STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

IBEW LOCAL UNION NO. 577, Complainant, vs. FRANK KUEHL, d/b/a KUEHL ELECTRIC, Respondent.	Case 1 No. 49740 Ce-2145 Decision No. 27854-B

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. Matthew R. Robbins, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin 53212, on behalf of IBEW Local Union No. 577.

Di Renzo & Bomier, Attorneys at Law, by Mr. Howard T. Healy and Mr. R. Valjon Anderson, 231 East Wisconsin Avenue, P.O. Box 788, Neenah, Wisconsin 54957-0788, on behalf of Frank Kuehl.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

On November 4, 1994, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Frank Kuehl d/b/a Kuehl Electric had not committed an unfair labor practice within the meaning of Sec. 111.06(1)(f), Stats. by refusing to comply with a final and binding arbitration award. The Examiner therefore dismissed the complaint.

Complainant IBEW Local Union No. 577 timely filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's decision pursuant to Sec. 111.07(5), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received January 18, 1995.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

ORDER 1/

A. Examiner Findings of Fact 1-19 are affirmed.

B. Examiner Finding of Fact 20 is set aside.

C. Examiner Finding of Fact 21 is affirmed and renumbered to Finding of Fact 20.

D. Examiner Conclusion of Law 1 is affirmed.

E. Examiner Conclusions of Law 2-3 are set aside.

F. Examiner Conclusion of Law 4 is affirmed and renumbered to Conclusion of Law 2.

G. The Examiner's Order dismissing the complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 29th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

(Footnote 1/ continues on the next page.)

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> 227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.
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> 227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.
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> (a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(Footnote 1/ continues on the next page.)

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> (b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and

placement in the mail to the Commission.

FRANK KUEHL, d/b/a KUEHL ELECTRIC

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

The Pleadings

Complainant IBEW Local Union No. 577 alleged that Respondent Frank Kuehl, d/b/a Kuehl Electric, has violated Sec. 111.06(1)(f), Stats., by refusing to comply with the arbitration award of the Joint Labor-Management Committee (JLMC). The JLMC concluded that Respondent violated the 1992-1994 Inside Labor Agreement between Complainant and the National Electrical Contractors Association (NECA) when Kuehl Electric, Inc. employed non-union electricians and did not comply with the terms and conditions of employment set forth in the 1992-1994 Agreement.

Respondent filed an answer asserting that the Commission does not, and that the JLMC did not, have jurisdiction over him as of July 31, 1992 when he went out of business and was no longer an employer. Respondent asserted that he therefore was not a party to the 1992-1994 Inside Labor Agreement between Complainant and NECA and was not bound by that Agreement or any arbitration clause contained therein.

The Examiner's Decision

The Examiner began his decision by noting that in cases where the Commission is asked to enforce an arbitration award under Sec. 111.06(1)(f), Stats., the Commission serves as a state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce. As such a tribunal, the Examiner pointed out that the Commission must apply legal standards which are consistent with federal case law developed in Sec. 301 actions under the Labor-Management Relations Act.

The Examiner concluded the issue posed by the pleadings was whether Respondent had a contractual obligation to arbitrate the question of whether it was a party to the 1992-1994 Inside Labor Agreement. The Examiner concluded that this issue was one of arbitrability which, in turn, was a matter for the courts (or a competent administrative tribunal) to determine rather than the JLMC. In reaching that conclusion, the Examiner distinguished the numerous cases cited by Complainant as being instances in which there was no dispute as to the existence of a collective bargaining agreement and/or in which employers had participated in the arbitration proceeding and subsequently attempted to raise issues or defenses which they had failed to present to the arbitrator. The Examiner found the issue presented in this proceeding was whether the Respondent is bound by the contract under which Complainant proceeded to arbitration before the JLMC.

Because Respondent had raised the issue of arbitrability and made clear to Complainant his position that he was not bound by the 1992-1994 Agreement, that he was no longer in business, and that the JLMC had no jurisdiction over him, the Examiner concluded it was incumbent on Complainant at that point to seek a judicial or administrative determination regarding the issue of arbitrability rather than proceeding with an *ex parte* proceeding before the JLMC. Because Complainant failed to first obtain a determination as to whether Respondent was bound by the Agreement under which Complainant was seeking to arbitrate, and instead proceeded with an *ex parte* arbitration (wherein the JLMC decided the issue of arbitrability instead of the court), the Examiner concluded that the decision and award the JLMC was not enforceable against the Respondent.

