BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

ELLSWORTH FARMERS UNION CO-OP OIL COMPANY

Case 8
No. 51125
A-5244

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Renata Krawczyk, appearing on behalf of the Union.

Doherty, Rumble & Butler, Professional Association, by Ms. Lisa Hurwitz Dercks, appearing on behalf of the Employer.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and Ellsworth Farmers Union Co-op Oil Company, hereinafter referred to as the Employer, are parties to a collective bargaining agreement which provides for the binding arbitration of grievances arising thereunder. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to designate a member of its staff to act as the Chairman of a three member Board of Arbitration to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was designated Chairman of the Board of Arbitration. Mr. Michael Thoms was designated the Union representative and Mr. Larry Dokkestul was designated the Employer representative on the Board of Arbitration. Hearing was held on October 26, 1994, in Ellsworth, Wisconsin. The hearing was not transcribed and the parties submitted post-hearing briefs and reply briefs, the last of which were exchanged on December 30, 1994. The parties waived that provision of the contract requiring a written decision within one (1) week after final submission of the dispute to the Board.

BACKGROUND:

Effective January 1, 1994, the Employer entered into a Joint Venture with two other Co-ops, Farmers Cooperative Produce Association, hereinafter "Baldwin" and New Richmond

Farmers Union Cooperative Oil Company, hereinafter "New Richmond." 1/The Joint Venture's purpose was to engage in the agronomy, i.e. fertilizer, and the grain and feed business previously performed by the three Co-ops. The Employer leased all its performing assets used in the fertilizer and grain and feed operation to the Joint Venture. Rent was based on the appraised value of plant and equipment divided by the number of years' depreciation. Baldwin managed the Joint Venture and received 40% of the profit for such management. Profit to each Co-op was based on a formula factoring sales and fixed assets contributed to the Joint Venture. The Joint Venture had a management council consisting of the General Manager of each Co-op and two other representatives of each Co-op for a total of nine persons, each with one vote with a majority vote required for Joint Venture decisions. On or about October 24, 1993, a public meeting was held to discuss the Joint Venture and sample questions and answers were distributed. 2/

On October 26, 1993, the Union's Business Agent, Ron Wait, sent the Employer's General Manager the following letter:

> Mr (sic) Ruemmele, Local 662 has been advised that a joint venture will be implemented on January 1, 1994 between the Ellsworth, Baldwin and New Richmond Farmers Union Co-ops.
>
> Teamsters Local 662 and Ellsworth Farmers Union Co-op Oil Company are signatory to a collective bargaining labor agreement. With that in mind, let this communication serve as a request as to the immediate and any future effect that this joint venture will have on the hours, wages and working conditions of the members of the bargaining unit.
>
> We also request that this Local continue to be informed of any future changes in the status of your operations that would have any impact on the bargaining unit members.
>
> I will make myself available should you determine that we need a meeting to discuss these issues.

1/ Ex. 2.

2/ Ex. 6.

Your prompt response to this request will be appreciated. 3/

On December 7, 1993, the Union's Business Agent sent the Employer's General Manager the following letter:

> Mr (sic) Ruemmele, as of this date I have not received a response to my letter dated October 26, 1993 concerning a joint venture between the Ellsworth, Baldwin, and New Richmond Farmers Union Cooperatives.
>
> I will remind you that Teamsters Local 662 and Ellsworth Farmers Union Co-op Oil Company are signatory to a collective bargaining labor agreement. By law the Co-op has an obligation to notify and meet with this Union prior to any unilateral implementation of any changes in operations that will affect the hours, wages, and working conditions of the bargaining unit members.
>
> Should any changes occur that the Union is not a party to, I will pursue the matter through the appropriate legal channels and agencies. 4/

Three employes worked in the fertilizer and grain and feed operations of the Employer. After January 1, 1994, the three continued to work the same as before with no change in wages, hours or working conditions. On March 9, 1994, a meeting was held between representatives of management and the Union at which time the Union was informed that the three employes of the fertilizer and grain and feed operations would be given three options effective July 1, 1994. They could stay with the Employer and be assigned to other jobs or bump less senior employes or they could go with Baldwin, a non-union employer, or they would be laid off. This meeting was confirmed in a letter dated March 16, 1994, to the Union's Business Agent from the Employer's attorney, which stated the following:

> This will confirm our meeting on March 9, 1994, in Rich Ruemmele's office attended by you, Rich Ruemmele, Dale Freier

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3/ Ex. 4.

4/ Ex. 5.

and me to discuss the Ellsworth Co-op's participation in the new Joint Venture with the Baldwin and New Richmond Co-ops.

