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-B

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of the Complainant Union.

Mr. Jere Wiedenman, Buchanan & Barry, Attorneys at Law, 250 East Wisconsin Avenue, Suite 910, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent Company.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Paper, Allied Industrial, Chemical & Energy Workers International Union (PACE) Local 7-0558, filed a complaint on April 21, 2000 with the Wisconsin Employment Relations Commission (WERC) which alleged 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. Thereafter, hearing on the complaint was held in abeyance pending efforts to settle the dispute. Those efforts were ultimately unsuccessful. 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 December 19, 2000, the Company filed an Answer to the complaint and amended complaint. On January 10, 2001, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sec. 111.07(5), Stats. 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. On February 14, 2001, the Examiner issued an Order Denying Motion to Defer to Arbitration (Dec. No. 30030-A). On February 16, 2001, hearing was held on the matter in West Bend, Wisconsin. During the hearing, the parties were given full opportunity to present their evidence and arguments. Following the hearing, both sides filed briefs, whereupon the record was closed on April 11, 2001. Having considered the record evidence and arguments of the parties, I make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Paper, Allied Industrial, Chemical & Energy Workers International Union (PACE) Local 7-0558, hereinafter referred to as the Union, is a labor organization with its offices located in care of President Jay Helton, 625 Westridge Drive, West Bend, Wisconsin 53095 and Vice-President Eddie Sims-Bey, N168 W21700 Main Street, Jackson, Wisconsin 53037.

2. Wesbar Corporation, hereinafter referred to as the Company, is an employer located in West Bend, Wisconsin. The Company is in the business of manufacturing parts for boat trailers. Its offices are located at 4201 County Highway "P", P.O. Box 577, West Bend, Wisconsin 53093. At all times material herein, Dean Cimpl has been the Company's Vice-President for Finance and Administration.

3. The Union is the exclusive bargaining representative for the production, maintenance, packing, shipping and warehouse employees at the Company's plant located at 4201 County Highway "P", West Bend, Wisconsin.

4. The Union and the Company have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the employees in the bargaining unit referenced in Finding 3. The parties' current collective bargaining agreement is effective July 1, 1998 through June 30, 2003. It contains the following pertinent provisions:

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ARTICLE II
HOURS OF WORK

Section 1. Eight (8) consecutive working hours, meal period excepted, in any twenty-four (24) hour period shall constitute a normal workday. It is understood, however, that the Company does not guarantee to provide eight (8) hours of work daily to any employee.

Section 2. Five (5) consecutive working days, beginning Monday at shift starting time shall constitute a normal work week. It is understood, however, that the Company does not guarantee to provide a work week of five (5) consecutive days to any employee. The normal work week for third shift will start on Sunday.

Section 3. The Company agrees to schedule one (1) paid rest period of ten (10) minutes for each employee in the first half of his/her scheduled normal workday. If ten (10) or more hours are scheduled for a shift, an additional rest period of ten (10) minutes shall be scheduled for each employee during the second half of his/her normal workday.

Section 4. In the event an employee reports to work at his/her regularly scheduled starting time without having been previously notified not to report, he/she shall be given four (4) hours work at his/her regular rate of pay. If no work is available, the employee shall receive four (4) hours pay, provided, however, that all of the foregoing shall not be applicable in the case of labor disputes or contingencies such as, but not limited to, fire, power failure, riots, civil disturbances or other causes beyond the Company's reasonable control. An employee who does not elect to do work assigned to him/her will not receive any pay under this section. A maintenance employee on call will be paid a minimum of one (1) hour, regardless of actual time worked, when called back to the premises outside of his/her regularly scheduled shift.

Section 5. Each employee shall be afforded a five (5) minute wash-up period prior to his/her meal period.

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ARTICLE VII
GRIEVANCE PROCEDURE

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. A grievance must specify the contract provision or provisions which it is claimed the Company has violated and also specify the particular action requested on behalf of the grievant.

Section 2. When an employee has any question concerning wages, hours, or conditions of employment, he/she may verbally discuss the situation with his/her supervisor either with or without a steward present, as the employee desires. Such discussion will be held in the supervisor's office and whenever practicable on the same day as the question is raised. If, as a result of such discussion, the aggrieved employee believes that a grievance exists, such employee shall reduce the grievance to writing and sign it with one copy each for the Company, the Union and the grievant, the procedure will then be as follows:

> FIRST STEP: The written grievance shall be presented to the supervisor, with the answer to be given in writing within not more than two (2) working days (excluding Saturdays, Sundays, and holidays). Any grievance, except a discharge grievance, not presented in writing within five (5) working days from the date the alleged cause for complaint occurs will be barred. Any discharge grievance must be presented in writing within three (3) working days following the date the notice of discharge was given to the Union or it will be barred.
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> SECOND STEP: If a satisfactory settlement is not reached in the First Step, the grievance may be referred to the Second Step, provided it is so referred in writing within three (3) working days after receipt of the supervisor's answer to the First Step of the grievance procedure. In the Second Step of the grievance procedure, the grievance will be discussed within three (3) working days after the Company receives the Second Step grievance, between the steward and the person designated by the Company as the Company representative in the Second Step of the grievance procedure. The Company's answer will be given in writing within three (3) working days after the Second Step meeting.