The Examiner then proceeded to examine the merits of the question of whether Respondent was in fact a party to a 1992-1994 Agreement. He concluded that because Respondent had failed to timely notify NECA and Complainant of his intent to withdraw authorization for NECA to bargain on his behalf, Respondent was a party to the June 1, 1992-May 31, 1994 contract. However, the Examiner then concluded that Respondent went out of business as of July 31, 1992 and did not thereafter continue in business in the form of Kuehl Electric, Inc. The Examiner thus determined that Respondent was no longer a party to an agreement with Complainant when the September, 1992 grievance was filed.

Given all of the foregoing, the Examiner dismissed the complaint.

POSITIONS OF THE PARTIES ON REVIEW

The Complainant

Complainant urges the Commission to reverse the Examiner's decision and to order Respondent to comply in all respects with the arbitration award. Complainant asserts the Examiner correctly concluded that Kuehl had not timely withdrawn the authority of the NECA to enter into a 1992-1994 Agreement on Kuehl's behalf. However, Complainant argues the Examiner erred when he concluded that an employer who ceases doing business is no longer required to comply with a labor agreement during its term.

Complainant contends that the question of arbitrability which concerned the Examiner is resolved by the fact that Kuehl was bound by the 1992-1994 labor agreement which contained a provision for final and binding arbitration. Under that agreement, Complainant asserts the JLMC had authority to determine the relationship between Kuehl Electric and Kuehl Electric, Inc. Complainant contends the Commission should defer to the JLMC's determination regarding the merits of the grievance. Complainant asserts there was ample evidence from which the JLMC could find that Frank Kuehl d/b/a Kuehl Electric and Kuehl Electric, Inc. were a single employer and that a violation of the contract occurred.

Under existing federal law, Complainant also argues that the Respondent cannot now defend against enforcement of the arbitration award with new evidence or new defenses which it had an opportunity to raise before the JLMC. Complainant alleges it is well settled that a party may not raise as a defense to enforcement of an arbitration award issues and information not first presented to an arbitrator. Complainant also contends that the JLMC's remedy should not be disturbed by the Commission as it was based upon the evidence presented.

In reply to arguments raised by Respondent, Complainant asserts that the dispute in question is not one of arbitrability, but rather, the merits of whether the Respondent had actually terminated the agreement in question. Complainant contends that such an issue is properly before an arbitrator and need not be submitted to a court or an administrative tribunal.

As to the Respondent's complaint that there was no judicial determination of arbitrability prior to the JLMC arbitration, Complainant argues the Respondent was free to seek a judicial determination in that regard or could have appeared at the arbitration and preserved its objections to arbitrability. Complainant notes that Respondent did neither and instead ignored the matter until Complainant commenced this action. Complainant alleges that Respondent's lack of diligence provides no grounds for refusing to enforce the arbitration award.

Given all of the foregoing, Complainant asks that the Examiner's decision be reversed.

The Respondent

The Respondent urges the Commission to affirm the Examiner. Respondent contends that the Examiner correctly followed long-established law that the issue of whether an entity is contractually bound to proceed to arbitration is to be decided by the courts rather than by an arbitrator. Respondent asserts the Examiner therefore correctly ruled that the award of the JLMC is not enforceable because the JLMC exceeded its jurisdiction by deciding the issue of arbitrability. In addition, Respondent argues the Examiner correctly concluded that there was insufficient proof that Respondent continued his business as an alter-ego entity.

Respondent notes that from the onset of the arbitration proceeding in question, it objected to the jurisdiction of the JLMC and refused to participate in the arbitration proceedings. Respondent contends that under such circumstances, it was incumbent upon Complainant to seek a judicial determination that the dispute in question was arbitrable. Because Complainant did not do so, Respondent asserts the Examiner correctly dismissed the complaint. Respondent asserts that Complainants have continually ignored the consequence of their failure to obtain such a judicial determination. Respondent contends that the failure of Complainant to obtain a judicial or administrative determination as to arbitrability cannot be cured in this proceeding. Respondent argues that the cases recited by Complainant involve circumstances where the union was seeking to compel the employer to proceed to arbitration and thus are distinguishable. Once the JLMC exceeded its jurisdiction, Respondent asserts that the *ex parte* arbitration was fatally flawed.