In light of the fact that the Ellsworth Co-op lost over $87,000 in fertilizer and over $46,700 in feed last year, something had to be done to put the business back into a positive financial condition. As a result, the Ellsworth Co-op entered into a Joint Venture Agreement with the cooperatives at New Richmond and Baldwin whereby Ellsworth leased to the Joint Venture, to be operated by the Baldwin Co-op, its entire feed and fertilizer operations. It is intended that this arrangement will become permanent because it is readily apparent to the Ellsworth Board of Directors that the Cooperative cannot profitably operate in the feed and fertilizer business.

As a result of the above action, three bargaining unit employees are affected. Rex Stewart and Tom Flanigan are full time feed employees. Tom Wider, who is classified as Utility-Maintenance, currently goes back and forth between the Ellsworth Co-op and the Joint Venture. Rich Ruemmele estimates that in the course of a year Wider would spend approximately 65% of his time working for the Joint Venture and 35% of his time working for Ellsworth. However, Rich is prepared to give to Wider the option of either working full time for the Joint Venture or working full time for Ellsworth. That is, Rich is prepared to find additional duties for Wider which would allow him to work 100% of his time in the Ellsworth bargaining unit. In Rex Stewart's case, he is the number two person on the seniority list and, therefore, would have the right to bump a junior bargaining unit person assuming he is qualified to perform that person's work. Tom Flanigan is last on the seniority list so he will have no seniority bumping opportunity and his only option will be either to work for the Joint Venture or to find employment elsewhere.

During the course of our meeting, we tentatively agreed as follows. You will speak to Tom Wider and explain to him that he can either go with the Joint Venture or remain with the Ellsworth Co-op with somewhat different duties. After you have had the opportunity to confer with Wider, Rich Ruemmele will speak to him and explain to him in detail about his option and the nature of the work he would be doing at either the Joint Venture or at Ellsworth. You will also meet with Rex Stewart and inform him that he has

> the opportunity to go with the Joint Venture or to exercise his seniority rights to stay within the bargaining unit at Ellsworth, again assuming that he is qualified to perform the work of a junior employee. You will also meet with Tom Flanigan to let him know that he must either go with the Joint Venture or he will be laid off from Ellsworth.
>
> In conclusion, the net effect of the Joint Venture is that Ellsworth is going out of the feed and fertilizer business. As a result, at least two full time bargaining unit positions are being eliminated in the feed area. If the Union and the effected (sic) bargaining unit employees so desire, the Ellsworth Co-op is willing to continue to maintain the affected employees on its payroll until the contract expires in June. At that time, they will be officially transferred off of the Ellsworth payroll. In the interim, it is understood that the two feed positions are in reality working for the Joint Venture and that the collective bargaining agreement which covers the feed and fertilizer operations will no longer be operative in those areas.
>
> Please feel free to call either Rich Ruemmele or me if you have any further questions. In the meantime, thank you very much for your cooperation in making this a relatively smooth transition. 5/

On April 5, 1994, the Union filed a grievance alleging a violation of a number of articles of the agreement in that the Joint Venture resulted in a loss of work, job opportunities and other adverse effects on the bargaining unit. 6/ The Employer's attorney answered the grievance on April 19, 1994, stating as follows:

> As the Company representatives informed you during our meeting on March 9th in Ellsworth, and as the Joint Venture Agreement itself provides, the Co-op is perfectly willing to abide by all the terms and conditions of the Labor Agreement until it expires on June 30, 1994, and it has done so to date. Therefore, your

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5/ Ex. 9.

6/ Ex. 3.

grievance on its face is completely without merit.

In addition, however, it is also the position of the Ellsworth Farmers Union Co-op that under existing federal labor law it has the right to partially close an operation, for reasons unrelated to the Union, on a unilateral basis. In short, neither the labor agreement nor federal law provide a guaranty (sic) of work to any member of the bargaining unit.

Therefore, in light of the above, the Company denies the grievance. 7/

7/ Ex. 7.

Article 28 of the parties' collective bargaining agreement provides that it is in effect until June 30, 1994, and shall continue in effect from year to year unless written notice to terminate it is served by either party at least sixty days prior to the date of expiration. 8/ Neither party gave such notice and the agreement continued in effect until at least June 30, 1995.

On July 1, 1994, Wider was assigned different duties with the Employer and Stewart was assigned duties in the Employer's hardware store. Flanigan quit his employment with the Employer. The Employer had no employes in its former fertilizer and grain and feed operations.

ISSUES:

The Union stated the issue as follows:

> Has the Employer breached the collective bargaining agreement by refusing to recognize the Union as bargaining representative of the employes in the Feed and Fertilizer Departments and by taking bargaining unit employes out of these departments?
>
> If so, what is the appropriate remedy?

