

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 2373**, Complainant,

vs.

SQUARE D COMPANY, Respondent.

Case 12
No. 57097
Ce-2195

Decision No. 29661-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by **Ms. Jill M. Hartley**, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, on behalf of International Brotherhood of Electrical Workers, Local 2373.

Seyfarth, Shaw, Fairweather & Geraldson, Attorneys at Law, by **Ms. Kristin E. Michaels**, 55 East Monroe Street, Suite 4200, Chicago, Illinois 60603, on behalf of Square D Company.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

International Brotherhood of Electrical Workers, Local 2373 filed a complaint of unfair labor practice with the Commission on December 14, 1998, alleging that Square D Company had violated Sec. 111.06(1)(f), Stats., by refusing to submit a grievance to arbitration. On January 22, 1999, Square D Company filed its answer to the complaint. After attempts to informally resolve the matter proved unsuccessful, International Brotherhood of Electrical Workers, Local 2373 filed an amendment to its complaint on May 3, 1999. On May 24, 1999, Square D Company filed a Motion to Dismiss the complaint, with supporting documentation. On July 9, 1999, the Commission appointed Richard B. McLaughlin, a member of its staff, to Act as Examiner. By July 9, 1999, the parties agreed to submit the Motion to Dismiss on

No. 29661-A

briefs. Square D Company filed the final responsive brief and certain accompanying affidavits by September 17, 1999. A misunderstanding regarding this submission arose and was resolved by October 5, 1999.

FINDINGS OF FACT

1. Square D Company (the Company) is an employer within the meaning of the Wisconsin Employment Peace Act (WEPA), and is located at 300 Medalist Drive, Oshkosh, Wisconsin 54904.

2. International Brotherhood of Electrical Workers, Local 2373, (the Union), is the exclusive bargaining representative for certain employees of the Company. The Union's President is Kevin Eggebeen, P.O. Box 2491, Oshkosh, Wisconsin 54903-2491.

3. On December 14, 1998, the Union filed a complaint with the Commission. On January 22, 1999, the Company filed its answer to the complaint. On May 3 and August 4, 1999, the Union filed amendments to its complaint. The August 4, 1999, amended complaint includes, among its allegations, the following:

...

3. On or about November 14, 1997, Mike Whitty, an employee represented by Local 2373, filed a grievance contesting the Company's discriminatory actions and oral warning in violation of Article II, Section 1 of the parties' collective bargaining agreement.

4. The grievance was processed through procedures set forth in the parties' collective bargaining agreement without satisfactory resolution. As a result, the Union requested arbitration.

5. On June 29, 1998, Union President Eggebeen received a memo from the Company indicating that Square D refused to arbitrate the grievance.

6. The Company has violated the parties' collective bargaining agreement.

7. Although the Company has claimed the Union failed to follow the time limitations in the mediation agreement, it has failed to grieve the alleged violation, but has engaged in self help.

8. The violation of the parties' collective bargaining agreement cannot be deferred to arbitration since the Employer effectively has refused to arbitrate the grievance on its merits.

9. The Company is violating the parties' agreement to limit the states from which the panel of potential arbitrators would be drawn to Illinois and Wisconsin by requesting panels from a nine state area.

10. On April 15, 1999, the Company refused to request a panel for grievance No. 18-99 as required by the parties' collective bargaining agreement alleging violation of the parties' July 22, 1997 mediated agreement. The Company did not file a grievance over the alleged violation but engaged in self-help.

11. On or about May 28, 1999, the Company through its legal counsel, Jason Katz, refused to arbitrate any of the above-referenced matters.

12. Since on or about June, 1999, the Company has refused to schedule arbitrations prior to February 2000 in violation of the parties' collective bargaining agreement.

...

On September 8, 1999, the Company filed an answer to the amended complaint. The answer included, among its responses, the following:

...

3. Square D admits that on or about November 14, 1997 Mike Whitty, an employee represented by Local 2373, filed a grievance against Square D. Square D denies all remaining allegations contained in paragraph 3 of the Second Amended Complaint.

4. Square D denies that the grievance was processed without satisfactory resolution. Square D states that it is without knowledge or information sufficient to form a belief as to why the Union requested arbitration.

5. Square D admits the allegations contained in Paragraph 5 of the Second Amended Complaint.

6. Square D denies the allegations contained in Paragraph 6 of the Second Amended Complaint.

7. Square D denies the allegations contained in Paragraph 7 of the Second Amended Complaint.

8. Square D denies the allegations contained in Paragraph 8 of the Second Amended Complaint.

9. Square D denies the allegations contained in Paragraph 9 of the Second Amended Complaint.

10. Square D denies the allegations contained in Paragraph 10 of the Second Amended Complaint.

11. Square D denies the allegations contained in Paragraph 11 of the Second Amended Complaint.

12. Square D denies the allegations contained in Paragraph 12 of the Second Amended Complaint.

...

The Union and Company filed documentation supporting their pleadings.

4. On May 24, 1999, the Company filed a Motion to Dismiss (the Motion). In a letter to the parties, dated July 9, 1999, I stated the following:

I write to state the status of the above-noted matter. It is my understanding that you agree that the pending motion to dismiss poses no issues of fact requiring hearing. It is further my understanding that you agree to enter your arguments thus. . . .

Upon receipt of these briefs, the motion to dismiss will be ready for decision.

. . .

Neither party filed any objection to the May 24, 1999 letter. Both parties filed written argument on the Motion.

