BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
GREEN BAY BOARD OF EDUCATION (FOOD SERVICE) EMPLOYEES UNION, LOCAL 3055A, AFSCME, AFL-CIO and affiliated with the WISCONSIN COUNTY AND MUNICIPAL EMPLOYEES	Case 184 No. 53594 MA-9394
and	Case 185 No. 53595 MA-9395
BOARD OF EDUCATION, GREEN BAY AREA PUBLIC SCHOOL DISTRICT	

Appearances:

Mr. James E. Miller, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 936 Pilgrim Way, #6, Green Bay, Wisconsin 54304, appearing on behalf of Green Bay Board of Education (Food Service) Employees Union, Local 3055A, AFSCME, AFL-CIO and affiliated with the Wisconsin County and Municipal Employees, referred to below as the Union.

Mr. William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., Attorneys at Law, 219 Washington Avenue, P. O. Box 1278, Oshkosh, Wisconsin 54902-1278, appearing on behalf of Board of Education, Green Bay Area Public School District, referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Mary Pirlot and Juanita Fruzen. The Employer took the position that neither grievance was arbitrable, but agreed to submit the question of arbitrability to arbitration if that issue was determined prior a hearing on the merits of the grievances. The Commission appointed Richard B. McLaughlin, a member of its staff, to act as Arbitrator. The parties stipulated the facts necessary to pose the issue of arbitrability, and filed briefs and reply briefs, the last of which was received by the Commission on March 19, 1996.

ISSUES

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

Are the Pirlot and Fruzen grievances arbitrable?

RELEVANT CONTRACT PROVISIONS

The 1992-94 Agreement

ARTICLE XII

AUTHORIZED ABSENCE

. . .

Holiday Leave: Employees shall be paid for each of the following holidays: Day before New Year's Day, New Year's Day . . . Day before Christmas and Christmas . . .

ARTICLE XVI

GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

. . .

Step 5. Within (10) workdays of the Human Resources Committee's answer at Step 4, the grievance may be submitted by the employee to the Wisconsin Employment Relations Commission for arbitration by one of its members . . . The Arbitrator shall have no power to add to or subtract from or modify any term(s) of this Agreement . . .

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer . . . The parties may mutually agree in writing to

extend the time limits in any step of the grievance procedure . . .

ARTICLE XXXII

DURATION

THIS AGREEMENT shall be effective on July 1, 1992, and shall remain in full force and effect until and including June 30, 1994, and shall be automatically renewed from year to year unless negotiations are initiated by March 1, 1994 and the first (1st) day of March of any subsequent effective year of this Agreement.

. . .

APPENDIX 1

SALARY SCHEDULE

Classification	Hourly Rates
. . .	
Assistant Cook	. . .
Head Cooks	. . .

APPENDIX 2

EXTENDED HOURS

. . .

The 1994-96 Agreement

ARTICLE XII

AUTHORIZED ABSENCE

. . .

Holiday Leave: Employees shall be paid for each of the following holidays: Day before New Year's Day, New Year's Day . . . Day before Christmas and Christmas . . .

ARTICLE XVI

GRIEVANCE PROCEDURE

All grievances which may arise shall be processed in the following manner:

. . .

Step 5. Within (10) workdays of the Human Resources Committee's answer at Step 4, the grievance may be submitted by the employee to the Wisconsin Employment Relations Commission for arbitration by one of its members . . . The Arbitrator shall have no power to add to or subtract from or modify any term(s) of this Agreement . . .

Time Limits: Grievances not appealed within the designated time limits in any step of the grievance procedure will be considered as having been resolved on the basis of the last preceding answer of the Employer . . . The parties may mutually agree in writing to extend the time limits in any step of the grievance procedure . . .

ARTICLE XXXII

DURATION

THIS AGREEMENT shall be effective on July 1, 1994, and shall remain in full force and effect until and including June 30, 1996, and shall be automatically renewed from year to year unless negotiations are initiated by March 1, 1996 and the first (1st) day of March of any subsequent effective year of this Agreement.

. . .

APPENDIX 1

SALARY SCHEDULE

Classification	Hourly Rates
. . .	
Assistant Cook	. . .
Head Cooks	. . .