The Employer stated the issue as follows:

> Did the Employer breach the collective bargaining agreement by unilaterally entering into the Joint Venture agreement that has resulted in the loss of work, job opportunities and other adverse effects on the bargaining unit employes?

The Employer also asserted the grievance was untimely.

The undersigned frames the issues as follows:

8/ Ex. 1.

1. Is the grievance timely? If so,

2. Did the Employer violate the parties' collective bargaining agreement by entering into the Joint Venture agreement without requiring the Joint Venture to assume the contract for employes of the Employer's fertilizer and feed and grain operations? If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

AGREEMENT

THIS AGREEMENT, made and entered into by and between GENERAL TEAMSTERS UNION, LOCAL 662, affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AFL-CIO, hereinafter referred to as the "Union", and the ELLSWORTH FARMERS UNION CO-OP OIL COMPANY, hereinafter referred to as the "Employer", its successors and assigns.

ARTICLE 1

RECOGNITION

Section 1. The Company agrees to recognize, and does hereby recognize, the Union, its agents, representatives or successors as the exclusive bargaining agency for all of the employees of the Company as herein defined.

Section 2. The term "employee", as used in this Agreement, shall include all employees of the Employer working on jobs as set forth in the attached Wage Schedule and Classifications, including such employees as may be presently or hereafter represented by the Union under this Agreement, excluding supervisors and guards as defined in the Act.

. . .

ARTICLE 6

GRIEVANCE PROCEDURE

. . .

Section 3. If the grievance is not called to the Employer's attention in the second Step of the Grievance Procedure, within thirty (30) days after the cause for such grievance develops, it shall be deemed not to exist.

. . .

ARTICLE 14

WAGES

A schedule attached hereto and marked Exhibit "A" shall be the rate of pay for the individuals listed thereon for jobs classified thereon for the term of this Contract. They shall also receive all general increases granted.

Each employee shall receive not less than the rate of pay provided for the classified labor he performs and shall continue to receive this rate of pay even though he works on the classified jobs scheduled at a lower rate of pay, except in cases of demotion.

. . .

ARTICLE 28

DURATION AND TERMINATION

Section 1. THIS AGREEMENT shall be in full force and effect from July 1, 1992, TO AND INCLUDING June 30, 1994, and shall continue to be in full force and effect from year to year thereafter unless written notice by registered or certified mail of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

Section 2. It is provided that where no such cancellation or termination notice is served and the parties desire to continue said Agreement, but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to June 30, 1994, or June 30th of any subsequent Contract year, advising that such party desires to continue this Agreement, but also desires to revise or change terms or conditions of such Agreement.

. . .

EXHIBIT "A"

EFFECTIVE: . . .		1-1-94
FILLING STATION Employees	. . .	$8.67
FEED MILL Employees	. . .	8.67
HARDWARE Employees	. . .	8.67
GFD and LP DRIVERS	. . .	8.81
UTILITY MAINTENANCE	. . .	8.67

UNION'S POSITION:

TIMELINESS

The Union contends that the grievance is timely filed as the occurrence which spurred the grieved activity was first made known to the Union on March 9, 1994, and the grievance was filed on April 5, 1994, within the thirty day period for filing grievances. It submits that contrary to the Employer's contentions, it is not grieving the Employer's association with the Joint Venture, rather it is grieving the effect the Joint Venture had on the bargaining unit which was not made known to the Union until March 9, 1994. It submits that prior to March 9, 1994, the Employer had assured it that the Joint Venture would have no effect on the bargaining unit and the Union had no reason to disbelieve the Employer. It maintains that there were no adverse effects on the Union prior to the March 9, 1994 meeting and the Union had put the Employer on notice that it was concerned with the effect on the bargaining unit and not with the Joint Venture in and of itself. The Union insists that the grievance is on the Joint Venture's effect on the bargaining unit and the Employer's tardy assertion that it is over the Employer's entrance into the Joint Venture is without merit and the Employer has been fully aware of the Union's position and has not stated otherwise until the arbitration hearing. It claims that the Employer's procedural argument is without merit and the grievance must be decided on its merits.

