BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL NO. 1086	Case 2 No. 42655 A-4485
and	
QUASIUS BROTHERS, INC.	

Appearances:

Mr. Matthew R. Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of Laborers' International Union of North America, Local No. 1086, referred to below as the Union.

Mr. Paul D. Lawent, General Counsel, Wisconsin Chapter, The Associated General Contractors of America, Inc., 4814 East Broadway, Madison, Wisconsin 53716, appearing on behalf of Quasius Brothers, Inc., referred to below as the Company or as the Employer.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested, and the Company agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed by Michael R. Ryan, the Union's Field Representative, in a letter to the Company dated July 28, 1989. The Commission appointed Richard B. McLaughlin, a member of its staff, to serve as the Arbitrator. Hearing on the matter was not scheduled until the parties had attempted, without success, to informally resolve the grievance. A hearing on the matter was conducted on November 9, 1989, in Sheboygan, Wisconsin. The hearing was transcribed, and the parties filed briefs by January 3, 1990.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the Company violate the 1987-1990 collective bargaining agreement by paying, since June 19, 1989, certain of its employes the wage rate provided in the wage rate addendum rather than that provided in the 1987-1990 collective bargaining agreement?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

> **ARTICLE I: PERIOD OF AGREEMENT**
>
> Sec. 1.1: This Agreement shall be binding upon the parties, their successors and assigns, and shall become effective as of June 26, 1987, and shall continue in full force and effect until May 31, 1990 . . .
>
> . . .

ARTICLE II: UNION SECURITY

Sec. 2.1: The Employer agrees to require, during the life of this Agreement, membership in the Union as a condition of continued employment of all Employees covered by this Agreement, within seven (7) days following the commencement of such employment, whichever is later, provided, however, that such membership in the Union is available to such Employees on the same terms and conditions generally applicable to other members and that such membership is not denied or terminated for reasons other than a failure by the affected Employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

Sec. 2.2: When the Employer needs additional men, he shall secure these additional men under the Referral System as hereinafter described.

. . .

ARTICLE III: ARBITRATION

. . .

Sec. 3.3: In the event the arbitrator finds a violation of the Agreement, he shall have the authority to award back pay to aggrieved person or persons in addition to whatever other or further remedy may be appropriate; provided, however, that in no event shall back pay be awarded for that period between the time of discovery of the violation and the time of occurrence. Time of discovery, as herein used, is defined as the date notice is given to the Employer or its authorized representative.

. . .

ARTICLE V: WAGE RATES

Sec. 5.1: The following wage rates shall become effective June 29, 1987.

. . .

Sec. 5.4:

. . .

There is established a category of "light commercial construction". On projects in this category where the general contract amount is under $500,000.00, the wage rate of employees covered by this agreement shall be reduced 10% from the base wage rate established in Agreement. Fringe benefit contribution amounts will be the same as provided in this Agreement. Projects under this provision shall be limited to Fast Food Stores, Strip Stores, Office Buildings, Churches, and Banks.

The parties will continually monitor the effectiveness of this Agreement relative to market conditions so that this Agreement can be modified when necessary to assure work opportunities for employees and the competitive position of the employers. Such modification may take the form of "targeting" certain jobs to put signatory contractors in a more competitive bidding position.

When agreement is reached on a targeted job, the Wisconsin Chapter of the A.G.C. will make the terms and conditions of such agreement available to all employers signatory to this agreement.

In order to implement this provision, a Labor-Management Committee(s) will be formed which shall meet no less than bi-monthly. In the event either of the parties feel that this provision is not being applied in a equitable manner, either party may refer, through the Associated General Contractors of America or the Wisconsin Laborers' District Council, the dispute to the Impasse Settlement Board for final resolution.

. . .

Sec. 5.6.1: Learner Program - Any new Employee that was not a member of a Laborers' Union, or has less than one (1) year's experience as a Construction Laborer, shall be classified as a Learner.

Sec. 5.6.2: The Learner Employee shall receive one dollar ($1.00) per hour less than the General Laborer's scale for a period not to exceed 1,000 hours from the date of employment. Certified training hours completed under the Laborers' Skill Improvement Program shall be accepted toward the 1,000 hours. All other provisions, including all fringe benefits, of the Agreement shall apply to the Learner.