APPENDIX 2

. . .

EXTENDED HOURS LIST

. . .

BACKGROUND

The parties submitted the following stipulation of fact:

1. The Green Bay Board of Education (Food Service) Union AFSCME Local 3055-A, hereinafter referred to as the Union, is a labor organization maintaining its offices c/o Jim Miller, 936 Pilgrim Way #6, Green Bay, WI 54304.

2. The Green Bay School District (Food Service) hereinafter referred to as the District, is a municipal employer, maintaining its offices at 200 S. Broadway, P.O. Box 23387, Green Bay, WI 54305 and is represented by William G. Bracken, Coordinator of Collective Bargaining Services, Godfrey & Kahn, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54902-1278.

3. At all times material herein the Union has been and is the exclusive collective bargaining representative of certain employees of the District, who are part of a Collective Bargaining Unit consisting of all food service employees of the Board of Education excluding supervisors, and all other employees of the employer, as certified by the Wisconsin Employment Relations Commission on February 7, 1979.

4. The Union and District have been parties to a Collective Bargaining Agreement, hereinafter referred to as the Agreement, covering the wages, hours and working conditions of the employees in said Unit which Agreement expired on June 30, 1994 . . .

5. That on June 2, 1994 the parties exchanged their Initial Proposals on matters to be included in a new Collective Bargaining Agreement to succeed the Agreement noted in paragraph 4 above.

6. Thereafter the parties met on five occasions in efforts to reach an accord on the new Collective Bargaining Agreement.

7. On November 7, 1994 the Union filed a Petition for Arbitration requesting that the WERC initiate arbitration pursuant to Sec. 111.70 (4) (cm) 6 of the Municipal Employment Relations Act.

8. On January 30, 1994 Sharon A. Gallagher, a member of the Commission's staff, conducted an investigation which reflected that the parties were deadlocked in their negotiations and by April 13, 1995 the parties submitted to said Investigator their Final Offers, written Positions regarding authorization of inclusion of non-residents of Wisconsin on the Arbitration Panel to be submitted by the Commission, as well as a Stipulation on matters agreed upon, and thereupon the Investigator notified the parties that the investigation was closed.

9. On April 25, 1995 the WERC ordered arbitration be initiated for the purpose of issuing a Final and Binding Award to resolve the bargaining impasse.

10. On May 17, 1995 the WERC formally appointed June Miller Weisberger as the Arbitrator to issue a Final and Binding Award pursuant to Sec. 111.70 (4) (cm) 6. and 7. of the Municipal Employment Relations Act.

11. The Union and District engaged in settlement discussions to resolve the bargaining impasse. The parties reached a Tentative Agreement on September 5, 1995. The Union ratified the Tentative Agreement for the terms of the successor Agreement on September 19, 1995. The School Board ratified the new Agreement on September 18, 1995. The Union and the District signed the new Agreement on or about December 20, 1995. The District issued back pay under the terms of the new contract on October 16, 1995 . . .

12. On September 8, 1995, June Miller Weisberger, was notified that the parties had resolved their differences; settled the dispute; cancelled the use of her services; and canceled the arbitration hearing previously scheduled for September 25, 1995.

13. There are two Grievances that have been filed by the Union:

a. Grievance #23 Mary Pirlot where the alleged infractions occurred on December 24, 1994, December 25, 1994, December 31, 1994 and January 1, 1995. The Grievance was initially filed on January 25, 1995 . . .

b. Grievance #24 Juanita Fruzen where the alleged infraction occurred on January 24, 1995. This Grievance was originally filed on January 25, 1995 . . .

14. Both of the above Grievances occurred and were filed while the parties were in hiatus period in which no Contract was in effect. The previous Contract was in effect from July 1, 1992 and expired June 30, 1994.

15. The District processed the Grievance through the successive steps in the Grievance Procedure contained in the expired 1992-94 Master Agreement as follows:

a. February 10, 1995 - John Wilson, Assistant to the Superintendent for Human Resources, denies the Pirlot Grievance . . . and Fruzen Grievance . . .

b. March 24, 1995 - John Wilson informs the Union that the Board has denied both Grievances . . .

