

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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OPEIU LOCAL #85, :
 :
Complainant, :
 :
vs. : Case 60
 : No. 51591 Ce-2163
 : Decision No. 28255-A
LADISH COMPANY, INC., :
 :
Respondent. :
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Appearances:

Murphy, Gillick, Wicht & Prachthauser, Attorneys at Law, by Ms. Sandra K. Graf, 300 North Corporate Drive, Suite 260, Brookfield, Wisconsin 53045, appearing on behalf of the Complainant.
Mr. Lawrence C. Hammond, Legal Counsel, Ladish Company, Inc., P. O. Box 8902, Cudahy, Wisconsin 53110-8902, appearing on behalf of the Respondent.

ORDER DENYING RESPONDENT'S
MOTION TO DISMISS COMPLAINT

On September 27, 1994, OPEIU, Local #85, hereinafter Complainant, filed a complaint alleging Ladish Company, Inc., hereinafter Respondent, committed unfair labor practices within the meaning of Sec. 111.06(1)(a), (d) and (f), Stats., by disciplining three employees for refusing to work overtime. On November 17, 1994, Respondent filed a Motion to Dismiss, with accompanying affidavit, the subject complaint contending that as a matter of law Complainant failed to state a claim upon which relief can be granted. Thereafter, on December 1, 1994, Complainant filed a written reply to Respondent's Motion to Dismiss. After reviewing Respondent's Motion, accompanying affidavit and Complainant's reply, the Examiner believes that Complainant's reply presents argument which cannot be dispositively dealt with as a matter of law based simply on the facts as alleged in the complaint and Respondent's affidavit. Therefore, an evidentiary hearing will be necessary to address all relevant facts surrounding Respondent's decision to implement its last offer in order to determine if there is an "implemented agreement," as alleged by the Complainant, and to take evidence as to whether the Commission has jurisdiction over Respondent with regard to Complainant's assertions that Respondent committed unfair labor practices within the meaning of Sec. 111.06(1)(a) and (d), Stats.

NOW, THEREFORE, it is

ORDERED

That Respondent's Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 19th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Examiner

LADISH COMPANY, INC.

MEMORANDUM ACCOMPANYING ORDER
DENYING RESPONDENT'S MOTION TO DISMISS COMPLAINT

The complaint alleges that Respondent has committed unfair labor practices in violation of Secs. 111.06(1)(a), (d) and (f), Stats., by disciplining three of its employees for refusing to work overtime on April 29 and 30, 1994, as requested by the Respondent. Complainant contends that while the conduct occurred subsequent to expiration of the parties' collective bargaining agreement, during the hiatus Respondent implemented a final offer which Complainant characterizes as an "implemented agreement" and that the employee's discipline for refusing to work overtime violated that "implemented agreement" in violation of Sec. 111.06(1)(f), Stats. Complainant also alleges Respondent's conduct in this regard constituted a unilateral "change to existing overtime provisions" in violation of Sec. 111.06(1)(a) and (d), Stats.

Respondent's Motion to Dismiss deals only with Complainant's allegations that Respondent's conduct constitutes a breach contract in violation of Sec. 111.06(1)(f), Stats. It argues that a duty to arbitrate only exists with respect to disputes arising under a collective bargaining agreement, and that the complaint asserts that the alleged breaches occurred on April 29 and 30, 1994, a time when Complainant's pleadings aver there was no collective bargaining agreement in effect. Respondent cites Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 137 LRRM 2441 (1991) et al. in support of its Motion to Dismiss.

Respondent contends that, as a matter of law, Complainant has failed to state a claim upon which relief can be granted because Respondent was not under an affirmative duty to arbitrate grievances that arose during a collective bargaining agreement hiatus. However, this argument is premised on a misunderstanding of what the Complainant has alleged and the relief sought if an unfair labor practice has been committed. The Complainant does not allege that Respondent has committed an unfair labor practice in violation of Sec. 111.06(1)(f), Stats., by refusing to arbitrate the disciplined employees' grievances. Nor is the remedy sought an order that Respondent arbitrate said grievances. Rather it asks the Commission to assert its jurisdiction over the subject matter, conduct a hearing, and determine whether the Respondent has breached a collective bargaining agreement and thereby committed an unfair labor practice in violation of Sec. 111.06(1)(f), Stats. Complainant does not contend Respondent has a duty to arbitrate these grievances under the rule of law enunciated in Nolde Bros., Inc. v. Bakery Workers, 430 U.S. 243, 94 LRRM 2753 (1977) and its progeny, including Litton Financial Printing Div. v. NLRB, supra. To the contrary, it contends the Commission can assert its jurisdiction to determine if a breach of contract occurred, and presumptively that Respondent has no duty to arbitrate said grievances.

The Union's pleadings, and argument in response to Respondent's motion, present a novel claim which has never before been confronted by the Commission.

However, the likelihood of Complainant prevailing in this case is not the basis upon which to decide whether the complaint should be dismissed. If Complainant can prove that there was an "implemented agreement" that does not include final and binding grievance arbitration, which Respondent breached in disciplining the three employees, it would establish a prima facie case that an unfair labor practice had been committed in violation of Sec. 111.06(1)(f), Stats. For these reasons, and because Respondent's Motion misstates, and therefore inappropriately argues the insufficiency of the complaint, the Motion to Dismiss is denied. However, because Complainant's case is premised on such

a novel theory of first impression, the undersigned is also ordering that the hearing on the complaint be bifurcated to deal with, among other matters, the issue of whether there is such an "implemented agreement" that is binding on Respondent, and the parameters of that agreement. If such an agreement can be proven to exist, and additionally, that it would be appropriate for the Commission to assert its jurisdiction to determine whether Respondent breached said agreement, additional hearing will be ordered for the purpose of reviewing evidence on the merits of the grievances.

Although Respondent has not asserted in its Motion to Dismiss that the Commission lacks subject matter jurisdiction over Complainant's allegations that by its disciplining of three employees, Respondent unilaterally changed existing overtime provisions, and thus breached its duty to bargain with Complainant and derivatively interfered with Complainant's rights, the undersigned believes the complaint presents a threshold issue of subject matter jurisdiction. Because jurisdiction cannot be conferred upon the Commission by waiver where it otherwise does not have jurisdiction, the Examiner will take evidence on that aspect of the case in the first phase of the bifurcated hearing.

Dated at Madison, Wisconsin, this 19th day of December, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Examiner