MERITS

The Union contends that the Employer failed to continue to abide by the terms of the

parties' collective bargaining agreement and also failed to require the Joint Venture to assume the collective bargaining agreement with respect to the feed and fertilizer departments. The Union relies on the Preamble of the parties' agreement which provides that the agreement is binding on the Employer, its successors and assigns. It points out that the agreement further defines covered employes as employes working on jobs set forth in Exhibit "A" which in turn lists jobs in the feed mill and fertilizer departments. The Union argues that the contract must be given its plain meaning and none of the Employer's rationales justifies circumvention of this clear contract language. In spite of the clear language, the Union, referring to the Joint Venture agreement, notes that the Employer clearly excluded the Joint Venture from assuming the parties' collective bargaining agreement. The Union insists that the Joint Venture is a successor and assign of the Employer. It points out that the Employer agreed to lease, assign or sublease all performing assets to the Joint Venture and the word "assign" in both agreements must be given the same meaning. The Union claims arbitral support for its argument citing Herbert J. Caplan, Inc., 81 LA 23 (Levine, 1983). The Union also relies on Court decisions in support of its position. It cites Howard Johnson Company, Inc. v. Detroit Local Joint Board, Hotel and Restaurant Employees, 417 U.S. 249 (1974) for the proposition that where there is not a substantial continuity in the work force, the Union may have a claim under the successorship clause against the seller where said clause does not require assumption of the contract by the purchaser. The Union submits that the language and intent of the successor/assign clause is to contractually obligate the Employer to require the assumption of its collective bargaining agreement as a condition of any transfer. It cites Boardman Company, 91 LA 489 (Harr, 1988), Marley-Wylain Co., 88 LA 978 (Jacobowski, 1987), Sexton's Steak House, Inc., 76 LA 576 (Ross, 1981) and High Point Sprinkler Company of Boston, 67 LA 239 (Connolly, 1976) in support of its argument. It asserts that the Employer violated the agreement by failing to have the Joint Venture assume the collective bargaining agreement, and to hold otherwise simply permits the Employer to unilaterally rewrite the parties' collective bargaining agreement.

The Union contends that the Joint Venture is not a separate employer but a disguised continuance of three wholly separate operations. It argues that the Joint Venture is the Employer's alter ego. It alleges that where there is a "substantial identity between new and old employers, a predecessor's contract binds the 'new' employer." It notes that "substantial identity" requires consideration of whether substantial identity exists in some or all of the following areas: business purpose, operations, equipment, customers, management/supervision and ownership. It asserts that all factors need not be present and common ownership is neither a critical nor a necessary predicate. It claims that arbitrators have consistently sustained grievances where bargaining unit positions are transferred due to financial difficulties. It argues that the Employer cannot lease its feed and fertilizer operations in order to remain price competitive.

The Union insists that the Employer's argument that a lack of a prohibition on transfer provision in the contract authorizes it to "transfer" operations to the Joint Venture, is without merit. The Union submits that job security is the heart of the labor agreement and that agreement would be rendered meaningless if the Employer could escape its obligations should it become

disenchanted with certain provisions.

The Union argues the Joint Venture is an alter ego because each of the co-venturers retain their own identity, patrons, property and other assets. According to the Union, the business purpose is identical; operations are the same; the Employer's equipment is used at the same location for the same customers. Although management may differ, the Union points out that the Employer pays 40% of the profit for such management and retains an equal vote and retains ownership of its property. The Union concludes that the Joint Venture is not a new entity, and the obligations of the collective bargaining agreement remain binding on the Employer.

The Union denies that it has given up its right to grieve based on the Employer's deal with Indianhead International. The Union distinguished the Indianhead deal on the basis that the Employer gave up full and total rights to trucking operations and the affected employes in that transaction never complained nor grieved the Employer's actions. It concludes that there is no similarity between the two transactions and the Indianhead transaction should not be considered. The Union requests that the grievance be sustained and the Employer make all bargaining unit employes whole and the Employer be required to recognize the Union as the bargaining representative of the feed and fertilizer employes working on the Employer's premises.

EMPLOYER'S POSITION:

TIMELINESS

The Employer contends that the grievance is untimely and must be dismissed. It points out that Article 6, Section 3 requires a grievance be filed within thirty days after the cause for the grievance develops. It notes that the Union was well aware of the Joint Venture in October, 1993, yet no grievance was filed for more than five months after the October, 1993 date and more than three months after the Joint Venture went into effect. The Employer argues that the statement of the grievance is over the Employer's entering into the Joint Venture Agreement, and thus, the grievance developed no later than its effective date, January 1, 1994, at which point, the Employer was no longer in the feed and fertilizer business. The Employer insists that the time for filing a grievance starts to run when the breach actually occurs and not when the Union learns of it. The Employer contends that the Joint Venture went into effect on January 1, 1994, and the Employer went out of the feed and fertilizer business eliminating three bargaining unit positions, so any grievance had to be filed by January 31, 1994. The Employer asserts the Union knew about the Joint Venture long before it went into effect, so filing the grievance on April 5, 1994, was past the time deadline. The Employer concludes that under the terms of the agreement, the untimely grievance shall be deemed not to exist and the Union's grievance must be denied as untimely.