15A. On March 27, 1995, the Union filed a 'Request to Initiate Grievance Arbitration' for both the Pirlot and Fruzen grievances with the Wisconsin Employment Relations Commission . . .

16. The District objected to proceeding to arbitration on both Grievances since the parties were in a hiatus period with no contract in effect and because the Grievances occurred in the hiatus period. On June 21, 1995 John Wilson sent letters to Arbitrators Jane Buffet . . . and Raleigh Jones . . . objecting to participating in grievance arbitration.

17. The successor Agreement was in effect from July 1, 1994 through June 30, 1996 . . .

18. The WERC has already "closed the file" in these two Grievances previously. Jane Buffett, Arbitrator, closed the file on June 28, 1995 regarding Green Bay School District Case 170, #52430,

MA-8968 (Pierlot (sic) Holiday Pay Grievance) . . .

19. Raleigh Jones, Arbitrator, on June 26, 1995, indicated that the Commission would not appoint an Arbitrator unless both parties concur. Green Bay School District (Food Service Unit - Grievance #24), Case 161, # 52429, MA-8967 . . .

20. On December 21, 1995 the Union resubmitted the request to process the two Grievances to grievance arbitration . . .

21. On January 11, 1996 the District objected to the Union's request to proceed to grievance arbitration.

Wilson's denial of the two grievances, referred to in Paragraph 15.a. of the stipulation, noted that he could "find no violation of the Food Service Union contract." The Board denial of the grievances, referred to in Paragraph 15.b. of the Stipulation, stated:

> The Board finds no violation of the terms set forth in the expired Agreement. Therefore, the grievances are denied.
>
> Furthermore, the parties are working in a hiatus period in which no ratified contract exists. Therefore, the Board will not arbitrate the above-referenced grievances.

The Union's resubmission letter, referred to in Paragraph 20 of the Stipulation, stated:

> I am resubmitting the enclosed requests for grievance arbitration that were filed . . . last March. The (Employer) refused to process them to arbitration because a contract had not been agreed to for the years 1994-1996.
>
> That contract has subsequently been agreed to and ratified by the parties and a final contract is being prepared for signature. The union desires to proceed with the arbitration of these matters at this time.

THE PARTIES' POSITIONS

The Employer's Initial Brief

After a review of the stipulated facts, the Employer contends that the two grievances pose the following threshold issues:

> 1. Are grievances that are filed and triggered by events occurring during a hiatus period, when there is no collective bargaining agreement in effect, arbitrable?
>
> 2. If it is determined that such grievances are arbitrable, then did the Union waive its right to arbitrate the grievances by failing to file a timely request for arbitration?

The Employer notes that the grievances were filed during a contract hiatus and were triggered by events occurring during that hiatus. The Union's resubmission of the grievances after the execution of a successor to the 1992-94 labor agreement thus "ignores the legal principles underlying their previous dismissal by the WERC." Commission precedent, the Employer contends, requires the Employer to maintain the grievance procedure as part of its statutory duty to maintain the status quo during a contract hiatus. That duty does not, however, extend to "honoring a previously existing contractual commitment to arbitrate grievances."

Both grievances are rooted in events occurring in December of 1994 and January of 1995, well after the expiration of the 1992-94 contract on June 30, 1994, and well before the execution of a 1994-96 agreement in December of 1995. The Employer further notes that each grievance was processed, up to the arbitration step, under the terms of the 1992-94 labor agreement. It follows, according to the Employer, that "(s)ince the grievances occurred and were filed at a time when no contract existed between the parties, the District has no contractual obligation to arbitrate them."

The Employer notes that the 1992-94 labor agreement contains no provision extending the arbitration provision beyond the contract's expiration date and that the parties did not otherwise agree to such an extension. It follows, the Employer concludes, that the grievances cannot be arbitrated under the 1992-94 agreement. The same considerations preclude extending the 1994-96 agreement to govern the grievances. Judicial precedent underscores this conclusion, according to the Employer. Unless the Union is to be awarded a result it never secured in arbitration, the Employer contends that the Union "has the burden to prove that it placed the District on notice that it intended to pursue said grievances to arbitration once a new contract was resolved."