THIRD STEP: If a satisfactory settlement of the grievance does not result in the Second Step, it may be referred to the Third Step, provided it is so referred in writing within three (3) working days after receipt of the Company's answer in the Second Step. At the Third Step of the grievance, the Union may call in an International representative(s), after notifying the Company, who shall have the right to take part in the meeting with the person(s) designated as the Company representative in the Third Step of the grievance procedure. The Company's answer will be given in writing within three (3) working days following the Third Step meeting. It is the intention of the parties that the Third Step meeting will be held promptly after a grievance has been submitted to the Third Step. The goal will be to meet within ten (10) days of the referral, but it is recognized that this will not always be attainable due to difficulties which may arise in coordinating the schedules of all the participants.

FOURTH STEP: If no satisfactory settlement has been reached in the first three steps, the grievance may be submitted to arbitration by the Union, by written notice given, within ten (10) calendar days after delivery of the Company's Third Step answer.

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Section 4. The sole function of the arbitrator shall be to determine whether or not the rights of the employee, 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. . . .

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ARTICLE XII
MANAGEMENT RIGHTS

The management of the plant and the direction of the working forces are vested exclusively in the Company including, but not limited to, the right to hire, the right to discipline or discharge for proper cause, the right to lay off for lack of work or other legitimate reasons, the right to transfer, the right to determine the hourly and daily schedules of employment and the right to set reasonable production standards. Any employee who feels aggrieved by any Company action in this respect shall have recourse through the grievance procedure, as set forth in this Agreement. The Company shall be the exclusive judge of all

matters pertaining to the conduct of its business including, but not limited to, the type, quantity, and quality of products to be manufactured, machine and tool equipment, schedules of production, the assignment of work, the methods and processes of manufacturing, the materials to be used therein, the extent other facilities will be used, and the disposition of its products, except as otherwise expressly provided in this Agreement. Nothing in this Agreement shall limit in any way the Company's subcontracting of work or shall require the Company to perform any particular work at this location rather than elsewhere.

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ARTICLE XVII
GENERAL

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Section 4. The parties acknowledge that, during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore the Company and the Union, for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subjects or matters may not have been within the knowledge or contemplation or either or both of the parties at the time that they negotiated or signed this Agreement. Nothing in this provision, however, shall prevent modification of this Agreement at any time by mutual consent of the parties.

5. This Finding, and Findings 6-11, relate to the Grievance 43 matter.

For at least the last 10 years, the Company has used a cost accounting system to track how certain plant employees utilize their time. This system distinguishes between direct labor and indirect labor. Direct labor is connected with the making of product, while indirect labor is not connected with the making of product. An example of a direct labor department and classification is assembly and an example of an indirect labor department and classification is material handling. Under this system, employees engaged in direct labor tasks record their worktime to direct labor codes. Thus, direct employees record their work time to a direct department and operation. Indirect employees list all of their indirect time against their home

department, even if some or all of the work was performed in another department at another indirect task. The recording of indirect time has never been as detailed or precise as the recording of direct time. When direct labor employees are assigned to indirect labor for a significant period of time, they record their indirect time to an indirect labor code. The phrase "significant period of time" refers to roughly a half hour or more. Short diversions from direct labor to indirect labor have never been recorded, particularly where the indirect labor is part of the flow or sequence of direct labor itself. Thus, direct employees who do indirect work do not have to record it in each and every instance. A time threshold of roughly half an hour has been used. Consequently, if a direct employee spends a half hour or more at one time doing indirect work, they are to record it; if it is less than that, they do not record it. When indirect labor employees perform direct labor, they are expected to report their direct labor. All this data is used for accounting purposes; it has no bearing on employee compensation.

6. In early 2000, the Union was concerned that the Company was planning to eliminate the material handler position because it was not filling vacant positions. Material handling work can be performed in large blocks of time, as well as on a piecemeal basis. The Union wanted to know how much time was going into material handling so it could track how much material handling work was being performed by non-material handlers.

7. On February 14, 2000, the Union filed Grievance No. 43. That grievance alleged that management was "knowingly allowing and encouraging" direct employees to omit to record the time they spent in indirect labor. Said another way, the grievance alleged that management was not requiring direct labor employees to properly record on their time sheets all of the instances in which they were assigned to indirect labor jobs, and that this breached the collective bargaining agreement. The Union envisioned the grievance as a way of developing a means for recording the amount of time employees spent performing tasks that involved material handling.

8. The Company denied the grievance at the first two steps of the contractual grievance procedure, so the Union advanced it to the Third Step. A Third Step meeting was held on February 22, 2000.

9. At that meeting, Company Vice-President Dean Cimpl made a proposal to the Union to resolve the grievance. Cimpl testified that his proposal to resolve the grievance was this: he would instruct the plant foremen to remind selected associates that they were to make sure that they charged significant indirect labor activities to the appropriate [indirect] labor codes. He meant the phrase "selected associates" to refer to direct labor employees, and he meant the word "significant" to refer to time periods lasting longer than 30 minutes. Union President Jay Helton testified that at that meeting, management did not say that it would keep track of time for material handling only for direct labor, not for indirect labor. Union Vice-

President Eddie Sims-Bey testified that Cimpl's proposal to resolve the grievance was this:

that the Company would have foremen notify all employees doing material handling to document their time in material handling. Sims-Bey also testified that at that meeting, management did not say that this settlement only applied when tasks lasted a specific period of time. Cimpl's proposal was accepted by the four Union representatives present at the meeting, who told him to put it in writing. He subsequently did. What Cimpl wrote up was this:

> In response to the Third Step meeting for the above-named grievance held on February 22, 2000, the Company has further reviewed the items discussed at the meeting.
>
> In settlement of the above-named grievance, the Company has instructed its plant manager who in turn will also instruct selected associates to properly account for time spent performing significant job tasks (i.e. material handling) that would not otherwise be directly included within their Job Titles.