. . .

Sec. 5.6.6: Upon completion of the 1,000 hours of work under the Laborers' Jurisdiction, such Learner shall be upgraded to the regular wage rate classification as set forth in this Laborers' Agreement.

Sec. 5.6.7: During the term of this Agreement in the event there is a layoff, the ratio of Laborers working for said Contractor on any one job shall be no less than five (5) regular Laborers to one (1) Learner. All Learners shall be subject to ARTICLE II: Union Security.

BACKGROUND

The grievance was filed by Michael R. Ryan, a Field Representative for the Union, in a letter to the Company dated July 28, 1989, which reads thus:

Please consider this a formal grievance pursuant to Article III of our Labor Agreement.

Since June 19, 1989, and continuing thereafter, your company has been in violation of our Labor Agreement by failing to pay the hourly wage rate provided for under Article V of the collective bargaining agreement between the signatory contractors of the Fox River Valley, Sheboygan area, Wisconsin River Valley and the Wisconsin Laborers' District Council.

As a remedy for this violation of the contract, we are requesting that the affected employees be made whole for all underpayments of wages and that they be paid interest on all amounts owed.

. . .

The "Labor Agreement" referred to in Ryan's letter is the 1987-90 agreement, portions of which are set forth above. On July 14, 1988, the parties executed an attachment to the labor agreement. That attachment is referred to below as the Addendum.

The Addendum consists of six pages. Four of those pages are separately numbered. The relevant portions of those numbered pages read thus:

ARTICLE V: WAGE RATES

Sec. 5.4:
There is hereby established a category of "Light Building Construction." On projects in this category where the general amount is under $750,000.00, excluding mechanical, electrical, elevator and interior furnishings, the prevailing wage package of the employee covered by this agreement shall be reduced 10%. Fringe benefit contribution amounts will be the same as provided in this agreement.

The parties will continually monitor the effectiveness of this Agreement relative to market conditions so that this Agreement can be modified where necessary to assure work opportunities for employees and the competitive position of the employers. Such modifications may take the form of "targeting" certain jobs to put signatory contractors in a more competitive bidding position.

Where market conditions are such that a targeted rate is beneficial to Union Construction, the parties to the Agreement shall meet, together with other trades, and agree upon a market rate for a particular project. Each trade employed by the contractor shall elect one member within the company to sit on a Labor-Management Team. It is the responsibility of this Team to decide on which jobs will be targeted and what rate will apply. The Union will be given at least three (3) days notice of a Labor-Management Team Meeting and the projects which will be discussed. Each Team member will have one vote in the decision with management receiving one equal vote.

The Union may if it chooses be involved in the election process of the Labor-Management Team. Each current Employee casts one vote for the person in their particular trade who they feel will best represent their position on this issue. The Union will be notified in writing of the results. The Union or a majority of the current Employees may call for a new election, no more than two times per year.

. . .

The option also exists to increase the ceiling on projects covered under the Light Building Construction category if agreed to by both parties.

Sec. 5.6.1: Learner Program -
Any new employee that is not a member in good standing of the Wisconsin Laborers' District Council Local #1086 as of June 1, 1988 will be classified as a Learner and fall under the following wage schedule:

HOURS	BRACKET	%	MONTHS
0 - 0780	1	55%	00 - 06
0781 - 1560	2	65%	07 - 12
1561 - 2340	3	70%	13 - 18
2341 - 3120	4	75%	19 - 24
3121 - 4680	5	80%	25 - 36
		100%	

Learners shall receive all fringe benefits provided by the Union.

The Learner shall advance within this schedule after completing the established claendar and work hour requirements. The Employer and the Union shall continue to monitor the progress of the individual, working together with the individual to reach full scale.

(Replaces Article V: Wage Rates: Sec. 5.6.1, 5.6.2, 5.6.6)

Sec. 5.6.7: During the term of this Agreement, the ratio of Laborers working for said Contractor shall be no more than five (5) regular Laborers to one (1) Learner. All Learners shall be subject to ARTICLE II: Union Security.

. . .

ARTICLE IX: WORKING HOURS

. . .

WORKING RULES

. . .

ARTICLE X: MISCELLANEOUS PROVISIONS

Sec. 10.10.1:

. . .

