STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VII No. 14196 Ce-1326 Decision No. 10010-B
LOCAL #150, SERVICE & HOSPITAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Et Al, Complainant, vs. MEMORIAL HOSPITAL ASSOCIATION, Burlington, Wisconsin, Respondent.	Case VIII No. 14197 Ce-1327 Decision No. 10011-B

ORDER AMENDING IN PART, REVERSING IN PART AND AFFIRMING IN PART THE EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner George R. Fleischli having on August 16, 1971, issued Findings of Fact, Conclusions of Law and Order in the above entitled matters, and the Respondent having, pursuant to Section 111.07, Wisconsin Statutes, timely filed a petition with the Wisconsin Employment Relations Commission for review of the Examiner's Findings of Fact, Conclusions of Law and Order, and a brief in support thereof; and the Commission, having reviewed the entire record, the Examiner's Findings of Fact, Conclusions of Law and Order, the Petition for Review and the brief in support thereof, and being fully advised in the premises, makes and files the following Order Amending in Part, Reversing in Part, and Affirming in Part the Examiner's Findings of Fact, Conclusions of Law and Order.

IT IS HEREBY ORDERED THAT:

1. Paragraph 6 of the Examiner's Findings of Fact is amended to include the additional contractual provision:

"Article XXVIII - The Entire Contract - Duration

"This constitutes the entire Agreement between the parties on all bargainable issues. The parties hereby waive

further collective bargaining during the life of this agreement . . ."

2. Paragraph 17 of the Examiner's Findings of Fact is amended to read as follows:

"17. That Complainant Jim Hensgen had a full time position on the afternoon shift in the Respondent's Maintenance Division prior to going on strike and was eligible for recall in accordance with the strike settlement agreement; that on or about October 21, 1970, the Respondent offered Hensgen a part time position on the day shift in the Maintenance Division; that at the time that said Hensgen was offered said position the Respondent knew that Hensgen had a full time job with the Soo Line Railroad during the day; that Hensgen objected to being offered a part time position on the day shift, insisting that he be employed to his former position on the afternoon shift, contending that it was contrary to the provisions of the strike settlement agreement and advised the Respondent on or about October 23, 1970, that he would not accept the position; that the Respondent did not subsequently hire an employe to fill the position offered to Hensgen and did not subsequently offer employment to Hensgen; that on October 28, 1970, the Respondent hired Harold Piper, the first of two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace an employe by the name of Larry Reinertson who was scheduled to retire on January 1, 1971; that Piper was allowed to work on the afternoon shift under the training supervision of Complainant Robert Smith until November 5, 1970, when Smith became ill and his doctor indicated that Smith would not be able to continue working; that on November 5, 1970, Piper was assigned, at his request, to a full time position on the afternoon shift to replace said Smith; that on December 21, 1970, the Respondent hired Raymond Dahl, the second of the two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace Reinertson; that Dahl was assigned directly to the night shift and has continued to work on the night shift since December 21, 1970."

IT IS FURTHER ORDERED THAT the Examiner's Conclusions of Law be amended in the following respects:

1. The reference to "Section 111.06(f) of the Wisconsin Statutes" appearing in paragraphs 1, 2, 3, 4, 5, 7, 8, 9, 10, 12, and 13 of the Examiner's Conclusions of Law are hereby amended to read "Section 111.06 (1)(f) of the Wisconsin Statutes".

2. The reference to "Sections 111.06(c) and 111.06(a) of the Wisconsin Statutes" appearing in paragraph 11 of the Examiner's Conclusions of Law is amended to read "Sections 111.06(1)(c) and 111.06(1)(a) of the Wisconsin Statutes".

3. The reference to "Section 111.06(e) of the Wisconsin Statutes" appearing in paragraph 14 of the Examiner's Conclusions of Law is amended to read "Section 111.06(1)(e) of the Wisconsin Statutes".

4. The reference to "Sections 111.06(d) and 111.06(a) of the Wisconsin Statutes" appearing in paragraphs 15 and 16 of the Examiner's Conclusions of Law is amended to read "Sections 111.06(1)(d) and 111.06(1)(a) of the Wisconsin Statutes".

