STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BUILDING SERVICE LOCAL #500, Complainant, vs. JOSEPH H. WAXER, Respondent.	Case II No. 14183 Ce-1325 Decision No. 9996-A

Appearances:
Eisenberg, Kletzke & Eisenberg, Attorneys at Law, by Mr. John G. Mueller, appearing on behalf of Complainant.
Ropella & Soukup, Attorneys at Law, by Mr. W. B. Ferebee, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Building Service Local #500 having on November 5, 1970 filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that Joseph H. Waxer had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act by refusing to bargain with the Complainant as a representative of a majority of its employes in an appropriate collective bargaining unit; and the Commission having appointed Marvin L. Schurke, a member of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and pursuant to notice issued by the Examiner on December 23, 1970, hearing on said complaint having been held at Milwaukee, Wisconsin, on January 22, 1971 before the Examiner; and the Examiner having considered the evidence, arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Building Service Local #500, affiliated with the AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its principal office at 2612 North Maryland Avenue, Milwaukee, Wisconsin, and that at all times pertinent hereto H. J. Evans has been a business representative of the Complainant.

2. That Joseph H. Waxer, hereinafter referred to as the Respondent operates apartment buildings at 2632 North Oakland Avenue and 2637 North Cramer Street, Milwaukee, Wisconsin, and maintains his principal office at 2040 West Wisconsin Avenue, Milwaukee, Wisconsin.

3. That on December 18, 1969 the Commission conducted a representation election and referendum among all custodial employes of the Respondent's apartments located at 2632 North Oakland Avenue and 2637 North Cramer Street, Milwaukee, Wisconsin, excluding supervisors and all other employes; that at such election, two employes

of the two eligible, cast ballots in favor of representation by the Complainant and none against such representation; that on December 30, 1969 the Commission certified the Complainant as the exclusive collective bargaining representative of all employes of the Respondent, employed in the aforementioned collective bargaining unit, for the purpose of collective bargaining, regarding rates of pay, wages, hours and other conditions of employment.

4. That subsequent to December 30, 1969 the Complainant requested negotiations with the Respondent for the purpose of obtaining a collective bargaining agreement; that the Respondent requested that negotiations be deferred until the employes then working for the Respondent were replaced with new employes; and that the Complainant, by Evans, agreed to defer negotiations on that basis.

5. That on an unspecified date in June, 1970, Evans submitted a proposed collective bargaining agreement to the Respondent; and that such proposed contract contains a wage provision as follows:

"ARTICLE V. WAGE SCHEDULE

The minimum wage rates for employees shall be as follows:

(a) Engineer:

To be paid at the rate of $_____(sic) per hour.

A day's work shall consist of eight (8) hours and forty (40) hours shall constitute a week's work. All work performed in excess of the above specified hours shall be paid for at the rate of time and one-half.

(b) Maintenance and Cleaning Help:

To be paid at the rate of $_____(sic) per hour.

A day's work shall consist of eight (8) hours and _____(sic) hours shall constitute a week's work. All work performed in excess of the above specified hours shall be paid for at the rate of time and one-half.

(c) Building Superintendent:

To be paid at the rate of $_____(sic) per month.

(d) It is further agreed that in the event of the sale of any building covered by this agreement, that the seller will be liable for any retroactive pay up to the date of the sale.

(e) No wages now being paid above the minimum scale herein prescribed shall be reduced. This applies to the employee, not the job.

(f) The wages of regular employees shall be paid semi-monthly and shall be paid on or before the ____(sic) and ____(sic)

day of each month. In the event the ____(sic) or ____(sic) shall fall on a holiday, the pay day shall be prior to such holiday. However, employees shall have the same pay day each month."

6. That the proposed contract submitted by Evans to the Respondent in June, 1970 contains provisions regarding paid vacations as follows:

"ARTICLE XIV. VACATIONS

Employees who have been in the continuous service of the Employer for a period of one (1) year and not exceeding two (2) years, shall receive one (1) week's vacation with full pay.