Sec. 10.20:
The Employer may request an Employee covered by this Agreement to attend certain educational programs.

. . .

The final page of the Addendum is the signature page, which is dated July 14, 1988. The page is not separately numbered and bears the signatures of David Quasius on behalf of the Company, and Thomas M. Klein on behalf of the Union. David Quasius, who is referred to below as Quasius, is the Company's Secretary-Treasurer and Vice President. Klein is the Union's Secretary-Treasurer and Business Manager.

The Addendum's cover sheet bears the signature of Klein only, and consists of two paragraphs which read thus:

> The following is an addendum to be attached to the Laborers' Collective Bargaining Agreement between the Signatory Contractors of the Fox River Valley, Sheboygan Area and Wisconsin River Valley and the Wisconsin Laborers' District Council representing Locals: 539, 931, 1086, 1359 and 1407, effective June 26, 1987 to May 31, 1990.
>
> This proposal is to be effective only in Sheboygan County. Any employer that is found in violation of this addendum will forfeit the right and result in the removal of this addendum for the duration of the working agreement.

The Union executed a separately signed addendum with Joe Schmitt & Sons Construction Company, which is referred to below as Schmitt & Sons. Reed Schmitt, who is referred to below as Schmitt, signed this addendum on behalf of Schmitt & Sons. Quasius served as the spokesman for the Company at these sessions, and Schmitt served as the spokesman for Schmitt & Sons. The Company and Schmitt & Sons are independent businesses.

On July 14, 1988, Klein delivered the separately numbered pages of the Addendum, with a signature page and the cover page to Quasius. Klein and Quasius went over the numbered pages of the Addendum on July 14, 1988, and made certain changes to those pages. Quasius and Klein also discussed the second paragraph of the cover page, which Klein had attached to the balance of the Addendum. The Addendum's cover page had not been addressed at any of the prior bargaining sessions.

Klein testified that Quasius, upon reading the second paragraph of the cover page, asked why it had been included. Klein stated he responded thus:

> I said that was to keep you people honest. I also stated I believe it was contained in the masons' addendum to their contract. 1/

Quasius testified that he asked Klein why the second paragraph was included in the Addendum's cover page, and further testified that he understood Klein's response thus:

> Well, I think my interpretation from what he said was that he was looking for some protection in case we went out and willfully did something to destroy it, we didn't follow this addendum, we tried to -- I don't want to say -- Well, that we purposely went out there and did something to disrupt the intent of this agreement. 2/

Each witness noted that their discussion of the Addendum's cover page was brief.

Upon signing the Addendum on July 14, 1988, Quasius phoned Schmitt to inform Schmitt that he had signed the Addendum and that Klein would be coming over to obtain Schmitt's signature.

Klein testified that he got the language of the second paragraph of the Addendum's cover page either from correspondence from Quasius or from a representative of the Masons' union.

Schmitt testified that he had proposed language similar to that of the second paragraph of the Addendum's cover page to representatives of the Masons' union during then ongoing negotiations. Schmitt stated his reasoning for proposing this language to the Masons' union thus:

1/ Transcript (Tr.) at 14.

2/ Tr. at 28.

> . . . What I proposed was I had read an escape clause which basically says that if someone does not use the contract within the intent of the contract, then -- Basically it was designed a gross violation would remove the addendum from that company. That's how I proposed it to the masons because they had a similar concern about sure, it might -- you might say it's you intent to use this contract in that respect, but what stops someone else from coming in and using it a different way. 3/

Schmitt signed a separate signature page to the addendum on July 14, 1988.

There is no dispute the purpose of the Addendum was to enhance the ability of the Company and Schmitt & Sons to obtain construction work.