5. The reference to "Section 111.06(b) of the Wisconsin Statutes" appearing in paragraph 17 of the Examiner's Conclusions of Law is amended to read "Section 111.06(1)(b) of the Wisconsin Statutes".

IT IS ALSO FURTHER ORDERED THAT the Examiner's Conclusion of Law set forth in paragraph 6 of the Examiner's Conclusions of Law is reversed, and it is now amended to read as follows:

> "6. That the Memorial Hospital Association did not violate the terms of the strike settlement agreement and did not commit an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes when it failed to offer Jim Hensgen his full-time job on the afternoon shift to replace Robert Smith."

IT IS ALSO FURTHER ORDERED THAT paragraph 2(d) of the Examiner's Order is reversed and considered deleted from the Order of the Commission.

The Commission hereby affirms the remaining portions of the Examiner's Findings of Fact, the Conclusions of Law as reflected in paragraph 18 of the Examiner's decision, as well as the remaining paragraphs of the Order contained in his decision.

Given under our hands and seal at the City of Madison, Wisconsin, this 19th day of November, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MEMORANDUM ACCOMPANYING COMMISSION'S ORDER AFFIRMING IN PART, AMENDING IN PART, AND REVERSING IN PART EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his decision the Hearing Examiner concluded that the Respondent had committed unfair labor practices within the meaning of Sec. 111.06 (1)(f) of the Wisconsin Employment Peace Act by violating the strike settlement agreement 1/ entered into by the Union and the Respondent (a) by hiring 14 Nurses' Aide Trainees on June 8 and 9, 1970, without, prior thereto recalling 13 employes who had engaged in the strike, and (b) by failing "to offer Jim Hensgen a full time job on the afternoon shift to replace Robert Smith."

The Examiner also concluded that the Respondent had committed an unfair labor practice within the meaning of Sec. 111.06(1)(d) and (a) of the Act by failing and refusing to provide the Union with an accurate employe list, which was reasonably necessary to carry out the Union's

1/ The Examiner found that the Respondent did not violate the strike settlement agreement in nine other respects.

responsibility as the bargaining agent. 2/ In its petition for review the Respondent contended that Examiner erred in his conclusions of law with respect to the unfair labor practices found.

The Recall of the Nurses' Aides

With respect to the conclusion involving the hiring of the Nurses' Aide Trainees prior to the recall of the employes who had been on strike the Respondent alleged that the Examiner's conclusions with respect thereto raised "a substantial question of law and administrative policy". In that regard the Respondent contended that the Nurses Aide Trainees had, prior to the strike settlement agreement, contracted for employment with the Respondent, and therefore to enforce the strike settlement agreement by requiring the Respondent to recall those Aides who had engaged in the strike would vitiate the individual employment contract of the Trainees, and would thus impair "the contractual obligations existing between the Respondent and its trainees by administrative fiat".

An agreement to hire and become an employe does not establish an employer-employe relationship until the prospective employe actually commences work for which he receives payment for his services rendered as an employe. Such agreement, among other things, required the Responde to recall employes where job openings or vacancies existed. Rather than fill the openings or vacancies with employes, as required by the strike settlement agreement, the Respondent, by placing the Trainees in such positions, in effect hired new employes. Rather than giving effect to the strike settlement agreement, the Respondent chose to honor its apparent obligation under the individual employment contracts with the Trainees. The Respondent did not enter into the strike settlement agreement with its eyes closed. At the time of its execution it was aware of its contracts with the Trainees, and if the Respondent intended to honor such individual contracts to hire, it should have provided therefore in the strike settlement agreement and conditioned the recall of employes subject to the individual contracts to employ the Trainees. The impairment of the contractual obligations to the individual Trainees is of the Respondent's own making as a result of its primary obligation reached in collective bargaining in the resolution of the strike. We therefore affirm the Examiner's Findings of Fact, Conclusion of Law and Order in that regard.