MERITS

The Employer contends that it has not violated the parties' collective bargaining agreement by any of its actions connected with the Joint Venture. The Employer asserts that the Union has attempted to reframe its grievance as a failure to recognize the Union as the representative of feed and fertilizer employes and by removing bargaining unit employes from the feed and fertilizer departments. The Employer insists that the grievance does not state this issue and the mischaracterization of the grievance by the Union evidences that it recognized that the grievance as filed would fail. The Employer argues that the Union has conceded that the Joint Venture Agreement does not violate the agreement and its newly articulated grievance must also fail.

The Employer submits that the evidence shows that it is no longer in the feed and fertilizer business having leased its facilities to the Joint Venture. It asserts that it has no control over any of the employes who now work at the facilities and the employes who work there are not the Employer's employes but Baldwin's, over which the Union has no jurisdiction.

The Employer insists that the evidence establishes that it continues to recognize the Union as the representative of its employes and it continues to follow the terms of the parties' collective bargaining agreement. It notes that Mr. Wider is still in the unit, as is Mr. Stewart, Mr. Luther and others. It maintains that the Union cannot be recognized as the bargaining agent for feed and fertilizer department employes as the Employer does not have feed and fertilizer departments, and without any employes, there is no one to represent. The Employer claims that it can remove employes from departments it no longer has just as it used to have a trucking department but does not anymore. It concludes that the grievance must fail as there is nothing to grieve.

The Employer contends that its decision to remove itself from the feed and fertilizer business is consistent with its past practice. It points out that in 1987, it sold its trucking business to Northwest International. In each situation, according to the Employer, it leased its facilities to another entity when it got out of the business and in each case, three bargaining unit members were affected and employes were leased to the new entity in each situation. The Union never grieved the trucking business decision and the Employer argues that there is no legally cognizable difference between that and the present situation. It states that based on past practice, the Union has no standing to allege that the Employer's conduct in the present situation violated the contract. It requests a finding that the grievance is unsupported by the evidence and that a decision be rendered in favor of the Employer.

UNION'S REPLY:

The Union contends that the grievance as written encompasses the Employer's failure to recognize the Union as bargaining representative for feed and fertilizer employes and, contrary to the Employer's arguments, is not limited solely to the Employer's entering into the Joint Venture. It asserts that the grievance, when read as a whole, complains of the loss of work, job opportunities and other adverse effects on the bargaining unit. It claims that the Employer is attempting to skirt the real issue and ignore the issues presented. The Union argues that the

Employer's assertion that it is no longer in the feed and fertilizer business is a farce and it has

remained in the business as there was no purchase or sale of the assets; no change in operations; the three co-ops retain their identity, patrons, property and assets; it is responsible to its board; and there was no creation of a new business.

The Union also notes that the Employer's argument that it no longer employs and has no control over employes of the feed and fertilizer facility is because the Employer revoked and tried to erase the clear contract language by ceasing such employment when the contract would have expired which was six months after the effective date of the Joint Venture Agreement. The Union submits that the Joint Venture Agreement shows that the Employer will retain control over the operations as it has an equal vote with the other co-ops and is paid a rental fee, as well as profits and operations run off of its property. The Union notes that only the Employer has a collective bargaining agreement and it agreed with the co-venturers that it alone would be responsible for it and would indemnify and hold harmless each of the other co-venturers should a breach arise. It maintains that the Employer bound itself to another collective bargaining agreement, which was completely within the realm of the Joint Venture, otherwise the indemnification provisions have no meaning. It claims that the Employer missed the period to open the contract and is now seeking to obtain which it cannot now negotiate or attain legally.

The Union insists that the Employer is bound by the terms of the collective bargaining agreement along with its successors and assigns and it is required to abide by those terms until the contract expires. It alleges that the Employer acknowledges that if the Employer had feed and fertilizer departments, the grievance would prevail; however, the feed and fertilizer departments did not vanish and there was no sale, so the Union must be recognized as the representative of these employes and they must be made whole.

It maintains the instant situation is wholly dissimilar from the Northwest International sale as no sale took place in the present case. Additionally, the Union notes there is no Joint Venture arrangement with Northwest International. The Union concludes that the Employer was aware of its collective bargaining obligations and abided by them until such time as it felt the contract would expire but the contract did not expire and the Employer must remain bound.

EMPLOYER'S REPLY:

The Employer reasserts its argument that the grievance is untimely. It contends that the Union has reframed its grievance on the Joint Venture in several ways but whatever way it is framed, the latest date that can be argued as the breach giving rise to the claim is January 1, 1994, the date the Joint Venture was implemented. It argues that the grievance time starts to run when the breach occurs and not when the grievant first learns of it. It maintains that the grievance was not timely filed and it does not exist, whether or not it is about the Joint Venture, the effects on the bargaining unit or the Employer's failure to require the Joint Venture to assume the contract.