The Addendum became the subject of a grievance between the Union and the Company. That grievance was addressed in an Arbitration Award issued by Sharon Gallagher Dobish on May 30, 1989. 4/ That arbitration award, in relevant part, reads thus:

> ISSUE
>
> The parties stipulated to the following issue for the Arbitrator's determination:
>
> > Did the Company violate the labor agreement when it paid less than the Fox River Valley Laborers' rate on the Master Gallery and Donahue Engineering Projects; if so, what is the appropriate remedy?
>
> RELEVANT CONTRACT PROVISIONS
>
> The Company has signed a copy of what is known as the "Blue Book", an agreement between signatory contractors in the Fox River Valley, Sheboygan area and the Wisconsin River Valley and the Wisconsin Laborers' District Council. The Company is also signatory to what is known as the "Sheboygan County Addendum" portions of both documents are relevant here. The Blue Book provides in pertinent part:
>
> . . .
>
> The Sheboygan County Addendum (hereafter the addendum) provides in pertinent part:
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> . . .
>
> DISCUSSION
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> . . .
>
> The Employer has argued that the only proper person to make the targeting decisions regarding the MG and Donahue Projects was Ostermann. This argument is based upon the Employer's misunderstanding that the language of the Addendum gave the Employer license to deal directly and solely with Ostermann on targeting

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3/ Tr. at 45.

4/ Commission Case 1, No. 41300, A-4370.

issues after the Labor-Management Team concept became inoperable due to the Carpenters' refusal to join it. As I see it, when the Labor-Management Team approach became defunct -- when it could not function as described in the Addendum -- the Labor-Management Team approach should have been discontinued entirely until it could be amended through contract negotiations or other mutually agreed upon discussions between the Employer and the Union.

. . .

The Employer has also argued that the second paragraph of Section 5.4 of the Addendum allowed it to modify the terms of the Addendum wherever necessary in order to get more construction work of all kinds. This assertion is simply not supported either by the language of the Addendum or by the evidence in this case. An intention to allow unilateral or bilateral modification of contract language during the term of a labor agree-ment would have to be quite specific and detailed to bind the parties. The language of paragraph 2 appears to be more aspirational than it is directory and it lacks the specificity required for the result urged by the Employer.

Furthermore, the Employer's argument flies in the face of the basic labor law notion that the parties signatory to a labor agreement must rely upon and apply the stated terms of their labor agreement (which is intended to regulate their conduct toward one another) for the duration of the agreement. 7/ Labor law does not allow one party to delete or to change portions of a labor agreement to suit its needs or to ignore terms which have become unworkable, even if such actions are taken (as I believe they were taken here by the Employer), in complete good faith.

Since the Projects were not properly targeted under the Addendum, I must conclude that the Employer should have paid the Blue Book rates to all Laborers on the Projects. In addition, the Employer's use of Bramsteadt as a Learner under the Addendum was not allowable and the terms of the Blue Book agreement must also be applied to the Bramsteadt situation.

Based upon the entire record in this case, I find that the Employer has violated the effective labor agreements and that the grievance must be sustained.

AWARD

The Company violated the labor agreement when it paid less than the Fox River Valley Laborers' rate on the Master Gallery and Donahue Engineering Projects.

REMEDY 8/

The Company shall make whole the laborer employes employed on the MG and Donahue Projects by paying each of them the difference between the Fox River Valley rate and the rate actually paid to each employe for the time each worked on each job. Bramsteadt must be paid the difference between the full FRV rate and the Learner rate he was paid for his work time on the MG Project.

. . .

7/ No evidence of past practice is before me in this case.

8/ Since the Employer has demonstrated its good faith in this case, no interest is appropriate on the amounts of backpay due. . . .

In a letter to Quasius dated June 16, 1989, Ryan and Klein stated the following:

> As a result of your violation of the addendum to our Labor Agreement, the addendum is hereby removed and void. Effective June 19, 1989, you are to comply with all provisions of the Labor Agreement between: Signatory Contractors of the Fox River Valley, Sheboygan Area, Wisconsin River Valley, and Wisconsin Laborers' District Council.

The parties entered the following stipulation at the November 9, 1989, arbitration hearing:

> Since June 19, 1989 the Employer has continued to pay certain of its employees the wage rate provided for in the wage rate addendum rather than as provided for in Joint Exhibit 1. 5/

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union phrases the issues for decision thus:

> Did the Employer violate the agreement by, subsequent to June 19, 1989, paying certain of its labor employees the lesser wage rate contained in the Sheboygan County addendum to the Fox River Valley agreement instead of the wage rate provided for in the Fox River Valley agreement?
>
> If so, what is the remedy?