If the Commission concludes it is appropriate to reach the question of the merits of the JLMC award, Respondent contends the JLMC award is a result of a mistake of law and should not be enforced. Respondent argues that the JLMC failed to apply the appropriate law to the alter-ego issue and that, in any event, the evidence presented did not support the JLMC's conclusion. Therefore, Respondent asserts the Examiner properly disregarded the JLMC's decision on the alter-ego issue.

Given the foregoing, Respondent urges the Commission to affirm the Examiner's dismissal of the complaint.

DISCUSSION

The Examiner concluded the arbitration award was unenforceable against Respondent because: (1) an issue of arbitrability raised by Respondent should have been but was not submitted by Complainant to a court or administrative tribunal (presumably the Commission) prior to any proceedings before the Joint Labor-Management Committee; and (2), in any event, Respondent was no longer party to any agreement to arbitrate once he went out of business. We affirm the Examiner's dismissal of the complaint based upon rationale (1) identified above.

Section 111.06(1)(f), Stats., of the Wisconsin Employment Peace Act makes it an unfair labor practice for an employer to:

> . . .violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

As correctly held by the Examiner, when the Commission exercises its jurisdiction under Sec. 111.06(1)(f), Stats., it functions as a state tribunal having concurrent jurisdiction with the federal courts to enforce bargaining agreements covering employes in industry affecting commerce, and must therefore apply legal standards to the dispute which are consistent with federal law under Section 301 of the Labor Management Relations Act.

Here, the parties disagree as to which well-settled legal principle governs this litigation. Complainant cites language from American Manufacturing Co. v. United Steelworkers, 363 U.S. 563, 568 (1960), that:

> Finally, 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 a particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of interpretation that covers the asserted dispute. Doubt should be resolved in favor of coverage.'

and argues that because the contract does not specifically exclude the issues raised by the grievance from the scope of the JLMC arbitration process, the grievance was arbitrable and properly before the JLMC. Respondent denies even the existence of a contract, points to the holding from John Wylie & Sons, Inc. v. Livingston, 376 U.S. 543, 546-547 (1964), that:

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties. . .(T)he duty to arbitrate being of contractual origin, the compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

and argues that Complainant was therefore obligated to seek a judicial or administrative determination as to the validity of Respondent's position that it could not be required to arbitrate before the JLMC because Respondent was not party to a contract with Complainant.

The Examiner concluded that it was the legal principle cited by Respondent which was the operative law. He stated:

> The Respondent having raised the issue of arbitrability and made clear his position that he was not bound by the 1992-94 Inside Labor Agreement, that he was no longer in business and that the JLMC had no jurisdiction over him, it was incumbent on the Complainant at that point to seek a judicial or administrative determination in regard to those issues, i.e., an order to compel arbitration, rather than proceed with an ex parte proceeding before the JLMC. 6/

6/ This is not to say that the Complainant was trying to "slide one by" Respondent. The record indicates it made every effort to notify Respondent of the hearing dates and that Respondent, in fact, received notice despite his efforts to ignore the whole matter.

and quoted at length the United States Supreme Court's decision in A T & T Technologies v. Communication Workers, 475 U.S. 643 (1986) including the following passage:

> The willingness of parties to enter into agreements that

> provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction. . ." Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." Ibid. This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective bargaining agreements, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.
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> (5) With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the Court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the Court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.
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> 475 U.S. at 649-651. (Emphasis added).

The Examiner was correct in his choice of the applicable law and in his application of that law to this dispute. The question of whether a party is obligated to arbitrate an issue is for the courts (or an appropriate administrative agency) to decide. Put another way, a forum other than arbitration must resolve disputes over whether the parties intended to allow arbitration to decide an issue.

Once in the appropriate judicial or administrative forum, and assuming agreement between the parties that they have an arbitration clause (not true here), then the law cited by Complainant would be applicable because the dispute would be "whether a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement." First Options of Chicago, Inc. v. Kaplan, 514 U.S. ___; 115 S.Ct. 1920 (1995). 2/ Thus, for instance, in the Kuhlman, Inc. v.