Employees who have been in the continuous service of the Employer for two (2) years or more and not exceeding ten (10) years, shall receive two (2) weeks' vacation with full pay.

Employees who have been in the continuous service of the Employer for ten (10) years or more, shall receive three (3) weeks' vacation with full pay.

Vacation period shall extend from June 1st to October 1st, and employees shall have the privilege of choosing vacation dates according to seniority in each classification.

In the event that a holiday occurs during the vacation period of any employee, such employee shall be entitled to one (1) additional day's pay in lieu thereof.

It is agreed that all employees shall receive vacation pay in advance.

In the event of a change of ownership, the former owner shall be obligated to pay his pro-rata of vacation and the new owner, if he becomes a party hereto, shall provide his pro-rata of vacation or vacation pay for the current year, but shall not be required to assume any obligation arising prior to said change of ownership. The service record of employees, for the purpose of vacations, shall not be broken by reason of change of ownership of a Building covered by this agreement if the new owner becomes a party hereto. Any employee receiving more than two (2) weeks' vacation pay prior to the signing of this agreement shall not have such vacation privileges reduced."

7. That on August 3, 1970 the Respondent hired George West to replace the employes employed by the Respondent at the time the representation election was held; that West does not receive a cash salary; and that the only compensation received by West for the services on behalf of the Respondent is the use of an apartment in one of the buildings without payment of rent and free use of utilities in connection with that apartment.

8. That in December, 1970 the Respondent submitted to the Complainant a complete counter-proposal of language for a collective bargaining agreement; that Evans and the Respondent met and discussed

the counter-proposal made by the Respondent; and that Evans took the counter-proposal and indicated his intent to go over the document and respond to it.

9. That Evans communicated his rejection of the counter-proposal made by the Respondent in writing as follows:

"Dec 5, 70

Mr. Waxer Wages

Article 1 -
To be included in Article 1 Wages scale even if you never use it.

Article 4- Vacation

To be inserted in your contract. Please recopy and mail signed copy.

H.J. Evans"

10. That the parties reached an impasse in bargaining on the issue of whether the wage provision and the vacation provision demanded by the Complainant should be included in a collective bargaining agreement between the parties; and that the Respondent has not refused to meet and negotiate.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

1. That Joseph H. Waxer did not refuse to bargain in good faith with Building Service Local #500 and therefore did not commit and is not committing any unfair labor practice in said regard within the meaning of the Wisconsin Employment Peace Act.

On the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED, that the complaint of Building Service Local #500 be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 16th day of March, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marvin L. Schurke
Marvin L. Schurke, Examiner

[illegible] Respondent submitted to the [illegible] of last wage and collective [illegible] the Respondent met and disc[illegible]

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Pleadings

In its complaint, filed on November 5, 1970, the Union alleged that the Employer had discussed the contract with H.J. Evans, Business Representative for the Union, only on two occasions, on the first of which the Respondent asserted that he could not do anything until he contacted his attorney, and on the second of which the Respondent "was very rude and said he was going to file a paper of decertification of the election and said he would not sit down and bargain for any contract." Notice of hearing was issued on November 6, 1970, setting hearing for November 23, 1970. On November 10, 1970, Attorney Ropella, representing the Employer, requested an indefinite postponement of the hearing, on the basis that the parties had agreed to try to negotiate the dispute. On November 11, 1970, the Examiner issued a Notice of Indefinite Postponement. On December 22, 1970, the Complainant requested that the hearing be rescheduled, and on December 23, 1970, Notice of Hearing was issued setting hearing for January 22, 1971. The Respondent filed its answer on January 14, 1971. At the hearing conducted on January 22, 1971, the Complainant called H.J. Evans as a witness, and the Respondent called George West, the present employe, as a witness. The hearing was completed and closed on that date. No briefs were filed.

Position of the Parties

The Union contends that the Employer has failed or refused to negotiate in good faith and seeks an order from the Commission that the Respondent sit down at a specific time and place to negotiate with the Union.