5. Included with the documentation supplied by the Company with its May 24, 1999, Motion to Dismiss was an affidavit of Donald Hadley, which includes, among its assertions, the following:

1. I am the Human Resources Manager at Square D Company's ("Respondent") Oshkosh Facility ("Oshkosh Facility").
2. As Human Resources Manager, I am responsible for labor relations, human resources, and labor contract administration for Respondent at the Oshkosh Facility.
3. Respondent and the International Brotherhood of Electrical Workers, Local 2373 ("Complainant") are parties to a collective bargaining agreement ("CBA"). Article X of the CBA provides the procedure for employees to file grievances.

. . .

5. In 1997, Complainant filed an unfair labor practice complaint against Respondent with the Wisconsin Employment Relations Commission ("Commission") alleging violations of Article X of the CBA, including that Respondent was violating Article X of the CBA by refusing to arbitrate grievances. . . .

6. The parties resolved this charge through mediation by entering into a settlement agreement on or about July 22, 1997 (the "Settlement").

. . .

11. Prior to the Settlement, Respondent was advancing grievances to arbitration but Complainant was refusing to select arbitrators or arbitration dates. Some of these pending grievances were over four years old. The Settlement was entered into, in part, to eliminate this practice by Complainant.

12. On or about November 14, 1997, Mike Whitty, an employee of Respondent, and Complainant filed a grievance against Respondent, Grievance Number 149-97 (the "Grievance").

13. The parties did not resolve the Grievance and Complainant requested arbitration.

14. On May 18, 1998, Respondent notified Complainant of the available arbitration dates provided by the arbitrator for the Grievance and indicated which date was acceptable to Respondent.

15. On June 8, 1998, Respondent sent a memorandum to Complainant regarding Complainant's lack of response on arbitration dates. This memorandum referred to the Settlement, the timelines that were established in the Settlement, and the consequences of not meeting those timelines. . . .

16. On June 29, 1998, after still not receiving any arbitration date from Complainant, Respondent notified Complainant that it would not be arbitrating the Grievance because of the passing of the deadline for choosing an arbitration date. . . .

Attached to the Hadley affidavit were a series of exhibits. One of those exhibits included a copy of certain provisions of a collective bargaining agreement between the Company and the Union in effect, on its face, from September 16, 1996 to September 15, 1999. Among those provisions are the following:

ARTICLE X Grievance Procedure

Section 1. During the term of this Agreement, any dispute which arises as to the meaning, application or interpretation of this Agreement shall be settled in accordance with the grievance and arbitration procedure outlined in this Article.

. . .

- a) Grievances not settled under Step 3 shall at the request of the Union . . . be submitted to impartial arbitration.

Also attached to the Hadley affidavit is a copy of a transcript of a complaint hearing involving the Union and the Company, conducted before Daniel J. Nielsen, a Commission-appointed Examiner on July 22, 1997, in cases captioned as Case 9, No. 54987, CE-2179 and Case 10, No. 55284, CW-3666. Ms. Marianne Goldstein Robbins appeared for the Union in that matter, and Ms. Mary Ann McLean appeared for the Company. The transcript reads as follows:

THE ARBITRATOR (sic): The parties have had discussions through the course of the day and have arrived at a voluntary resolution of the cases. My understanding of the resolution is as follows:

. . .

Further, the parties will enter into a side letter of agreement which will run for 1997 and through the end of the collective bargaining agreement. And that side letter of agreement will set forth a procedure for handling cases that had been advanced to the arbitration step. Within five days of advancing to the arbitration step the Company will contact the FMCS for a panel of arbitrators and will carbon the Union on that correspondence. Within two weeks of the receipt of a panel, the parties will meet and select an arbitrator or there is also an option in the contract for request for a new panel. If there's a request for a new panel, the Company will within five days request that new panel. Within two weeks of receiving the subsequent panel, the parties will meet to pick the arbitrator. In any event, once the arbitrator is selected, the Company will contact the arbitrator within five working days of the selection and secure dates. Within two weeks of receiving dates from the arbitrator, the parties will agree -- or will meet to agree on a date or to request a new array of dates. If they request a new array of dates, that request must be made by the Company to the arbitrator within five days. So far does that sound familiar to the parties?

MS. McLEAN: Yes.

THE ARBITRATOR: All right.

MS. ROBBINS: I think there's one thing that we wanted to make clear. That is that all correspondence that the Company sends to arbitrators, the Union will be copied on and that all requests to FMCS and to arbitrators, there will be a request that FMCS and the arbitrator communicate -- send a copy of the letter to the Union as well as to the Company.

MS. McLEAN: Okay. Clarification, to the Union meaning the local or to you?

MS. ROBBINS: To the local.

MS. McLEAN: Okay . . . The Company is in agreement.

THE ARBITRATOR: Now, in the event that either party cancels an arbitration hearing within one week before the hearing, the cancelling party will pay the cost of the cancellation fee unless the cancellation is the result of a voluntary mutual settlement. If there is a violation of the timelines set forth in the side letter, the party violating the guidelines, unless they have made a written request for an extension of a specific period of time beforehand, will default the case on a non-precedential basis.

MS. McLEAN: I'd like to add in that it has to be mutually agreed upon. I mean, a written request with a specific day upon mutual agreement.

MS. ROBBINS: That's not what we understood.

THE ARBITRATOR: Let's go off the record here.

(A brief discussion was held off the record.)

THE ARBITRATOR: The clarification of the timeliness guidelines, if there's a request for an extension, the party may voluntarily agree to any length of extension or extension of any length but each party does have -- has a matter of right, the ability to request a two-week extension of the time lines. Failure to make such a request and violation of the time lines yields a default on a non-precedential basis. That doesn't apply to discharge cases, however. In discharge cases, the result of violating the timeliness guidelines would be that the party that was violating the timeliness guidelines would pay the cost of the arbitrator's fees for the hearing days involved in the case. The side agreement would be enforceable via the grievance and arbitration provisions of the contract. Does that sound like a fair summation?