This letter was subsequently signed by Union Vice-President Eddie Sims-Bey.

10. Cimpl subsequently informed Manufacturing Manager Chip Greene to inform the line supervisors that they were to tell employees to follow the proper procedure for recording work time (namely, that the direct labor employees were to record significant indirect work to which they were assigned). That occurred. Cimpl testified that in the last year, there has been no change in the relative balance of direct to indirect labor.

11. The Union believes there is a difference between what the Union's representatives were told at the Third Step grievance meeting about the grievance settlement agreement, and what was ultimately written up and signed by the parties. The Union alleges that the Company has violated the grievance settlement agreement because it has not instructed all employees performing material handling duties to record all time spent performing indirect work, including material handling.

12. This Finding, and Findings 13-16, relate to the hours of work matter.

The parties' collective bargaining agreement does not contain a daily shift schedule. Instead, it provides in the Management Rights clause (Article XII) that management has "the right to determine the hourly and daily schedules of employment." For many years, the Company had the first shift start at 7:00 a.m. and end at 3:30 p.m. However in the summertime, specifically from Memorial Day through Labor Day, the Company would unilaterally change this schedule and start the shift one hour earlier. This schedule came to be called the summer schedule. When the summer schedule was in place, the first shift would start at 6:00 a.m. and end at 2:30 p.m. After Labor Day each year, the Company would revert

back to a 7:00 a.m. to 3:30 p.m. schedule. The work schedule changed back and forth in this

fashion (i.e. from a 7:00 a.m. start time to a 6:00 a.m. start time). Each time, this change occurred without collective bargaining. In 1997, the Company unilaterally instituted the summer schedule of 6:00 a.m. to 2:30 p.m. as it had done previously. The employees worked this schedule until Labor Day whereupon the Employer unilaterally changed the First Shift schedule back to 7:00 a.m. to 3:30 p.m.

13. In early October, 1997, an unidentified First Shift employee prepared a handwritten petition which contained the following caption: "Which hours do you prefer? Sign below." Underneath this caption were two columns which were denominated as "6:00 a.m. – 2:30 p.m." on the left hand side of the document and "7:00 a.m. – 3:30 p.m." on the right hand side of the document. This petition was not initiated or sponsored by the Union. Additionally, it was not prepared by a Union officer or done at the Union's request. Nothing on this petition indicated it came from the Union. The petition was then circulated among the First Shift employees. 45 employees signed their names under the "6:00 a.m. – 2:30 p.m." column. No employees signed their name under the 7:00 a.m. – 3:30 p.m. column. The Union's officers were among those who signed their names under the "6:00 a.m. – 2:30 p.m." column. Someone then gave the petition to Manufacturing Manager Chip Greene. After he received the petition, Greene scheduled an employee meeting in response to same. The memo which called the meeting provided thus:

> TO: All Hourly Associates
>
> FROM: Chip Greene
>
> DATE: October 9, 1997
>
> SUBJECT: Meeting Today
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> A brief meeting will be held at 3:20 p.m. today (10/9/97) in the plant lunchroom. Your prompt attendance will be appreciated.

About 60 to 70 employees attended the meeting. The Union's officers were among those in attendance. Almost all of those who attended were First Shift employees. At the time, the Company had about a dozen employees working the Second Shift, and four of them attended the meeting. Those four were the only Second Shift employees in attendance. At the meeting, Greene indicated that it was his understanding from the petition that many employees wanted the summer schedule to be observed year-round, and he asked for comments. Some employees then spoke about why they wanted to start the shift an hour earlier and what their reasons were for doing so. After a short discussion, Greene asked those present to vote concerning whether they wanted to start the First Shift at 6:00 a.m. The vote was by a show of hands. All but

four employees wanted a 6:00 a.m. start time. The four employees who did not want a

6:00 a.m. start time were second shift employees. This vote satisfied Greene that most of the employees wanted a 6:00 a.m. start time. Greene then told those in attendance that pursuant to the vote, the starting time for the First Shift would move from 7:00 a.m. to 6:00 a.m. effective the following Monday. Greene did not make any statements at the meeting concerning how long the 6:00 a.m. to 2:30 p.m. schedule would stay in effect.

14. Following this meeting and the changing of the start time back to 6:00 a.m., no document was created which memorialized the matter such as a memorandum of understanding or a side letter. Additionally, there was no written correspondence between the Company and the Union concerning same. Neither side notified the other that it had ratified the "agreement" to set 6:00 a.m. as the permanent First Shift start time. This changed work schedule was not collectively bargained between the parties.

15. In late August, 2000, the Company announced to employees that effective Labor Day, 2000, the First Shift hours would be changed from 6:00 a.m. to 2:30 p.m. to 7:00 a.m. to 3:30 p.m. It made this announcement by posting a notice to that effect on the bulletin board. The Company subsequently discontinued the 6:00 a.m. start time and instituted a 7:00 a.m. start time. Prior to doing so, the Company did not notify the Union of the change, or hold another employee meeting. It simply posted the notice just referenced, and changed the hours. The Union grieved the changed start time.