The Employer denies that it has violated the parties' agreement. It asserts that it continued to abide by the terms of the agreement and had no duty to require the Joint Venture to agree to assume the agreement. It submits that the affected employes were not terminated but continued to be covered by the agreement and nothing in the agreement imposes on the Employer an affirmative duty to obtain the agreement of the Joint Venture to assume the contract, and even if the contract imposes a duty on the Employer to obtain the agreement of a successor or assign to assume the agreement, the Joint Venture is neither a successor nor assign of the Employer.

The Employer contends that it is no longer in the feed and fertilizer business and has not terminated any employe who worked for those departments but has complied with all terms of the agreement in respect to these employes. It distinguishes the cases cited by the Union as being inapplicable to the current situation. According to the Employer, in each case cited, the employer sold all or substantially all of its assets or an entire division that had been a separate entity, resulting in the termination of employes. Here, the Employer maintains it ceased its feed and fertilizer business but did not sell all or substantially all of its assets and did not terminate any of its employes as one employe's job was modified and one employe was laid off. It claims it did not sell any of its assets and remains intact and still employs bargaining unit employes and continues to abide by its obligations under the collective bargaining agreement.

The Employer submits that it had no duty to require the Joint Venture to assume the collective bargaining agreement even assuming the Joint Venture is a successor or assign. It cites Wyatt Mfg. Co., Inc., 82 LA 153 (Goodman, 1983), in support of its position in that Arbitrator Goodman held that the requirement that the agreement be assumed must be expressly stated in the agreement and will not be inferred by a clause stating successors are to be bound, and in the absence of bargaining history establishing an intent to impose a duty to bind a successor, none should be imposed. Additionally, the Employer points out that Arbitrator Goodman referred to express language in successor clauses whereby predecessor liability was imposed. The Employer notes that the parties' collective bargaining agreement does not contain language evidencing an intent to obligate it to secure the assumption of the agreement by a successor. The Employer also points out that it did not sell substantially all of its assets and there is no bargaining history from which a duty to require assumption may be implied. It points to the sale of the trucking operations to Indianhead International where there was no assumption, no grievance and no evidence the subject was raised in later negotiations. The Employer takes the position that these factors distinguish the present case from Boardman Co., 91 LA 489 (Harr, 1988) and asserts that there is no obligation to require assumption of the agreement by the Joint Venture and no liability on the part of the Employer for failing to do so.

The Employer maintains that the Joint Venture is neither its successor nor assignee. It notes that there was no continuity in the work force and the Joint Venture involves greater assets, client base and a lack of continuity of the Employer's entire business as the Employer still operates a hardware store and filling station, which businesses the Joint Venture is not engaged in. The Employer argues that under the totality of circumstances test, the Joint Venture

is not a successor of the Employer. Additionally, it points out that it merely leased its performing assets in the feed and fertilizer departments to the Joint Venture, so it is not an assignee but a lessee.

The Employer contends that the Joint Venture is not the Employer's alter ego. It argues that it operates its hardware store and filling station and the Joint Venture does not and there is no interchange of equipment, personnel or supervision and Baldwin supervises and manages the feed and fertilizer operations and the Employer no longer operates such businesses. The Employer and Baldwin are responsible for their respective employes. According to the Employer, it and the Joint Venture do not have substantially identical management, business purpose, operation, equipment, customers, supervision or ownership, in short, no alter ego status. It asks that the grievance be found unsupported by the evidence and a decision rendered in its favor.

DISCUSSION:

TIMELINESS

Article 6, Section 3 of the parties' collective bargaining agreement provides as follows:

> If the grievance is not called to the Employer's attention in the second Step of the Grievance Procedure, within thirty (30) days after the cause for such grievance develops, it shall be deemed not to exist.

The Employer contends that a reading of the statement of the grievance leads to the conclusion that the grievance is over the Joint Venture which, by its terms, became effective on January 1, 1994, and the grievance was not filed until April 5, 1994, well beyond the time limit set forth in Section 3, above. The Employer's premise is in error. A reading of the grievance states that by entering into the Joint Venture, there has been a loss of work, job opportunities and other adverse effects on the bargaining unit employes. It is apparent from this statement that the Union is asserting that the adverse effects of the Joint Venture on the bargaining unit is a violation of the parties' agreement. Article 6, Section 1 defines a grievance as "any difference or controversy between the Employer and an employee (or employees) concerning compliance with any provision of this Agreement." Unless the Joint Venture had some effect on an employe or employes such that there was not compliance with a provision of the agreement, there would be no grievance. The evidence establishes that as far as the wages, hours and conditions of employment, there was no change on any employe on and after January 1, 1994. The Union had asked to be informed as to any "immediate" and "future" affect on employes by its letters of October 26 and

