STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES, AND HELPERS UNION LOCAL 695, Complainant, vs. VALLEY SANITATION COMPANY, INC., Respondent.	Case I No. 13346 Ce-1277 Decision No. 9475-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Mr. Frederick Hobe, Attorney at Law, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695 having on December 2, and December 10, 1969, filed a complaint and a first amended complaint with the Wisconsin Employment Relations Commission wherein it alleged that Valley Sanitation Company, Inc., had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act, in discharging an employe because of his concerted activities and by refusing to bargain with the Complainant as the representative of a majority of its employes in an appropriate collective bargaining unit; that, pursuant to notice issued by the Commission on December 11, 1969, hearing on said complaints was held at Fort Atkinson, Wisconsin, on January 7, 1970, Chairman Morris Slavney being present; that hearing on said complaints was closed on the latter day; that, prior to any further action, said Complainant, on January 20, 1970, filed a motion with the Commission to amend its complaints and at the same time filed a second amended complaint and moved that the hearing be reopened to take evidence with regard to said second complaint, wherein the Complainant alleged, in addition to the allegations previously alleged in the complaint and first amended complaint, that the Respondent had committed additional unfair labor practices just prior to and following the hearing conducted by the Commission on January 7, 1970; that thereupon and on January 26, 1970, the Commission issued an Order reopening hearing in the matter, which hearing was conducted on February 12, 1970 before John Coughlin, Examiner; and the Commission, having considered the evidence, arguments and briefs of Counsel, and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 695, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, hereinafter referred to as the Complainant, is a labor organization having its principal office

at 1314 North Stoughton Road, Madison, Wisconsin; and that at all times pertinent hereto, Eugene Machkovitz has been a Business Representative of the Complainant.

2. That Valley Sanitation Company, Inc., hereinafter referred to as the Respondent, operates a refuse hauling service and sanitary landfill in or near the city of Fort Atkinson, Wisconsin and maintains its principal office at 824 Monroe Street, Fort Atkinson, Wisconsin; and that at all times pertinent hereto, Joseph Tate and Gerald DeVetter have been stockholders of the Respondent, authorized to represent the Respondent in all matters and relationships involving the Respondent and it employes.

3. That on November 18, 1969 the Respondent's full-time work force consisted of Melvin Ford and Romaine G. Smith, employed as drivers and William Carey and Jim Wisniewski, employed as helpers, as well as Herbert Dodd, employed as a landfill operator; that on the evening of November 18, 1969 all of said employes met with Machkovitz at the home of Carey at a meeting organized by Smith, at which meeting Machkovitz discussed possible representation of the employes by the Complainant, and that in said regard all employes executed documents authorizing the Complainant to represent them for the purposes of collective bargaining with the Respondent; and that on November 19, 1969 the Complainant, over the signature of Machkovitz, delivered the following letter to the Respondent:

> "Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local No. 695, has been authorized by a majority of your employees to represent them for purposes of collective bargaining on wages, hours, and working conditions in the following unit:
>
> > 'All drivers, helpers, and equipment operators, excluding office clerical employees, guards, and supervisors as defined in the Act.'
>
> Any discrimination or reprisals directed against these employees will cause the above local union to engage in all legal and economic recourse to protect their right guaranteed by Federal Law, to join this Labor Union.
>
> We hereby request that negotiations on the terms and conditions of a collective bargaining agreement commence at the earliest possible date. We suggest that the first meeting be held at the offices of this Local Union, located at 1314 North Stoughton Road, Madison, Wisconsin, at 10:00 A. M. on Wednesday, November 26, 1969.
>
> If the time, place or date are inconvenient for you, please telephone the undersigned and mutually convenient arrangements will be made."

4. That on or about November 20, 1969, during a coffee break, Carey, in the presence of other employes, disclosed to Tate that all Respondent's employes had "joined" the Complainant, and that Complainant's agent would contact the Respondent for the purpose of collective bargaining; that on November 21, 1969, in response to Machkovitz's letter of November 19, DeVetter, by letter, advised the Complainant as follows:

"Thank you for your advise of November 19.

We have a demonstration running at a local manufacturing plant this week and will find it impossible to meet with you on the suggested date.

Next week we plan a cut-back in personnel necessitated by changes in our business projection through the end of this year, and both Mr. Tate and I will be involved in actual pick-up and disposal operations through the remainder of the period.

Hopefully circumstances will have changed by mid-January to permit us to direct our full attention to managerial responsibilities, including your request."

5. That on November 24, 1969 Tate and DeVetter advised Smith, who had a satisfactory employment record, and who was hired subsequent to driver Ford, that Smith would be laid off as of November 28, 1969, giving as reasons for such action that the Respondent was low on funds and that Smith lived "farthest away" from his place of employment than did any of the other employes; that at the time Tate also advised Smith that the latter should not plan on being returned to active employment; that, however, Smith, in fact, lived closer to the work area than did two other employes, both of whom had less service with the Respondent than did Smith; and that Smith was in fact terminated on November 28, 1969.

6. That prior to November 24, 1969 the Respondent had been actively soliciting new accounts but had failed to obtain same; and that, however, the failure to obtain such accounts did not reduce the existing contracts held by the Respondent, or materially affect the manpower or equipment requirements of the Respondent for the performance of its existing contracts in the collection and disposal of refuse.