16. The parties negotiated their current collective bargaining agreement in the Spring of 1998. At that time, the first shift schedule was 6:00 a.m. – 2:30 p.m. In the negotiations, both sides made proposals dealing with hours of work. The Company made a proposal which sought to eliminate Article II, Section 6 from the agreement. That section provided thus:

> Section 6. The Company and the Union mutually agree to discuss the scheduling of summer hours between Memorial Day and Labor Day during each year of the contract.

The Union also sought to delete Article II, Section 6. This proposal mirrored the proposal made by the Company to eliminate that section. Article II, Section 6 was deleted from the agreement. The Union also made two proposals dealing with Article II, Section 1. The first was that the summer schedule be placed in the contract as the regular schedule. The second was that the Union sought to preclude the Company from making unilateral changes to the shift schedule. The Union ultimately dropped both these proposals. Union negotiator Helton testified that the Company's negotiator assured the Union's negotiators that the Union's proposal to set the First Shift hours at 6:00 a.m. to 2:30 p.m. was unnecessary because those hours were already in place; thus, there was no need to add that language. Company negotiator Cimpl testified that he did not give Union negotiators any assurances that the

6:00 a.m. to 2:30 p.m. schedule would be permanent.

17. On April 21, 2000, the Union filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission which alleged that Wesbar had breached the settlement of Grievance No. 43 by "direct[ing] employees. . .to disregard proper accounting for time spent performing material handling." On September 13, 2000, the Union amended its complaint by adding a second cause of action. The second cause of action dealt with the hours of work matter. Therein, the Union alleged that when the Company announced a change in the work schedule, this was contrary to "the parties' agreement." The Union seeks to have both matters heard and decided in the instant proceeding.

18. The record does not indicate that employees were told to disregard the proper procedure for recording work time. Instead, the record indicates that the Company instructed employees in direct labor positions to record significant indirect work to which they were assigned. Employees continue to follow and use the same procedure for recording work time which has been in place for ten years. Under that procedure, indirect employees record their direct and indirect time. Direct employees punch off direct time onto indirect time whenever they are assigned to an indirect duty, such as material handling, and it appears that the indirect labor will occupy them for at least half an hour.

19. The record does not indicate that the parties made an enforceable oral agreement in October, 1997 to permanently set the First Shift start time at 6:00 a.m.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Since grievance settlement agreements and oral agreements are not subject to arbitration under the parties' collective bargaining agreement referenced in Finding of Fact 4, the Examiner exercises the Commission's jurisdiction to decide whether the collective bargaining agreement was breached in violation of Sec. 111.06(1)(f), Stats.

2. The Company did not violate the written settlement agreement concerning Grievance 43. Therefore, the Company did not violate Sec. 111.06(1)(f), Stats., by its actions herein.

3. Since there was no binding oral agreement between the parties to permanently set the First Shift start time at 6:00 a.m., the Company did not violate the parties' collective bargaining agreement when it changed the First Shift work hours from 6:00 a.m. to 2:30 p.m. to 7:00 a.m. to 3:30 p.m. effective Labor Day, 2000. Therefore, the Company did not violate Sec. 111.06(1)(f), Stats., by its actions herein.

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

The complaint and amended complaint are dismissed.

Dated at Madison, Wisconsin this 7th day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

WESBAR CORPORATION

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint and amended complaint raise breach of contract claims under Sec. 111.06(1)(f) of WEPA. The first claim is whether the Company breached a grievance settlement agreement and the second claim is whether the Company breached an alleged oral agreement between the parties dealing with the First Shift hours of work. In a previous motion decision, the Examiner addressed the question of whether these claims would be litigated before a grievance arbitrator or before the WERC. I found it would be the latter. My reasoning was this: while the parties' current collective bargaining agreement provides for arbitration of unresolved grievances, the agreements which the Union seeks to enforce (i.e. a grievance settlement agreement and an alleged oral agreement) are not contained in the parties' current collective bargaining agreement, and are not subject to arbitration under that agreement. DEC. NO. 30030-A. Accordingly, the complaint was not deferred to arbitration.

POSITIONS OF THE PARTIES

Union

The Union avers that the Company's conduct herein constituted unfair labor practices. The Union first asserts that refusing to abide by a grievance settlement agreement constitutes an unfair labor practice under Section 111.06(1)(f). Building on that premise, the Union contends that the Company has not abided by the settlement terms it agreed to at the Third Step grievance meeting. Second, the Union asserts that an oral agreement between the parties is also enforceable under Section 111.06(1)(f). Building on that premise, the Union contends that the Company breached an oral agreement with the Union on the hours of work for the First Shift when it unilaterally changed the First Shift hours in September, 2000. It elaborates on these contentions as follows.

