargaining agreement as of their first day of employment with the Employer, regardless of such trial or other waiting periods as may apply to other sections of the bargaining agreement.

Section 3.

The parties agree that, except as provided by the Employee Retirement Income Security Act of 1974, as amended, and other such laws that may be enacted from time to time, and except as may be otherwise provided herein, the Employer's obligation to the Pension Fund shall be fulfilled at the time the Employer makes the contributions to the said Pension Fund in the amount and in the manner provided herein and provided further that upon making said contributions as aforesaid the Employer shall be relieved and discharged from any further obligations to the said Pension Fund. Notwithstanding the foregoing, the Pension Fund shall have the right to collect all costs, including but not limited to costs associated with litigation, incurred in collecting delinquent Employer contributions. Such costs include, but are not limited to auditors' fees, interest, liquidated damages, costs, and attorneys' fees.

Notwithstanding any other agreement between the Employer and the Union, the Employer agrees that its obligations to the Pension Fund and Pension Plan during the term of this agreement are as set forth in this separate Memorandum of Agreement and in the event of any conflict between this Memorandum of Agreement and any other agreement between the Employer and the Union the terms of this Memorandum of Agreement shall be controlling.

This Agreement shall remain in full force and effect up to and including Midnight July 31, 1993.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals the day and year first written above.

FOR THE EMPLOYER:	FOR THE UNION:
_____ (Name of Company)	INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO, LOCAL NO. 800
By _____	By Bruce Van Ess /s/
By _____	By Randy Tayloe
By _____	By _____

On May 6, 1992, McGirl informed Van Ess that the Company was unwilling to sign the Pension Plan Agreement until the issue of credit for past service for employes was resolved. It was the Company's position it would agree to credit for past service only if it did not cost the Respondent additional money. Respondent has not signed the Standard Memorandum of Agreement for the IUE AFL-CIO Pension Fund at any time to the present.

7. In August of 1992, the parties once again met and attempted to resolve the pension dispute unsuccessfully.

8. Thereafter, on September 1, 1992, the Complainant filed a grievance with the Respondent. It stated as follows:

> The Company is in violation of Article XII (Pension) for not honoring our contractual agreement, by not making any pension contributions since the beginning of the agreement and refusing to sign our pension agreement set up by the pension fund. We are asking for the Company to make contributions due to the fund and executing the agreement by signing the agreement.

On September 21, 1992, McGirl advised Randy Tayloe, Union Business Agent, as follows:

> Re: Wrico Stamping Co. of Wisconsin
> Grievance Dated 9/1/92 Regarding Pension Plan
>
> Dear Randy:
>
> Your letter of September 18, 1992, addressed to Mike San Filippo regarding the above matter has been referred to the undersigned for attention and reply.
>
> As you were previously advised, it is the position of Wrico Stamping Co. that the above mentioned grievance is not eligible for arbitration. The reasons for the Company's position are set forth in detail in the Company's response to the grievance. Since there has never been a meeting of the minds between the parties, there has never been an agreement. As such, there was no contract and there is nothing to arbitrate.
>
> As previously indicated, the Company stands ready to negotiate with you on this subject. Therefore, the Company will not agree to arbitrate the above matter.

Respondent has refused and continues to refuse to process said grievance to arbitration.

9. The Complainant filed the instant complaint on October 20, 1992.

10. The collective bargaining agreement in effect between the parties from August 1, 1991 to July 31, 1993, contains a clause requiring the submission of disputes or differences of opinion on the part of the parties over the interpretation of/or adherence to the terms of the agreement to arbitration. The dispute as to whether or not Respondent Employer violated Article XII by refusing to sign the pension agreement necessary to set up the fund and by failing to make pension contributions is a dispute or difference of opinion over the interpretation or adherence to Article XII and the Pension Plan Appendage of the parties' collective bargaining agreement.

11. The Respondent Employer, by refusing to submit the Complainant's grievances in Finding of Fact 10 to arbitration, violated the parties' collective bargaining agreement.

12. Complainant is seeking to enforce the arbitration clause contained

in the parties' collective bargaining agreement and not attempting to invoke the arbitration provision contained in the unsigned Pension Plan Memorandum of Agreement.

Based upon the above Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

By its failure to arbitrate the grievance involving the Respondent's contributions to a pension fund and its failure to execute a pension fund agreement, Respondent, Wrico Stamping Company of Wisconsin has violated the terms of the collective bargaining agreement and accordingly violated Sec. 111.06(1)(f), Stats.