December 7, 1993. The evidence establishes that the employes did the same duties and were paid in accordance with the agreement on and after January 1, 1994. As the terms of the agreement were complied with by the Employer, there was nothing to grieve and no basis for a grievance. It was only after the meeting of the parties on March 9, 1994, that the Union became aware that employes would be affected on July 1, 1994. It was only at this point that a controversy or difference between the parties arose such that the cause of a grievance came into existence. The grievance filed on April 5, 1994, and reaffirmed on July 8, 1994, was with thirty days of the cause for such a grievance, and it is held that the grievance is timely filed.

The Employer's argument that the Joint Venture was the alleged breach of the parties' agreement is contradicted by the Employer's attorney's letter of April 19, 1994, which states that the Employer "is perfectly willing to abide by all the terms and conditions of the Labor Agreement until it expires on June 30, 1994, and it has done so to date." If the Employer complied with the agreement to that date, there would be no basis for a grievance prior to that date. Thus, the undersigned concludes the grievance is timely and must be heard on its merits.

MERITS

The parties were unable to agree on a statement of the issues and they refined them in their briefs. The undersigned has framed the issue to reflect the nature of the dispute in this matter. Essentially, the Union is asserting that pursuant to the Agreement provision of the collective bargaining agreement which states that it is between the Union and the Employer, its successors and assigns, as well as the wage schedule, that the Employer was obligated to abide by the terms of the agreement or to require the Joint Venture to assume the terms of the contract. The Union has cited a number of cases in support of its position. A review of these cases reveals that a number of them had a specific provision in the contract which dealt with successors and assigns. For example, in Sexton's Steak House, Inc., 76 LA 576 (Ross, 1981), Section 26 provided as follows:

> This Agreement shall be binding on any and all successors and assigns of the Employer, whether by sale, transfer, merger, acquisition, consolidation or otherwise. The Employer shall make it a condition of transfer that the successor or assigns shall be bound by the terms of this Agreement.

High Point Sprinkler Co. of Boston, 67 LA 239 (Connolly, 1976) contained the following in Article 3:

This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assigns. It is

> understood that the parties hereto shall not use any sale, transfer, lease, assignment, receivership, or bankruptcy to evade the terms of this Agreement.

Herbert J. Caplan, Inc., 81 LA 22 (Levine, 1983) contained the following in Section XXVI:

> This Agreement shall be binding on all parties hereto, their legal representatives and assigns, it being understood that no Employer shall take any action with the objective of avoiding its obligations under this contract.

The arbitrators in these respective cases found the Employer violated the contract by failing to comply with the express language of the agreement. In the instant case, the contract does not contain such language but merely refers to the Employer, its successors and assigns.

The Union has cited two cases with similar language as appears in the parties' collective bargaining agreement: Boardman Company, 91 LA 489 (Harr, 1988) and Marley-Wylain Co., 88 LA 978 (Jacobowski, 1987). In each of these cases the arbitrators held that a mere successors and assigns in the preamble bound the employers to have the purchaser assume the contract. In Boardman, supra, the employer sold almost all of its assets (cash and certain accounts receivable were excluded) to another company which used the same location to do the same work using the same equipment and manufacturing the same product with employes, a majority of which, were former employes of Boardman. The supervision was the same and the same management was hired by the new company. The Arbitrator considered the following factors:

> 1. Was there a substantial continuity of the same business operation?
>
> 2. Is the new employer using the same plant?
>
> 3. Is the same or substantially the same work force employed?
>
> 4. Do the same jobs exist under the same working conditions?
>
> 5. Are the same supervisors employed?

6. Are the same equipment, machinery, and methods of production used?

7. Is the same product manufactured, or the same services offered?

and concluded that Boardman violated the contract by failing to make assumption of the contract by the purchaser, a condition of the sale of Boardman assets.

In Marley-Wylain, supra, a company named Barry Blower located in Fridley, Minnesota, which was unionized since 1969, was sold in 1973 to Wylain, Inc. This was a stock purchase sale and Wylain continued the company with the same employes and assumed the contract between Barry Blower and the union representing its employes. In 1980, Marley Corporation bought Wylain by stock purchase, and it assumed the contract. In 1986, Barry Blower was sold to Snyder General Corporation, headquartered in Dallas, Texas. This sale was a substantial business and asset type sale, but the sale agreement specifically provided that Snyder would not be obligated to assume the collective bargaining agreement. Snyder hired a majority of the employes and the union negotiated a new contract with Snyder which provided less benefits to the employes. The arbitrator, noting that arbitrators have found both ways on the seller's obligation related to successors depending on the specific circumstances, concluded that based on the specific circumstances present in the case, the employer violated the agreement by not requiring Snyder to assume the contract. These circumstances included continuation of the business with a majority of the employes of the seller, the mere successors and assigns language, negotiating history and past practice where two prior sales resulted in assumption of the agreement and the seller's conduct in not giving notice to the Union that this sale would be different from the others.