The Union argues initially that: "(I)t is clear that the determination by Arbitrator Gallagher Dobish that the employer violated the addendum is binding here as a matter of res judicata". The principles of res judicata, according to the Union, "require that an issue determined in a prior award is binding upon the parties in a subsequent arbitration". It follows, the Union argues, that the Gallagher Dobish award establishes a Company violation of the addendum. From this, the Union asserts that the "clear and unambiguous" language of the addendum requires that the Company "loses the benefit of the addendum and must comply with all provisions of the Fox River Valley Signatory Contractors Agreement". The language of the addendum and arbitral precedent establish, according to the Union, that "good faith" can not operate as a defense to the operation of the sanction clearly stated in the addendum. The final issue addressed by the Union is that of remedy. The Union states its view of the appropriate remedy thus:

> Obviously employees who were underpaid since June 19, 1989 should receive full back pay. In addition, however, they should receive interest on any back pay.
>
> While arbitrators do not always award interest, in appropriate cases it is well recognized that interest is appropriate. See e.g., Allied Chemical Corp., 66-3 ARB Par. 9022 (Hilpert); American Chain and Cable Co., 40 LA 312, 315 (McDermott); Elkouri & Elkouri, How Arbitration Works, (4th Ed.) 407 n. 183. Here, in the original case Arbitrator Dobish charitably declined to award interest. It is time for that charity to end.

Because the Company knew it had violated the Addendum yet did not attempt to vacate that award in court, and because the "good faith" defense is without

5/ Tr. at 4-5. Joint Exhibit 1 is the 1987-1990 labor agreement summarized in the RELEVANT CONTRACT PROVISIONS section above.

support in the contract, it follows, according to the Union, that a failure to award interest would exact an interest free loan to the Company from those employes who worked at below contractual wage rates.

THE COMPANY'S POSITION

The Company phrases the issues for decision thus:

> If an arbitrator finds a good faith violation by Quasius Bros., Inc., of the July 14, 1988, Quasius-Local 1086 addendum to the Laborers' Collective Bargaining Agreement, does said finding also void the entire addendum from the period June 19, 1989 thru the end of the collective bargaining agreement?
>
> If yes, what is the appropriate remedy?

The Company notes that negotiations regarding the addendum were "intense" and that Klein "in effect surprised Dave Quasius with this cover sheet". The Company evaluates the bargaining context thus:

> There was no negotiating background and little time to properly analyze this new proposal. The Union obviously had the upper hand, it could withold executing the document with Quasius and execute one with Schmitt thus placing Quasius at a disadvantage. The parties were not together when the document was signed. Quasius had no choice but to execute this document, and for the Union to attempt to void it against Quasius at this point is unconscionable. It will place Quasius at a disadvantage not only with Schmitt but with any other contractor that had already signed the agreement and has the potential of seriously endangering their business as Schmitt (or any other contractor) would have the opportunity to pay lower wages and thus have a better opportunity to obtain available projects.

Because, according to the Company, the "main concern was not whether Quasius or Schmitt . . . would violate the addendum (but whether) other contractors, outside of the County" would do so, and because Arbitrator Gallagher Dobish emphasized the Company's good faith, it follows that the Addendum should not be voided. Beyond this, the Company contends that the "concept of unconscionability" is established at law 6/ and should be applied to the facts of this matter, since "(m)any of the factors of unconscionability have been included in this case". Viewing the record as a whole, the Company concludes that the grievance should be denied. Any other conclusion would ignore that "(t)here was never any attempt or understanding that this clause would be utilized to prejudice those contractors which had diligently attempted to make union construction more competitive in Sheboygan County".

DISCUSSION

Neither party's formulation of the issues can be characterized as inappropriate. The issues I have adopted are sufficiently broad to incorporate both parties' arguments.

The first of the two issues posed for decision here highlights the viability of the Addendum in light of the Gallagher Dobish award. The Company has violated the 1987-1990 agreement by paying the wage rates specified in the Addendum if the Addendum was effectively voided by the Gallagher Dobish award. This point is governed by the final sentence of the Addendum's cover page. The parties' arguments focus less on the interpretation of that sentence than on the defense asserted by the Company to the operation of that sentence.