7. That on November 25, 1969 the Complainant sent, by certified mail, identical letters addressed to the Respondent, to the addresses of Tate and DeVetter, with respect to its claim of representation; that said letters were held in the post office at Fort Atkinson, since there was insufficient postage on each letter, each in the amount of 20 cents, and that on November 26, 1969, when DeVetter called at the post office, he refused to pay the postage due and also refused to accept delivery of said mail.

8. That on an undisclosed date between November 18, 1969 and December 3, 1969, the Complainant filed a petition with the 13th Region of the National Labor Relations Board requesting an election among the employes of the Respondent to determine whether said employes desired to be represented by the Complainant for the purposes of collective bargaining; that on December 3, 1969 the Regional Director of said region, by letter, which was received by the Complainant on December 5, 1969, copies of which were also sent to the Respondent, as well as to its Counsel, advised that, since the Respondent did not meet the jurisdictional standards of the NLRB, said Regional Director had dismissed the petition; and that on December 2, 1969 the Complainant, apparently having doubts that the Respondent was subject to the jurisdiction of the NLRB, filed a petition with the Wisconsin Employment Relations Commission requesting the Commission to conduct an election among all drivers, helpers and equipment operators in the employ of the Respondent, excluding office clerical, guards

and supervisors, to determine whether said employes desired to be represented by the Complainant for the purposes of collective bargaining with the Respondent; that on the same date the Complainant filed its initial complaint with the Commission, alleging that the Respondent had committed certain unfair labor practices in violation of the Wisconsin Employment Peace Act; and that on December 11, 1969 the Commission issued separate notices of hearing, setting hearing on both the election and complaint matters for January 7, 1970, copies of which were received by the Complainant and Respondent in the due course of mailing.

9. That on an unspecified date between November 24, 1969 and January 5, 1970 Carey advised Tate that the employes, in their organizational meeting with Machkovitz, had indicated an interest in obtaining health insurance, in addition to other benefits and improved working conditions, and that on said occasion Tate advised Carey that the Respondent was willing to grant such benefits to the employes; that on January 5, 1970, within three weeks following the receipt of the initial Notice of Hearing issued by the Wisconsin Employment Relations Commission, and just two days prior to the initial hearing on the complaint and 1st amended complaint of unfair labor practices filed by the Complainant initiating the instant proceeding, the Respondent proffered individual employment contracts to Carey, Dodd, Wisniewski and Ford, which contained provisions relating to job descriptions, wages, hours, medical insurance, holidays, sick leave, job security, and "purpose"; that the provisions with respect to medical insurance and job security provided benefits over and above those working conditions previously enjoyed by the employes; that on January 5, 1970 Carey, Dodd and Wisniewski individually executed such individual agreements; that, however, Ford did not do so, but asserted to Tate on January 5, 1970, his intent to consult with the Complainant before discussing the individual agreement with the Respondent.

10. That on January 6, 1970 Ford, in a conversation with Tate, advised the latter that he, Ford, would appear as a witness at the complaint hearing on the following day and that he "would have to tell the truth", and that, in reply, Tate remarked that "You'll probably have to get another job too"; that on January 7, 1970, the date of the hearing, Ford, pursuant to a subpoena served upon him which required him to be present at the hearing which was to commence at 2:00 p.m., Ford left his job duties at 11:00 a.m. and appeared at the hearing at the time scheduled; that he was called as a witness by the Complainant, who had subpoenaed Ford, and as such witness testified with respect to the conversation between himself and Tate held the previous day, as well as his conversation with Tate wherein Ford indicated that he desired to consult with the Complainant prior to executing an individual employment contract; that upon the conclusion of his testimony Ford remained present at the hearing to its conclusion at 5:00 p.m.; that he did not perform any work the remainder of that day; and that, since Ford left his employment at 11:00 a.m. and performed no further duties the day of the hearing, following the hearing, Tate found it necessary to complete the route which normally was assigned to Ford; and that on January 8, 1970, the day following the date of the first hearing herein, Tate advised Ford to seek other employment and that Tate would make conditions "miserable enough" for Ford to do so; and that however, Ford did not quit his employment but was still employed as of February 12, 1970, the date upon which hearing was closed herein.

11. That on January 9, 1970 Dodd left his work station at the landfill site at 4:30 p.m., which was his normal quitting time, prior to

the completion of his duties, in order to travel to Madison, Wisconsin to visit his wife who was hospitalized; that on January 10, 1970 Dodd overslept and reported for work approximately two hours late; that on January 12, 1970 Dodd left his job at noon, without any notification to the Respondent, and proceeded to Madison to visit his wife in the hospital; that on January 13, 1970 Dodd reported for work inappropriately dressed for duty and was instructed not to return to work unless authorized to do so by either Tate or DeVetter; that on said date, without contacting either Tate or DeVetter, Dodd returned to Madison to again visit his wife; that on January 14, 1970 the Respondent discharged Dodd; and that such action by the Respondent resulted from Dodd's unexcused absences from his duties and his failure to properly perform same on January 9, 1970 and was thus for cause and was not motivated by his membership in or activity on behalf of the Complainant.