Although private sector precedent can extend the duty to arbitrate to grievances filed during a contract hiatus, that precedent requires such a grievance to "arise under" the expired agreement. The Employer argues that even if this precedent is applied in the public sector, neither

grievance can be said to have arisen under the terms of the 1992-94 labor agreement. Neither the pay disputed in the Pirlot grievance nor the position assignment disputed in the Fruzen grievance accrued until after June 30, 1994

Even if the grievances could be considered arbitrable, the Employer argues that "the Union has waived its right to arbitrate them by failing to make a timely request for arbitration." Steps 4 and 5 of the expired 1992-94 labor agreement govern this point, according to the Employer. Those steps impose a ten day filing limit on the Union. The Employer contends this limit was triggered by the parties' September 19, 1995 ratification of the successor agreement. The Union did not refile the grievances until December of 1995, thus violating the grievance time lines. Arbitral precedent, the Employer argues, underscores the significance of enforcing these time lines.

The Employer concludes that each grievance must be dismissed, either because it is not arbitrable or because it was untimely filed.

The Union's Initial Brief

The Union acknowledges that "absent an agreement by the employer during the hiatus period to arbitrate issues arising from that contract . . . the employer cannot be forced to do so." The Union argues, however, that the "hiatus period ceased to exist" with the execution of a 1994-96 labor agreement. Its resubmission of the grievances was, the Union contends, appropriate once the successor agreement had been finalized.

The Union notes that the Employer has raised both procedural and substantive objections to the refiling of the grievances. The Union notes that the Commission's closing of the files during the contact hiatus "has no bearing upon whether the same grievances can be resubmitted at a time when the contract hiatus no longer exists." The refiling of the grievances once a successor agreement had been reached is unaffected by the prior closing of those cases, since the later filing was made with an agreement in place.

The Union next contends that its refiling of the grievances on December 21, 1995, was timely. That it ratified the agreement on September 19 and that the Employer paid back pay under the new agreement on October 16 has, the Union contends, no bearing on the timeliness issue. The 1994-96 labor agreement was not finalized or executed until December 21, 1995. That date, the Union argues, triggered the contractual time limits regarding the refiling of the grievances. By its terms, the 1994-96 agreement is effective from July 1, 1994.

That the Employer never challenged the timeliness of the original filing of the grievances cannot, the Union asserts, be ignored. The belated refiling of the grievances reflected no more than the temporary unavailability of the arbitration process.

The Union contends that the Employer's obligation to maintain the status quo during a contract hiatus sets the relevant background to the Employer's substantive arbitrability objections. Those objections rest on the fact that the Employer cannot be compelled to process grievances to arbitration unless a binding agreement to do so is in force at the time of the arbitration request. The Union contends that the Employer's interpretation of employe rights during this period creates a contractual void. The Union puts the point thus:

> The denial of this dispute resolution process once a successor agreement has been reached is an absurd result of the original hiatus argument.

That there was no hiatus period between the two agreements on the face of the governing agreements' duration clauses manifests, to the Union, a mutual desire to resolve disputes throughout that period.

The Union then asserts that the Employer's claim that the parties failed to indicate a willingness to arbitrate hiatus grievances must be rejected. The 1992-94 and the 1994-96 agreements each contain duration clauses which preclude any permanent hiatus between the agreements. Thus, the absence of any agreement to limit the full retroactivity of the 1994-96 agreement is, according to the Union, the essential fact. Arbitral precedent establishes, the Union asserts, that "without a specific agreement not to arbitrate these issues, the Duration clause of the successor agreement establishes retroactivity as to the arbitration of grievances that had been timely raised during the hiatus period."