The Union first addresses the Grievance 43 matter. It avers at the outset that the reason it filed that grievance was to develop a means for recording the amount of time employees spent performing tasks that involved material handling. The Union claims it was concerned about the Company's recent failure to re-post vacant material handler positions. It believed that by requiring the Company to force all employees to document how much time they spent performing material handling duties, it would be able to track how much material handling work was being done by non-material handlers. Said another way, the Union thought it would learn precisely how much material handling work was being performed, and who was

performing it. After the grievance was filed, the parties participated in a Third Step meeting over same. The Union agrees that the parties settled the grievance at that meeting. According to the Union, what the parties agreed to was this: the Company would ensure that all employees would account for all time which was spent performing indirect tasks, specifically material handling work. The Union asserts that at no time during that meeting did the Company state that it would only require direct labor employees performing indirect labor for more than thirty minutes to record their time, nor did it state that indirect employees performing indirect work outside of their department would not have to record their time.

The Union contends that when the parties reached their grievance settlement agreement, they did not attach any restrictions or conditions to it. As the Union sees it, what has happened here is that the Company subsequently attached some restrictions to it. The first is that the Company now claims that direct employees only have to record their time performing material handling work if it takes them more than thirty minutes to complete, and the second is that indirect employees do not have to account for time spent working in a different department performing indirect work. According to the Union, these two conditions were never agreed to, let alone discussed, by the parties during the Third Step grievance meeting.

The Union essentially acknowledges that the Company has always had these two restrictions as part of its cost accounting system. However, in the Union's view, it is immaterial how the Company has utilized its system in the past, or whether or not it previously only required direct employees to record indirect time lasting more than thirty minutes, or that it formerly did not require indirect employees to record work performed outside of their own departments. According to the Union, what is material is that the parties agreed that employees would be instructed to properly account for all time spent performing material handling not directly included in their job titles; there was no exclusion of indirect classifications and no reference to thirty (30) minutes.

Turning now to the written settlement agreement itself, the Union asserts that the document makes no mention whatsoever of any of the limitations and restrictions which the Company now reads into the agreement. Building on that premise, the Union argues that the interpretation the Company gives it is not supported by its actual language. According to the Union, the Company's interpretation of the terms of the settlement agreement renders the agreement meaningless because by excluding time-keeping from all indirect employees and all employees under half an hour, there would be no useful record-keeping. Finally, the Union asserts that if there were any ambiguity in the language used in the written settlement agreement, the language should be interpreted against the drafter (Cimpl) who could have cured the ambiguity had he chosen to.

The Union maintains that following the settlement, the Company has failed to have its management personnel instruct employees to record all time spent performing indirect work, including material handling. To support this premise, it notes that group leader Al Melius spends one hour a day performing material handling tasks, and that no one from management has ever instructed him that he needs to record the time he spends doing material handling duties. The Union therefore argues that the Company is in violation of the grievance settlement agreement reached at the Third Step meeting.

Next, the Union addresses the hours of work matter. It notes the following for background purposes. First, the Company has traditionally changed its regular First Shift hours from 7:00 a.m. to 3:30 p.m., to 6:00 a.m. to 2:30 p.m., during the summer months. Second, this happened in the summer of 1997 as it had previously. Third, after the Company had returned to a 7:00 a.m. start time, a petition dealing with work hours was passed around inquiring as to employee preference for First Shift hours. The employees who signed overwhelmingly favored a 6:00 a.m. start time. Fourth, in response to the employees' petition, Manufacturing Manager Greene called an employee meeting. The Union officers were present at that meeting. Fifth, at that meeting, there was an overwhelming vote to start the First Shift at 6:00 a.m. After the vote, Greene announced that the start time for the First Shift would change to 6:00 a.m.

The Union argues that the parties reached an oral collective bargaining agreement on First Shift hours when this vote was taken at the employee meeting in October, 1997. According to the Union, the vote on hours at that meeting constituted a ratification by the majority of the bargaining unit. The Union believes it is irrelevant that the Union president and vice-president did not initiate or circulate the petition. Building on the premise that the parties reached an oral collective bargaining agreement, the Union asserts that this agreement is binding on the Company and is enforceable by the Examiner.

Finally, the Union argues that its bargaining proposals in the last round of contract negotiations regarding First Shift hours are irrelevant to whether an enforceable oral agreement was reached. In its view, the Company places unwarranted emphasis on the Union's proposals, and later withdrawal, of language dealing with hours of work. The Union avers that the reason it withdrew its bargaining proposals was this: Cimpl told the Union negotiators that it was unnecessary to add a 6:00 a.m. start time to the contract because it was already in place, and there was no need to add superfluous language. The Union argues that this caused the Union to rely on the parties' oral agreement, so the Company should be barred from denying its validity. The Union therefore argues that the Company violated the parties' oral collective bargaining agreement when it changed the First Shift hours of work in September, 2000.

In order to remedy these violations, the Union asks that the Examiner order the Company to comply with the terms of the settlement agreement pertaining to Grievance No. 43, and to comply with the terms of the oral agreement concerning hours of work.

Company

The Company denies that its conduct herein constituted unfair labor practices. The Company first contends that it has not violated the Grievance 43 Settlement Agreement as alleged. In the Company's view, it has complied with same. Second, the Company contends that it did not violate an alleged oral agreement concerning the hours of work when it changed the start time of the First Shift in September, 2000. It elaborates on these two contentions as follows.