12. That on January 12, 1970, at approximately 9:30 a.m. Carey drove the truck assigned to him to the landfill site and terminated his employment by walking off the job without completing the remainder of his route duties.

13. That during the period commencing on January 12, 1970 and continuing at least through February 12, 1970, the date on which hearing was closed herein, the Respondent continued its operations with a work force consisting of five employes, namely Melvin Ford, Jim Wisniewski, Doug Punzak, Bill Czdotar and John Delo; that, although the latter three employes were characterized by the Respondent as "part-time" employes, they were in fact performing duties identical to those performed by "full-time" employes and were working substantially the same number of hours per day as were worked by said "full-time" employes; and that at no time after November 28, 1969, through and including February 12, 1970, did the Respondent make any effort to recall Smith from his "layoff" status or to offer him any form of employment with the Respondent, although both Carey and Dodd had terminated their employment prior to February 12, 1970.

14. That the characterization of the termination of Smith as a "layoff" and the reasons assigned by the Respondent for said termination were pretexts to conceal the true nature and motivation of the Respondent's action in that regard; that Smith was discharged in reprisal for his activity and membership in the Complainant; that, by said discharge, the Respondent intended to, and in fact did, interfere with, restrain and coerce its employes in the exercise of their right to engage in concerted activity; and that the activity engaged in by the Respondent with respect to the individual employment contracts made with certain employes and with respect to the threats made to Ford, were calculated to, and in fact did, interfere with, restrain and coerce its employes in the exercise of their rights to engage in concerted activity in and on behalf of the Complainant.

15. That the Respondent's acts of interference, restraint and coercion, as found heretofore, committed after the Complainant had been authorized by a majority of the employes of the Respondent to represent them for the purposes of collective bargaining, were engaged in for the purpose of undermining the prestige and authority of the Complainant as the representative of the majority of the Respondent's employes; that the Respondent's refusal to recognize the Complainant as the exclusive representative of its employes and its refusal to bargain and negotiate with the Complainant on wages, hours and working conditions of its employes, were not motivated

by any good faith doubt as to the Complainant's majority status, but, rather, by a desire to gain time within which to undermine the Complainant and to dissipate its majority status; and that thereby, and by unilaterally discussing working conditions with the employes, and by unilaterally implementing changes in working conditions, including the layoff of Smith in November 1969, and the implementation of a new insurance plan, without notice to or consultation with the Complainant, the Respondent refused, and continues to refuse, to bargain in good faith with the Complainant.

Upon the basis of the above and foregoing Findings of Fact, the Commission makes the following

CONCLUSIONS OF LAW

1. That all drivers, helpers and equipment operators employed by the Respondent, Valley Sanitation Company, Inc., excluding office and clerical employes, guards and supervisors, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 111.05 of the Wisconsin Employment Peace Act; and that at least since November 18, 1969, and continuing at all times thereafter, the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695 has been, and is, the exclusive representative of the employes in said unit, for the purposes of collective bargaining within the meaning of the Wisconsin Employment Peace Act.

2. That the Respondent, Valley Sanitation Company, Inc., by threatening its employes with loss of employment, and promising benefits with respect to working conditions, all for the purpose of attempting to induce its employes to cease their support of the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695, are for the purpose of interfering with, coercing and restraining its employes in the exercise of their right to engage in concerted activities within the meaning of Section 111.04 of the Wisconsin Employment Peace Act, engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

3. That the Respondent, Valley Sanitation Company, Inc., its officers and agents, by discriminating against employe Romaine G. Smith, by discharging him to discourage, and in reprisal for, the exercise of the right of employes to engage in concerted activity in and on behalf of the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers, Union Local 695, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (c) of the Wisconsin Employment Peace Act.

4. That the Respondent, Valley Sanitation Company, Inc., since November 19, 1969, and at all times thereafter, has, by refusing to recognize, bargain and negotiate with the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, as the exclusive representative of its employes in the aforesaid unit, and by unilaterally discussing and implementing changes in the conditions of employment of its employes, has engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act.

5. That the Respondent, Valley Sanitation Company, Inc., by entering into individual employment contracts with certain of its employes, by offering an insurance plan to employes signatory to such individual employment contracts, by establishing a job classification and pay structure for employes signatory to such individual employment contracts, and by establishing a job security procedure for employes signatory to such individual employment contracts, all for the purpose of interfering with, coercing and restraining its employes in the exercise of their right to engage in concerted activity within the meaning of Section 111.04 of the Wisconsin Employment Peace Act, engaged in, and is engaging in, unfair labor practices within the meaning of Section 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act.

6. That since William Carey voluntarily quit his employment and since the termination of the employment of Herbert Dodd was for just cause, the Respondent Valley Sanitation Company, Inc., did not commit, and is not committing, any unfair labor practices within the meaning of any provisions of the Wisconsin Employment Peace Act, with repect to the termination of employment of such employes.

