BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
LOCAL 139, INTERNATIONAL UNION OF OPERATING ENGINEERS	:	Case 3 No. 47859 A-4962
and	:	
HEITMAN, INC.	:	

Appearances:

Mr. Warren Kaston, Legal Counsel, appearing on behalf of the Union.

Shindell & Shindell, Attorneys, by Ms. Anne B. Shindell, and Ms. M. Elizabeth Burns, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1988-90 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve 23 separate grievances involving non-bargaining unit personnel allegedly performing bargaining unit work.

The undersigned was appointed, and the parties agreed to submit the arbitrability of the grievances as a threshold issue. The parties stipulated to the facts and waived hearing; briefs were filed by both parties, and the record as to arbitrability was closed on November 25, 1992.

STIPULATED ISSUE:

Are the grievances arbitrable?

RELEVANT CONTRACTUAL PROVISIONS:

. . .

ARTICLE VIII

Grievance Procedure

Section 8.1. A grievance must be filed in writing by the Employer, the Contractor, or

the Union, within thirty (30) days of the date of the occurrence of the grievance.

Section 8.2. All grievances, disputes or complaints of violations of an provisions of this Agreement shall be submitted to final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. Notice of the grievance dispute shall be given to the Employer or as applicable to the Milwaukee office of the Union at least two (2) days before serving of the demand for arbitration in order to permit efforts to adjust the matter without litigation. The arbitrator shall be a member or staff member of the Wisconsin Employment Relations Commission. The arbitrator shall have the sole and exclusive jurisdiction to determine the arbitrability of such dispute as well as the merits thereof. Written notice by certified return receipt of a demand for arbitration shall be given to the Contractor and Employer or as applicable to the Union at its Milwaukee headquarters. The Contractor and Employer as the case may be, shall agree in writing within seven (7) days to arbitrate the dispute.

Both parties shall cooperate to have the case heard by an arbitrator within seven (7) calendar days of the written agreement to arbitrate, provided an arbitrator is available. The arbitrator shall have the authority to give a bench decision at the close of the hearing, unless he shall deem the issues to be unusually complex, and thereafter he shall reduce the award to writing. Grievances over discharge or suspension shall be filed no later than ten (10) calendar days after the matter is brought to the attention of the Business Representative of the Union.

Section 8.3. In the event the arbitrator finds a violation of the Agreement, he shall have the authority to award backpay to the aggrieved or persons on the referral list in addition to whatever other or further remedy may be appropriate.

Section 8.4. In the event a Contractor

> or the Union does not agree to arbitrate a dispute within seven (7) calendar days or does not cooperate to have the case heard within seven (7) calendar days after the written agreement to arbitrate or does not comply with the award of the arbitrator, the other party shall have the right to use all legal and economic recourse.
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> Section 8.5. All expenses of the Arbitrator shall be shared equally by the Union and the Contractor involved.
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> . . .

DISCUSSION:

This matter began when, in the Fall of 1989, a business agent of the Union allegedly observed non-bargaining unit personnel operating heavy equipment for the Company, and began to file grievances. The Company has maintained throughout that it was merely pursuing a long-standing arrangement under which some of its employes were Union while others were non-Union, and that this state of affairs had been known to and accepted by the Union for decades. In their briefs in this matter, and in the accompanying exhibits, the parties range far beyond the narrow issue presented by the present phase of these proceedings; the following discussion will recount these facts only as absolutely necessary to an understanding of the arbitrability issue.

There is no dispute that at the initial step of the grievance procedure the grievances were filed timely within the terms of the multi-Employer collective bargaining agreement to which Heitman was a signatory at the time. The Company and Union then engaged in a series of battles which involved two NLRB cases and a proceeding in Federal District Court, before arriving in front of this Arbitrator, all concerning the same underlying series of events.

A full description of the parties' activities to date would be tedious and unnecessary to the present purpose. It is sufficient to summarize: The Union began filing a series of grievances about November 9, 1989, in each of which it requested payroll and other related information from the Company in order to determine whether a violation had in fact occurred. The Company initially declined to provide the requested information. The Union filed an unfair labor practice charge with the National Labor Relations Board, Region 30, and the Company and Union eventually agreed to a settlement of the charge under which the

