STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS UNION LOCAL NO. 75, Complainant,

vs.

BROWN COUNTY, Respondent.

Case 727
No. 65040
MP-4180

Refusal to Arbitrate – Marsha Englebert

Decision No. 31526-A

Appearances:

Andrea F. Hoeschen, Attorney at Law, Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, 1555 North RiverCenter Drive, Milwaukee, WI 53212, appearing on behalf of Teamsters Local No. 75.

Thomas P. Godar, Attorney at Law, Whyte Hirschboeck Dudek, One East Main Street, Suite 300, Madison, WI 53703, appearing on behalf of Brown County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DISMISSING COMPLAINT

Daniel Nielsen, Examiner: On August 12, 2005, the above-named Complainant, Teamsters Local No. 75, filed with the Commission a complaint, alleging that the above-named Respondent, Brown County, violated the provisions of Ch. 111.70, MERA, by refusing to arbitrate a grievance filed by Marsha Englebert.

A hearing was held on January 18, 2006, in Green Bay, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The hearing was transcribed and a transcript was received on January 26, 2006. The parties thereafter submitted additional exhibits, and briefs which were exchanged through the Examiner on April 15, 2006, whereupon the record was closed.

On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

FINDINGS OF FACT

1. Brown County (hereinafter referred to as either the County or the Respondent) is a municipal employer, which provides general governmental services to the citizens of the County. The County's business address is 305 East Walnut Street, Green Bay, Wisconsin, 54302. At the time the events underlying this complaint took place, Richard Gschwend was the County's Human Resources Director. He was subsequently replaced by Michael Kwaterski, who had been a Labor Relations Manager for the County, became Interim Human Resources Director in September of 2005, and was appointed Director in December, 2005.

2. Teamsters Local No. 75 (hereinafter referred to as either the Union or the Complainant) is a labor organization and is the exclusive bargaining representative for the County's courthouse bargaining unit, encompassing a broad range of classifications. The Union's business address is 1546 Main Street, Green Bay, WI 54302. At all time relevant to this complaint, the Business Agent and chief spokesperson for the Union was Mike Williquette.

3. The County and the Union have been parties to a series of collective bargaining agreements. The last settled agreement between the parties had a term covering calendar years 2002 and 2003, and expired on December 31, 2003. That agreement contained, inter alia, a provision concerning payment of overtime for hours in excess of eight in a day, a Maintenance of Standards Clause, and a provision for the binding arbitration of grievances.

4. Marsha Englebert is an employee in the bargaining unit represented by Teamsters Local No. 75. On April 15, 2005, she filed a grievance, protesting a reprimand placed in her personnel file, and her supervisor's decision to deny her overtime and the right to vary her schedule, unless approved in advance. The grievance was denied in the lower steps of the grievance procedure, and the Union submitted a request for arbitration to the Wisconsin Employment Relations Commission. On June 29, 2005, Richard Gschwend wrote to the Commission and to Williquette stating the County's view that "the subject matter of this grievance is not substantively arbitrable and that it is not governed by the labor agreement terms of the collective bargaining unit at issue here."

5. On August 12, 2005, the instant Complaint was filed alleging that the County had violated Section 111.70(3)(a)5 by violating the collective bargaining agreement and refusing to submit to grievance arbitration.

6. The right to schedule overtime primarily relates to wages and hours. The right to vary one's work schedule primarily relates to hours. The propriety of discipline is primarily related to terms and conditions of employment.

7. The 2005 reprimand, and the withdrawal of Englebert's right to schedule overtime and vary her work schedule without advance permission, did not implicate any right or benefit that vested prior to the expiration of the 2002-2003 collective bargaining agreement.

8. The 1992-1993 collective bargaining agreement between the parties expired on December 31, 1993. The 1994-1995 collective bargaining agreement was settled on June 29, 1994.