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

ORDER 1/

1. It is ordered that Wrico Stamping Company of Wisconsin, its officers and agents, shall immediately cease and desist from refusing to arbitrate grievances in violation of the collective bargaining agreement and Section 111.06(1)(f), Stats.

2. It is further ordered that Wrico Stamping Company of Wisconsin take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

a) Immediately proceed to arbitration on Grievance dated 9/1/92 regarding Pension Plan.

b) Notify its employes in the bargaining unit represented by Complainant Union by posting in conspicuous places on its premises where notices to such employes are usually posted, a copy of the Notice attached hereto and marked Appendix "A". The Notice(s) shall be signed by an officer of the Respondent 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 by other material.

c) Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of this decision what steps it has taken to comply with the above Order.

Dated at Madison, Wisconsin this 23rd day of June, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

(Footnote 1/ will appear on the next page.)

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

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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

APPENDIX "A"

NOTICE TO EMPLOYES

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 our employes that:

1. We will immediately cease and desist from refusing to arbitrate in violation of the collective bargaining agreement with United Furniture Workers Local 800.

2. We will immediately proceed to arbitration on the grievance dated 9/1/92 -- Pension Plan.

Dated at _____, Wisconsin, this _____ day of _____, 1993.

WRICO STAMPING COMPANY OF WISCONSIN

By _____
Company Official

SAID NOTICE IS TO REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE IT IS SIGNED AND SHALL NOT BE ALTERED, DEFACED, OR COVERED WITH OTHER MATERIAL.

WRICO STAMPING COMPANY OF WISCONSIN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complainant and Respondent entered into an initial collective bargaining agreement providing for final and binding arbitration of grievances. The Complainant has filed a grievance relating to the Respondent's failure to execute a separate pension trust agreement and/or remit payments to the IUE Pension Trust. The Respondent Employer refuses to submit said grievance to arbitration.

POSITIONS OF THE PARTIES

Complainant Union

The Union takes the position that for purposes of this proceeding, it has established the following essential prerequisites for an order compelling arbitration. These essential elements are (1) the existence of a collective bargaining agreement binding the parties; (2) a broad and all-encompassing grievance-arbitration procedure; (3) a grievance raising a genuine dispute concerning the interpretation and application of the collective bargaining agreement; and (4) a refusal to arbitrate. It argues that this matter is substantively arbitrable and that the Respondent has failed to comply with its obligation to arbitrate.

According to the Complainant Union, as long as the Union makes an arguable claim of a contract violation, that matter must be submitted to arbitration if the parties have included an arbitration clause in the collective bargaining agreement. Citing the Steelworkers Trilogy, 2/ the Union argues that the presumption of arbitrability stands unless "it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute." Doubts, it asserts, should be resolved in favor of coverage.

The Complainant maintains that claims of procedural untimeliness are for the arbitrator to decide and do not go to substantive arbitrability. Because it is a procedural defense, it must be presented to the arbitrator and not to the Examiner or the WERC. The Union maintains that the grievance clearly raises a claim of a breach of the agreement. Pointing to Section 14.01 of the collective bargaining agreement, the Union emphasizes that "disputes arising over the interpretation of or adherence to the terms of this Agreement" or the "interpretation and application" of the Agreement are subject to the grievance procedure. This, it alleges, is an exceedingly broad and all-encompassing definition of a grievance with no exclusions or restrictions. Virtually any dispute or claim of breach of contract is subject to the grievance procedure.

The grievance on its face clearly alleges a violation of Article XII of the agreement, the article which deals with pensions and specifically incorporates the Pension Plan Appendage into the collective bargaining agreement. This, the Union alleges, is where the Commission's inquiry should end. The Commission's function is to determine whether or not the moving party has made a claim of a violation of the collective bargaining agreement. If so, it submits, the matter must be submitted to arbitration. Respondent Employer's attempt to enmesh the Commission in the underlying merits of the dispute is improper. According to the Union, the Commission should not be drawn into a disposition on the merits under the guise of substantive arbitrability. The presumption in favor or arbitration is so strong that even if the grievance "appears to the Court to be frivolous", a court nonetheless must order arbitration.