7. That since the record contains no evidence of a discharge or other action to discriminate against any employe because he had filed charges or given information or testimony in good faith under the provisions of the Wisconsin Employment Peace Act, the Respondent, Valley Sanitation Company, Inc., did not commit, and is not committing, an unfair labor practice within the meaning of Section 111.06(1)(h) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes the following

ORDER

IT IS ORDERED that the Respondent, Valley Sanitation Company, Inc., its officers and agents, shall immediately,

1. Cease and desist from:

   (a) Refusing to recognize, bargain and negotiate with the Complainant, Drivers, Salesmen, Warehousemen Milk Processors, Cannery, Dairy Employees, and Helpers Union, Local 695, as the exclusive representative of all of its drivers, helpers and equipment operators, excluding office and clerical employes, guards and supervisors, with respect to wages, hours and other terms and conditions of employment.

   (b) Discouraging membership and activity of its employes in and on behalf of the Complainant, Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695, or any other labor organization, by discharging, or otherwise discriminating against any employe in regard to his hire, tenure of employment, or in regard to any term or condition of employment, except as authorized in Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

   (c) Unilaterally changing wages, hours or other terms and conditions of employment of employes in the bargaining unit, without prior consultation with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees

and Helpers Union, Local 695, or any other labor organization the employes may select as their exclusive bargaining representative.

(d) Engaging in individual bargaining with employes in the bargaining unit with respect to individual employment contracts or promising or granting employes any improved benefits or conditions of employment to discourage their activities on behalf of and membership in Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union, Local 695, or any other labor organization.

(e) Threatening employes with loss of employment or changes in working conditions for the purpose of discouraging their activities on behalf of Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union, Local 695, or any other labor organization.

2. Take the following affirmative action which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Offer to Romaine G. Smith immediate and full reinstatement to his former or a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him, by payment to him the sum of money equal to that which he would normally have earned as an employe, from the date of his termination to the date of the unconditional offer of reinstatement, less any earnings he may have received during said period, and less the amount of unemployment compensation, if any, received by him during said period, and in the event that he received unemployment compensation benefits, reimburse the Unemployment Compensation Division of the Wisconsin Department of Industry, Labor and Human Relations in such amount.

(b) Upon request bargain collectively with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union, Local 695, as the exclusive representative of all employes in the aforesaid appropriate unit with respect to wages, hours and other terms or conditions of employment, and if an understanding is reached, embody such understanding in a signed agreement.

(c) Notify all of its employes, by posting, in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". Such copies shall be signed by Joseph Tate and Gerald DeVetter, and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Valley Sanitation Company, Inc., to insure that said Notice is not altered, defaced or covered by other material.

(d) Notify the Wisconsin Employment Relations Commission in writing, within ten (10) days of the receipt of a copy of this Order, what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 25th day of January, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. WE WILL offer to Romaine G. Smith immediate and full reinstatement to his former or a substantially equivalent position without prejudice to his seniority or other rights and privileges previously enjoyed by him, and make Romaine G. Smith whole for any loss of pay which he may have suffered by reason of the discriminatory discharge of Romaine G. Smith.

2. WE WILL, upon request, bargain collectively with Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, as the exclusive representative of all employes, excluding office and clerical employes, guards and supervisors with respect to wages, hours and other terms and conditions of employment.

3. WE WILL NOT discourage membership in Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695 or any other labor organization of our employes, by discharging, laying off, suspending or otherwise discriminating against any employe with regard to his hire, tenure of employment or in regard to any term or condition of employment, except as authorized in Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

4. WE WILL NOT engage in individual bargaining with employes in the bargaining unit with respect to individual employment contracts or promises or granting employes any improved benefits of employment to discourage their activities on behalf of and membership in Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, or any other labor organization.

5. WE WILL NOT threaten employes with loss of benefits previously enjoyed by them to discourage membership in or activity on behalf of Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, or any other labor organization.

6. WE WILL NOT in any other manner, interfere with, restrain or coerce our employes in the exercise of their right to self-organization to form labor organizations, to join or assist Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or any mutual aid or protection except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

All our employes are free to become, remain, or refrain from becoming members of Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees, and Helpers Union Local 695, or any other labor organization, except to the extent that such rights may be affected by an agreement in conformity with Section 111.06(1)(c)1 of the Act.

VALLEY SANITATION COMPANY, INC.

By _____
Joseph Tate

_____
Gerald DeVetter

Dated this day of 1971.

THIS NOTICE MUST REMAIN POSTED FOR THIRTY(30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES, AND HELPERS UNION LOCAL 695,	:	
Complainant,	:	Case I No. 13346 Ce-1277
vs.	:	Decision No. 9475-A
VALLEY SANITATION COMPANY, INC.,	:	
Respondent.	:	

MEMORANDUM ACCOMPANYING FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The Pleadings

In its complaint, filed on December 2, 1969, 1/ the Union alleged that the discharge of Gene Smith by the Employer was motivated by Smith's union activity. On December 9, 1969 the Union filed a First Amended Complaint, alleging (a) the discharge of Smith because of his union activities; (b) the refusal of the Employer to bargain a decision on December 1, 1969 affecting employment opportunities and working conditions of the employes after the Union had been chosen by a majority of the employes to represent them for the purposes of collective bargaining; and (c) the bad faith refusal of the Employer to bargain with the Union on November 21, 1969.

Notice of hearing was issued on December 11, 1969 setting the hearing for January 7, 1970, and setting December 30, 1969 as the date for filing answer. No answer was filed. At the hearing conducted on January 7, 1970 the Complainant called its business agent, Eugene Machkovitz and employes Smith, Carey and Ford as witnesses, and the Respondent called Tate and DeVetter as witnesses. The hearing was completed and closed on January 7.