The Hensgen Recall

The Respondent also contends that the Examiner erred in finding that the Respondent violated the strike settlement agreement in not making a bona fide offer of re-employment to Hensgen by failing to offer him a full-time job on the afternoon shift to replace one Robert Smith. The Examiner's Findings of Fact with respect to the Hensgen incident are reflected in paragraphs 17 and 18 as follows:

> "17. That the Respondent has hired two new employes in its Maintenance Division since May 29, 1970, the effective date of the strike settlement agreement; that Complainant Jim Hensgen had a full time position on the afternoon shift in the Respondent's Maintenance Division prior to going on strike and was eligible for recall in accordance with the

strike settlement agreement; that on or about October 21, 1970, the Respondent offered Hensgen a part time position on the day shift in the Maintenance Division; that at the time that said Hensgen was offered said position the Respondent knew that Hensgen had a full time job with the Soo Line Railroad during the day; that said Hensgen objected to being offered a part time position on the day shift, contending that it was contrary to the provisions of the strike settlement agreement and advised the Respondent on or about October 23, 1970, that he would not accept the position; that the Respondent did not subsequently hire an employe to fill the the position offered to Hensgen and did not subsequently offer employment to Hensgen; that on October 28, 1970, the Respondent hired Harold Piper, the first of two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace an employe by the name of Larry Reinertson who was scheduled to retire on January 1, 1971; that Piper was allowed to work on the afternoon shift under the training supervision of Complainant Robert Smith until November 5, 1970, when Smith became ill and his doctor indicated that he would not be able to continue working; that on November 5, 1970, Piper was assigned, at his request, to a full time position on the afternoon shift to replace said Smith; that on December 21, 1970, the Respondent hired Raymond Dahl, the second of the two new employes in the Maintenance Division and advised him that he would be employed full time on the night shift to replace Reinertson; that Dahl was assigned directly to the night shift and has continued to work on the night shift since December 21, 1970.

18. That neither. . . or Complainant Jim Hensgen was offered employment in the Housekeeping or Dietary Division of the Hospital at any time prior to the hearing herein."

The Examiner's rationale in support of his conclusion of law to the effect that the Respondent violated the strike settlement agreement with respect to Hensgen is stated as follows in the Memorandum accompanying his decision:

"On October 21, 1970 the Respondent offered Complainant Jim Hensgen a part time position on a different shift than the one on which he had worked prior to the strike which offer Hensgen turned down on October 25, 1970 because he held a full time job during the day. The Complainants contend that this offer did not comply with the Respondent's obligation under the agreement since the Respondent knew that Hensgen would not accept the position because of his other job and only offered him the position in order to eliminate him from the preferential hiring list. As evidence of this the Complainant points out that the Respondent hired a full time employe named Piper five days later to replace an employe by the name of Reinertson who was not due to retire until January 1, 1971 and assigned Piper to work with Smith on the afternoon shift. When Smith became ill the Respondent assigned Piper to take his place on the afternoon shift and hired a new employe named Dahl on December 21, 1970. The Respondent contends that it fulfilled its obligation to Hensgen when it offered

him a part time job on the day shift and so advised him when he turned the job down.

The first question that needs to be answered is whether or not the Respondent has complied with its obligation to "first offer re-employment" to Hensgen before it hired Piper and Dahl. The offer to Hensgen did not comply with that obligation. It was a foregone conclusion that Hensgen would turn down the part time position. The offer of employment under the conditions present did not constitute a good faith offer of re-employment, it was a mere formality. This offer was made only five days before Piper was hired, to replace a man that the Respondent knew or should have known was due to retire. Although the Respondent claimed that Reinertson did not give notice until after Hensgen had turned the part time day shift job down it was unable to produce evidence of that claim at the hearing. If the Respondent desired to hire a part time maintenance man on the day shift why did it not do so when Hensgen turned the job down? Instead it hired Piper for a full time job on the night shift and temporarily assigned him to the afternoon shift for training. When Hensgen turned the job down why did the Respondent insist that he had burned his bridges? It could easily have offered Hensgen the job it gave to Piper five days later since there was no one else below Hensgen on the preferential list and it would not have needed to put Hensgen through a training period. One possible conclusion that can be drawn from the sequence of events is that the Respondent desired for reasons that are not established in the record to eliminate Hensgen from the possibility of recall. If the Respondent's action was motivated by the fact that Hensgen was a striker, the Respondent's conduct would be a violation of Section 111.06(c) and Article III of the collective bargaining agreement. The action is certainly suspicious, but the absence of any evidence regarding the Respondent's motivation precludes a finding that the Respondent's action was discriminatory. There is nothing in the evidence that indicates why Hensgen might have been singled out among the strikers in the Maintenance Division for discriminatory treatment. Several other strikers with more seniority were properly recalled in the Maintenance Division.

Even so the Respondent's action was a violation of the terms of the strike settlement agreement because it was not in compliance with its obligation to "first offer re-employment" to Hensgen. The offer in this case was not a bona fide offer of re-employment and Hensgen was improperly excluded from consideration for the jobs that were subsequently given to Piper and Dahl."

The evidence with respect to the Hensgen matter was adduced by Counsel for the Union in adverse examination of Donald A. Kincade, the Administrator of the Respondent, as well as the testimony of said witness elicited by Counsel for the Respondent. 3/

3/ Transcript, pages 6, 7, 39, 40, 48, 49, 50, 51, 80, 81, 82, 83, 85, 86, 87, 88, 90, 91 and 92.

The Examiner overlooked a significant fact with respect to the Hensgen matter, specifically that Hensgen insisted working on the second shift, his former position.

Section 111.07(3) of the Wisconsin Employment Peace Act provides, in part, that, in complaint proceedings, "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." Since the Union alleged that the Respondent violated the strike settlement agreement with respect to the recall of Hensgen, such burden of proof lies with the Union. 4/ A review of the evidence with regard to the Hensgen matter convinces the Commission that the Union has not established, by a clear and satisfactory preponderance of the evidence, that the Respondent violated the strike settlement agreement with respect to the recall of Hensgen. The rationale of the Examiner that "One possible conclusion that can be drawn from the sequence of events is that the Respondent desired for reasons that are not established in the record to eliminate Hensgen from the possibility of recall" is speculative and is based neither on a clear and satisfactory preponderance of the evidence, nor upon any substantial evidence upon which such an inference can be drawn. The Respondent's offer of part time employment to Hensgen followed the filing of a grievance by him prior to his recall. It is to be noted that Hensgen's grievance, as filed, was not in protest of the placing of a new employe on his old shift, since no new employe had as yet been hired. Furthermore, the evidence discloses that a full time opening on the second shift did not occur until the illness of Smith on November 5, 1970, when Piper, who was a new hire on October 28, 1970, and who was hired to replace a retiring employe on the night shift, was assigned to the second shift at his request. There is no proof that, at the time Hensgen insisted that he work the second shift, the Respondent had any knowledge that there would be an opening on the second shift. Under such circumstances, we disagree with the Examiner with respect to his finding that the offer to re-employ Hensgen was not made in good faith and we, therefore, have revised his Findings of Fact and reverse his conclusion of law in that respect.

The Failure of the Respondent to Furnish the Union With an Accurate Employe List

In paragraph 6 of his Findings of Fact the Examiner found that the parties on June 1, 1970 had entered into four collective bargaining agreements covering employes in the four units represented by the Union, and in that regard the Examiner set forth certain identical provisions of said agreements, which, in the Examiner's opinion were material to the issues involved, namely provisions with respect to "Non-discrimination", "Seniority", "Holidays", "Vacation", "Grievance Procedure", and "Management".

As set forth in paragraphs 23 and 24 in his Findings of Fact, the Examiner found that following the request by the Union for a list of the employes working in the four collective bargaining units represented by the Union, the Respondent, in furnishing list of employes employed on July 1, 1970, intentionally failed to list the fourteen Nurses' Aide Trainees, who had commenced working as Nurses' Aides on June 8 and 9, 1970. The Union had requested said list in order to determine, after grievances had been brought to the Union's attention, whether

4/ Golden Guernsey Dairy Co-op, 238 Wis 379, 6/41.

the Respondent was complying with the terms of the strike settlement agreement with respect to the recall of employes. The Examiner concluded that the failure of the Respondent to furnish an accurate list, under the circumstances involved, constituted a refusal to bargain with the Union within the meaning of the Wisconsin Employment Peace Act, and the Examiner ordered the Respondent to cease and desist from such activity and to provide the Union "with all information reasonably necessary for the performance of its duties as the certified bargaining representative."

In its petition for review the Respondent alleged that the Examiner erred in his conclusion of law that the Respondent with respect to the furnishing of "an incompete list of employes" since the Respondent and Union had "waived further collective bargaining during the life of their collective bargaining agreement, as set forth in Article XXVIII of the collective bargaining agreements, which provides in material part as follows:

> "This constitutes the entire Agreement between the parties on all bargainable issues. The parties hereby waive further collective bargaining during the life of this agreement....." 5/

The Respondent contends the above cited provision constitutes a waiver by the parties of "any further collective bargaining during the life of the agreement", and therefore the Examiner's conclusion of law to the effect that the Respondent refused to bargain with the Union with respect to the matter involved is contrary to the collectiv bargaining agreement.

Paragraph 6 of the Examiner's Findings of Fact has been amended to include Article XXVIII as cited above.

In its brief supporting its petition for review the Respondent further argued:

> "The Respondent does admit, however, that if the Examiner's finding that its submitting an incomplete list was prejudicial to the Complainants' rights and intentional, neither of which findings the Respondent feels is supported by the record, it may be guilty of violating Article V of the four collective bargaining agreements. But this article provides that lists be given to the Union for seniority purposes. Since the trainees do not attain any seniority, their names on this list would be superfluous. Although this fact does not appear in the record, this is the reason that Respondent did not list the trainees when the Union requested the list in the first instance. It supplied the list pursuant to Article V, that is, for seniority purposes. Just as the true reason does not appear in the record, however, the reason which the Examiner ascribes to the Respondent does not appear either. His inference is perhaps justified, but in the absence of persuasive evidence either way and in light of Article V of the bargaining agreements, the Respondent urges that his conclusion should be re-evaluated and modified."

5/ The Examiner did not include this provision in paragraph 6 of his Findings of Fact.

The material portion of Article V of the agreements provides as follows:

> "In January and July of each year that this contract is in force, the Hospital will prepare and give to the Union a list of employees covered by this agreement, setting forth their names in alphabetical order, their addresses from the records, their job classifications or job titles, and their date of seniority as adjusted for unpaid balances."

It is apparent from the Respondent's own argument that the list provided by it, contained only the names of individuals who were actually "employees" as of the date of the preparation of the list and therefore, it omitted the names of the Nurses' Aide Trainees, who were working, but who were not accumulating seniority. The list of the employes desired by the Union, as communicated in a request made prior to July 1, 1970, was to include those working and their seniority dates. At the time the Union was unaware that the Trainees were actually working. The request for such list was made by the Union, not pursuant to Article V, but in order to ascertain whether the grievances received by the Union, protesting the failure of the Respondent to recall the grieving employes, had any substance, and if so, in order for the Union to determine whether the Respondent was violating the strike settlement agreement, which agreement contained no provisions for its enforcement. The failure of the Respondent to recall employes pursuant to the strike settlement agreement and the failure to include the names of the Trainees on the employe lists were no ordinary contract violations. Such action by the Respondent tainted the very spirit of the collective bargaining which resulted in the termination of the strike and in the execution of the collective bargaining agreement. We are, therefore, affirming the Examiner's conclusion of law in that regard.

We have also amended the Examiner's decision to correct certain typographical errors therein with reference to certain sections of the Wisconsin Employment Peace Act.

Dated at Madison, Wisconsin, this 19th day of November, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Zel S. Rice II, Commissioner

_____
Jos. B. Kerkman, Commissioner