Here, the Complainant argues, the grievance is hardly frivolous. The Pension Plan Appendage clearly and unmistakably allows Complainant to "designate" a pension plan. According to Complainant, Respondent has refused to accept the Union's designation of the IUE AFL-CIO Pension Fund. It claims that an arbitrator could easily determine Respondent violated the first paragraph of the Pension Plan Appendage. The Union also claims that a second,

---

2/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

and related, violation occurs because Respondent has refused to agree to participate in any pension plan which might entail withdrawal liability. It alleges that this also violates the Pension Plan Appendage. Whether or not the Union or the Respondent is correct in its interpretation of various provisions of the Pension Plan Appendage is, however, a matter for the arbitrator to decide.

The Union strenuously asserts that Joint Exhibit 1, the signed collective bargaining agreement between the parties is the operative document and that a revised unsigned document, Employer Exhibit 2, is a mid-term modification attempt by the Respondent Employer to significantly modify the Pension Plan Appendage. The Union's claim with respect to the Respondent's obligation to fund its promise of past service pension credit for its members is based upon Joint Exhibit 1, the document to which the parties in fact agreed.

In conclusion, the Complainant does not ask the Examiner or the Commission to decide the Union's claim on the merits, but rather, requests that the Respondent be found to have violated its obligation to arbitrate the grievance and ordered to submit said grievance to arbitration.

Respondent Employer

The Respondent makes numerous arguments regarding its failure to submit the grievance to arbitration. It argues that the grievance is not arbitrable because it was not timely filed. According to the terms of the collective bargaining agreement, a grievance must be in written form within six working days after it has arisen. Respondent contends that Complainant's grievance is twofold, dealing with the Respondents failure to sign the Memorandum of Agreement as required by the Pension Fund and its failure to contribute to the Pension Plan as allegedly required by the collective bargaining agreement. Respondent points out that its attempt to contribute to the plan was rejected because it refused to sign the Memorandum of Agreement. Thus, the grievance arose when Respondent Employer failed to sign the Memorandum. Although Respondent refused on several occasions to sign the Memorandum, it made its refusal in writing on May 6, 1992. The latest date on which Complainant's purported claim could have arisen is May 6, 1992, yet the grievance was not filed until September 1, 1992. Thus, it is not timely.

Respondent, in its initial and reply brief, also claims that the arbitration agreement which Complainant attempts to enforce is not applicable to this case, and therefore, cannot be enforced by the Wisconsin Employment Relations Commission. In this vein, it argues that the grievance/arbitration procedure in the collective bargaining agreement applies only to the interpretation or adherence to the terms of the collective bargaining agreement between the parties. First, it asserts that the parties do not have an "all encompassing grievance procedure." Second, there is, it stresses, no genuine dispute concerning a matter of agreement. Because there has been no agreement regarding the appropriate pension plan, there is no agreement which is enforceable according to the terms of the arbitration agreement. Citing International Association of Machinists and Aerospace Workers, Progressive Lodge 1000 vs. General Electric, 3/ Respondent alleges that because no agreement has been reached as to the subject matter involved, it cannot be the subject of an arbitration provision which limits itself only to those matter upon which the parties have agreed.

Because, Respondent maintains, there has been no agreement regarding the appropriate pension plan in which Respondent will contribute, there has never

3/ International Association of Machinists and Aerospace Workers, Progressive Lodge 1000 v. General Electric, 865 F2d 902, 904-05, 130 LRRM 2464 (Ca7, 1989).

been a meeting of the minds as to which pension plan the Respondent should make contributions. Respondent argues that what the Complainant is doing through this proceeding and by charges with the National Labor Relations Board is forcing Respondent to accept a pension plan to which it clearly never agreed.

It points out that the grievance makes it clear that Complainant believes Respondent is obligated to contribute to the IUE Pension Plan and to sign a Memorandum of Agreement required of all participants. It notes that the collective bargaining agreement does not specifically require the Respondent to sign the IUE Pension Plan. But, nevertheless, Complainant Union demands that the IUE Pension Plan be adopted. Respondent argues that the Memorandum of Agreement is contrary to the express agreement of the parties in that it does not limit Respondent's liability to ten cents per hour nor does it limit Respondent's liability to the time period in which the collective bargaining agreement is in effect. It stresses that the Memorandum of Agreement requires the Respondent Employer to pay all costs, including attorneys' fees, to collect delinquent contributions while Respondent never obligated itself to pay these monies. Moreover, the Memorandum of Agreement defines hours worked to include paid sick leave while the collective bargaining agreement contains no provision to pay for sick leave or to contribute to a pension plan based on sick leave. Emphasizing that the Memorandum of Agreement provides that all terms of the Pension Plan govern over any contradictory terms in the collective bargaining agreement between the parties and that the terms of the Memorandum of Agreement provide that the Pension Plan can be amended by the Trustees of the Plan without the consent of Respondent, Respondent argues that it is clear that there is not, nor could there be, an agreement to be bound by the terms of the Memorandum of Agreement. Thus, the arbitration provision in the collective bargaining agreement cannot apply to the present situation.