MS. ROBBINS: I think that there needs to be clarification in saying that the hearing -- that -- in a discharge case that there would be the default would be payment of the arbitrator's fee for the hearing dates, that would not include other fees such as transcript fees or the arbitrator's fee for briefing.

MS. McLEAN: And those fees would be subject to the --

MS. ROBBINS: To splitting.

MS. McLEAN: Yes.

MS. ROBBINS: Splitting equally.

MS. McLEAN: Yes.

THE ARBITRATOR: Okay. The final point is that with respect to the allegations in the Union's complaint of violation of a settlement agreement on reading on the job, the Company agrees that by withdrawing the complaint and settling the complaint the Union is not waiving that argument in the pending grievance on that topic, is not making any admission of any type with respect to that. Is that --

MS. ROBBINS: That the Union's position in the present case is not waived and can be fully litigated in any future grievance which addresses the issue in the context of this.

MS. McLEAN: Yes, on the issue of reading materials. On the issue of withdrawal of unfair labor practice charges, the same issue that was part of the unfair labor practice charge filed before the with ERC, both parties agree not to file any similar actions with any other agency, tribunal, or court on the same issues, leaving open the issue of the reading materials.

MS. ROBBINS: I'm thinking about that for a moment. That also is something that we had not discussed. There's another item that's missing in that is that in terms of the additional grievances, if there would be additional grievances during the term of the contract on discharge cases, that they would have priority.

THE ARBITRATOR: I apologize.

MS. ROBBINS: If there were a conflict in dates at the point where the parties were selected, a conflict of availability of counsel, that the discharge case would have priority.

MS. McLEAN: We'll agree to that as long as we've got complete waiver on the issues of this. I don't want to be fighting this again tomorrow.

MS. ROBBINS: Okay. You just said a complete waiver.

MS. McLEAN: I meant --

MS. ROBBINS: I assume you were rephrasing the prior --

MS. McLEAN: To mean --

MS. ROBBINS: -- proposal, which is not the waiver of the reading material issue.

MS. McLEAN: But on the issues that we've -- all believe we've resolved here today and by withdrawing this unfair labor practice, both parties are agreeing not to file a similar charge with another court or agency.

MS. ROBBINS: With the exception of the reading material, which we've talked about.

MS. McLEAN: We agree.

THE ARBITRATOR: Is there anything --
(A brief discussion was held off the record.)

THE ARBITRATOR: We have an agreement on the not raising the issue of additional forms. Is there anything further to come before the examiner?

MS. McClean: No.

MS. Robbins: No.

The agreement reached during this hearing is referred to below as the Settlement.

6. Included with the documentation supplied by the Union with its August 4, 1999 amended complaint were the affidavits of Marianne Goldstein Robbins and Kevin Eggebeen. Eggebeen's affidavit includes, among its assertions, the following:

. . .

4. On Thursday June 18, 1998, Company representative Mary Hilker sent me a memo asking that the Union and Company agree on a date for arbitration of Mr. Whitty's grievance by Monday, June 22, 1998.
5. I spoke with Ms. Hilker regarding arbitration dates for the Whitty grievance early in the week of June 22, 1998.
6. I informed Ms. Hilker that I needed to speak with the Union's International Representative regarding his availability because he was the one who would be handling the arbitration hearing for the Union.
7. Ms. Hilker agreed to give me until the following Monday, June 29, 1998, to get back to her with an acceptable date for the arbitration hearing.
8. I reached our International Representative on Friday, June 26, 1998 and confirmed an arbitration date with him.
9. On Saturday, June 27, 1998, I called the Company's Human Resources Department and left a message for Ms. Hilker informing her of the International Representative's availability for hearing.
10. On Monday, June 29, 1998, I received a memo from Ms. Hilker informing me that the Company would no longer arbitrate Mr. Whitty's grievance because the union had missed the deadline for scheduling a hearing.

. . .

Goldstein Robbins' affidavit includes, among its assertions, the following:

. . .

2. On or about May 28, 1999, I had a telephone conversation with Attorney for Respondent, Jason Katz, regarding the above-captioned complaint.
3. During our telephone conversation, I inquired as to whether Respondent would be willing to arbitrate the issues raised in the complaint.
4. Mr. Katz informed me that the Respondent, Square D Company, would not agree to arbitrate any of the issues raised in the complaint.

The Union has not amended the complaint since August 4, 1999.

7. Included with the documentation supplied by the Company with its September 8, 1999 answer to the amended complaint were the affidavits of Jason Katz, Mary Hilker and Donald Hadley. Hilker's affidavit includes, among its assertions, the following:

1. I am the Human Resources Representative at Square D . . .

. . .

3. On May 18, 1998, I had a conversation with Randy Brown, Vice President of International Brotherhood of Electrical Workers, Local 2373, during which I provided Mr. Brown with dates that the Company was available to arbitrate Grievance Number 149-97 . . .

4. On June 4, 1998, I sent a memorandum to Mr. Brown reminding him that the Company had notified Mr. Brown on May 18, 1998 of dates it was available for arbitration . . . As of June 4th, the Company had received no response from the Union. In the memorandum, I reminded Mr. Brown that, pursuant to the parties' Settlement Agreement of July 22, 1997 . . . the Union was required to respond within two weeks to the Company's offer of arbitration dates. I further informed Mr. Brown that, because more than two weeks had passed since our May 18th conversation, the Whitty grievance was in default. . .