The Union then rejects the Employer's contention that "non-economic items" cannot be made retroactive without a specific agreement to do so. The Union notes that "(w)hile the arbitration procedure in the contract is not in itself an 'economic item', the issues that were submitted in the two grievances under consideration were definitely economic." The Employer's distinction is, the Union concludes, illusory. Beyond this, the Union argues that this distinction is based on a misreading of Sauk County. 1/ The distinction drawn by the court in that case was made only "in the context of clarifying the questions in regards to the retroactivity of dues/fair share deductions." The court did not, the Union contends, "take a definitive position on the question of grievances submitted to arbitration during that same hiatus period." The result applied by the court to fair share and dues deductions in Sauk County should, the Union concludes, be applied to the arbitrability of hiatus grievances.

The Union concludes that the two grievances "should be determined to be arbitrable and

---

1/ Sauk County v. WERC, 165 Wis.2d 406 (1991).

the (Employer) should be required to comply with the arbitration provisions of the parties 1994-96 contract."

The Employer's Reply Brief

The Employer argues initially that arbitral precedent cited by the Union is inapposite since the cases "involved situations where the grievances at issue were triggered by events occurring before the expiration of the contract."

The Employer then contends that "the actions of the parties show that they treated the contract as being in full force and effect" as of its ratification. The Union's refiling of the grievances ninety-two days after ratification cannot, the Employer concludes, be considered timely. The execution of that agreement was, the Employer asserts "a mere formality."

The Union's Reply Brief

The Union contends that authority cited by the Employer to preclude arbitration of hiatus grievances is inapposite. One of the crucial cases cited by the Employer turns on "the rights of employees who had been on strike to submit grievances over reinstatement issues arising after that strike was over." That issue was not, the Union contends, covered by either the expired agreement or its successor. That situation is, the Union concludes, distinguishable from the grievances posed here. Employer responses to the grievances state, according to the Union, no more than a denial of a willingness to arbitrate during the contract hiatus. The Employer's contention that those responses indicate an express refusal to apply the 1994-96 labor agreement to the grievances is, the Union asserts, unfounded.

The Union then asserts that the Employer's arguments create a contractual void which will eliminate any consideration of hiatus grievances. The preferable view is, the Union asserts, to require a filing after the contract is settled, the terms of the settled agreement are made retroactive and the terms of the retroactivity agreement encompass the hiatus grievances.

The Union then contends that the Employer's insistence that the grievances arise during the term of the 1992-94 agreement ignores the terms of the 1994-96 agreement. Its refiling reflects, the Union argues, not a refiling of the grievances but the initial request for arbitration under the terms of the 1994-96 agreement.

DISCUSSION

The issue adopted for decision reflects that the parties seek a determination of the arbitrability of two grievances. This determination has a procedural and a substantive component, and the issue adopted above is broad enough to incorporate both.

The Employer broke these components into separate issues. The first issue focuses on the fact that the grievances arose in the gap between the expiration of the 1992-94 labor agreement and the execution of its successor. This factual focus is more appropriate to the issue of procedural than to substantive arbitrability. The principles governing substantive arbitrability are broader than the facts highlighted by the Employer. Those facts are relevant to the arbitrability determination, but do not control it.

The Wisconsin Supreme Court, in Jt. School District No. 10, City of Jefferson et. al., 78 Wis.2d 94 (1977), set forth the framework governing the determination of substantive arbitrability. The Jefferson court noted the policies underlying the determination turn on the consensual nature of arbitration. The aim of fostering the peaceful resolution of labor disputes is enhanced by deferring disputes, to the broadest extent possible, to the consensually created arbitration process. 2/ The limit of that deferral is, however, the consensual nature of the process itself: "a party cannot be required to submit to arbitration any dispute which the party has not so agreed to submit." 3/

The Jefferson court balanced these considerations thus:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage. 4/

More specifically, the Jefferson court stated the analysis appropriate to this determination thus:

> The court's function is limited to a determination whether there is a construction of the arbitration clause that would cover the grievance on its face and whether any other provision of the contract specifically excludes it. 5/

This two-step analysis must be applied to determine if arbitration is available for the Pirlot and Fruzen grievances under either, neither or both of the agreements posed here.

Neither the 1992-94 nor the 1994-96 labor agreement defines "grievance." Rather, each establishes a procedure for processing "(a)ll grievances which may arise." This imposes no

---

2/ 78 Wis.2d at 112.