Respondent Employer further alleges that, according to the Pension Plan Agreement which the Complainant is attempting to enforce, arbitrability is governed by the arbitration provisions of the Pension Plan, and not those of the collective bargaining agreement. It maintains that Complainant's demand for arbitration under the collective bargaining agreement is contrary to its claim that the IUE Pension Plan should govern this case. Because the Memorandum of Agreement is controlling over any agreement between the parties, the arbitration provisions of the pension plan, not the collective bargaining agreement, govern the resolution of this action. Because the Complainant has not produced the Pension Plan which contains the appropriate arbitration agreement, the Commission cannot rule on the issue of arbitrability.

Moreover, according to the Respondent, the Commission has no authority to resolve a dispute set forth pursuant to the IUE Pension Plan because the complaint is based upon Section 111.06(f) of the Wisconsin Employment Peace Act which makes it an unfair labor practice to violate the terms of a collective bargaining agreement. The Commission has no jurisdiction to mandate submission of a dispute pursuant to the arbitration agreement contained in the pension plan.

Finally, Respondent argues that the arbitrability issue is governed by a document to which Respondent has never agreed. To the contrary, Respondent was not even aware of the terms of the Memorandum of Agreement until March of 1992. It cannot be found that Respondent agreed to follow arbitration procedures which are set out in a Pension Plan document which, to this day Complainant has failed to provide to the Respondent. Because there is no agreement as to the appropriate arbitration provision, there is no agreement to be enforced through the arbitration procedure. Respondent requests that Complainant's demand for arbitration be denied and that the complaint be dismissed.

DISCUSSION

Generally speaking, in a situation where the parties' agreement provides

for binding arbitration and a complaining party alleges that the employer refuses to process a grievance to arbitration, the Commission will assert jurisdiction to determine whether said refusal violates the collective bargaining agreement. 4/

As Complainant notes, the law governing a Commission determination as to whether a particular grievance falls within the scope of a contractual arbitration clause is ultimately rooted in the Steelworkers Trilogy. 5/ In a later decision, AT & T Technologies, Inc. v. Communications Workers of America, 6/ the U.S. Supreme Court set forth four guiding principles. It said:

> The principles necessary to decide this case are not new. They were set out by this court over 25 years ago in a series of cases known as the Steelworkers Trilogy. . . .
>
> The first principle gleaned from the Trilogy is that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." . . .
>
> The second rule, which follows inexorably from the first, is that the question of arbitrability -- whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance -- is undeniably an issue for judicial determination. . . .
>
> The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be frivolous, the union's claim that the employer violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. . . .
>
> Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "(a)n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 7/

5/ Modern Poured Walls, Inc., Dec. No. 19102-B (WERC, 1982); Aqua-Chem, Inc., Dec. No. 26102-A (Engmann, 6/90), aff'd Dec. No. 26102-B (WERC, 11/90).

5/ Steelworkers v. American Manufacturing Co., 363 U.S. 546, 46 LRRM 2412 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960); and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 LRRM 2423 (1960).

6/ 475 U.S. 643, 121 LRRM 3329 (1986).

7/ AT & T, supra, 121 LRRM at 3331-3332 (citations omitted).

The Wisconsin Supreme Court and the Commission have also adopted these principles. They have held that an order to arbitrate must be granted if the Union's grievance makes a claim which on its face is covered by the parties' collective bargaining agreement. 8/ The grievance would state such a claim if the arbitration clause is broad enough to cover the grievance, and if the collective bargaining agreement contains no specific bars to the arbitration of the grievance. 9/

As Finding of Fact 4 indicates, Section 14.01 of the collective bargaining agreement is very broad. For purposes of the Agreement, a grievance is defined as meaning "a dispute or difference of opinion on the part of the Union or employees concerning the interpretation or application of this agreement." The grievance dated 9-1-92 regarding the Pension Plan expressly references the Respondent Employer's actions or inaction as violating Article XII of the collective bargaining agreement. There is no specific or express prohibition barring arbitration of pensions or pension plan matters in the agreement. Accordingly, on its face, the grievance appears to make a claim which is covered by the agreement.