On January 19, 1970 the Union filed a motion for leave to file a Second Amended Complaint and to reopen the hearing to take evidence on the additional allegations set forth. The Commission granted the motion on January 26, 1970 and issued Notice of Hearing, setting February 12, 1970 as the date of hearing. The Second Amended Complaint alleged (1) that the Union is a labor organization; (2) that the Employer is an employer within the meaning of the Act; (3) that the discharge of Smith was in violation of Section 111.06(1)(c); (4) that the refusal to bargain on December 1, 1969 was in violation of Section 111.06(1)(d); (5) that the refusal to bargain on November 21, 1969 was in violation of Section 111.06(1)(d); (6) that on January 5, 1970 the Employer threatened employes with reprisals for their "cooperation" with the Commission in violation of Section 111.06(1)(a) and (h); (7) that on January 5, 1970, the Employer engaged in individual bargaining with employes in the unit in violation of Section 111.06(1)(d) and (a); (8) that on January 8, 1970, the Employer threatened one of the employes who had testified before

1/ On the same date the Union filed a petition with the Commission requesting the Commission to conduct an election among the employes to determine their bargaining representative.

the Commission, in violation of Section 111.06(1)(a) and (h); (9) that on January 13, 1970, the Employer discharged William Carey in violation of Section 111.06(1)(a) and (c) and (h); (10) that on January 14, 1970, the Employer discharged Herbert Dodd in violation of Section 111.06(1)(a) and (c) and (h); and that the Employer had refused to recall Smith from layoff, in violation of Section 111.06(1)(a), (c) and (h). The Employer filed no answer. The reopened hearing was conducted on February 12, 1970. Briefs were submitted by the Employer on April 27, 1970, and by the Union on May 21, 1970.

Position of the Parties

The Union contends that the Employer coerced its employes and interfered with their organizational rights and by such acts prevented a fair election proceeding. It argues that the termination of Smith was in reprisal for his activity in the Union and not for the reasons claimed by the Employer, which the Union alleged were "vague" and "specious", and that Tate's threat to discharge Ford, with respect to the latter's intent to tell the "truth" at the complaint hearing constituted a "blatant act of coercion surpassed only by a vengeful promise of discharge the day after the hearing", and that both Dodd and Carey were unlawfully terminated, rather than having voluntarily quit their employment.

The Union further asserts that the individual employment contracts executed under the circumstances herein, constituted both an unlawful refusal to bargain and coercion of the employes, and that the health insurance program provided therein constituted a benefit granted to the employes in an effort to interfere with their rights, and further that the Employer, despite its knowledge that the Union represented a majority of its employes, avoided its duty to bargain with the Union, and, further, in that regard unilaterally implemented changes in the working conditions of its employes, their benefits and its operations, and that because of the entire course of conduct, the Employer should be ordered to bargain without requiring a representation election.

The Employer, who filed no answers to any of the complaints filed by the Union, in its brief argued that the Union failed to produce sufficient evidence to sustain any of the allegations contained in its complaints. The Employer contends that Smith was terminated because of a cut-back in its operations, which had been considered prior to the receipt of the Union's letter of November 19, 1969, that Smith had been hired four months earlier to relieve Tate, an agent of the Employer, to permit the latter to seek additional contracts for the Employer's services, and when such contracts were not acquired, the Employer laid Smith off, since the latter was junior in seniority of the two drivers then employed. The Employer also argues that Smith was not the only employe who had signed a Union Authorization card that, in fact, all of them had. The Employer also contends that "termination does not fall within the terms" of Section 111.06(1)(c) of the Wisconisn Employment Peace Act, 2/ and claimed that Smith's termination was logical in light of the circumstances concerning his hire and the failure of the Employer to attain additional business and did not constitute unlawful discrimination "no matter what the Employer's attitude toward the Union may have been".

With respect to the Union's allegation that the Employer refused to bargain in violation of Section 111.06(1)(d) of the Act, the Employer asserts that the authorization cards were not exhibited to the Employer and that the latter had no way of telling whether the Union "did in fact represent a majority" of the employes, and further that "there has been

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2/ We fail to comprehend the Employer's position in this regard since any act terminating an employment relationship affects the tenure of such employment.

no demand made by the Union prior to the commencement of this action or the pendency thereof". The Employer contends that its letter of November 21, 1969, in reply to the Union's letter of November 19, can, in no way be interpreted as a refusal to bargain, but rather contained an explanation of its inability to meet with the Union on the date requested, and that the Employer did indicate a willingness to meet once its circumstances stabilized.

Regarding the Union's allegation that the Employer threatened employes with reprisals should they testify in the complaint hearing, the Employer would discredit the testimony of Ford with respect to the alleged conversation between the latter and Tate, and would credit the testimony of Tate regarding said conversation, wherein Tate claims to have told Ford "if you don't like this job you can look for another job". The Employer argues that Tate's remarks indicated Tate's "annoyance at Ford to refuse to comply with Tate's request for an employe meeting". Further the Employer argues that "without further context and more specific recollection (on Ford's part) it is difficult to find any threat of reprisal in an Employer's reprimand of an employe", and further the Employer asserts, even if Ford's testimony were to be believed, the Employer questions the relationship of the alleged threat of reprisal to the sections of the Act alleged to have been violated by the Employer.