The final sentence of the Addendum's cover page does not permit any room for contract interpretation. The sentence specifies conduct subject to a sanction, the parties subject to the sanction, and the sanction. None of these

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6/ Citing: Discount Fabric House of Racine v. Wisconsin Telephone Company, 117 Wis.2d 587, 602, 345 N.W.2d 417, 424 (1984); Johnson v. Mobil Oil Corp., 415 F.Supp. 264 (E.D. Mich., S.D., 1976); Foursquare Properties Joint Venture I v. Johnys' Loaf & Stein, Ltd., 116 Wis.2d 679, 681, 343 N.W.2d 126, 127 (Ct. Appeals, 1983); Wassenar V. Pannos, 111 Wis.2d 518, 526, 331 N.W.2d 357, 361 (1983); Koval v. Liberty Mutual Insurance Company, 531 A.2d 487, 491 (Pa., 1987); Nylen v. Park Doral Apartments, 535 N.E.2d 178, 184 (Ind., 1989); Lewis v. Lewis, 748 P.2d 1362, 1366 (Hawaii, 1988); and Guess v. Brophy, 115 Ill. Dec. 282, 517 N.E.2d 693, 699, 164 Ill. App.3d 75, 83 (Ill. App. 4 Dist., 1987).

elements can be considered in doubt on this record. There is no dispute the Company is an "employer" within the meaning of the Addendum. The labor agreement as well as the Addendum expressly refers to the Company as an "employer", and the Company is a party to each agreement. The Company asserts the Addendum is addressed to non-Sheboygan County contractors who might misuse the Addendum while performing work in the county. This assertion can not be accepted without reading the cover page of the Addendum out of existence, and without unpersua-sively interpreting the reference to "Any employer" in the final sentence of the Addendum's cover page to apply only to employers who have not signed the Addendum.

Nor is there any dispute that the Gallagher Dobish award, however read, establishes a violation of the Addendum. It is undisputed that the Company has not sought to vacate that award in court, and the Company does not assert that the labor agreement empowers me to vacate the award. Thus, the violation of the Addendum stated in that award is binding in this proceeding, for it is impossible to conclude the award does not establish a violation of the Addendum without vacating it. It should be stressed the issue here is not whether I agree or disagree with the Gallagher Dobish award. Rather, the issue is whether that award establishes a violation of the Addendum. Because I lack the authority to vacate that award, it follows that the award establishes a violation of the Addendum.

The final element to the operation of the final sentence of the Addendum's cover page is triggered by the violation established in the Gallagher Dobish award. That sentence provides that "Any employer that is found in violation" of the Addendum "will forfeit the right and result in the removal of this addendum for the duration of the working agreement". The record affords no room for arbitral interpretation of this language. The language does not appear ambiguous, and mandates the sanction which "will" follow if an employer "is found in violation" of the Addendum. The interpretation asserted by the Company requires the implication of the terms "bad faith" or "willful" before "violation". This interpretation ignores that the sentence does not employ these terms and is at least arguably clear and unambiguous without them. Even assuming an ambiguity exists, evidence of bargaining history fails to establish the parties mutually understood or discussed the necessity of a "bad faith" or "willful" violation. Quasius and Schmitt may have assumed such a violation was necessary, but this assumption was never shared with the Union in a proposal or in mutual discussions. Thus, even assuming the language is ambiguous, bargaining history affords no persuasive basis for the implication sought by the Company.

Since there is no dispute that the cover sheet was included with the Addendum at the time of its execution by Quasius and Klein on July 14, 1988, the Gallagher Dobish award effectively voided the Addendum.

As noted above, however, the parties' arguments focus less on the operation of the final sentence of the Addendum's cover page than on whether a valid defense exists to the operation of that sentence.

The Company has made a number of contentions stating that enforcement of the final sentence of the Addendum's cover page would be "unconscionable". To establish this doctrine, the Company cites a number of judicial decisions. These decisions establish a widely varying series of contexts and issues: Discount Fabric House involved an exculpatory clause in an advertising contract; Johnson involved a clause excluding consequential damages in a retail dealer contract; Foursquare Properties involved a tax clause in a commercial lease; Wassenar involved a stipulated damages clause in an individual employment contract; Koval involved an "anti-stacking" clause in an insurance contract; Nylen involved a savings clause in a residential lease; Lewis involved the enforceability of a pre-marital agreement; and Guess involved a service contract in which a corporation offered to assist an heir in obtaining his inheritance.