Respondent disagrees believing that the first two principles set forth in AT & T control the instant situation. It argues that no agreement has been reached as to the subject matter involved herein because there has been no meeting of the minds on the pension issue. Because they have not agreed, the dispute in Respondent's view is not subject to arbitration. This argument is rejected inasmuch as Article XII and the Pension Plan Appendage make it clear that the parties did agree to certain terms and conditions regarding the establishment of a pension plan for employes. It may be that an arbitrator's interpretation of Article XII and the Pension Plan Appendage will ultimately support or favor the Respondent Employer's argument in this regard. However, an appropriate assessment of the Respondent's actions in light of Article XII and the Pension Plan Appendage must be reserved for the arbitrator, not for the Commission or this Examiner.

Respondent argues that what Complainant is really attempting to enforce is the arbitration clause in the Pension Plan's Standard Memorandum of Agreement over which the Commission has no subject matter jurisdiction, rather than the arbitration clause of the parties' collective bargaining agreement. This allegation is not borne out by the grievance document itself which makes express reference to Article XII, the pension provision of the collective bargaining agreement, as being the clause which Respondent is violating. Complainant made the request to arbitrate under the parties' collective bargaining agreement and not the Pension Plan Standard Memorandum of Agreement to which Respondent is not a signatory.

8/ Joint School District No. 10, City of Jefferson v. Jefferson Education Association, 78 Wis. 2d 94, 111 (1977). The Wisconsin Supreme Court adopted the Steelworkers Trilogy in Dehnart v. Waukesha Brewing Co., Inc., 17 Wis. 2d 44 (1962); see also Sparta Manufacturing Company, Dec. No. 20787-A (McLaughlin, 11/83); Johnson Roofing and Insulation Company, Dec. No. 16308-A, B. See also, Seaman-Andwall Corp., Dec. No. 5910 (WERC, 1/62).

9/ Joint School District No. 10, City of Jefferson, supra.; Sparta Manufacturing, supra. at p. 12.

Given the presumption of arbitrability which applies in these cases and the inability of the Examiner to conclude with positive assurance that the arbitration clause in the parties' agreement is not susceptible to any interpretation which covers the dispute 10/, this Examiner finds that the Respondent must submit said dispute to arbitration.

Respondent also defends its refusal to arbitrate by alleging that the grievance is untimely. Commission case law again follows the federal precedent in Section 301 cases. The Commission has held that where a collective bargaining agreement provided for arbitration of disputes concerning the application, interpretation or violation of the agreement, the issue as to whether the union complied with contractual procedure in requesting arbitration is for determination by the arbitrator and not the Commission. 11/ Questions of timely processing pursuant to the grievance procedure constitute "procedural" defenses which are to be left to the arbitrator. 12/ Accordingly, it is appropriate to order Respondent Employer to comply with the arbitration provisions of the parties' collective bargaining agreement and to submit the instant grievance to arbitration.

Dated at Madison, Wisconsin this 23rd day of June, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Examiner

10/ The instant case is clearly distinguishable from I.A.M. v. General Electric, supra., where the arbitration clause was unusually narrow; assignment of work - a subject of the grievance - was expressly excluded from the arbitration clause and the parties' bargaining history did not support the Union's contentions that the grievance was substantively arbitrable because the arbitration clause had been expressly modified to limit its applications in situations involving assignment of work.

11/ John Wiley & Sons, Inc. v. Livingston, 376 U.S., 543, 555-59 (1964); Reimer's Meat Products, Inc., Dec. No. 15577-A, B (5/78) (Aff. Brown Co. Cir. Ct., 11/79); Johnson Roofing & Insulation Co. Dec. No. 16308-A, B (10/78) (Aff. Rock Co. Cir. Ct., 2/79); Labor Temple Bar, Inc., Dec. No. 11943-A, B (10/73); Dings Co., Dec. No. 18722-A, B (10/81).

12/ Reimer's Meat Products, Inc., supra., at p. 6; Labor Temple Bar, Inc., supra., at p. 4.