3/ Ibid., at 101, citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

4/ Ibid., at 112, citing United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582,583 (1960).

5/ Ibid., at 111.

restriction on the scope of what constitutes, under either agreement, a grievance. Article XVI, Step 5 of each agreement limits an arbitrator to the language of the agreement, but this admonition does not detract from the breadth of the reference to "(a)ll grievances." The Pirlot grievance questions the holiday pay and, potentially, the normal wage rate appropriate to an Assistant Cook who assumes Head Cook duties. Each agreement provides Holiday Pay and separate wage rates for an Assistant Cook or a Head Cook. The arbitration clause of either agreement is, then, broad enough to cover the Pirlot grievance on its face.

Similar considerations govern the Fruzen grievance. That grievance questions the application of the "Extended Hours" portion of Appendix 2 of the agreement. Here too, the arbitration clause of either agreement is sufficiently broad to cover the grievance on its face.

Under Jefferson, the next question is whether any other agreement provision specifically excludes the grievance from arbitration. Article XXXII of the 1992-94 agreement ends the effective term of the agreement on June 30, 1994. This provision specifically bars arbitration of either grievance. Both arose after June 30, 1994. Neither concerns rights which would have accrued on or before June 30, 1994. There is no evidence the parties agreed to extend the agreement beyond its expiration date. Thus, arbitration is not available under the 1992-94 agreement for either grievance.

Article XXXII of the 1994-96 agreement, however, makes it effective "on July 1, 1994 . . . until and including June 30, 1996." Both grievances, on their face, challenge Employer actions falling within this period. There is, then, under the 1994-96 agreement, no provision specifically excluding the grievances from arbitration. Each element of the Jefferson analysis has, then, been met and each grievance is arbitrable under that agreement.

The procedural component of the parties' arbitrability dispute is metaphysical in its implications. The core of the dispute has, however, been narrowly defined by the parties. The issue posed is whether the time limit for the arbitration step should be triggered by the ratification or the execution of the labor agreement. On balance, the Union makes the more persuasive case.

The persuasiveness of the Union's position turns on the clarity of the date of execution. Execution is a mutual process and thus not a disputable point. The date of execution establishes the clearest point by which the arbitration demand can be dated. Parties often do not ratify an agreement at the same time, and the result of a ratification vote is not necessarily known until communicated from one party to the other. The date of any such communication is a disputable point. I can see no persuasive reason to date the arbitration time line from an uncertain and disputable date when a certain and undisputed date is available.

Before closing, it is necessary to tie the conclusions stated above more closely to the parties' arguments. The parties raise difficult points which should not go unaddressed.

The Employer contends that judicial and Commission precedent establishes that grievances which arise during a contractual hiatus are, as a matter of law, not arbitrable. The Commission's status quo doctrine does no more than establish the conditions of employment an employer is obligated to maintain during periods of collective bargaining in which no contract is in place. Under Commission precedent, the duty to process grievances survives, as a statutory matter, the expiration of the contract. The duty to arbitrate, which is a contractual matter, does not. 6/ The doctrine is rooted in the statutory duty to bargain, but the purpose of the doctrine is to promote the bargaining process by establishing stable conditions of employment upon which ongoing bargaining can be based. Whether the parties choose to make disputes which arise during the hiatus period arbitrable is itself a bargainable point which the status quo doctrine does not reach. The Commission precedent cited by the Employer does not preclude the arbitration of hiatus grievances.

Nor does the judicial precedent cited by the Employer alter this conclusion. The Sauk County court did distinguish between economic and non-economic items to establish whether a dispute over the retroactive application of a fair share/dues deduction provision was enforceable through Sec. 111.70(3)(a)7, Stats. The Sauk County majority did reject an assertion that the dispute must be reserved for grievance arbitration. If the Employer contends that the grievance procedure is not retroactive, Sauk County establishes that this contention may be resolvable under Sec. 111.70(3)(a)7, Stats. If this is the case, the arbitrability issue could be handled as a prohibited practice in which legal fees are available. The issue posed by the Employer does not, however, appear to pose that point. Rather, the Employer questions not the retroactivity of the grievance procedure, but the arbitrability of two grievances. Jefferson, not Sauk County, governs this point. If Sauk County was applied to the grievances, the difficulty of maintaining the "economic/non-economic" distinction would, at a minimum, be apparent. 7/ More to the point, it is apparent that the grievances posed are economic in nature.