The Company first addresses the Grievance 43 matter. The Company notes the following for background purposes. First, the Company's cost accounting system distinguishes between direct labor and indirect labor. Under this system, employees engaged in direct labor tasks are to record their work time to direct labor codes; if those employees are reassigned to indirect tasks, they are expected to record their indirect time if the diversion lasts more than 30 minutes. Second, the Company interpreted Grievance 43 to allege that the Company was encouraging direct labor employees to omit to record the time they spent on indirect labor tasks. Third, at the Third Step grievance meeting for that grievance, Cimpl offered to resolve the grievance by instructing the foreman to remind direct labor employees that when they were assigned for a significant amount of time to indirect tasks, they were to report that time to indirect labor codes. The Union accepted Cimpl's proposal. Fourth, Cimpl subsequently wrote up a document concerning same and gave it to the Union's vice-president, who signed it.

The Company contends that the record evidence does not support the Union's contention that the Company is directing employees to disregard properly accounting for time spent performing material handling. To support this premise, the Company points out that Cimpl instructed the manufacturing manager to inform the line supervisors that they were to remind employees of the proper procedure for recording work time. The Company asserts that the Union's contrary charge (i.e. that employees were told to disregard the procedure) was specifically denied by Union witness Al Melius. According to the Company, employees have continued to follow the same recording procedure which had been used under the Company's cost accounting system for more than ten years. The Company asserts that the statistics bear this out: indirect employees, like Melius, record their direct and indirect time in accordance with the established procedure, while direct employees, like Jim Fellner, punch off direct time onto indirect time whenever they are assigned to an indirect duty, such as material handling, and it appears that the indirect labor will occupy them for at least one-half of an hour. The Company believes it follows from the foregoing that the Union has failed to prove a breach of

the settlement agreement. Finally, at the hearing, the Company made the following comment concerning this claim:

> In fact, the curious feature in this claim is that the employer is charged for deviating from an accounting system in which the Union has no interest. The statistics on direct and indirect work are not given to the Union, and it would be contrary to the best interest of the employer to ignore the recording of work time as direct or indirect. We instituted this system. It's for our accounting purposes, and we're only cutting our throat not to have appropriately accurate recording of these statistics.
>
> (Transcript, p. 13).

Next, the Company addresses the hours of work matter. For background purposes, the Company notes that there is no set daily work schedule contained in the collective bargaining agreement. Instead, the Management Rights clause gives the Company "the right to determine the hourly and daily schedules of employment." The Company avers that it has repeatedly exercised this management right over the years and changed the employees' summer work hours. To support that premise, the Company notes that around Memorial Day each year, it would move the First Shift start time up one hour from 7:00 a.m. to 6:00 a.m.; then around Labor Day, it would move the start time back one hour from 6:00 a.m. to 7:00 a.m. The Company emphasizes that each time this change occurred, there was no collective bargaining between the parties; instead, the Company acted unilaterally. The Company notes that is exactly what happened in the summer of 1997: first, on Memorial Day, it instituted the summer schedule of 6:00 a.m. to 2:30 p.m.; then on Labor Day, it changed the schedule back to 7:00 a.m. to 3:30 p.m. The Company acknowledges that in October, 1997, it changed the hours for the First Shift back to the traditional summer hours (i.e. 6:00 a.m. to 2:30 p.m.) The Company asserts that the reason it did so was because many employees favored the earlier start time. In the Company's view, its decision to change the start time was not an oral agreement, let alone one that is enforceable and binding until the parties mutually agree to change the schedule. The Company believes this argument is misplaced for three reasons. First, the Company again calls attention to the fact that no start times or work schedules are contained in the contract, and further that nothing therein precludes the Company from making shift changes. Second, the Company notes that the contract contains a so-called zipper clause which provides that after engaging in bargaining, the "understanding and agreements arrived at by the parties after the exercise of [the right to bargain] are set forth in this Agreement." The Company reads that clause to essentially say that oral agreements do not count. The Company argues that given the preclusive effect of the zipper clause, plus the fact that nothing in the contract bars shift changes, the Commission should not re-write the collective bargaining agreement and supply such a term. Finally, the Company calls attention to the parties' 1998 bargaining history. Specifically, it notes that in bargaining, the Union proposed a 6:00 a.m.

start time for the First Shift and language which took away the Company's unilateral authority to change shift times as it saw fit. The Company calls attention to the fact that the Union ultimately dropped both proposals. The Company maintains that notwithstanding the Union's contention to the contrary, the Company's negotiator never gave the Union any assurances or reason to believe that the 6:00 a.m. to 2:30 p.m. schedule would be permanent. According to the Company, "it could not be clearer that the Union well understood it had no agreement on shift start time or it would not have bargained for a fixed shift schedule." The Company asks that the Examiner not "abet this thinly veiled attempt to obtain through litigation what the Union failed to achieve in negotiation."

Overall, the Company believes that its position herein is supported by the language of the collective bargaining agreement, and the facts of this case. It therefore maintains that it should prevail, and the complaint be dismissed.

DISCUSSION

The Legal Standards

The complaint and amended complaint allege Company violations of Section 111.06(1)(f) of WEPA. That section 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.

A labor organization having exclusive bargaining status can file a complaint with the Commission under this section alleging (1) a breach of contract (specifically that the Employer has violated the terms of a collective bargaining agreement between the parties); or (2) a refusal to accept an arbitration award.

In this case, the Union is not alleging that the Company has refused to accept an arbitration award (i.e. (2) above). Rather, the Union seeks a determination from the Examiner whether the Employer's conduct in question breached the terms of a collective bargaining agreement (i.e. (1) above).