2/ The distinctions between the issues which are appropriate for the courts and arbitrators can be difficult to express. In First Options, the Court made a successful effort to describe these distinctions (and the law applicable to them) with some clarity, as follows:

The first question -- the standard of review applied to an arbitrator's decision about arbitrability -- is a narrow one. To understand just how narrow, consider three types of disagreement present in this case. First, the Kaplans and First Options disagree about whether the Kaplans are personally liable for MKI's debt to First Options. That disagreement makes up the *merits* of the dispute. Second, they disagree about whether they agreed to arbitrate the merits. That disagreement is about the *arbitrability* of the dispute. Third, they disagree about *who should have the primary power to decide the second matter*. Does that power belong primarily to the arbitrators (because the court reviews their arbitrability decision deferentially) or to the court (because the court makes up its mind about arbitrability independently)? We consider here only this third question.

Although the question is a narrow one, it has a certain practical importance. That is because a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute (say, as here, its obligation under a contract). But, where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances. See, e.g., 9 U.S.C. ss. 10 (award procured by corruption, fraud or undue means; arbitrator exceeded his powers); Wilko v. Swan, 346 U.S. 427, 436-437, 74 S.Ct. 182, 187-188, 98 L.Ed. 168 (1953) (parties bound by arbitrator's decision not in "manifest disregard" of the law), overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed. 2d 526 (1989). Hence, who -- court or arbitrator -- has the primary authority to decide whether a party has agreed to arbitrate can make a crucial difference to a party resisting arbitration.

[1.2] We believe the answer to the "who" question (i.e., the standard-of-review question) is fairly simple. Just as the arbitrability of the merits of a dispute depends upon

whether the parties agreed to arbitrate that dispute, see, e.g., Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. ___ , _____, 115 S.Ct. 1212, 1216, 131 L.Ed. 2d 76 (1995); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 105 S.Ct. 3346, 3353, 87 L.Ed.2d (444) (1985), so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration? If so, then the court's standard for reviewing the arbitrator's decision about *that* matter should not differ from the standard courts apply when they review any other matter that parties have agreed to arbitrate. See, A T & T Technologies, Inc. v. Communication Workers, 475 U.S. 643, 649, 106 S.Ct. 1415, 1418, 89 L.Ed.2d. 648 (1986) (parties may agree to arbitrate arbitrability); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583, n.7, 80 S.Ct. 1347, 1353, n.7 4 L.Ed.2d 1409 (1960) (same). That is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances. See, e.g. p. 9. U.S.C. ss. 10. If, on the other hand, the parties did ***not*** agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently. These two answers flow inexorably from the fact that arbitration is simply a matter of contract between the parties; it is a way to resolve those disputes -- but only those disputes -- that the parties have agreed to submit to arbitration. See, e.g., A T & T Technologies, supra, at 649, 106 S.Ct. at 1418; Mastrobuono, supra, at _____, and n.9, 115 S.Ct., at 1216-1217, and n.9; Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. ___, ____, 115 S.Ct. 834, 837-838, 130 L.Ed.2d 753 (1995); Mitsubishi Motors Corp., supra, at 625-626, 105 S.Ct., at 3353.

We agree with First Options, therefore, that a court must defer to an arbitrator's arbitrability decision when the parties submitted that matter to arbitration. Nevertheless, that conclusion does not help First Options win this case. That is because a fair and complete answer to the standard-of-review question requires a word about how a court should

decide whether the parties have agreed to submit the arbitrability issue to arbitration. And, that word makes clear that the Kaplans did not agree to arbitrate arbitrability here.

[3.4] When deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally (though with a qualification we discuss below) should apply ordinary state law principles that govern the formation of contracts. See, e.g., Mastrobuono, supra, at ___ _, and n.9, 115 S.Ct. at 1219, and n.9; Volt Information Services, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 475-476, 109 S.Ct. 1248, 1253-1254, 103 L.Ed.2d 488 (1989); Perry v. Thomas, 482 U.S. 483, 492-493, n.9, 107 S.Ct. 2520, 2526-2527, n.9, 96 L.Ed.2d 426 (1987); G. Wilner, 1 Domke on Commercial Arbitration ss.4:04, p. 15 (rev. ed. Supp. 1993) (hereinafter Domke). The relevant state law here, for example, would require the court to see whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration. See, e.g., Estate of Jesmer v. Rohlev, 241 Ill. App. 3d 798, 803, 182 Ill. Dec. 282, 286, 609 N.E. 2d 816, 820 (1993) (law of the State whose law governs the workout agreement); Burkett v. Allstate Ins. Co., 368 Pa.Super. 600, 608, 534 A.2d 819, 823-824 (1987) (law of the State where the Kaplans objected to arbitrability). See generally Mitsubishi Motors, supra, at 626, 105 S.Ct., at 3353.