5. On June 8, 1998, I sent another memorandum to Mr. Brown, in which I reiterated that the Union had not met the required deadline for scheduling the arbitration hearing for the Whitty grievance, and thus was in default. . . .

6. In a memorandum I sent to Kevin Eggebeen dated June 18, 1998, I indicated that, although the deadline had passed for the Union to respond to available arbitration dates for the Whitty grievance, the Company would give the Union until June 22, 1998 to respond with available dates. . . .

7. I spoke with Mr. Brown on June 22, 1998, at which time Mr. Brown stated that the Union would provide the Company with available arbitration dates on June 23, 1998. On June 25, 1998, having not heard anything from the Union, I sent a memorandum to the Union stating that they were in default on the Whitty grievance and that the Company would not arbitrate the Whitty grievance. . . .

8. Contrary to Mr. Eggebeen's affidavit, I never agreed that the Union could have until June 29, 1998 to notify the Company of available arbitration dates. Furthermore, pursuant to the parties' Settlement Agreement, any request for an extension of time to respond to available arbitration dates must be in writing.

9. On June 29, 1998, I sent a memorandum to Mr. Eggebeen memorializing the events for the week of June 22, 1998, including confirming that Mr. Brown had stated that the Union would respond by June 23, 1998 with available arbitration dates . . . I received no response from Mr. Eggebeen or the Union disputing the statements in my June 29, 1998 memorandum. . . .

Hadley's affidavit includes, among its assertions, the following:

3. Square D Company is, and always has been, willing to arbitrate a grievance over the Company's refusal to arbitrate Grievance No. 149-97 (the Mike Whitty grievance).

. . .

5. IBEW Local 2373 has never filed a grievance over the Company's refusal to request an arbitration panel for grievance no. 18-99.

6. IBEW Local 2373 has never filed a grievance over its claim that Square D is violating an agreement to limit the states from which a panel of potential arbitrators are drawn.

7. Square D has no agreement with IBEW Local 2373 to limit the states from which a panel of potential arbitrators is drawn.

Katz' affidavit includes, among its assertions, the following:

2. I have never stated to Marianne Goldstein Robbins, counsel for the Complainant, that Square D Company was unwilling to arbitrate a grievance over the Company's refusal to arbitrate . . . the Mike Whitty grievance.

3. I have stated to Ms. Robbins that the Company is unwilling to arbitrate the merits of the Mike Whitty grievance. I have never stated to Ms. Robbins that Square D is unwilling to arbitrate any other grievance.

The Company has not filed any formal pleading since September 8, 1999.

8. The Company is within the jurisdiction of the National Labor Relations Board (NLRB). The Union does not, in this proceeding, allege repudiation by the Company of the grievance procedure noted in Finding of Fact 5. The Company's refusal to arbitrate the merits of either the Whitty grievance or Grievance No. 18-99 does not, in this proceeding, warrant Commission exercise of its jurisdiction under Sec. 111.06(1)(f), Stats., to determine the merit of either grievance.

CONCLUSIONS OF LAW

1. The Union serves as the "representative", within the meaning of Secs. 111.02 (10) and (11), Stats., of certain "employee(s)", within the meaning of Sec. 111.02(6), Stats., of the Company.

2. The Company is an "employer" within the meaning of Sec. 111.02(7), Stats.

3. The exercise of Commission jurisdiction over the Company, under Sec. 111.06(1), Stats., is preempted by the National Labor Relations Act as to those allegations of the amended complaint for which the Union has not filed a grievance.

4. The exercise of Commission jurisdiction under Sec. 111.06(1)(f), Stats., regarding the Whitty grievance and Grievance No. 18-99 is not preempted by the National Labor Relations Act.

5. Commission exercise of jurisdiction under Sec. 111.06(1)(f), Stats., to determine the merits of the Whitty grievance or Grievance No. 18-99 is inappropriate provided the Company and Union submit those matters to grievance arbitration consistent with the terms of the grievance procedure and Settlement noted in Finding of Fact 5. This submission does not require the Company to waive any argument that the grievance procedure or Settlement noted in Finding of Fact 5 demands an arbitration award stating that the Union has, through its processing of the Whitty grievance and Grievance 18-99, defaulted either or both of them. This submission does not require the Union to waive any argument that the grievance procedure or Settlement noted in Finding of Fact 5 permits an arbitration award addressing the contractual merit of the Whitty grievance and Grievance 18-99. The dismissal of the complaint is necessary to effect the preference, under Sec. 111.06(1)(f), Stats., and governing federal law, for grievance arbitration, and is made without prejudice to the Union's right to refile a complaint if the Company refuses to submit either the Whitty grievance or Grievance No. 18-99 to arbitration consistent with the terms of the grievance procedure or Settlement noted in Finding of Fact 5 and the Order entered below. Governing limitations on the filing of complaints shall be deemed to have been tolled during the pendency of this complaint.

ORDER

The complaint, as amended, is dismissed, without prejudice to the right of the Union to refile a complaint, if necessary, under Conclusion of Law 5.

Dated at Madison, Wisconsin, this 17th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

SQUARE D COMPANY

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER**

THE PARTIES' POSITIONS

The Company's Initial Brief

The Company notes that the complaint, as amended, seeks the arbitration of the Whitty grievance, a determination that it is violating the labor agreement by requesting arbitration panels from a nine state area, and a determination that its refusal to request an arbitration panel for Grievance No. 18-99 violated the July 22, 1997 settlement agreement. The Union's failure to submit these issues to grievance arbitration "requires dismissal of both the Complaint and Amended Complaint. Beyond this, the complaint and amended complaint "are preempted by federal labor law."