The Company does not, however, cite these decisions as binding precedent, but cites them to establish the doctrine of unconscionability and to establish a line of reasoning the Company feels should be applied to the present grievance. That line of reasoning is variously stated by the courts. Among the indicia of unconscionability cited by the courts are "one-sidedness and unfair surprise" 7/ and the lack of "meaningful choice". 8/ Two of the cited decisions, citing commentators from the field of commercial law, 9/ have distilled the various decisions into a balancing approach. Under that approach, the factors establishing unconscionability are divided into "procedural" and "substantive" categories. The two categories are detailed thus:

7/ Lewis, cited at footnote 6/, 748 P.2d at 1366.

8/ Guess, cited at footnote 6/, 517 N.E.2d at 699.

9/ Discount Fabric House and Johnson, cited at footnote 6/, citing White & Summers, Uniform Commercial Code (1972).

> Under the 'procedural' rubric come those factors bearing upon . . . the 'real and voluntary meeting of the minds': age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible, whether there were alternative sources of supply for the goods in question. The 'substantive' heading embraces the contractual terms themselves, and requires a determination whether they are commercially reasonable. 10/

The two categories are applied, under the balancing approach, thus: "To tip the scales in favor of unconscionability requires a certain quantum of procedural plus a certain quantum of substantive unconscionability". 11/ This is as clear a statement of the doctrine as appears in the cited cases, and will be employed to address the Company's asserted defense in this case.

Even assuming the doctrine can appropriately be applied in the collective bargaining context, applying the balancing approach stated above will not warrant denying the enforceability of the final sentence of the Addendum's cover page. Regarding the procedural factors noted above, the Company points out that the Union drafted the Addendum's cover page, and did not bring that page to the Company's attention until the date the Addendum was executed. These factors point, as the Company asserts, toward surprise on the Company's part in reviewing the Addendum. Other procedural factors must, however, also be weighed. Quasius and Klein are both adults, with experience in the construction business and in collective bargaining. Quasius graduated from college and has a background in accounting. Nothing in the record offers any indication that the Company is anything other than a considerable, well-run construction company. While discussion of the provisions of the Addendum's cover page was brief, it is apparent that Quasius asked why the cover page was necessary and was informed it would act as a check against misconduct by employers. Beyond this, the Company's assertion that it was "the weaker party", is not established in the record. The Company contends that it needed the provisions of the Addendum while the Union could fall back on the provisions of the labor agreement if no agreement could be reached. This does not, however, establish weakness in the employer's position, within the meaning of the cases cited above. Agreement on the Addendum required about twelve sessions. If the Union had no interest in varying the provisions of the labor agreement, it is impossible to understand why the Union entered those negotiations at all, much less to understand why those negotiations would be the protracted and intense sessions noted by each testifying witness. Beyond this, the parties modified the provisions of the Addendum on July 14, 1988. There is no persuasive evidence in the record to establish that the Addendum's cover page could not have been modified, had the Company chosen to propose doing so.

Regarding the substantive factors, the Company correctly points out that the final sentence of the Addendum's cover page states an unusual provision. Standing alone, however, the provision can not be characterized as commercially unreasonable. The sanction involved is severe, but the severity of the sanction was arguably necessary and was mitigated by the fact that the Union could not unilaterally invoke it. As preface to these points, it is necessary to note that the sanction served also as an incentive for an employer to comply with the Addendum's terms. Such a sanction/incentive may have been necessary to assuage Union concerns about entering into an agreement varying the terms of the labor contract. Beyond this, the severity of the sanction is mitigated by the fact that the sanction could not be unilaterally invoked by the Union, but required the determination, after evidentiary hearing, of a neutral third party.

The record demonstrates neither the procedural nor the substantive factors necessary to a finding that the Addendum's cover page states an unconscionable provision. The Company has demonstrated it was surprised by the Union's proposal of the cover page on July 14, 1988, but the record will not support the conclusion that the substance of the cover page or the procedure by which it was proposed denied the Company of a meaningful choice in the matter. Even assuming the doctrine of unconscionability should be applied in labor arbitration, a finding of unconscionability is not persuasive on the present record.

The final issue posed concerns remedy. Section 3.3 of the labor agreement governs remedy, and provides that an arbitrator "shall have the authority to award back pay . . . in addition to whatever other or further remedy may be appropriate". Under that section, an award of back pay dates

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10/ Discount Fabric House, 117 Wis.2d at 602.