Elberta Crate & Box 8/ does not undercut this conclusion. That case concerned the applicability of arbitration to the conflicting employment rights of strikers and their replacements. The case does no more than emphasize that the considerations articulated by the Jefferson court govern the arbitrability determination. The Elberta court determined the parties never addressed, as a matter of contract, the conflicting statutory/contractual claims of strikers and replacement workers. The Elberta court concluded that the issue posed was not one of contract interpretation. In this case, there is no dispute the parties have addressed Extended Hours, Holiday Pay and Wages in the 1994-96 labor agreement. The dispute is whether the Employer's or the Union's view of those provisions is to be favored.

6/ Racine Unified School District, Dec. No. 24272-B (WERC, 3/88).

7/ See Justice Abrahamson's dissent at 165 Wis.2d 420-428.

8/ Local 5-176 v. Elberta Crate & Box Co., 117 LRRM 2560 (M.D.Ga., 1984).

The Employer's contention that the Union has failed to meet its burden of proving the grievances are arbitrable cannot be accepted. Burden of proof concepts are of dubious worth here. The obligation to arbitrate is a shared duty, once an agreement to arbitrate has been reached. Against this background, placing a burden of proof on either party has little persuasive force. Rather, the policy considerations and doctrine of Jefferson assume controlling significance. In this case, that analysis favors the Union. Even if the more factual analysis advocated by the Employer was applied, that analysis favors the Union. The Union twice put the Employer on notice that it wished to arbitrate these disputes. While the grievances were being processed, the Employer did not contend the agreement did not cover the disputes. Rather, the Employer contended it had not violated the agreement. There is no contention the governing contract language was modified in collective bargaining. When a successor agreement was made retroactive to the date of expiration of its predecessor, no bar to arbitration remained.

The conclusions reached above should not foster unnecessary litigation. If the Employer's contention is accepted, an incentive is granted parties to raise hiatus grievances as a prohibited practice questioning the Employer's maintenance of the status quo. Under the Commission's current law on that point, this determination is, roughly, a determination of what the expired agreement requires. Such litigation only complicates the bargaining process and yields answers less clear than those available through arbitration. For example, in this case, prohibited practice litigation could have been brought to determine whether the Employer was obligated to make the payments sought by the grievances. Whatever conclusion that litigation resulted in, the conclusion would be subject to the claim that the successor agreement altered the underlying rights.

The conclusions stated above should not be taken beyond the facts posed here. The arbitration of hiatus disputes is a point best left to the bargaining parties. The arbitrability of such disputes is best expressly considered by the parties. Where, however, the parties do not expressly address this in the bargaining process, the Jefferson analysis determines substantive arbitrability. It should be stressed that bargaining history and past practice can be helpful in cases of this nature. The parties' conduct can be a valuable guide to whether an understanding has been reached to extend an agreement's term forward or backward into the contractual hiatus. In this case, however, what evidence there is on this point favors the Union.

In sum, the arbitration clause of either the 1992-94 or the 1994-96 labor agreements is broad enough to cover the grievances on their face. Article XXXII of the 1992-94 labor agreement, however, specifically excludes from arbitration disputes arising after June 30, 1994. Article XXXII of the 1994-96 labor agreement, however, makes the grievance procedure effective throughout the period of time relevant to the grievances. The grievances are, then, substantively arbitrable under the 1994-96 labor agreement.

As a procedural matter, and under the unique facts posed here, the execution of the contract is a more persuasive date to trigger the arbitration time line than is the date of the

parties' ratification. Because the request for arbitration was filed within ten workdays of the execution of the 1994-96 agreement on December 20, 1995, the Union cannot be considered to have waived the right to arbitration.

AWARD

The Pirlot and Fruzen grievances are arbitrable.

Dated at Madison, Wisconsin, this 3rd day of April, 1996.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/mb
0403RM84.A