Since the labor agreement and the mediated settlement require disputes "to be resolved through the grievance and arbitration process" it follows, according to the Company, that the Union "has failed to state a claim upon which relief can be granted." Each of the issues posed by the complaint and amended complaint "constitutes a dispute under the CBA and/or Settlement," and thus each must be submitted to the contractually set means to resolve disputes. Since the Union has failed to allege recourse to arbitration would be futile and since there is no claim it has refused to arbitrate any pending issue, "Complainant has not stated a viable claim." Since the parties intentionally agreed to enforce disputes through arbitration and not through the unfair labor practice process, assertion of Commission jurisdiction would be "(c)ontrary to WEPA's purpose of promoting industrial peace." Underlying the mediated settlement was an "abusive practice" by which Complainant accumulated "a backlog of pending arbitrations . . .to improve its settlement posture with Respondent." To assert Commission jurisdiction would render the settlement meaningless.

Beyond this, the Union's allegations are "'arguably' subject to Section 8 of the National Labor Relations Act," and thus preempted by federal law. Since the Union's three fundamental allegations turn on the violation of the "contractual grievance and arbitration procedures," and since those allegations fall "within the ambit of Section 8," it follows that "the Commission's jurisdiction over such allegations is preempted." The Company concludes that the complaint, as amended, must be dismissed "and the Respondent be awarded its costs, disbursements and reasonable attorneys' fees."

The Union's Reply

After a review of the documentation supporting the motion, the Union contends that the complaint, as amended, is “properly before the Commission and may not be dismissed.” The Union characterizes the Company’s assertion that the complaint should be dismissed based on the Union’s failure to follow the grievance procedure thus:

Respondent, however, although it has claimed that the union is guilty of failing to follow time limitations in the mediation agreement, has itself failed to grieve the alleged violation according to the agreement, and resorted to self-help by refusing to arbitrate.

Thus, there “is no merit to the argument that the Union is precluded from seeking assistance from the Commission.”

Even if such merit existed, “the Company has indicated that it will not agree to arbitrate any of the issues raised by Complainant.” If the matter cannot be placed before the Commission, the Union is left “without a remedy.” Under Commission case law, “it will only decline jurisdiction when it is clear that the parties will waive any impediments to arbitration under their agreement and allow an arbitrator to issue a decision on the merits of the claim.” The Company’s refusal to arbitrate “clearly renders the filing of a grievance futile,” and the motion to dismiss must be denied.

Nor is there “merit to the Company’s allegation that the Union is attempting to ‘turn back the clock and wash its hands of the Settlement.’” The Union “sought and received an extension” for scheduling the grievance the Company accuses the Union of abandoning under the settlement. The facts underlying the motion to dismiss “must be liberally construed in favor of the complainant and the motion must be denied except where no interpretation of the facts alleged would enable the (complainant) to relief.” Since the facts alleged in the amended complaint and supporting documentation support a remedy, it follows that “dismissal is inappropriate.”

Nor can the complaint be considered preempted by federal labor law. The amended complaint “alleges isolated violations of the collective bargaining agreement and seeks enforcement of the agreement.” NLRB precedent supports preemption only if an employer’s “refusal to arbitrate . . . amounts to a wholesale repudiation of the contract” or “a modification of the agreement” which could constitute a violation of Section 8(a)(1) or (5). The isolated violations of contract alleged in the amended complaint appropriately require the enforcement of the agreement and are thus properly before the Commission.

The Union concludes, “Respondent’s Motion to Dismiss must be denied.”

The Company's Reply

The Company repeats that the 1997 complaint was rooted in the Union's "stockpiling grievances (to improve its settlement posture)" and produced the Settlement. The Agreement addressed the "stockpiling" issue "by requiring Complainant to meet certain deadlines for the filing of grievances" and by setting grievance arbitration, not an unfair labor practice proceeding, as the enforcement forum. To assert Commission jurisdiction is to undermine the contractual forum where "Complainant has neither exhausted its contractual remedies nor complied with the parties' Settlement Agreement." The Company puts the point thus:

Counsel for Respondent has never stated that Respondent refuses to arbitrate the issue of whether, under the parties' Settlement Agreement, Respondent may properly refuse to arbitrate the merits of the Whitty grievance. Respondent has been willing to arbitrate this grievance, and remains willing to do so. . . . Should an arbitrator find that Complainant has not defaulted the Whitty grievance, then Respondent would subsequently proceed to arbitrate the merits of the Whitty grievance.

Against this background, an assertion of Commission jurisdiction "would render meaningless both the parties' Settlement Agreement and Collective Bargaining Agreement, allow Complainant to circumvent the contractual provisions it has agreed to, and undermine WEPA's purpose of promoting stability in, and giving effect to, parties' written agreements."

Beyond this, the Company argues that the labor agreement does not permit it to file the grievance that the Union attempts to fault it for not filing. At most, the Union's argument "is a tacit admission that exhaustion of contractual remedies is a prerequisite to engaging in or seeking any extra-contractual remedies." Beyond this, the Company contends that the Settlement Agreement addresses "stockpiling" by the Union, and cannot be read to encourage the Company to file grievances.

Even if the Commission could address the complaint's allegations, the Union's arguments establish their lack of merit. Ignoring potential disputes of fact, the Union acknowledges that the requested extension of grievance timelines was made verbally, in spite of the terms of the Settlement Agreement. Beyond this, the absence of factual allegations underlying the amended complaint precludes Commission resolution of their merit.

Nor can the preemption argument be resolved as the Union asserts. An examination of the amended complaint establishes that the Union does assert a wholesale repudiation of the grievance procedure by the Company. This puts the complaint and its amendments at odds.