[5] This Court, however, has (as we have just said) added an important qualification, applicable when courts decide whether a party has agreed that arbitrators should decide arbitrability: Courts should not assume that the parties agreed to arbitrate arbitrability unless there is "clear and unmistakable" evidence that they did so. A T & T Technologies, supra, at 649, 106 S.Ct., at 1418-1419; see Warrior & Gulf, supra, at 583, n.7, 80 S.Ct., at 1353, n.7. In this manner, the law treats silence or ambiguity about the question "who (primarily) should decide arbitrability" differently from the way it treats silence or ambiguity about the question "whether a particular merits-based dispute is arbitrable because it is within the scope of a valid arbitration agreement" -- for in respect to this latter question the law

reverses the presumption. See, Mitsubishi Motors, supra, at 626, 105 S.Ct., at 3353 ("'Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'") (quoting Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d. 765 (1983)); Warrior & Gulf, supra, at 582-583, 80 S.Ct., at 1352-1353.

But, this difference in treatment is understandable. The latter question arises when the parties have a contract that provides for arbitration of some issues. In such circumstances, the parties likely gave at least some thought to the scope of arbitration. And, given the law's permissive policies in respect to arbitration, see, e.g., Mitsubishi Motors, supra, at 626, 105 S.Ct., at 3353, one can understand why the law would insist upon clarity before concluding that the parties did *not* want to arbitrate a related matter. See Domke ss. 12.02, p. 156 (issues will be deemed arbitrable unless "it is clear that the arbitration clause has not included" them). On the other hand, the former question -- the "who (primarily) should decide arbitrability" question -- is rather arcane. A party often might not focus upon that question or upon the significance of having arbitrators decide the scope of their own powers. Cf. Cox, Reflections Upon Labor Arbitration, 72 Harv. L. Rev. 1482, 1508-1509 (1959), cited in Warrior & Gulf, 363 U.S., at 583, n.7, 80 S.Ct., at 1353, n.7. And, given the principle that a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration, one can understand why courts might hesitate to interpret silence or ambiguity on the "who should decide arbitrability" point as giving the arbitrators that power, for doing so might too often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide. Ibid. See, generally, Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-220, 105 S.Ct. 1238, 1241-1242, 84 L.Ed.2d 158 (1985) (Arbitration Act's basic purpose is to "ensure judicial enforcement of privately made agreements to arbitrate").

[6] On the record before us, First Options cannot show that the Kaplans clearly agreed to have the arbitrators

decide (i.e., to arbitrate) the question of arbitrability. First Options relies on the Kaplans' filing with the arbitrators a written memorandum objecting to the arbitrator's jurisdiction. But merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, i.e., a willingness to be effectively bound by the arbitrator's decision on that point. To the contrary, insofar as the Kaplans were forcefully objecting to the arbitrators deciding their dispute with First Options, one naturally would think that they did not want the arbitrators to have binding authority over them. This conclusion draws added support from (1) an obvious explanation for the Kaplans' presence before the arbitrators (i.e., that MKI, Mr. Kaplan's wholly owned firm, was arbitrating workout agreement matters); and (2) Third Circuit law that suggested that the Kaplans might argue arbitrability to the arbitrators without losing their right to independent court review, Teamsters v. Western Pennsylvania Motor Carriers Assn., 674 F.2d. 783, 786-788 (1978); see 19 F.3d, at 1512, n.13.