A review of the facts and circumstances present in the instant case is necessary to determine whether the Employer violated the terms of the contract. The first three arbitration cases cited; Sexton, High Point and Caplan, have different contract language, essentially separate clauses with specified obligations, and these are not comparable to the instant case. In Boardman and Marley-Wylain, the contract language on successors and assigns is the same as the instant case. A review of the circumstances reveals the following: 1) There was not a sale of almost all of the assets of the Employer but merely the lease of its operating equipment in feed and fertilizer; 2) The successor employer did not hire or retain any of the Employer's bargaining unit employes; 3) There is no negotiation history; and 4) The past practice establishes that there was a prior sale of trucking operations to Indianhead International and no assumption of the contract. The undersigned finds that the instant case more closely resembles that of Wyatt Manufacturing Co., Inc., 82 LA 153 (Goodman, 1983). In Wyatt, the employer sold part of its operations, a manufacturing operation which produced Bazooka grain handling products, to Great Plains Manufacturing, Inc. Great Plains did not assume the collective bargaining agreement. The arbitrator held the employer, Wyatt, had not violated the contract on the grounds that the language

on successors and assigns did not specifically require it to obligate a purchaser to assume the contract. The arbitrator also noted that the collective bargaining agreement had not been changed or affected by the sale as it remained intact for those employes in Wyatt's remaining operations. The arbitrator stated there were fewer employes and the Bazooka classifications were effectively removed from the contract but these did not flow from the sale but from Great Plains refusal to assume the contract. Here, the contract remains applicable to employes of the Employer's continuing operations and employes of the feed and fertilizer operations were allowed to stay with the Employer under the contract with the same benefits and wages. Therefore, when all the circumstances of the instant case are considered, including the language, the past history and practice, the partial sale, the continuation of the contract by the Employer, it is concluded, as in Wyatt, supra, that the Employer has not violated the contract.

The Union has argued that the Joint Venture is an alter ego of the Employer. Alter ego status requires a careful examination of the facts. Alter egos must share substantially identical management, business purpose, operations, equipment, customers, supervision and ownership. A motive to avoid labor obligations is also a factor to be considered. Certainly, in the instant case, there are a number of factors present, however, ownership and management are different. Although the Employer has a 33 1/3% representation on the Joint Venture Management Council, it does not have a majority control and a review of the contribution of each of the co-venturers demonstrates that the Employer's contribution was only 17.35%, compared to New Richmond at 22.52% and Baldwin at 60.13%. 9/ Baldwin manages the Joint Venture on a day-to-day basis. Additionally, the Joint Venture does not have the same customers or patrons but has many customers or patrons different from the Employer's. The alter ego doctrine is used to bind a new employer which is a thinly disguised continuance of the old employer whose motive is to avoid its contractual obligations. The facts of the instant case fail to demonstrate that the Joint Venture is an alter ego of the Employer.

The Union's reliance on Teledyne Monarch Rubber, 89 LA 565 (Shanker, 1987) is misplaced. Here, the lease of the facilities to the Joint Venture was a transfer of operations to a different employer and not to non-union employes of the same employer. The primary purpose was not to reduce labor costs as the evidence established the labor costs here were substantially the same. These jobs were not shown by the evidence to be a major component of the Employer's major business effort. The evidence established that these operations were not profitable for the Employer. Additionally, the evidence failed to establish a major impact on the bargaining unit. The facts of the instant case distinguish it from Teledyne, supra. Given all the facts and circumstances present in this case, it is concluded that the Joint Venture is not an alter ego of the Employer.

9/ Ex. 2.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

AWARD

1. The grievance is timely.

2. The Employer did not violate the parties' collective bargaining agreement by entering into the Joint Venture Agreement without requiring the Joint Venture to assume the agreement for employes of the Employer's fertilizer and feed operations, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 2nd day of March, 1995.

By Lionel L. Crowley /s/
Lionel L. Crowley
Chairman of Arbitration Board

UNION

I CONCUR:

Michael Thoms

Date

I DISSENT:

Michael Thoms /s/
Michael Thoms

EMPLOYER

I CONCUR:

Larry Dokkestul /s/
Larry Dokkestul

3/7/95
Date

I DISSENT:

Larry Dokkestul

3/10/95	
Date	Date