The Union cannot assert that the Commission should exercise its jurisdiction over an isolated violation of contract, while alleging in the amendments to the complaint a series of allegations that “Respondent repeatedly refuses to arbitrate grievances.”

The Company concludes that the complaint, as amended, should “be dismissed with prejudice, and Respondent be awarded its costs, disbursements and reasonable attorneys’ fees.”

DISCUSSION

The Motion poses a number of troublesome points. The necessary preface to addressing it is to specify the allegations posed by the amended complaint and the governing law. After this, the law can be applied to the allegations of the amended complaint to address the Motion.

The first allegation spans Paragraphs 3 through 8 of the amended complaint. The Union alleges that the Company, in violation of the labor agreement, refused to arbitrate the Whitty grievance. Since the Company has not filed a grievance over alleged Union non-compliance with time limits, it has engaged in improper self help. Since the Company’s refusal precludes arbitral determination of the merit of the Whitty grievance, it cannot be deferred to arbitration. The second allegation is covered by Paragraph 9 of the amended complaint, and asserts Company violation of “the parties’ agreement to limit the states” from which arbitration panels are drawn. Paragraph 10 of the amended complaint states the next allegation, asserting that the Company declined to request an arbitration panel as a means of self help to challenge alleged Union non-compliance with the Settlement. Paragraph 12 of the amended complaint details the final allegation, asserting Company refusal to promptly schedule arbitration hearings.

The Motion urges that the complaint fails to state a claim upon which relief can be granted by the Commission. The Motion essentially asserts that the amended complaint makes an improper forum choice. Union allegations can yield no Commission relief since they are either preempted by federal labor law, or must be determined in the contractual forum established by Article X of the Collective Bargaining Agreement and the Settlement.

Sec. 111.06(1), Stats., establishes the unfair labor practices enforceable by the Commission. Subsection (f) 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).”

Commission enforcement of the unfair labor practice provisions of the WEPA is, however, subject to preemption by federal labor law. The parties do not dispute that the Company is subject to the exercise of the jurisdiction of the NLRB. The unfair labor practices administered by the Commission and the NLRB are not, however, identical. Sec. 111.06(1)(f), Stats., grants authority distinguishable from the unfair labor practices administered by the NLRB. As a result, preemption must be applied in distinguishable tracks.

BUILDING TRADES COUNCIL (SAN DIEGO) v. GARMON, 359 U.S. 236, 244-245, 43 LRRM 2838 (1959), establishes that “(w)hen an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted.” Thus, the Commission can exercise, over an employer subject to the jurisdiction of the NLRB, no authority based on those provisions of Sec. 111.06(1), Stats., which would impinge on the primary jurisdiction of the NLRB. However, there is no parallel NLRB jurisdiction to Sec. 111.06(1)(f), Stats., and the Commission has stated “(w)here parallel provisions do not exist . . . we proceed to exercise our jurisdiction.” AQUA-CHEM, INC., DEC. NO. 26102-B (WERC, 11/90) at 8.

This jurisdiction is essentially that granted by Sec. 301 of the Labor Management Relations act. Under Sec. 301, an agreement to arbitrate is enforceable in court, TEXTILE WORKERS v. LINCOLN MILLS 353 U.S. 448, 40 LRRM 2113 (1957). CHARLES DOWD BOX CO. v. COURTNEY, 368 U.S. 502, 49 LRRM 2619 (1962) established that state courts have concurrent jurisdiction with federal courts over Sec. 301 actions. The Commission has been determined to be a competent state tribunal of concurrent jurisdiction with state and federal courts to determine violations of collective bargaining agreements. TECUMSEH PRODUCTS CO. v. WERB, 23 Wis.2d 118 (1963), and AMERICAN MOTORS CORP. v. WERB, 32 Wis.2d 237 (1966). The Commission must, however, apply substantive federal law in enforcing Sec. 111.06(1)(f), Stats. TECUMSEH, supra., and TEAMSTERS LOCAL 174 v. LUCAS FLOUR CO., 369 U.S. 95 (1962). This states a branch of the preemption doctrine distinguishable from GARMON, see, for example, VACA v. SIPES 386 U.S. 171 (1967).

The distinction is, however, blurred in certain cases. The NLRB has determined that an employer’s “wholesale repudiation of its obligation to arbitrate” constitutes an unfair labor practice under Secs. 8(a)1 and 5, INDIANA & MICHIGAN ELECTRIC CO., 284 NLRB No. 7 (1987). NLRB exercise of its primary jurisdiction can, then, overlap the enforcement of a collective bargaining agreement, thus blurring the distinction between the tracks of preemption.

This sets the general background to the Motion. To address the Motion these general considerations must be applied to the specific allegations of the amended complaint. The Motion asserts that the Whitty grievance poses an issue of compliance with procedural requirements of the Labor Agreement and the Settlement, and that this dispute should be determined through arbitration. The degree of judicial preference for arbitration can be debated, but since the STEELWORKERS TRILOGY, the preference is undeniable, UNITED STEELWORKERS V. AMERICAN MFG. CO., 363 U.S. 564, 46 LRRM 2414 (1960); UNITED STEELWORKERS V. WARRIOR & GULF NAVIGATION Co., 363 U.S. 574, 46 LRRM 2416 (1960); and UNITED STEELWORKERS V. ENTERPRISE WHEEL & CAR CORP., 363 U.S. 593, 46 LRRM, 2423 (1960), AT&T TECHNOLOGIES, INC. V. COMMUNICATION WORKERS OF AMERICA, 475 U.S. 643, 121 LRRM 3329 (1986), and DEHNART V. WAUKESHA BREWING CO., INC., 17 WIS.2D 44 (1962).

Viewed separately or together, the labor agreement and the Settlement are enforceable through Sec. 111.06(1)(f), Stats., BAY SHIPBUILDING CORP., DECS. NO. 19957-B and 19958-B (Shaw, 4/83), aff'd DECS. NO. 19957-C and 19958-C (WERC, 2/84). Enforcement through WEPA must, however, account for the presence of grievance arbitration and the judicial preference for that forum. Both parties' arguments presume exhaustion of the arbitration process is necessary prior to Commission exercise of its authority to enforce the agreement. Beyond this, "the Commission's usual policy in response to a complaint alleging breach of contract is to defer to the arbitration process" DECS. NO. 19957-B and 19958-B, supra., at 10, and see NORTHLAND COLLEGE, DEC. NO. 22094-B (WERC, 5/86).

Applied more specifically to this case, deferral means the exercise of discretion by the Commission not to assert its contract enforcement powers in deference to the arbitration process. Given the GARMON line of preemption, this meaning of deferral is significant, since the complaint cannot involve Commission deferral to arbitration of unfair labor practices it could not properly assert jurisdiction over. Thus focused, the deferral issue is whether recourse to arbitration is futile in this case, since the Company has refused to arbitrate the Whitty grievance.

It is not necessary to resolve a factual dispute between the Goldstein Robbins and Katz affidavits to address this issue. Hadley's affidavit states the Company's willingness to arbitrate a grievance on Union compliance with the time limits of the Settlement. The Company's reply brief states its willingness to litigate the merits of the Whitty grievance if an arbitrator determines the Union has not defaulted it under the Settlement. Recourse to Sec. 111.06(1)(f), Stats., does not grant the Union greater rights to a determination of the merits of the grievance than granted by the Collective Bargaining Agreement and the Settlement. Sec. 111.06(1)(f), Stats., does not operate as a defense for violation of contractual time lines, ALUMINUM GOODS MANUFACTURING COMPANY, DEC. NO. 3923 (WERC, 3/55) aff'd in relevant part, ALUMINUM

GOODS MANUFACTURING COMPANY V. WERB, 271 WIS. 597 (1956). The issue of compliance with contractual time requirements is a matter of procedural arbitrability that should be left to an arbitrator to resolve, see DUNPHY BOAT V. WERB, 267 WIS. 316 (1954), SEAMAN-ANDWALL CORP, DEC. NO. 5910 (WERC, 1/62); ALLEN-BRADLEY CO., DEC. NO. 6284 (WERC, 3/62), HANDCRAFT COMPANY, INC. DEC. NO. 13510-B (1/76). Against this background, the matter should be resolved in arbitration. This denies the Union a remedy only if the Company, contrary to the Hadley affidavit and its reply brief, refuses to arbitrate. The Order entered above addresses this possibility by dismissing the complaint without prejudice to the Union's right to refile if such a refusal occurs. Cf., STATE OF WISCONSIN ET. AL., DEC. NO. 15261 (WERC, 1/78), and WAUKESHA COUNTY, DEC. NO. 28726-C (McLaughlin, 9/97), AFF'D BY OPERATION OF LAW, DEC. NO. 28726-D (WERC, 10/97). The Order seeks to preserve the preference for arbitration without prejudicing the Union's ability to seek a remedy if recourse to that process proves futile.

The complaint alleges that the Company's refusal to arbitrate the Whitty grievance is a form of improper self help, since it failed to file a grievance on the timeliness issue. "Self help" can be taken to mean that the Company's refusal to arbitrate, rather than to file a grievance, violates the Labor Agreement or the Settlement. Whether or not the Company has a right to grieve under the Labor Agreement, "self help" has no contractual significance if the Labor Agreement or the Settlement demand that the Whitty grievance be considered defaulted because untimely processed by the Union. The Company's stated willingness to arbitrate this issue, and the merits of the Whitty grievance if it does not prevail on the timeliness issue, puts the contractual component of "self help" within the preference noted above for arbitration.

Beyond this, "self help" can be taken to mean the Company's refusal to arbitrate is unilateral action that interferes with protected rights or the duty to bargain. The Union's brief states that the amended complaint does not allege wholesale Company repudiation of the grievance procedure. This statement, as the Company's professed willingness to arbitrate, must be taken on its face. The statement underscores that Commission jurisdiction under Sec. 111.06(1)(f), Stats., can extend to the contractual component of "self help." It cannot, however, remove the interference and duty to bargain implications of "self help" from the GARMON line of preemption, since the NLRB enforces, as its primary jurisdiction, allegations of interference with protected employe rights and the duty to bargain. In sum, the contract enforcement component of "self help" must be left for a grievance arbitrator, and the remaining statutory component of those terms must be left for the NLRB.

Similar considerations govern the next Union allegation, concerning alleged Company refusal to honor an agreement to limit the states from which arbitration panels are drawn. The amended complaint does not allege the Union has filed a grievance on this point, or that the

Company has refused to process such a grievance. The Hadley affidavit asserts no such agreement exists. From this, it could be concluded that the Company would refuse to arbitrate such a grievance. The denial that an agreement exists can be taken to indicate a dispute over substantive arbitrability. A dispute over substantive arbitrability poses a threshold legal point to a contractual dispute. It thus falls within Sec. 111.06(1)(f), Stats., and cannot be resolved by declining jurisdiction to permit an arbitrator to address it. See, generally, STEELWORKERS V. WARRIOR NAVIGATION CO., 363 U.S. 574, 582, 46 LRRM 2416 (1960); AT&T TECHNOLOGIES, INC. V. COMMUNICATIONS WORKERS OF AMERICA, 475 U.S. 643, 121 LRRM 3329, 3331 (1986); FRANK KUEHL, D/B/A KUEHL ELECTRIC, DEC. NO. 27854-B (WERC, 8/96).

Here, however, the issue is speculative. There is no dispute that the Collective Bargaining Agreement provides for grievance arbitration. There is, however, no allegation that the Union has filed a grievance that the Company has refused to arbitrate. Rather, Paragraph 9 asserts the Company is violating “the parties’ agreement to limit . . . the panel.” In the absence of contract enforcement under Sec. 111.06(1)(f), Stats., the Commission has no authority to determine the allegation. There can be no contract enforcement in the absence of a grievance processed through the grievance procedure, and thus the allegation connotes interference and refusal to bargain issues falling within the GARMON line of preemption.

The next allegation involves alleged Company refusal to request a panel for Grievance 18-99 “as required by the parties’ collective bargaining agreement.” Paragraph 10 highlights Company failure to file a grievance and recourse to self help. The Hadley affidavit asserts that the Union failed to grieve this point. Commission interpretation of the Collective Bargaining Agreement or the Settlement is not necessary to underscore that “self help” as used in Paragraph 10 has the contractual and non-contractual components discussed above regarding the Whitty grievance. As noted above, the non-contractual components connote interference and refusal to bargain issues falling within the GARMON line of preemption. To the extent the refusal to request a panel turns on Company or Union compliance with the procedural requirements of the Collective Bargaining Agreement or the Settlement, it falls within the preference for grievance arbitration noted above. Unlike the Whitty grievance, the record does not specifically state Company willingness to arbitrate the issue. However, the conditional Order stated above permits the Union to refile the complaint if unilateral Company action precludes arbitral determination of the issue. This attempts to preserve the preference for grievance arbitration without denying the Union a remedy if the forum is unavailable through improper unilateral action by the Company.

Paragraph 12 poses the final allegation requiring discussion here. The allegation questions a Company refusal, “(s)ince on or about June, 1999” to schedule arbitrations prior to February of 2000. The paragraph does not allege the Union has grieved the point. A

grievance cannot be presumed under Sec. 111.06(1)(f), Stats. Union contention that Commission dismissal of the complaint leaves it without a remedy begs what is a jurisdictional issue for the Commission. If the alleged refusal violates the labor agreement, the violation is grievable. If the violation is grievable, but not grieved, the Commission lacks the ability to assert its authority under Sec. 111.06(1)(f), Stats. The absence of a grievance cannot establish futility of using the grievance procedure, since the futility of recourse to the procedure is established by the response to a grievance. The appropriate steps in response to a grievance are specified by Article X, not by pleadings before the Commission. In any event, in the absence of a grievance, the violation alleged in Paragraph 12 appears to question a repudiation of the grievance procedure that is resolvable, under GARMON, by the NLRB, not the Commission. Cf. WJA REALTY LIMITED PARTNERSHIP, 308 NLRB 728 (1992).

In sum, the Order entered above seeks to reconcile the relationship of arbitral, NLRB and Commission jurisdiction by declining to assert Commission jurisdiction under Sec. 111.06(1)(f), Stats., regarding the Whitty grievance and Grievance No. 18-99. This essentially defers them to grievance arbitration in the narrow sense of the term “defer”, see, STATE OF WISCONSIN, DEC. NO. 25281-C (WERC, 8/91) at 12, FOOTNOTE 3/.

The conditions to the Order, noted in Conclusion of Law 5, are stated to permit the issues posed in the grievances to be addressed, to the extent appropriate under the Labor Agreement and the Settlement, in grievance arbitration. The conditions are stated to permit the Company to maintain its position that the Union has not complied with the procedural requirements of the grievance procedure. The conditions are also stated to assure that the Union has access to grievance arbitration to the full extent permitted by the Labor Agreement and the Settlement. This does not guarantee a determination of the merit of either grievance. Rather, it guarantees that an arbitrator’s ruling on contract language, not unilateral Company action, will determine whether either grievance has merit or has been defaulted under the terms of the Labor Agreement and the Settlement. The Order does not address whether the procedural issues are to be handled as a threshold proceeding or by separate arbitrators. This treats such points as procedural items governed by the Labor Agreement and the Settlement. If they pose issues of substantive, not procedural, arbitrability, the Commission becomes an appropriate forum under Sec. 111.06(1)(f), Stats., whether invoked by a Union refile of the complaint or by a Company-filed complaint. The Order of Dismissal does not “leave the Union without a remedy.” Rather, it makes the Order final, and thus appealable as a matter of right to the Commission. Cf. WAUKESHA COUNTY, supra.

The Order declines to assert Commission jurisdiction over the remaining complaint allegations. This reflects that in this case, in the absence of a grievance processed through the grievance procedure to pose an actual issue of contract interpretation, the Commission has no means of exercising authority under Sec. 111.06(1)(f), Stats., without encroaching upon the NLRB’s primary jurisdiction, in violation of the GARMON line of preemption.

Both parties request attorneys' fees and costs. Neither party cites authority for the request. Under current Commission law, no such award is appropriate to the Company as the responding party, see DEPT. OF EMPLOYMENT RELATIONS ET. AL., DEC. NO. 29093-B (WERC, 11/98). Nor is such an award appropriate to the Union, since the Motion poses no frivolous defense, see MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 16471-D (WERC, 5/81), aff'd in pertinent part, MTI v. WERC, 115 WIS.2D 623 (CT.APP. 1983).

Dated at Madison, Wisconsin, this 17th day of November, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

RBM/gjc
29661-A.D