Company would supply certain information to the Union. While the initial NLRB charge was pending, the Union attempted to file for arbitration of the underlying grievances with the WERC, but the Company did not concur in the initial request. Pursuant to its usual rules, the WERC thereupon declined to docket an arbitration case, but a second NLRB charge alleging that the Company was failing to process grievances was dismissed. The Union then filed a Section 301 lawsuit in Federal District Court to compel the Company to arbitrate. The Company filed a motion to dismiss, a hearing was held, and in his July 24, 1992 Order, Federal District Judge John W. Reynolds concluded that the parties were bound by the language of the collective bargaining agreement to arbitrate the grievances, and ordered that Heitman submit to arbitration. It is clear from the face of Judge Reynolds' Order that the scope of that Order was limited, based on Judge Reynolds' reading of the collective bargaining agreement's broad statement that: "The arbitrator shall have the sole and exclusive jurisdiction to determine the arbitrability of such dispute as well as the merits thereof". Thus Judge Reynolds did not dispose of the procedural arguments relating to arbitrability which the Company had raised before him, finding instead that arbitration was the proper place to raise such defenses. On August 4, 1992 the Union re-filed its request for arbitration with the WERC; this time, the Company assented, with the proviso that the issue of arbitrability of the grievances would be considered first. The parties subsequently agreed to a format under which evidence and argument in the first phase of the proceeding would be limited to that necessary to determine arbitrability, but both parties strayed from this undertaking and filed somewhat broader material.

Evidence and argument as to the underlying motivations of each party in their handling of the grievances might well be relevant to the merits of the dispute. But inasmuch as the parties have stipulated a record, the conflicting contentions as to motivation arise without witnesses whose testimony can be evaluated. Furthermore, much of the evidence submitted is immaterial to the strictly limited question before me at present.

I find the essential sub-issues as to arbitrability to be these:

1. Does Section 8.02 allow the Company to decline to arbitrate a grievance at its option?

2. Did the Union fail, as the Company argues, to make "any of the notices or demands for arbitration required under the grievance procedure" before filing

for arbitration with the WERC on December 27, 1990?

3. Did the Union waive its arbitration rights under the collective bargaining agreement when, in the Company's terms, it "danced off to the NLRB to resolve . . . substantive issues instead of pursuing the arbitration remedy"?

4. Did the Union fail an essential requirement by admittedly not filing written notice of a demand for arbitration with the contractor by certified mail?

5. Did the Union, as the Company contends, sit on its rights for so long that arbitration would not now be appropriate?

These will be addressed one by one.

VOLUNTARY ARBITRATION

The Company asserts that in requesting that new contract language replace the grievance procedure in evidence prior to the 1988-90 contract, the Union knowingly proposed language in 1988 which permitted a party to decline to arbitrate any specific grievance. The Company relies for this on Section 8.4's reference to "In the event a Contractor or the Union does not agree to arbitrate . . . ."

I disagree with this interpretation, for two reasons. First, the Company's proposed interpretation of this language would make Section 8.4 appear to contradict Section 8.2's "The Contractor . . . . shall agree in writing within seven (7) days to arbitrate the dispute." If, on the contrary the quoted sentence of Section 8.2 is seen as a device for finding out relatively quickly whether an employer intends to place roadblocks in a grievance's path to arbitration, Section 8.4 can be seen as a device intended to discourage such recalcitrance, and there is no conflict. Second, it is far more probable, as the Union argues, that the Union would propose language to streamline grievance processing than that it would propose language that would for the first time allow signatory employers, at will, to refuse to arbitrate any particular grievance. I note also that this argument was at least impliedly rejected in Judge Reynolds' order to arbitrate.

NOTICE TO BE GIVEN

The Company argues that the Union never filed "any notice of dispute related to any of the harassment grievances . . . nor any notice of dispute indicating arbitration was to be requested." "Notice" of a dispute could mean either a formal document, as the Company appears to imply, or something less. The applicable contract language does not indicate either specifically. Certainly in a formal proceeding, or under Rules such as the Commission's, a notice may well be a specific form of document. In general labor relations parlance, however, "notice" usually means something more like "Any announcement, information, or indication of some present or coming event." 1/ The ordinary and usual construction of a word or phrase is the arbitrator's touchstone. Also, there is nothing in this record to indicate that a more formal meaning was intended; indeed, this contract's grievance procedure language in general is rather more terse than most. Finally, the purpose of "notice" is, as Section 8.2 says, to permit efforts to settle the matter. This is as well accomplished by the definition cited above as by a formal document. I therefore conclude that the "any . . . indication" definition should be applied.

The initial filing of the grievance, however, is clearly "notice" that one party believes something is amiss. The Company admits that in each of the 23 grievances, it did receive the initial grievance. Thus, it clearly received "notice" long prior to the Union's December, 1990 filing for arbitration. Nothing in the applicable language requires that notice be given more than once, and it is notable that this contract does not provide for an elaborate, multi-stage grievance procedure.