Normally, the collective bargaining agreement which is involved is the traditional written agreement between the parties. Here, though, that is not the case. The "agreements" that are involved here are a grievance settlement agreement and an alleged oral agreement. The threshold question is whether the foregoing can constitute "a collective bargaining agreement" within the meaning of Sec. 111.06(1)(f).

Previous 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 grievance 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.
>
> p. 5.

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

While neither of the foregoing cases involved WEPA, the rationale stated therein is equally applicable to WEPA cases. That being so, these cases support the proposition that both grievance settlement agreements and oral agreements between the parties are collective bargaining agreements within the meaning of Sec. 111.06(1)(f) and therefore enforceable as same.

Application of The Legal Standards To the Facts

Having so found, the question in this case is whether the Company breached a settlement agreement concerning Grievance 43 as alleged by the Union, and whether the Company breached an oral agreement concerning the hours of work for the First Shift as alleged by the Union. These matters will be addressed in the order just listed.

It is noted at the outset that the parties agree that they settled Grievance 43. That being so, what is at issue here is whether the Company has complied with the settlement agreement. The Company contends that it has while the Union disputes that assertion.

My discussion begins with a review of the written settlement agreement itself. The part pertinent here is the second paragraph which provides thus:

> In settlement of the above-named grievance, the Company has instructed its plant manager who in turn will also instruct selected associates to properly account for time spent performing significant job tasks (i.e. material handling) that would not otherwise be directly included within their Job Titles.

In my view, the meaning of this sentence is not ambiguous. The following analysis shows why. It provides in plain terms that the plant manager will instruct "selected associates" to properly account for the time they spend "performing significant job tasks (i.e. material handling)" that are not directly part of their job. The meaning of the phrases marked in quotes is supplied by the record evidence. The phrase "selected associates" refers to direct employees. Thus, it is the direct employees who will be instructed to do something. What they will be instructed to do is "properly account for" (meaning record) the time they spend "performing significant job tasks". While this phrase does not identify whether the job tasks involve direct labor or indirect labor, the answer to this is supplied in the parenthesis which follows which references "material handling". The record indicates that material handling is an indirect task. When read in that context, the sentence means that direct employees are to properly record the time they spend performing "significant" indirect tasks which are not part of their job. The remaining question is what the word "significant" means when used in this sentence. Once again, its meaning is supplied by the record evidence. The record indicates that this particular term is used in conjunction with the Company's cost accounting system and refers to the element of time, as in a particular amount of time. In that context, the word "significant" refers to a "significant period of time", which has historically been interpreted as a half-hour or more. Putting this all together, the sentence means that when "selected associates" (meaning direct labor employees) spend a "significant" amount of time (meaning a half-hour or more) doing indirect work such as material handling, they are to record it. It is implicit from the foregoing that if the indirect work takes less than 30 minutes to complete, the direct employees do not have to record it. It is also implicit from the foregoing that indirect employees are not covered by the written settlement agreement because they are not "selected associates". As previously noted, the record clearly indicates that the phrase "selected associates" refers to direct employees, not indirect employees.

Having said that, it is noted that this dispute is really not about what the written settlement agreement says and means. As the Union sees it, there is a difference between what the Union's representatives were told at the Third Step meeting about the grievance settlement

agreement, and what was ultimately written up by Cimpl and signed by the parties. What the Union essentially wants enforced is what the Union thought it got as a settlement at the Third Step meeting.

In my view, what the Union wants me to do in this case can be fairly stated thus: 1) I should review the differing versions about what was or was not said at the Third Step meeting and find that the Union witnesses' recollections about same are more accurate than the Company's witness; and 2) I should then give effect to the Union's interpretation of what it thought it was getting from Cimpl's settlement proposal (i.e. that the Company would ensure that all employees would account for all time which was spent performing indirect tasks, specifically, material handling tasks) even though that result was not expressed in the written settlement agreement itself. Based on the following rationale, I decline to do so.

A basic principle of contract interpretation is that a written agreement may not be changed or modified by any oral statements made by the parties in connection with the negotiation of the agreement. Under this principle, known as the parol evidence rule, a written agreement consummating previous oral negotiations is deemed to embrace the entire agreement. Thus, parol (i.e. oral) statements are not allowed to vary the clear meaning of a written agreement. One exception to this principle is when the written agreement is ambiguous. When the language is ambiguous, decision makers sometimes use parol evidence and bargaining history to help them interpret the ambiguous language. The key word in the previous sentence is "ambiguous". The reason that word is key is because that is not the case here. That language has previously been reviewed and its meaning has been found to be plain, clear and unambiguous. That being so, there is no need for the undersigned to resort to using any parol evidence and/or bargaining history to determine the parties' intent concerning the meaning of the written settlement agreement. That language speaks for itself and presumably incorporates the parties' mutual intent. Given this finding, the undersigned will not comment on the differing versions of what was or was not said at the Third Step meeting and whose recollection is more accurate. Additionally, I will not try to give effect to the Union's interpretation of what it thought it was getting from Cimpl's settlement proposal because that result was not expressed in the written settlement agreement itself.

Having so found, the final question is whether the Company has complied with the written settlement agreement. I find that it has. The written settlement agreement required the Company to instruct employees in direct labor positions to record significant indirect work they perform. That has occurred. While the Company has not instructed all employees (both direct and indirect) to account for all time which is spent performing all indirect tasks, such as material handling, there is a simple reason for this: the written settlement agreement does not require the Company to do it. That being so, the Company has not violated the written settlement agreement concerning Grievance 43. Instead, it has complied with it. Accordingly, that portion of the complaint is dismissed.

The focus now turns to the second part of the case. The Union contends that the Company has breached an oral agreement which the parties had regarding the work hours for the First Shift. The Company disputes that contention.

My discussion begins with the observation that while the parties agreed there was a grievance settlement agreement between them for Grievance 43, there is no similar agreement between the parties concerning the alleged oral agreement. The Company disputes its existence. That being so, it follows that there are two questions to be answered here: 1) did the parties have an oral agreement concerning the First Shift hours; and 2) if so, has the Company violated that agreement?

Before I address the question of whether the parties reached an oral agreement in October, 1997 concerning the work hours for the First Shift, I have decided to first review the contractual language relevant to this dispute.

Since the basic subject matter of this dispute involves hours of work, I think that the logical starting point for purposes of discussion is to ask rhetorically whether there is contract language dealing with work hours. There is. The parties' current collective bargaining agreement contains an article entitled "Hours of Work" (Article II). What is somewhat unique about that clause is that it does not contain any particular work schedules. For example, it does not say that the First Shift schedule is 6:00 a.m. to 2:30 p.m., or 7:00 a.m. to 3:30 p.m., etc. Instead, all it says is that the normal workday shall consist of eight consecutive working hours. What this means is that the parties have not included language in their hours of work provision which specifies certain work schedules.

When a particular contract provision is silent on the subject matter being addressed (i.e. the situation present here), arbitrators routinely look to the contractual management rights clause, if there is one, to see if it provides any guidance. In accordance with that generally-accepted notion, the undersigned will next look to the contractual management rights clause.

The Management Rights clause (Article XII) found here provides in pertinent part that management has "the right to determine the hourly and daily schedules of employment." That clause expressly gives management the right to set and/or change daily work schedules.

The record indicates that the Company has regularly exercised its right to set and/or change the daily work schedule. The following shows this. Each Memorial Day, the Company would move the start time for the First Shift up one hour from 7:00 a.m. to 6:00 a.m., and then, after Labor Day, move it back one hour to 7:00 a.m. Each time, this change occurred without collective bargaining.

It is against this contractual and historical backdrop that the Union wants me to enforce an alleged oral agreement which is contrary to the foregoing. According to the Union, the parties made an oral agreement at the October, 1997 employee meeting to permanently set the hours for the First Shift at 6:00 a.m. to 2:30 p.m. The Union believes that agreement should stand until the parties mutually agree to change it. Since the Company disputes the existence of an oral agreement concerning the First Shift hours of work, it stands to reason that the threshold question is whether there was, in fact, an oral agreement between the parties on the First Shift hours of work.

I find that the Union and the Company did not make an enforceable oral agreement at the October, 1997 employee meeting concerning the First Shift hours of work. My reasoning is this. First, a prerequisite to entering into an oral agreement is that both sides must consider the "agreement" binding. That did not happen here. While Greene did tell the employees at the October, 1997 employee meeting that the Company was changing the First Shift hours from 7:00 a.m. to 3:30 p.m. to 6:00 a.m. to 2:30 p.m. at their request, he did not say anything that indicated this change was permanent or waived the Company's contractual right to change work hours in the future. Additionally, after the meeting, the Company did not tell the Union that the 6:00 a.m. start time was permanent, or that the Company had waived their contractual right to change work hours in the future. Second, when the parties involved in a collective bargaining relationship make oral agreements, they generally find a way to document it in some way, shape or form so that it can be enforced, if need be. That did not happen here either. In this case, following the employee meeting and the changing of the start time back to 6:00 a.m., there was nothing exchanged between the parties which memorialized the matter. Third, following the employee meeting, neither side notified the other that it had ratified the "agreement" to set 6:00 a.m. as the permanent First Shift start time. I therefore conclude that no enforceable oral agreement was reached between the parties in October, 1997 to keep 6:00 a.m. as the permanent First Shift start time until mutually changed by the parties.

Aside from the foregoing, there is also a contractual basis for not enforcing the alleged oral agreement. The basis is the zipper clause which is found in Article XVII, Sec. 4. That clause provides that after engaging in bargaining, "the understanding and agreements arrived at by the parties after the exercise of that right and opportunity [to bargain] are set forth in this Agreement." That clause essentially says that oral agreements do not count; what counts is what is in the written collective bargaining agreement. Based on that clause, plus the fact that nothing in the labor agreement bars shift changes, I decline to supply (i.e. read) a 6:00 a.m. start time into the agreement.

Given that finding, the Examiner believes it is unnecessary to address the parties' 1998 bargaining history wherein both sides made proposals concerning the hours of work provision. Consequently, no comments are made concerning same.

In sum then, it is held that there was no oral agreement between the parties to permanently set the First Shift start time at 6:00 a.m. That being so, the Company did not breach the parties' collective bargaining agreement when it changed the First Shift work hours from 6:00 a.m. to 2:30 p.m. to 7:00 a.m. to 3:30 p.m. effective Labor Day, 2000. Accordingly, that portion of the complaint has also been dismissed.

Dated at Madison, Wisconsin this 7th day of June, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

REJ/gjc
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