9. On March 2, 1994 two grievances were filed by the Teamsters on behalf of employees of the County's Child Support Office, seeking reclassification of their positions. Their original request for reclassification had been submitted in February of 1993, and had been held in abeyance while the County studied it. In November 1993, a County Human Resource Analyst recommended in favor of the reclassifications, subject to an internal audit. On February 28, 1994, the employees were advised that their reclassification requests were being denied, and the grievances followed. The grievances were processed through the grievance procedure, and were referred to arbitration before a single arbitrator. In her award, the arbitrator characterized the substantive issue before her as involving a claimed violation of the 1994-1995 collective bargaining agreement. Arbitrator Baron issued her Award in September, 1995.

10. The 1997-1998 collective bargaining agreement between Brown County and Teamsters Local 75 expired on December 31, 1998. The 1999-2000 collective bargaining agreement was settled in August, 2000.

11. In February of 1999, a Correctional Officer in the Teamsters' bargaining unit was assessed a 30 day suspension. A grievance was filed, and the matter was referred to arbitration. A hearing was held before Arbitrator Petrie on September 2, 1999, and his Award was issued on January 26, 2000.

12. On April 4, 2000, a Correctional Officer in the Teamsters' bargaining unit was discharged. A grievance was filed, and was processed through the grievance procedure to arbitration. A hearing was held on September 20, 2000 before Arbitrator Michelstetter, who issued his Award in February, 2001.

13. The arbitration cases heard by Arbitrators Baron, Petrie and Michelstetter do not constitute a clear and consistent practice of arbitrating post-expiration disputes.

14. The Complainant and the Respondent did not enter into an implicit agreement to arbitrate all post-expiration grievances during the contract hiatus.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainant, Teamsters Union Local No. 75, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, Brown County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That by the conduct described in the above Findings of Fact, the Respondent municipal employer did not violate any prov0ision of Section 111.70, MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that the instant complaint be, and the same hereby is, dismissed in its entirety.

Dated at Racine, Wisconsin, this 28th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

BROWN COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case presents the question of an Employer's obligation to arbitrate disputes arising during the hiatus period after expiration of a collective bargaining agreement. The Complainant, Teamsters Local No. 75, asserts that there has long been an implicit agreement between the parties to proceed to arbitration on such matters. In support of this proposition, it submits three grievance arbitration awards, from 1995, 2000 and 2001, where it asserts the underlying disputes arose during a hiatus between contracts. The Respondent, Brown County, denies any such implicit agreement, and points out that most of the facts underlying the 1995 Baron Award arose while the 1993 contract was still in place, and that the referral to arbitration took place after the successor agreement was reached. As to the 2000 Petrie Award, the County asserts that there is nothing in the body of the Award to indicate any specific waiver of rights in other cases. It distinguishes the 2001 Michelstter Award on the grounds that the arbitration hearing and the issuance of the Award took place after agreement was reached on the 1999-2000 contract. It asserts that three Awards scattered across ten years cannot prove some specific agreement between the parties to arbitrate dispute arising during the hiatus.

DISCUSSION

In GREENFIELD SCHOOL DISTRICT, Dec. No. 14026-B (WERC, 11/77), the Commission announced its general agreement with the principle enunciated in the Steelworkers Trilogy, holding that the right to proceed to arbitration is purely contractual, and does not generally extend to post-expiration disputes:

> In arriving at this conclusion, we begin with the general rule that an employer must, pending discharge of its duty to bargain, maintain the status quo of all terms of the expired agreement which concern mandatory subjects of bargaining. Thus, even though the amount of wages owing originally was established by the expired agreement, an employer may not change the established wage rates without first discharging its duty to bargain over that item. This general rule, however, is subject to various exceptions, and an arbitration provision in an expired agreement is one of the well-recognized exceptions. Although the issue whether to agree to an arbitration provision is a mandatory subject of bargaining, the duty to arbitrate is wholly contractual. Recognizing that the case law from the private sector has limited applicability to the extent it is based on the coterminous right of employes to strike, a right not enjoyed by public sector employcs, nevertheless the power of an arbitrator is solely dependent on the terms of an agreement, and the arbitrator's responsibility is to construe a contract. If the contract has expired, the arbitrator has no powers and nothing to construe in respect to post-expiration contractual obligations. (GREENFIELD, at pages 5-6, (footnotes omitted).