11/ Ibid.

from the "time of discovery of the violation", which is defined as "the date notice is given to the Employer or its authorized representative". It is not disputed that the time of discovery in this case is June 19, 1989, and the back pay award entered below reflects this.

The disputed point regarding remedy concerns the Union's request for an award of interest on the back pay. The parties' labor agreement does not expressly provide for, or preclude an award of interest. Section 3.3 is arguably broad enough to encompass such an award, for it provides that "other or further remedy" beyond back pay "may be appropriate". Even assuming an award of interest is authorized by Section 3.3, such an award is not persuasive on the present facts. Initially, it must be noted that an award of interest is not the majority rule. This point is made by Elkouri and Elkouri thus:

> The question of interest on the principal sum awarded has sometimes arisen. Arbitrator Sanford H. Kadish refused to order payment of interest on his award of holiday pay since neither the collective bargaining agreement nor the submission expressly authorized him to order the payment of interest and 'it is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing.' A number of other arbitrators have likewise expressly refused to

> award interest. Although interest has been awarded in a fair number of cases, most cases still make no mention of interest and this indicates the continued validity of Arbitrator Kadish's statement that 'it is not customary in arbitrations for the arbitrator to grant interest on claims which he finds owing.' 12/

Hill and Sinicropi make the point thus:

> In general, it has not been the practice of arbitrators to award interest as a part of the traditional 'make whole' package, primarily because (1) the parties rarely request it in the submission, and (2) it is not considered customary in the industrial relations forum. 13/
>
> . . .
>
> In general, the awarding of interest in arbitration has been the exception rather than the rule. When it has occurred it has resulted because it has been requested or because there has been such dilatory action by the employer that the arbitrator has concluded that some penalty in the form of interest was due. . . . While interest in arbitration awards has not been frequently granted, there is reason to believe that a contrary trend may develop. 14/

Neither the authority cited by the Union, nor the facts at issue here warrant deviating from the majority rule.

The authority cited by the Union is inapposite to the present grievance. Arbitrator Hilpert's award of interest in Allied Chemical concerned a suspension, and relied on the "the 'common law' damages for wrongful suspension or discharge". 15/ Arbitrator McDermott, in American Chain stated an award of interest "can only be granted under very special circumstances", and mentioned "good faith" as a relevant criterion. 16/ Arbitrator Gallagher Dobish found no evidence of bad faith by the Company in the matter before her, and I can find no evidence of bad faith by the Company in the matter before me. At most, the record demonstrates the Company's frustration at the parties' inability to get the Addendum to work as negotiated. The record does not establish this frustration casued the Company to use the Addendum to deny or to delay its employes' receipt of the proper wage rate. Rather, the record establishes the Company continued to attempt to make the Addendum work as negotiated, in the belief that it was entitled to do so. The present record does not, then, provide an appropriate factual basis to depart from the majority rule on the award of interest.

AWARD

The Company did violate the 1987-1990 collective bargaining agreement by paying, since June 19, 1989, certain of its employes the wage rate provided in the wage rate addendum rather than that provided in the 1987-1990 collective bargaining agreement.

12/ Elkouri & Elkouri, How Arbitration Works, (BNA, 1985), at 406-407, citations omitted.

13/ Hill & Sinicropi, Remedies in Arbitration, (BNA, 1981), at 197.

14/ Ibid., at 199-200.

15/ Allied Chemical Corporation, 66-3 Arb. at 6550.

16/ American Chain and Cable Co., 40 LA at 315.

As the remedy appropriate to the Company's violation of the 1987-1990 collective bargaining agreement, the Company and the Union shall identify those employes who were paid, since June 19, 1989, the wage rate provided in the wage rate addendum rather than that provided in the 1987-1990 collective bargaining agreement. The Company shall make the employes thus identified whole by paying them the difference between the amount actually paid from June 19, 1989, until the date the Company ceased paying the wage rate provided in the Addendum, and the amount the Company would have paid had the Company paid the wage rate provided in the 1987-1990 collective bargaining agreement.

Dated at Madison, Wisconsin this 5th day of February, 1990.

By _____
Richard B. McLaughlin, Arbitrator