The Employer argues that it has negotiated with the Union, that negotiations have reached an impasse, and that at this point the Employer is not bound to come forward with proposals or compromises on the issues on which impasse has been reached.

The Alleged Refusal to Bargain

The evidence adduced at the hearing in this matter bears little relation to the allegations of the Complaint. At no time did the Complainant amend its complaint so as to cover the conduct which took place between November 5, 1970 and January 22, 1971. Both parties relied on conduct during that period in their evidence and arguments at Hearing, and accordingly, the Examiner, in conforming the pleadings

to the proof, has made findings of fact with respect to events which took place following filing of the complaint herein. Contrary to the allegation that only two contacts were had between the parties, the Union's witness testified on direct examination that there had been six or seven attempts to negotiate, and stated in other testimony that he had met with the Employer several times, both at the union office and at the Employer's office. When specifically asked by his Counsel if the Employer had refused to negotiate, Evans testified: "He didn't refuse; he just actually stalled." Evans also testified that: "The negotiation has never really been broken down; it just has been delayed." There was no testimony that the Employer had been "very rude" or that the Employer had stated he would refuse to sign any contract with the Union. The complaint of the Union is summarized in the opening statement of its Counsel, wherein he stated "an election has been held and there's no contract that has been negotiated." The Union apparently defines the term 'negotiation' to include 'agreement' and equates the failure of the parties to conclude and sign a contract with refusal to bargain. Throughout this proceeding the Employer has not raised any question as to the representative status of the Union and it was the Union which seemed to be concerned about the possibility of decertification. In closing, Counsel for the Union argued "With the election of the two employes, these two buildings that Mr. Waxer owns are subject to union."

The bargaining unit involved is the custodial "staff" of two apartment buildings located near one another in a residential neighborhood of Milwaukee. The job was previously performed by a married couple who received a salary of $125 a month plus free use of an apartment and utilities as compensation. The Union, after certification as bargaining representative, agreed to defer negotiations until the Employer replaced the employes whom he had employed at the time the election was held. With the replacement of those individuals the Union has in fact consented to a complete replacement of the membership of the bargaining unit. The Union comes into this proceeding from a footing of weakness and asks the Commission in effect to order the Employer to agree to what the Union itself has been unable to obtain.

A comparison of the proposal submitted by the Union and the counter-proposal submitted by the Employer indicates a number of differences, many of which might tend to make the counter-proposal unattractive to the Union, but the only issues upon which negotiations have reached an impasse and the only issues which were argued at hearing on this matter were the inclusion of a wage schedule and a vacation provision. Mr. Evans has testified that the wage provision and vacation provision are something which he feels are a necessary part of any collective bargaining agreement which a Union signs. The Union has not demanded wages for the present employe, and there is no evidence that the Employer has refused to discuss payment of a cash wage. While there is undoubtedly some basis on which the parties could arrive at an agreement which would provide for vacation for the employe, the Union has not modified its original demand, even in the face of the impossibility of performance that would result from having the blank wage schedule it has demanded.

In closing argument, Counsel for the Employer stated that under an impasse the Employer is not required to bargain unless the Union comes back with a change in its position and that the law does not require useless bargaining. While this is perhaps not a totally

correct statement of the holdings of the Wisconsin Supreme Court in St. Francis Hospital, 8 Wis. 2d 308, (1959), wherein the Court stated:

> "Section 111.06(1)(d), Stats, condemns as an unfair labor practice the refusal of an employer to bargain collectively with (the representative of) a majority of his employes in any collective bargaining unit. The collective bargaining so ordered by the statute does not compel either party to surrender to the demands of the other, but such bargaining does require the parties in good faith to engage in a mutually genuine effort to reach a collective bargaining agreement.",

the Union in this case has failed to prove that the Employer came to the bargaining table in bad faith or has refused to negotiate. There is insufficient evidence in the record to base a finding that the Employer has engaged in an unfair labor practice under Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin, this 16th day of March, 1971.

By Marvin L. Schurke
Marvin L. Schurke, Examiner