First Options makes several counterarguments: (1) that the Kaplans had other ways to get an independent court decision on the question of arbitrability without arguing the issue to the arbitrators (e.g., by trying to enjoin the arbitration, or by refusing to participate in the arbitration and then defending against a court petition First Options would have brought to compel arbitration, see 9, U.S.C. ss. 4); (2) that permitting parties to argue arbitrability to an arbitrator without being bound by the result would cause delay and waste in the resolution of disputes; and (3) that the Arbitration Act therefore requires a presumption that the Kaplans agreed to be bound by the arbitrator's decision, not the contrary. The first of these points, however, while true, simply does not say anything about whether the Kaplans intended to be bound by the arbitrators' decision. The second point, too, is inconclusive for factual circumstances vary too greatly to permit a confident conclusion about whether allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination would, in general, slow down the dispute resolution process. And, the third point is illegally erroneous, for there is no strong arbitration-

Insulators Local 19, Case No. 92-C-121 (E.D. Wis. 1993), decision cited by Complainant and attached to its brief on review, the dispute was whether a grievance fell within the scope of an arbitration clause both parties acknowledged existed. In such a case, the "presumption of arbitrability" law cited by Complainant is applicable (but again is law to be applied by a court/administrative agency not by an arbitration forum). Here, Respondent clearly disputes even the existence of an arbitration clause and thus Kuhlman is clearly inapplicable.

If Complainant had proceeded to the proper forum to litigate the existence of the 1992-94 contract (and thus, an arbitration clause), it is conceivable that the JLMC would have been found to have had the authority to decide that issue. In Local 70 v. Interstate Distributor Co., 831 F.2d 507 (9th Cir., 1987) (cited by Complainant) the Court concluded in the context of a suit to compel arbitration that it was for an arbitrator to decide whether a contract had been terminated or not. In the context of the holdings from A T & T and First Options, the Interstate Court decided the parties had "clearly and unmistakably agreed" to have the arbitrator decide the issue of arbitrability instead

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> related policy favoring First Options in respect to its particular argument here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes. Dean Witter Reynolds, supra, at 219-220, 105 S.Ct., at 1241-1242, but to ensure that commercial arbitration agreements, like other contracts, "are enforced according to their terms," Mastrobuono, 514 U.S. at ____, 115 S.Ct. at 1214 (quoting Volt Information Sciences, 489 U.S. at 479, 109 S.Ct., at 1256), and according to the intentions of the parties, Mitsubishi Motors, 473 U.S., at 626, 105 S.Ct., at 3353. See, Allied-Bruce, 513 U.S. at _____, 115 S.Ct. at 837. That policy favors the Kaplans, not First Options.

of the court. But it is important to note that in Interstate, the union brought the issue to the proper forum (i.e., the court) for resolution before proceeding to arbitration. Thus, Interstate only reaffirms the court's status as the appropriate forum for resolution of arbitrability issues (including the question of whether the parties agreed to have an arbitrator decide arbitrability) and does not support Complainant's position herein.

Because the issue of the existence of an arbitration clause was not one which was appropriate for the arbitration forum (JLMC) to consider and resolve (unless such consideration had been first found appropriate by a court or administrative agency) and because Complainant did not seek a judicial or administrative resolution of that issue, the JLMC arbitration award is unenforceable against Respondent. Nor do we believe it is appropriate for us to now determine the merits of the arbitrability issue which Complainant should have but did not seek to resolve before any arbitration proceeding. To do so would be to encourage rather than discourage the improper sequence of issue resolution followed by Complainant herein 3/ and would (if Complainants were to successfully persuade us that a contract and thus an arbitration clause existed) have the effect of "bootstrapping" the JLMC proceeding back into a status of legitimacy even though Respondent was within its rights to choose not to participate in the JLMC proceeding. 4/

Given all of the foregoing, we have affirmed the Examiner's decision that Respondent did not violate Sec. 111.06(1)(f), Stats. and his dismissal of the complaint.

Dated at Madison, Wisconsin this 29th day of August, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/

3/ As quoted earlier herein, the Court in John Wylie held: ". . .the compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. . ." (emphasis added).

4/ Complainant has correctly argued that the Respondent could have, but did not initiate, a judicial proceeding to raise the issue of arbitrability prior to the JLMC proceeding or could have appeared before the JLMC and preserved its arbitrability defense. However, Complainant has not cited any persuasive precedent for the proposition that Respondent's inaction somehow gave the JLMC jurisdiction to decide the issue of arbitrability. Instead, as the party wishing to proceed to arbitration, it was incumbent on Complainant to initiate litigation to resolve the arbitrability issue. As indicated by the Court in First Options, 115 S.Ct 1920, 1925 (1995), (quoted in Footnote 2 herein), refusing to participate in the arbitration and then defending against a suit to compel arbitration is an acceptable way for an employer to proceed.

James R. Meier, Chairperson

A. Henry Hempe /s/
A. Henry Hempe, Commissioner