The Union contends, and the Company does not deny, that the Union's December, 1990 arbitration request to the WERC was copied to the Company by regular mail. The Company appears to be arguing here that two factors in that particular exchange justify denying the arbitrability of these grievances. One is sending the copy to the Company by regular rather than certified mail (discussed below); the other is sending the request directly to the WERC rather than first sending it to the Company.

The language of Section 8.2 on its face fails to state whether the "demand for arbitration" must be filed initially with the company involved or with the WERC. In this stipulated record, of course, neither party has offered testimony as to the intent of this language, and the documents submitted as to its origin fail to enlighten me. Reviewing Section 8.2 on its face, however, I

1/ American Heritage Dictionary, Houghton Mifflin Co., 1969, 1981.

note that it is at least plausible that the requirement that "Written notice . . . of a demand for arbitration" be given to the Company involved means that the demand itself goes to the arbitrating agency. That would not be inconsistent with the WERC's long-established practice of expecting a filing party to file a form entitled "Request for. . . Arbitration" with the agency, with a copy to the other party.

But in view of the ambiguity of the language at issue, something more needs to be said. The purpose of contractual grievance-processing requirements is fundamentally to ensure that both parties have had adequate opportunity to know about and attempt to resolve a dispute short of arbitration. Here, the record is replete with evidence that the Union had been attempting to get the Company to supply information concerning these grievances for a year by the time of the first arbitration request. The Company subsequently complied, under what appears to have been some degree of pressure from the NLRB. 2/ For the Company in effect to claim, given the extensive and rancorous documents in the record, that the Union's filing for arbitration surprised it seems a little disingenuous.

THE NLRB

The Company asserts that the Union waived any right to arbitration by filing with the NLRB on substantive issues. Upon a review of the NLRB charges and other documents in the record, I find this argument meritless. The Union's first charge to the NLRB was that the Company was withholding relevant and requested information. As noted above, the NLRB's regional office appears to have supported this charge, and the Company settled on that basis. The Union's second NLRB charge was over the Company's refusal to arbitrate the grievances. The NLRB dismissed that charge as not an NLRA violation, while noting that the Union had a Section 301 lawsuit available as a remedy. The Union duly pursued that remedy, with the results already noted. Nowhere in the documents is there evidence that the Union brought those charges primarily to address the substance of the dispute. Furthermore, to the extent that the Union also averred substantive issues in the course of advancing the second charge, it was specifically authorized to do so by Section 8.4's explicit and broad language allowing a party against whom another has refused to arbitrate "to use all legal and economic recourse."

2/ I note in particular Regional Director Szabo's statement in a June 6, 1991 letter that if the Company did not withdraw asserted restrictions on the Union's future use of documents furnished pursuant to the Union's June, 1990 charge, "I intend to immediately issue complaint in the matter."

REGULAR MAIL

For reasons related to the second issue above, I do not find the Union's use of ordinary mail to be a fatal error: The Company was, if nothing else, already well and truly on notice that the Union intended to pursue these grievances. The Company impliedly asserts that the grievance procedure here represents not a series of devices to try to get the parties to resolve matters on their merits, but rather a series of procedural "hoops", constructed so as to exclude arbitration on procedural grounds if the Union misses one. This view is contrary to many years of arbitral interpretation. In particular, where one party argues for punctilious observance of minor points of procedure, arbitrators have generally weighed such arguments in light of that party's own conduct.

SITTING ON RIGHTS

The Company's final assertion is that the Union in its overall handling of the dispute sat on its rights for so long that arbitration now would be inappropriate. The record shows, however, that it was the Company that first declined to produce information relevant to the Union's effort to determine whether its initial grievances should be pressed further. In general the dates of documents in the record show that the Union did not wait significantly before pressing its claims, in a series of actions to the length of which the Company was full party. The sole period in which there are reasonable grounds for doubt as to whether the Union acted promptly is the fall of 1991 when, the Company asserts, the Union failed for three months to pick up from Attorney Shindell's office a series of documents prepared as a result of the settlement of the Union's first NLRB charge. This is an assertion, however, which is not buttressed by clear evidence; the stipulated record is silent as to any related facts. If the Company can prove in a hearing on the merits that the Union delayed in this manner, and if the Union fails to establish adequate reasons, this might well be taken into account in setting a remedy, in the event that the Union prevails on the merits of the underlying grievances. But an assertion of delay, standing alone, is not enough to deny arbitrability. And again, a long line of arbitration cases has held, in particular, that where one party has delayed a grievance, its assertions of delay by the other party are entitled to less weight than would normally be true.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

That the grievances in this matter are arbitrable.

Dated at Madison, Wisconsin this 29th day of January, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator