BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GENERAL TEAMSTERS UNION LOCAL 662	
and	Case 164 No. 41789 MA-5462
EAU CLAIRE COUNTY (SHERIFF'S DEPARTMENT)	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Mr. Frederick Perillo, on behalf of General Teamsters Union Local 662.
Mr. Keith R. Zehms, Corporation Counsel, on behalf of Eau Claire County.

INTERIM ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter the Union, and Eau Claire County, hereinafter the County, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the County in accordance with the grievance and arbitration procedures contained in the parties' labor agreement, and the undersigned was appointed to arbitrate in the dispute. A hearing was held before the undersigned on April 20, 1989 in Eau Claire, Wisconsin. There was a stenographic transcript made of the hearing and the parties completed the submission of briefs in the matter by June 19, 1989. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Interim Award.

ISSUE

The County has raised the issue of whether the grievance is substantively arbitrable and the Union has asserted the position that the undersigned has no authority to decide the issue in the absence of joint submission whereby both parties agree to be bound by the Arbitrator's decision. Therefore, there is initially the following issue to be decided:

> Should the Arbitrator address the issue of substantive arbitrability?

POSITIONS

County:

The County takes the position that the Arbitrator should decide the issue of substantive arbitrability. In support of its position the County cites the following:

> "Arbitrators appear generally agreed that the legitimate interest of the parties are adquately (sic) served by submitting arbitrability issues to the Arbitrator." How Arbitration Works, 4th ed. (1985), p. 216.

In addition, the County then cites a number of arbitration awards in support of its contention that the parties' interests are best served if the Arbitrator decides the issue of arbitrability. The County also asserts that making such a determination is an "inherent part of an arbitrator's duty," citing the following from Report of the Committee on Administration of Union-Employer Contracts, Section of Labor Law, American Bar Association:

> "The function of the Arbitrator to decide whether or not an allegation of non-arbitrability is sound could be compared to that of a trial judge who is asked to dismiss a complaint on motion for a directed verdict or for failure to state a

> cause of action. The analogy indicates that a preliminary decision relating to arbitrability by the Arbitrator 'is an inherent part of his duty'." Arbitrability, 18 LA 942, 950.

Also cited is Hertz Corp., 81 LA 1 (Mittelman), for the holding that an arbitrator has "inherent jurisdiction at least to decide his or her own jurisdiction." (At 9). Lastly, the County asserts that the Sheriff's constitutional and statutory authority must be considered in deciding arbitrability, as the issue on the merits concerns the authority to assign personnel. Since that authority is constitutional and statutory, it is outside the labor agreement and cannot be limited by the agreement. Citing, Wisconsin Professional Police Ass'n v. Dane County, 106 Wis.2d 303 (1982).

Union:

The Union takes the position that the Arbitrator does not have authority to decide the issue of substantive arbitrability. The Union notes that the County did not agree to submit the issue of substantive arbitrability to the Arbitrator for a final and binding determination, and asserts that Section 6.03 1/ of the Agreement "strictly limits the arbitrator's jurisdiction to those questions which the parties agree to submit to him." The Union also asserts that arbitrators draw their jurisdiction only from the contract and that the parties can only be required to arbitrate that which they agree by contract to arbitrate. The Union further contends that "it has long been held that the decision of substantive arbitrability is purely and solely a question for courts to decide." In support thereof, the Union cites the following:

> Thus the question of substantive arbitrability -- whether the parties agreed to submit an issue to arbitration -- is a question of law for the courts to decide. The arbitrator cannot, except by agreement of the parties, be the judge of the scope of his authority under the contract. If a party asserts that the arbitrator is to decide the question of arbitrability "the claimant must bear the burden of a clear demonstration of that purpose".

Joint School District No. 10 vs. Jefferson Education Ass'n, 78 Wis.2d 94, 101-102 (1977). Further, where the contract does not expressly or impliedly authorize the arbitrator to determine the scope of his own jurisdiction, the issue is solely one for the court. Citing, Milwaukee Police Ass'n v. Milwaukee, 92 Wis.2d 145, 151 (1979); AFSCME District Council 48 v. Milwaukee County, 131 Wis.2d 557, 560, (Ct. App. 1986).