This is a presumption, and there are circumstances in which the presumption is rebutted. A grievance in which the dispute itself arose during the contract, but the processing or submission to arbitration was not completed until after expiration, is held to be arbitrable.[1] There is federal precedent for the proposition that a post-expiration grievance will be arbitrable if it arose during the contract, in the sense that "it involves facts and occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement."[2] The Complainant here asserts that the right to proceed to arbitration survives expiration because there has been a consistent past practice of arbitrating post-expiration disputes, evincing an implicit agreement to arbitrate such disputes. There are a number of flaws in this theory.

The Examiner begins by noting that the Commission has never decided whether NOLDE and, by extension, LITTON are good law in the public sector of Wisconsin, where the availability of interest arbitration presents different dynamics for bargaining and post-expiration dispute resolution than are present in the private sector.[3] Assuming solely for the sake of analysis that these principles would be applicable, it is clear that the first two of the circumstances allowing arbitration of post-expiration disputes set forth in LITTON are not present here. The events giving rise to Englebert's grievance took place well after expiration, and the right to overtime and schedule variances cannot plausibly be said to have "accrued or vested" under the agreement. Thus if there is a right to proceed to arbitration, it must be because the "normal principles of contract interpretation" indicate that the parties either intended the underlying substantive contractual right to survive expiration or intended to have the general contractual right to arbitrate survive expiration.[4]

Certainly the rights of employees under the overtime, hours and just cause provisions continue during the hiatus as a matter of the Employer's duty to maintain the status quo ante. However, there is nothing at all in the record that would allow the Examiner to conclude that

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[1] "On the contrary, the Sec. 111/70(3)(a)5, Stats., duty not to violate an agreement to arbitrate is not extinguished – as regards a grievance concerning pre-expiration events – by the fact that the agreement expired before the grievance was initiated and/or fully processed through the contractual grievance and arbitration procedures." RACINE UNIFIED SCHOOL DISTRICT NO. 1, Dec. No. 24272-B, (WERC, 3/88), hereinafter referred to as "RACINE SCHOOLS", at page 7.

[2] LITTON FINANCIAL PRINTING DIV. V. NLRB, 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991), hereinafter referred to "LITTON", clarifying the right announced in NOLDE BROS. V. BAKERY AND CONFECTIONERY WORKERS LOCAL 358, 430 U.S. 243, 97 S.Ct. 1067, 51 L.Ed.2d 300 (1977), hereinafter referred to as NOLDE. See also the discussion in Gorman and Finkin, BASIC TEXT ON LABOR LAW, 2d.Ed., (2004), at pages 762-766.

[3] VILLAGE OF SAUKVILLE, Dec. No. 28032-B (WERC, 3/96) at page 26.

[4] While NOLDE and LITTON focused on the substantive contractual rights being asserted in the grievances – severance pay in the case of NOLDE, and seniority in the case of LITTON – some later cases have focused on whether the parties evinced an intention to have the general right to arbitrate grievances continue in the hiatus. See the discussion in GORMAN, at pages 765-766.

the parties had any special understanding that those specific provisions would survive as contractual rights after expiration. With respect to a broad agreement to arbitrate all post-expiration disputes, as noted the Complainant asserts the existence of a clear and consistent past practice evincing an implicit agreement to arbitrate. This implicit agreement is based on three cases, one arising during the hiatus of the 1992-93 agreement, and two arising during the hiatus of the 1997-1998 agreement. I find the evidence of this alleged practice is, at best, ambiguous.

In the case of the 1992-93 hiatus, the dispute before Arbitrator Baron concerned a request for reclassification. The request was submitted ten months before expiration. It was taken under advisement for study, and a recommendation in favor of reclassification was made in November of 1993, two months before expiration. The decision against reclassification was announced in February of 1994 and the grievance was filed at the beginning of March. The claim in that case was that a higher rate was warranted by the work already being performed. The claim was asserted before expiration. As discussed in RACINE SCHOOLS, a dispute arising under the terms of the expired agreement is arbitrable, even though the grievance itself was not yet filed as of the time of expiration. Moreover, the Baron hearing was held, and the Award was issued, after the 1994-1995 contract was settled, and in the Award Arbitrator Baron stated that she was ruling on whether the 1994-1995 contract had been violated. This strongly suggests an understanding that the retroactivity of the 1994-1995 agreement extended to grievances brought during the hiatus. Whether it is viewed as the post-expiration arbitration of a pre-expiration dispute under the 1992-1993 agreement, or as a function of the retroactivity of the 1994-1995 agreement, the Baron Award does not provide persuasive evidence of the broad implicit agreement to arbitrate claimed by the Union.

The 2001 Michelstetter Award was, like the Baron Award, the result of a hearing held after a new agreement was reached, giving rise to questions about whether the parties proceeded under the expired agreement or as a consequence of the retroactive application of the new agreement. Only the 2000 Petrie Award appears to involve a grievance where the underlying facts arose during the hiatus, and a hearing was held before any new agreement had been implemented. Plainly in that case, the parties agreed to arbitrate a post-expiration dispute during the contract hiatus. The parties are always free to do so. The question is whether this one case – absent any evidence of broader discussions concerning post-expiration arbitration - provides clear evidence of an enduring agreement to arbitrate all such cases. It does not. The overall evidence of prior arbitrations is subject to a variety of interpretations, and no firm conclusion can be drawn from them as to the parties' long term intentions.

Finally, I note that even if I were to conclude that the Baron, Petrie and Michelstetter Awards provided persuasive evidence of an intent to extend the arbitration provisions of the contract for a time during the hiatus, the parties could not be presumed to have extended that general right to encompass the Englebert grievance. The Union does not allege a specific agreement to arbitrate this grievance. It asserts a continuation of the contract's general arbitration provision. As the right to proceed to arbitration is purely a matter of contract,

rather than the status quo obligations of the parties, it is subject to the limitations of Section 111.70(3)(a)4, Stats., on the duration of public sector contracts. As the Commission held in RACINE SCHOOLS:

> Fourth, we consider an additional controlling "contrary indication" to be the Sec. 111.70(3)(a)4, Stats., requirement that "The term of any collective bargaining agreement shall not exceed 3 years." To find that the parties' three year 1982-85 agreement required arbitration of grievances concerning events occurring after its expiration would, as the District argues, extend the agreement beyond the statutory three year limitation. The parties cannot be presumed to have mutually intended an unlawfully long term of agreement, and even if they were, the Association would not be permitted to enforce an agreement beyond the statutory three year limit..." RACINE SCHOOLS, supra, at page 8.

The 2002-2003 agreement expired on December 31, 2003. This grievance arose in 2005. Even if the parties' past practice had created an implicit agreement to extend the arbitration provisions beyond expiration, that agreement would not have been enforceable after December 31, 2004, the end of the third year. Thus as a matter of law, any such agreement could not extend to the Englebert grievance.[5]

Dated at Racine, Wisconsin, this 28th day of June, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

[5] I would stress that this observation applies only to the alleged extension of the general arbitration provision in the collective bargaining agreement. There is nothing to prevent the parties from separately agreeing to arbitrate during the hiatus on a case by case basis, or from entering into a free standing agreement to arbitrate all disputes during the contract hiatus, so long as that free standing agreement does not exceed three years in length.