Concerning the Union's allegation that the Employer violated Section 111.06(1)(a) and (d) of the Act, by bargaining individually with the employes and inducing them to sign individual employment contracts on or about January 5, 1970, the Employer contends that "without any evidence except the Union's unsupported statement that the Union was the authorized representative of a majority of the employes" the Employer, upon being approached by Carey "who purported to speak for the others with a request for some spelling out of the circumstances of their employment, the Employer prepared the individual contracts at a time when the Union had not yet disclosed any evidence supporting its claim to represent a majority of its employes".

With regard to the reprimand given to Ford on January 8, 1970, the Employer argues that such reprimand resulted from Ford's refusal to return to his duties following the close of the hearing held that day.

With respect to the termination of Carey and Dodd the Employer contends that both had "abandoned" their employment through their own volition. In summation the Employer, in effect, argues that the evidence adduced during the hearing failed to establish that the Employer committed any unfair labor practices.

The Concerted Activity and Knowledge Thereof by the Respondent

The concerted activity of the employes commenced in November, 1969, and at a meeting at the home of Carey in the evening of November 18, 1969, which meeting had been previously arranged by Smith in contact with Machkovitz, a representative of the Union, all five employes executed cards authorizing the Union to represent them for the purposes of collective bargaining. On the following day Machkovitz delivered a letter to the Employer, wherein the Union set forth its claim that it represented a majority of the employes of the Employer and requested negotiations on a collective bargaining agreement. With regard to Employer's contention that it had no way of knowing whether the Union represented a majority of the employes, since the authorization cards were not exhibited to it, we credit the testimony of Carey with respect to the conversation with Tate during the "coffee break" on or about November 20, 1969, wherein the latter was advised that all the employes had "joined" the Union.

Further, while not established in the record, the Employer in its brief set forth that an election petition filed by the Union with the National Labor Relations Board was filed on November 20, 1969, and it is apparent that the Employer received notification thereof within a few days thereafter, since, following an investigation by the latter agency, the petition was dismissed as early as December 3, 1969.

In addition, the Employer in its brief admitted knowledge of such concerted activity prior to the "layoff" of Smith, in its contention that Smith's "layoff" was not because of his concerted activity, by the following statement:

> "By selecting a logical man for termination based upon a business and financial situation with the company, where, to the Employer's knowledge, all employes had requested union representation 3/ no discrimination can possibly be determined without (1) ignoring the reason for the employe's termination, and (2) establishing that the employe was engaged in union activities to a greater degree than all other employes."

The Termination of Gene Smith

Smith had the second longest employment record among the five employes employed on November 18, 1969. The record also indicates that the Employer had suffered a labor turnover of 40 to 50 men in a 3 man work force during the two years preceding this proceeding. Smith had an employment tenure approximately twice as long as the average tenure of the employes during said two year period. The Employer made no claim to have based the termination on a poor record and, on the contrary, the record indicates no basis for the termination being a discharge for cause. Smith was paid $5.00 per week more than the three employes junior to him in service, and was classified as a "Driver". We are satisfied that the duties of "Driver" and "Helper" were substantially the same and that the real supervision of and responsibility for all operations was undertaken by Tate and DeVetter. Further, the evidence indicates that management would assign two "Drivers" or two "Helpers" or a member of the management and a "Driver" to the same truck whenever it was convenient to do so.

The evidence presented by the Employer with respect to the need to implement a force reduction due to financial difficulties is not beyond question. The Employer had only recently moved from a work force of 3 to a work force of 5 and had discussed the possibility of further increases. The Employer also had one idle truck, indicating a potential equipment capacity for additional contracts. The Employer lost out in bidding on at least 4 new contracts, but it is clear that the loss of those contracts did not reduce the existing work load. It is not clear that the Employer was foreclosed from seeking and obtaining contracts other than the 4 which are mentioned in this record. Assuming, arguendo, that the Employer's financial position required a reduction of its work force by the layoff of one employe, the credible evidence would nevertheless indicate that the reasons given for the choice of Smith as the employe to be terminated are completely without merit.

One of the reasons given to Smith at the time he was advised of his layoff was that he lived "farthest away". Smith testified, however, that he lived closer to work than did either of the men in the "Helper" classification, both of whom had less service with the Employer than

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3/ Emphasis added.

Smith, and this testimony was not challenged. Other testimony indicates that the Employer showed a great deal of willingness to accommodate employe Ford by picking him up at his home on mornings when his car was disabled or would not start in cold weather. Each such trip would tie up Tate or DeVetter for a half hour or more and would tie up the other employe assigned to work with Ford. There was no evidence whatever that the distance had ever caused Smith to be late for work or that the Employer had been inconvenienced in any way by the location of Smith's home.

