STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PAPER, ALLIED INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, (PACE) LOCAL 7-0558, Complainant,

vs.

WESBAR CORPORATION, Respondent.

Case 3
No. 58845
Ce-2202

Decision No. 30030-A

ORDER DENYING MOTION TO DEFER TO ARBITRATION

On April 21, 2000, Paper, Allied Industrial, Chemical & Energy Workers International Union (PACE) Local 7-0558, filed a complaint with the Wisconsin Employment Relations Commission (WERC) alleging that Wesbar Corporation had committed unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA). Specifically, the complaint alleged that the Company breached a grievance settlement agreement concerning the material handler position. On September 13, 2000, the Union amended the aforementioned complaint by adding another cause of action. The amendment alleged that when the Company announced a change in the employees' work schedule, it breached an oral agreement between the parties dealing with hours of work. On January 10, 2001, the Commission appointed Raleigh Jones to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order in the matter. A hearing on the complaint is scheduled for February 16, 2001. On January 18, 2001, the Company filed a motion to defer the matters complained of to the grievance and arbitration provisions included in the parties' collective bargaining agreement. The Union responded to the motion on January 29, 2001. Both sides subsequently filed additional written statements in the matter. After considering the arguments of the parties, the Examiner has decided to deny the Company's Motion to Defer the matters complained of to grievance arbitration.

Accordingly, it is

ORDERED

That the Motion to Defer to Arbitration is denied.

Dated at Madison, Wisconsin this 14th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

WESBAR CORPORATION

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DEFER TO ARBITRATION

DISCUSSION

The complaint and amended complaint raise breach of contract claims under Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act (WEPA). The first claim is whether the Company breached an alleged grievance settlement agreement concerning the material handler position. The second claim is whether the Company breached an alleged oral agreement between the parties dealing with hours of work. The Union avers that both of the agreements which it seeks to enforce are not contained in the parties' current collective bargaining agreement, and are not subject to arbitration under that agreement.

In Wisconsin, breach of contract claims can be addressed and resolved in several different forums. The forums relevant to this case are 1) grievance arbitration and 2) statutory complaint adjudication by the WERC. With regard to the latter forum, it suffices to say here that the Commission has a statutory duty to ensure that claims of statutory violations receive a determination on the merits in a fair and timely fashion. Sec. 111.06(1)(f) of WEPA specifically empowers the WERC to hear and adjudicate breach of contract claims.

In this case, the Union wants to litigate the aforementioned breach of contract claims before the WERC. The Company proposes to move the litigation to a different forum, namely the grievance and arbitration provisions included in the parties' collective bargaining agreement. Thus, the question for resolution herein is whether the matters complained of should be heard by the WERC (as the Union wants) or deferred to arbitration (as the Company wants).

In STATE OF WISCONSIN, the Commission made the following comments on the subject of deferring statutory claims to arbitration:

> Deferral of alleged statutory violations to arbitration is a discretionary act in which the commission abstains from adjudicating the statutory question. The United States Supreme Court has approved deferral on the ground that it harmonizes the objectives of administrative determinations of unfair labor practices with the equally important legislative objective to encourage parties to utilize their mutually agreed upon forum for the resolution of contractual questions. The decision to abstain from discharging the commission's statutory responsibility to adjudicate complaints in favor of the arbitral process will not be

> made lightly. The commission will abstain and defer only after it is satisfied that the legislature's goal to encourage the resolution of disputes through the method agreed to by the parties will be realized and that there are no superseding considerations in a particular case. Among the guiding criteria for deferral are these: First, the parties must be willing to arbitrate and renounce technical objections, such as timeliness under the contract and arbitrability, which would prevent a decision on the merits by the arbitrator. Otherwise, the commission would defer only to have the dispute go unresolved. Second, the collective bargaining agreement must clearly address itself to the dispute. The legislative objective to encourage the resolution of disputes through arbitration would not be realized when the parties have not bargained over the matter in dispute. Third, the dispute must not involve important issues of law. An arbitrator's award is final and ordinarily not subject to judicial review on questions of law. Further, questions of legislative policy and law are neither within the province nor the expertise of arbitrators. 1/

1/ STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, DEC. NO. 15261 (WERC, 1/78).

In this case, I find that sufficient questions exist regarding the first and second criteria referenced above. The following discussion shows why.

The first criteria specifies that the parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator. In an effort to satisfy this criteria, the Company included the following statement in an affidavit which was part of their motion:

> 10. If an order is issued by the WERC that the grievances are to be deferred to the grievance-arbitration procedure, then the employer agrees to arbitrate them, at the behest of the Union, waives all time-based and procedural defenses that might be available, and agrees to abide by the arbitration awards.

While this statement can certainly be read to establish that the Company renounces all procedural and time-based defenses to the arbitration of the matters complained of, I read it as something less than an explicit waiver of "all technical objections". For example, it is unclear from this statement whether the Company is willing to waive defenses based on subject matter jurisdiction, and whether it will waive the limitations on the arbitrator's authority to allow him or her to enforce agreements other than those contained in the parties' 1998-2003 collective bargaining agreement. Given these questions, it is held that the first criteria for deferral is not present here.

Even if the Examiner were to assume that the Company's affidavit establishes that the first criteria for deferral has been met, the application of the second criteria to this case is problematic. The second criteria specifies that the collective bargaining agreement must address itself to the dispute. In this case, the Union seeks enforcement of an alleged grievance settlement agreement and an alleged oral agreement. As the Company sees it, both of these claims are covered by the arbitration clause contained in the parties' current collective bargaining agreement. The Union disagrees.

The question of whether these claims are covered by the grievance and arbitration clause obviously depends on what the contract language says. That language is found in Article VII, Sections 1 and 4, and provides thus:

> Section 1. A grievance is a dispute raised with the Company by an employee as to the meaning or application of a provision of this Agreement. . .
>
> . . .
>
> Section 4. The sole function of the arbitrator shall be to determine whether or not the rights of the employe, as set forth in the grievance, have been violated by the Company. The arbitrator shall have no authority to add to, subtract from, or modify this Agreement in any way.

The Union argues that the reference in both these sections to "this Agreement" means that arbitration is limited to only the application of the provisions of the parties' 1998-2003 collective bargaining agreement, and not all collective bargaining agreements which may exist between the parties (such as grievance settlements and/or oral agreements). The undersigned is hard pressed to find that that proposed interpretation is unreasonable especially when there is no contrary past practice or bargaining history contained in the record compiled thus far. That being so, I cannot say with absolute assurance that the arbitration clause contained in Article VII positively covers grievance settlements and oral agreements. Given that uncertainty, it is held that the second criteria for deferral is not present here either.

In so finding, it is noted that several WERC decisions have found it appropriate for the Commission to exercise its jurisdiction to determine whether the employer violated the terms of a grievance settlement agreement and an oral agreement.

An example of a grievance settlement agreement case is STATE OF WISCONSIN (CARAVELLO), DEC. NO. 25281-B and C (WERC, 8/91). In that case, the question was, as here, whether the employer had violated the terms of a settlement agreement. Both the Examiner and the Commission found that since disputes regarding settlement agreements were not subject to the arbitration clause of the parties' collective bargaining agreement, it was

appropriate to exercise the Commission's jurisdiction to determine whether the grievance settlement agreement had been violated.

A recent example of an oral agreement case is VILLAGE OF KIMBERLY, DEC. NO. 28759-A (Burns, 7/96). In that case, the examiner denied a pre-hearing motion to dismiss a complaint seeking to enforce an oral agreement to grandfather a past practice educational incentive policy, notwithstanding the respondent's argument that the examiner should refuse to assert jurisdiction on the basis of the parties' contractual grievance procedure. The examiner reasoned thus:

> Complainant's Sec. 111.70(3)(a)5 claim does not concern any provision of the written collective bargaining agreement between the Villages of Little Chute and Kimberly and the Fox Valley Metro Professional Police Association. Rather, Complainant's Sec. 111.70(3)(a)5 claim is an allegation that Respondent has violated an oral collective bargaining agreement which exists separate and distinct from the written collective bargaining agreement.
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> p. 5.

She therefore asserted jurisdiction over the Complainant's breach of contract claim.

Based on the foregoing, I have decided that the instant complaint is appropriately before the WERC for resolution. Accordingly, the Company's Motion to Defer to Arbitration is denied.

Given this finding, the hearing will proceed as scheduled on February 16, 2001.

Dated at Madison, Wisconsin this 14th day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

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