Next, the Union contends that the County is relying on sources outside the agreement, i.e., constitutional and statutory provisions, to support its challenge to arbitrability, and that this provides another reason for the Arbitrator not to decide arbitrability. While the Arbitrator is selected by the parties to interpret their agreement, he has no general public law authority to interpret statutes and constitutional provisions. According to the Union, an attempt to base the award on something other than the agreement, "would render that award completely invalid." Citing, Milwaukee Professional Firefighters Local 215 vs. Milwaukee, 78 Wis.2d 1, 21 (1977); United Steelworkers vs. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960); and Alexander vs. Gardner Denver Co., 415 U.S. 36, 53-54 (1974). The Union asserts that the County is asking the Arbitrator to exceed his jurisdiction by denying the grievance on the basis of statutory and constitutional provisions outside the Agreement, and, thus, to render an invalid award. If there is something in the Agreement or the award that contravenes such provisions, the parties have to resort to the courts to litigate those matters.

The Union cites Dane County, 83 LA 1205 (Briggs, 1984), as a case involving the same situation as here and where the arbitrator held his consideration was confined to the labor agreement and he did not consider legal precedent in reaching his decision.

Lastly, the Union contends that the claim that the creation of civilian jailer positions is a permissive subject of bargaining is irrelevant. The Union is claiming that the County's actions violated an existing provision in the Agreement, not that the County has refused to bargain.

On the basis of the above, the Union concludes that a court will be free to examine all of the above claims de novo and that it would serve no purpose

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1/ Section 6.03 provides as follows:

> 6.03The Arbitrator shall expressly confine himself to the precise issues submitted for arbitration and shall have no authority to determine any other issue not so submitted to him or to submit observations or declarations of opinion which are not directly essential in reaching the determination.

now for the Arbitrator to decide those issues.

DISCUSSION

Both of the parties make persuasive arguments in support of their respective positions; however, the great weight of authority supports a conclusion that having the arbitrator initially decide the issue of substantive arbitrability is favored, even though the decision is subject to de novo review by the courts. In Jt. School District No. 10 v. Jefferson Ed. Assn., supra, the Wisconsin Supreme Court opined:

> If the parties submitted the merits to the arbitrators and at the same time challenged the arbitrability of the question and reserved the right to challenge in court an adverse ruling on arbitrability, the court would decide the issue of arbitrability de novo. This procedure is similar to court procedure where a party challenges the court's jurisdiction. The court considers the question and may hold that it has jurisdiction. The parties then proceed to the merits of the case maintaining their right to continue the jurisdictional challenge on appeal. If we were to hold that under these circumstances the parties are bound by the arbitrators' decision on arbitrability, the party alleging nonarbitrability would be forced to enjoin arbitration or to refrain from participation in arbitration. Such a judicial procedure entails time and cost. If meaningful arbitration were thus indefinitely delayed, the purpose of the sec. 111.70, Stats. and of the collective bargaining agreement could be defeated. In contrast, allowing the arbitrator to make the initial determination of arbitrability, which is subject to de novo judicial determination, is desirable since it economizes time and effort. The evidence bearing upon questions of arbitrability are very often relevant to the merits. An evaluation of the arbitrability issue may demand substantially the same expertise and experience with employment relations as a decision on the merits.
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> Numerous cases in other jurisdictions have endorsed this procedure of allowing the courts to determine arbitrability de novo after an arbitrator's initial determination. We find nothing in the development of "common law arbitration" in this state or in ch. 298, Stats., to bar the use of this procedure in Wisconsin.

At 106-108 (Footnotes omitted, emphasis supplied). As the County has noted, arbitrators have, for the most part, taken the same view.

The Union's construction of Section 6.03 of the Agreement is overly restrictive. The Arbitrator doubts whether that provision was intended to limit the arbitrator to only deciding issues which are jointly submitted by the parties. Under such a construction the arbitration process could be frustrated simply by one party's refusal to join in the submission.

On the basis of the foregoing, the Arbitrator makes and issues the following

INTERIM AWARD

The Arbitrator should, and will, address the issue of substantive arbitrability raised by the County. The parties are hereby given the opportunity to submit additional written argument, if they desire, regarding whether the grievance is arbitrable, with such written argument to be postmarked no later than fourteen (14) days from the date of this Award.

Dated at Madison, Wisconsin this 23rd day of August, 1989.

By _____
David E. Shaw, Arbitrator