At the hearing the Employer's witnesses testified that Smith had been hired to replace Tate on a truck and that the choice of Smith as the employe to be terminated was made because Tate expected to return to truck driving. Even accepting a seniority concept as claimed by the Employer, the failure to offer Smith a demotion to "Helper", or a right to bump a junior employe, with an attendant cut in pay, indicates that the choice was directed at the individual rather than at the group. We are also satisfied that Tate worked on the same truck with Ford at times during the period between Smith's termination and the first hearing held by the Commission, leaving both of the lower paid and more junior "Helpers" working together on the same truck at those times. The record also indicates that following the termination of Carey, leaving a vacancy in each classification, Wisniewski was promoted to "Driver" without any attempt being made to recall Smith. The evidence is clear and convincing that the Employer had no intention to recall Smith at the time they advised him that he was to be laid off, and that the Employer's description of the men hired after January 12, 1970 rather than recalling Smith as being "part time" was a pretext. Under such circumstances, we conclude that the reasons given to Smith and the reasons set forth in testimony at the hearing were pretexts to camouflage the true reason and nature of the termination, which was in reprisal for Smith's concerted activity, who originally contacted the Union representative and arranged the organizational meeting and intended to undermine the Union, and we conclude that such termination constitutes a violation of Section 111.06(1)(a) and (c). 4/

Termination of William Carey

Carey had been involved with the concerted activity and also served as the pipeline through which the Employer received its first notice of who had joined the Union and the request for individual employment contracts. Carey appeared and testified at the first hearing when issues of refusal to bargain and the discharge of Smith were at issue, but failed to appear at the second hearing when his own termination was in issue. The evidence discloses that following his termination Carey's relationship with DeVetter remained cordial and that Carey obtained comparable or better employment elsewhere. With respect to the events which occurred on the day Carey last worked for the Employer, it is apparent that Carey was dissatisfied with his employment and was complaining about the work of his fellow employes. The truck he was driving suffered a mechanical breakdown. There is no evidence whatever that Carey was told by either Tate or DeVetter that he was to stop working or that he was being terminated. Neither Tate nor DeVetter were present when Carey drove the truck to the landfill and walked off the job. The Employer considered Carey as having quit, and there is nothing in the record to indicate that Carey ever requested reinstatement or made any effort to return to employment. The evidence does not provide a basis on which the Commission can base a finding that the Employer had engaged in a course of conduct directed at Carey to induce him to quit his employment, and there is consequently no basis for finding of a discriminatory constructive discharge as alleged by the Union.

4/ Checker Taxi & Transfer Co., (8821-B) 8/69

Termination of Herbert Dodd

Although their last names are different, Dodd and Carey are in fact brothers. Their terminations occurred within a matter of hours of one another, and the Employer has made a credible claim that Dodd forfeited his job by his own actions rather than by action on the part of the Employer. The evidence presented by the Union goes mainly to whether Dodd's discharge was based on good cause, rather than on whether the discharge was motivated by discrimination against Dodd for his concerted activity. Dodd did not testify at the first hearing. He had cooperated with the Employer with respect to the signing of the individual employment contracts, and, although he had joined the Union, his name is not associated with the main contacts and issues in this case. The record is thus devoid of items on which Dodd interposed the Union between himself and the Employer or items on which specific acts of discrimination are claimed. The standard for finding an improper discharge in a complaint proceeding alleging a violation of Section 111.06(1)(c) of the Act, is not "just cause". The Union has failed to sustain its burden of proving that the termination of Dodd was discriminatory or motivated by the concerted activity engaged in by Dodd or any employe. We therefore find no unfair labor practice was committed with respect to Dodd's termination of employment.

The Refusal to Bargain

The Union seeks an order from the Commission wherein the Employer would be required to bargain with it, and in that regard the Union contends that it was authorized by a majority of the employes in an appropriate unit to represent them for the purposes of collective bargaining, and that the Employer refused to recognize and bargain with it after being advised of the Union's majority status. All the employes of the Employer, employed as drivers, helpers and equipment operators, executed cards authorizing the Union to represent them for the purposes of collective bargaining. Immediately after obtaining such cards at an organizational meeting held at the home of one of the employes, the Union, by letter to the Employer, indicated its representative status and requested the Employer to commence negotiations as early as possible. Within a day or two after the Union had delivered its letter of November 19, 1969, the Employer was also notified, during a coffee break, that all of the employes had joined the Union. In response to the Union's letter the Employer did not challenge the representative status of the Union, but indicated that it would be impossible to meet with the Union as suggested and further therein, inferred that it would not meet until at least mid-January 1970.

The incident involving the letters sent on November 25, 1969, with insufficient postage to cover the certified mail charges, as it affects the issue of refusal to bargain, cannot be conclusive on the issue, in light of the errors made by the Union in sending the letter, however, the then-current situation and the Employer's awarenss of the possibility of receiving further communications from the Union, leads us to the conclusion that the refusal of these letters was one of several actions taken by the Employer in avoidance of communication with the Union.

It has been well established that, after an employer has become aware that a union represents the majority of its employes, the employer has the duty to recognize the union as the bargaining agent. 5/ Generally, the Commission will not require an employer to recognize a union as a bargaining agent absent a representation election. However, where there is no doubt as to the employer's knowledge concerning the representative status of the union, the Commission will find that the union is, in fact,

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5/ Stowe Plastic Products Co., Milw. Co. Cir. Ct., 5/51.

the collective bargaining representative. 6/ We are satisfied that, after the receipt of the Union's letter and upon being advised orally by one of the employes that all employes had authorized the Union to represent them, the Employer was fully aware of the majority status of the Union. In its brief the Employer contended that the Union made no demand upon the Employer to bargain prior to the filing of the complaint proceeding. Its argument is unconvincing, especially in the light of the language in the Union's letter of November 19, 1969, as follows:

> "We hereby request that negotiations on the terms and conditions of a collective bargaining agreement commence at the earliest possible date. We suggest that the first meeting be held at the offices of this Local Union, located at 1314 North Stoughton Road, Madison, Wisconsin, at 10:00 A.M. on Wednesday, November 26, 1969.
>
> If the time, place or date are inconvenient for you, please telephone the undersigned and mutually convenient arrangements will be made."

While the Employer's reply letter did not specifically indicate a refusal to meet and negotiate with the Union, it did infer that the Employer would not meet for approximately sixty days or more. The facts establish that upon immediately learning of the employes' organizational activity and the Union's representative status, the Employer engaged in activity to dissipate such status, by discharging Smith, holding meetings of the employes to discuss working conditions and employe benefits, and by entering into individual employment contracts, making no reference to the Union. The provisions thereof encroached upon matters which are proper subjects of collective bargaining. The individual contracts were made wholly without the consent of the Union despite the Employer's knowledge of its representative status. The fact that the contracts were proffered at the request of one of the employes in the bargaining unit does not change the nature of the contracts or make them acceptable. Carey, the employe who suggested the individual contracts, was not authorized by the Union to represent the Union in any type of negotiations with the Employer and the individual contracts should in no way be considered a collective bargaining agreement, although a majority of the employes in the unit executed same.

The evidence satisfies the Commission that the Employer chose to delay its bargaining obligation with the Union and during the interim to attempt to dissipate the Union's majority. At the time of the Employer's activity there were five employes in the bargaining unit. All five had authorized the Union to represent them. As of the close of the hearing Smith had been discharged and Carey and Dodd had voluntarily quit their employment. We have found that the discharge of Smith was discriminatory and he is entitled to reinstatement. Therefore, the voluntary quit of Carey and Dodd, two of the five employes who had executed authorization cards on behalf of the Union, did not affect the majority status of the Union during the period in which the violations occurred even though new employes were hired to replace Carey and Dodd. Although the Union has not been certified or voluntarily recognized as the collective bargaining representative, since the Employer herein attempted to dissapate its majority status by the activity noted above, we conclude that the Union is the bargaining representative and that the Employer has refused to bargain with the Union as comtemplated in Section 111.06(1)(d) of the Act, and we have ordered the Employer to

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6/ Pleasant Valley Co-operative Creamery, (6304), 4/63.

bargain with the Union as the representative of the employes in its employ. 7/

The Alleged Violation of Section 111.06(1)(h)

The Union alleged, and attempted to establish, that the Employer violated Sec. 111.06(1)(h) of the Act in threatening Ford on the day prior to and the day following the initial hearing before the Commission. Said provision of the Act is as follows:

> "It shall be an unfair labor practice for an employer individually or in concert with others:
>
> (h) To discharge or otherwise discriminate against an employe because he has filed charges or given information or testimony in good faith under the provisions of this subchapter."

The testimony of Ford would indicate that Tate had clearly threatened Ford with discharge on the day preceding the hearing in an effort to coerce the employe to modify or withhold his testimony before the Commission, and that on the day following the hearing Tate threatened Ford with reprisals by stating that he intended to make life miserable for Ford unless he voluntarily quit his employment. Tate claimed that his threats of discharge directed at Ford on the day preceding the hearing before the Commission were based on the refusal of Ford to attend a meeting of employes called by the Employer. It is clear that the sole purpose of that meeting was to discuss and sign the individual employment contracts which we have found, infra, to be in violation of the Act. The employe refused to attend the meeting and asserted his right to consult with his designated exclusive bargaining representative before engaging in any such discussions or signing any such contract with the employer. On the basis claimed by Tate the threats can only be viewed as action taken by the Employer in reprisal for the assertion by the employe of the employe's rights under Section 111.04, and consequently in violation of Section 111.06(1)(a). With respect to the day following the hearing, Tate claimed that Ford left work unreasonably early on the day of the hearing and that Ford refused to return to work following the hearing, resulting in a burden on Tate to complete Ford's work, and that this was the basis for the reprimand. The testimony indicates that Ford worked until 11:00 A.M. on the day of the hearing and that the hearing began at 2:00 P.M. The official transcript indicates that the proceedings continued until 5:00 P.M. In light of the testimony elsewhere in the record indicating the usual duration of the work day for employes in Driver and Helper classifications, we are not convinced that such reprimand was motivated other than in reprisal for the employes' testimony given in good faith before the Commission. Such threats constitute interference, restraint and coercion in violation of Section 111.06(1)(a) of the Act. No action was ever taken to carry out either threat and, lacking affirmative action

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7/ Hot Coffee Service (7566), 4/66 (Aff. Milw. Co. Cir. Ct. 9/67); Chuck Wagon Industrial Catering Service (7093-B), 8/66 (Aff. Milw. Co. Cir. Ct. 2/68).

on the part of the Employer to discharge or otherwise discriminate against Ford, the threats alone do not constitute a violation of Section 111.06 (1)(h).

Dated at Madison, Wisconsin, this 25th day of January, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner