STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 444, AFL-CIO,	
Complainant,	Case VII No. 15279 Ce-1398
vs.	Decision No. 10761-B
DORANCE J. BENZSCHAWEL & TERRENCE D. SWINGEN, PARTNERSHIP, d/b/a PARKWOOD IGA,	
Respondent.	

Appearances:
Jacobs, Gore, Burns and Sugarman, Attorneys at Law, by Mr. Charles Orlove, appearing on behalf of the Complainant.
Witwer, Moran & Burlage, Attorneys at Law, by Mr. Lawrence Wick, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Madison, Wisconsin, on February 29 and March 1, 1972, before the Examiner; and the Examiner having considered the evidence, arguments and briefs of counsel, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its offices at 3106 Commercial Avenue, Madison, Wisconsin.

2. That Dorance J. Benzschawel and Terrence D. Swingen are individuals and equal partners in a partnership doing business as Parkwood IGA, hereinafter referred to as the Respondent, which operates a retail food business at 6825 University Avenue, in Middleton, Wisconsin, and that the Respondent is engaged in a business affecting interstate commerce within the meaning of the National Labor Relations Act as amended and Section 301 of the Labor Management Relations Act and is included within the self-imposed jurisdictional standards of the National Labor Relations Board.

3. That prior to July 1971, the Kroger Company, an Ohio corporation, hereinafter referred to as Kroger, operated a number of

retail food stores in the State of Wisconsin, including the Respondent's store in Middleton, Wisconsin; that since 1942 the Complainant or its predecessors had been recognized by Kroger as the collective bargaining agent for all meat department employes employed by Kroger in its retail stores in the Madison area including its Middleton store; that on or about May 4, 1971 Kroger, on behalf of itself and its "successors and assigns" entered into a collective bargaining agreement with the Complainant effective from March 21, 1971 through March 24, 1973; that said collective bargaining agreement is an industry agreement covering all signatory employers in the retail food industry in the geographic area covered by the Complainant's jurisdiction regardless of whether said employers operate a single store or several stores; that by past practice the provisions of the collective bargaining agreement have been applied to the various signatory employers only to the extent that they are applicable based on the size and nature of the employer's operation; that there are three separate wage schedules for said collective bargaining agreement covering the three separate geographic areas of Wisconsin included within the Complainant's jurisdiction, to wit: the Madison area, the Janesville-Beloit area and the LaCrosse area.

4. That the collective bargaining agreement between Kroger and the Complainant contains among its various provisions the following provisions which are relevant herein:

"ARTICLE XV. ARBITRATION AND GRIEVANCE PROCEDURE

. . .

B. Should any differences, disputes, or complaints arise over the interpretation or application of the contents of this Agreement, there shall be earnest effort on the part of both parties to settle such promptly through the following steps:

STEP 1. By conference between the aggrieved employee, the shop steward and/or the Union representative and the head of the department.

STEP 2. By conference between the shop steward and/or the Union representative and a representative of the Employer.

STEP 3. By conference between an official or officials of the Union and a representative of the Employer.

STEP 4. In the event the last steps fails to satisfactorily settle the complaint, it shall be referred to the Board of Arbitration. However, any such referral to arbitration must be made not more than thirty (30) days after the Employer has given his answer in writing in Step 3.

C. The Board of Arbitration shall consist of one (1) person appointed by the Union and one (1) person appointed by the Employer. Said two (2) persons shall select the third member of the Board within five (5) working days. In the event said two members cannot agree upon a third member, the Union and the Employer shall jointly request the Director of the Federal Mediation and Conciliation Service to

supply a panel of arbitrators from which the third arbitrator may be chosen. The arbitrator shall be mutually selected within five (5) working days after receipt of the panel. The decision of the majority of the Board of Arbitration shall be binding upon the Union, the Employer, and the aggrieved employee. Authorized expenses of this third arbitrator shall be paid equally and jointly by the Employer and the Union."

5. That on or about July 14, 1971, Kroger agreed to sell all of the tangible items, except cash, checks and Kroger signs located at its Middleton store to the Respondent, but that the Respondent did not assume any of the liabilities of Kroger; that on or about July 14, 1971, the Respondent entered into an "operating and security agreement" with Gateway Foods Incorporated, a corporation engaged in the wholesale grocery business, hereinafter referred to as Gateway; that on or about July 16, 1971, Kroger assigned its lease on its Middleton store to Gateway and Gateway in turn assigned the lease to the Respondent; that on Saturday, July 24, 1971, Kroger closed its retail food operation in the Middleton store at the end of the regular business day; that on Monday, July 26, 1971, at noon, the Respondent opened its retail food operation in the Middleton store; that during the period of time between said closing and opening the Respondent restocked the shelves with food items it had purchased, since the inventory purchased from Kroger only constituted approximately 60% of capacity, and rearranged certain moveable displays; that the Respondent did not make any substantial purchase of new store fixtures, office furniture or meat cutting equipment or tools and continued to sell the same essential line of food items sold by Kroger, including groceries, produce and meat.

6. That when Kroger operated the Middleton store, its zone manager, who was responsible for the stores in the Madison area, exercised considerable managerial authority including the authority to make decisions with regard to personnel matters and that decisions with regard to the pricing of food items, including meat, and general sales policy were made by persons working in Kroger's general offices in Butler, Wisconsin; that Benzschawel and Swingen have final authority with regard to personnel matters, food pricing and general sales policy, however Gateway retains substantial authority to review the manner of the operation of the Respondent's store through its "operating and security agreement" and the Retailer Franchise and Cooperative Merchandising Plan referenced therein.

7. That Kroger consolidated its meat orders and purchased meat centrally and since 1969 operated a meat fabrication plant in the Madison area, where it broke down carcasses or halves into primal cuts before delivery to its Madison area stores, including the Middleton store; that the Respondent is free to purchase its meat from whatever sources it choses and breaks down the carcasses or havles into primal cuts and then into saleable portions at the Middleton store before packaging; that Kroger employed a head meat cutter, one or more journeymen or apprentice meat cutters and one or more wrappers in its meat department when Kroger operated the Middleton store; that since July 26, 1971, the Respondent's meat department has been operated by Swingen who has the skill of a journeyman meat cutter along with one part-time meat cutter whose skill level has varied over time from that of a journeyman to that of an apprentice; and, during the period beginning September 25, 1971 and ending December 11, 1971 and since January 29, 1972, one full-time wrapper.

8. That prior to purchasing Kroger's Middleton store, Benzschawel was a store manager for Kroger at another store in the Madison area and Swingen was a head meat cutter for the same store; that immediately upon opening the Middleton store the Respondent hired one employe formerly employed by Kroger at its Middleton store and four employes formerly employed by Kroger at other Madison area stores including Duane Dagget, a journeyman meat cutter, who was employed by the Respondent from July 24, 1971 until on or about January 8, 1972.

9. That both Benzschawel and Swingen were aware of the fact that there was a collective bargaining agreement covering Kroger's meat department employes at the Middleton store at the time that they agreed to purchase the Middleton store but that they specifically refused to agree to the following language contained in the proposed sales agreement which was deleted at their insistance:

> "It is agreed and understood that Buyer will assume and be bound by the following collective bargaining agreements:
>
> . . .
>
> It is agreed and understood that Buyer will offer employment to all current employes of Kroger who are covered by the foregoing agreements. It is likewise agreed and understood that Buyer will offer such employment to said employes without a break in the continuity of employment, giving them credit for length of service with Kroger, and without any loss of seniority rights under any applicable collective bargaining agreement."
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> . . .

10. That on or about July 20, 1971, Charles F. Zalesak, Financial Secretary-Treasurer and Business Manager of the Complainant, having been advised that Swingen and Benzschawel had agreed to purchase Kroger's Middleton store, called Swingen at his home and asked Swingen to honor and enforce the collective bargaining agreement existing between the Complainant and Kroger; that Swingen who was personally acquainted with Zalesak and was generally aware of the provisions contained in said collective bargaining agreement advised Zalesak that he would discuss the matter with his partner and advise Zalesak of their decision; that sometime after July 20, 1971 and before July 24, 1971 Zalesak called Swingen back and Swingen again agreed to discuss the matter with his partner and give Zalesak an answer if he would come by the store; that on or about July 26, 1971 Zalesak went to the Middleton store and asked Swingen and Benzschawel to honor and enforce the contract and that Benzschawel advised Zalesak that they, Swingen and Benzschawel, had no intent to honor and enforce the contract; that on August 16, 1971 Complainant's legal counsel wrote the Respondent and again asked the Respondent to honor and enforce the collective bargaining agreement and Swingen and Benzschawel responded by letter dated August 10, 1971 indicating that they had no intention of honoring and enforcing the agreement; that thereafter and continuing to date the Respondent has refused to honor or enforce any provision of the collective bargaining agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes the following:

CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission lacks jurisdiction over Parkwood IGA for the purpose of determining whether or not Parkwood IGA has committed any unfair labor practices within the meaning of Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) of the Wisconsin Statutes.

2. That the Wisconsin Employment Relations Commission has jurisdiction over Parkwood IGA for the purpose of determining whether or not Parkwood IGA has committed any unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

3. That Parkwood IGA is a successor to the Kroger Company for the purpose of allowing Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, to seek to enforce the provisions, if any, of its collective bargaining agreement with the Kroger Company which are enforceable against successors.

4. That Parkwood IGA by its refusal to honor and enforce any provisions of the collective bargaining agreement existing between the Kroger Company and the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, including the agreement to arbitrate disputes as to the interpretation or application of the agreement which is contained in Article XV, has violated and is violating the terms of a collective bargaining agreement, and has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Parkwood IGA, its partners, officers and agents shall immediately:

1. Cease and desist from refusing to comply with the provisions of Article XV of the collective bargaining agreement with regard to arbitration of disputes over the application of the agreement between the Kroger Company and Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, to it as the successor to the Kroger Company.

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

(a) Notify the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, in writing of its intent to comply with the provisions of Article XV of the collective bargaining agreement with regard to arbitration of any disputes over the application of the agreement between the Kroger Company and the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, to it as the successor to the Kroger Company.

(b) Comply with any request made by the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO that it participate in the arbitration of

any dispute over the application of the agreement between the Kroger Company and the Amalgamated Meat Cutters & Butcher Workmen of North America, Local 444, AFL-CIO, to it as the successor to the Kroger Company.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 5th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint the Complainant alleged that the Respondent is the legal successor to Kroger but has refused to honor and enforce the collective bargaining agreement negotiated between the Complainant and Kroger and that such conduct is a violation of 111.06(1)(f) of the Wisconsin Employment Peace Act. The Respondent filed a motion to dismiss the complaint alleging that the Respondent is engaged in a business affecting interstate commerce and that therefore the National Labor Relations Board has exclusive jurisdiction over the subject matter of the complaint. In response to the Respondent's motion the Complainant argued that the complaint involved a one-man bargaining unit over which the National Labor Relations Board lacks jurisdiction.

In disposing of the Respondent's motion the Examiner did not find it necessary to pass on the question of the jurisdiction of the National Labor Relations Board since the complaint did not allege a violation of Sections 111.06(1)(a), 111.06(1)(c) or 111.06(1)(d) of the Wisconsin Statutes which are substantially similar to Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act, as amended, but rather alleged a violation of Section 111.06(1)(f) of the Wisconsin Statutes which gives the Wisconsin Employment Relations Commission jurisdiction to enforce the provisions of a collective bargaining agreement as a state tribunal within the meaning of Section 301 of the Labor-Management Relations Act. 1/

At the hearing the Respondent renewed its motion to dismiss the complaint on the basis of certain new factual allegations and arguments which may be summarized as follows:

1. That Kroger's bargaining unit of meat department employes and the Respondent's meat department both include more than one employe within the meaning of the National Labor Relations Act.

2. That the Complainant is not seeking to enforce any specific provision of the collective bargaining agreement against the Respondent but rather seeks to obtain a finding that the Respondent has engaged in conduct which arguably would constitute a violation of Sections 8(a)(1), 8 (a)(3) and 8(a)(5) of the National Labor Relations Act as amended and that the Wisconsin Employment Relations Commission lacks jurisdiction to make such a determination.

3. That even if the Wisconsin Employment Relations Commission has jurisdiction to find that the Respondent has engaged in the conduct alleged the matter is res

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1/ Parkwood IGA (10761-A) 2/72 and cases cited therein. See also Volkswagon Inc. v. Puerto Rico Labor Board 79 LRRM 2246.

Judicata since the National Labor Relations Board investigated identical charges filed by the Complainant and refused to issue a complaint on those charges.

At the request of the Respondent the Examiner reserved ruling on the Respondent's renewed motion for dismissal. During the course of the hearing and after evidence had been introduced regarding the Respondent's impact on commerce and the number of employes employed in the Respondent's meat department the Complainant was allowed to amend its complaint to allege that the Respondent had violated Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) of the Wisconsin Statutes and that the Respondent was allowed to amend its answer and motion to dismiss to meet those new allegations. The Respondent argues in its brief that the evidence establishes that its business is in commerce and covered by the self-imposed jurisdictional limitations of the National Labor Relations Board and that more than one employe is employed in the bargaining unit involved whether that bargaining unit is the unit formerly recognized by Kroger or the unit which resulted when the Respondent took over the operation of the Middleton store.

Jurisdiction

The question of the jurisdiction of the Wisconsin Employment Relations Commission is a threshold issue that must be determined at the outset. The other questions raised by the Respondent's motion are dealt with below to the extent that they are still relevant in view of the disposition of the question of jurisdiction.

The uncontradicated evidence of record indicates that the Respondent's volume of business exceeds $500,000 on an annual basis Therefore, unless it can be said that the National Labor Relations Board lacks jurisdiction because the complaint involves a one-man bargaining unit, the Wisconsin Employment Relations Commission is pre-empted from asserting its jurisdiction to determine the allegations that the Respondent has violated Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) of the Wisconsin Statutes.

In dismissing the Complainant's charges filed with the National Labor Relations Board by letter dated January 13, 1972, the Acting Regional Director stated in relevant part:

> "The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended has been carefully investigated and considered.
>
> As a result of the investigation, the evidence fails to establish that the Employer violated Section 8(a)(1), (3) and (5) of the Act either by not honoring, adopting and enforcing the collective bargaining agreement between Kroger and the Union, or by not offering employment to the meat department employees formerly employed by Kroger at the Middleton, Wisconsin store. I am, therefore, refusing to issue a complaint in this matter."

According to the Respondent the language employed in this letter indicates that the National Labor Relations Board asserted jurisdiction

and found that the charges were lacking in merit. While it is true that the Respondent filed a commerce report which apparently satisfied the Board that the Respondent is in commerce, that Report contained no information with regard to the number of employes in the bargaining unit.

In a subsequent communication to the Complainant's attorney, dated January 14, 1972, the Field Attorney for the Board who was assigned to handle the charges in question stated as follows:

> "With respect to the Benzschawel case the Region found that there was no evidence of discriminatory refusal to retain the former Kroger employes in the meat department inasmuch as the Employer did hire a meat cutter, Duane Daggett, who had been a co-owner with Swingen and a union member at the East Washington store. The Region would have found a legal obligation on the part of this Employer to recognize the Union and honor the contract between Kroger and the Union, but for the existence of the one-man unit, namely Daggett, inasmuch as Swingen and his wife would be excluded from the unit."

The undersigned is satisfied that the question of the jurisdiction of the National Labor Relations Board is not finally resolved by the above communications and that the question of jurisdiction requires a determination on the record established in this case of whether the National Labor Relations Board has jurisdiction to entertain the relevant portions of the complaint herein. The determination to dismiss the Complainant's charges filed with the National Labor Relations Board for the reasons indicated in the communication dated January 14, 1972 does not resolve the question raised by the evidence with regard to the size of the bargaining unit at the time of the hearing herein.

There was a period of time immediately after the Respondent took over the operation of the Middleton store and lasting until the middle of September 1971 where the Respondent employed only one employe in its meat department, Duane Daggett, a member of the Complainant's labor organization and a former employe of Kroger at another Madison store. Sometime during the week ending September 25, 1971 the Respondent hired Katherine Banna to work as a wrapper in its meat department and she continued to work in the meat department thereafter until the week ending December 11, 1971. During that week and the following six weeks the Respondent's records indicate that it employed only one employe in its meat department, Daggett. Daggett quit working for the Respondent on or about January 8, 1972 and the Respondent then hired Tod Planner, a student with the skill of an apprentice meat cutter. It was during this period of time that both letters from the National Labor Relations Board were written. Sometime during the week ending January 29, 1972 the Respondent hired Mary Stasek, another wrapper, to work in its meat department. It was during this week that the Complainant filed its complaint herein. The complaint itself was received on January 24, 1972 but the Respondent's employment records are not sufficiently detailed to indicate whether the new wrapper actually began work before or after that date. There were two employes working in the Respondent's meat department at the time of the hearing which was concluded on February 2[illegible], 1972, and the Examiner has not been advised of any change in the situation since that date.

The Examiner has been unable to find any decision of the National Labor Relations Board indicating what date or dates are critical in its judgment regarding the limitations on its jurisdiction over one man bargaining units that subsequently expand. In Westinghouse Electric Corporation 2/ the Board held that it "would not effectuate the policies of the act" to proceed further in a case where the bargaining unit was reduced to a one man unit after hearing on a complaint but before the decision had been made, and dismissed the complaint. That decision does not make it clear whether the National Labor Relations Board concluded that it lacked jurisdiction on the date it issued its decision and therefore lacked jurisdiction to issue a decision or whether it merely concluded that it lacked jurisdiction to enforce any meaningful remedial order.

There are at least three dates in this case that might be considered important in determining the jurisdiction of the National Labor Relations Board and consequently the jurisdiction of the Commission. One date would be the date or dates on which the alleged unfair labor practices were committed. The second is the date on which the complaint of unfair labor practices was filed with the Commission. The third possible date would be the date on which the decision of the Commission is issued. To hold that the date on which the complaint was filed to be a critical date could, in a given case, result in the dismissal of an otherwise meritorius complaint which could be refiled if still timely.

It is clear that the Wisconsin Employment Relations Commission does have jurisdiction over a bargaining unit that is a one-man bargaining unit at the time of the alleged violation of the duty to bargain began and remains so at the time of the decision of the Commission. In the Sinclair Refining Co. case 3/ that question was clearly decided. The question raised by the facts in this case is, does the Wisconsin Employment Relations Commission have jurisdiction over a bargaining unit that was a one-man bargaining unit at the time the alleged violation of the duty to bargain began but ceases to be a one-man bargaining unit before the Wisconsin Employment Relations Commission exercises its jurisdiction. The Examiner is satisfied that under the circumstances posed by the facts in this case, the Commission is now pre-empted from exercising jurisdiction over the bargaining unit in question by reason of the fact that the unit in question is no longer a one-man unit. 4/ Even if the Commission still had jurisdiction over the bargaining unit in question

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2/ 179 NLRB No. 49, 72 LRRM 1316 (1969)

3/ (H.E. 8526-A) 2/69, (Comm. 8526-B) 3/69, affirmed sub nom. WERC v. Atlantic Richfield Company 52 Wis 2d 126 (1971).

4/ The ephemeral nature of the Commission's jurisdiction over one-man bargaining units is a shortcoming recognized by the Examiner in the Sinclair Refining Co. case, supra, note 3. However, that shortcoming is the result of the National Labor Relations Board's restrictive interpretation of the words "concerted action" and "collective bargaining" and not Wisconsin's policy of recognizing the bargaining rights of employes in one-man bargaining units, a policy that is shared by the states of Connecticut, Massachusetts, Michigan, New York and Pennsylvania. It should be noted that the Complainant in this case does not argue, nor does the evidence support a finding that the Responder is endeavoring to manipulate the question of jurisdiction. If such were the case the Examiner might be persuaded to disregard the hiring of the wrapper as a sham or subterfuge.

there would be a serious policy question raised regarding the exercise of that jurisdiction since the change in circumstances would severely limit the value of any remedial order issued by the Commission to remedy any violations found.

This limitation on the Commission's jurisdiction to decide whether the Respondent has committed the alleged violations of Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) in no way restricts the Commission's jurisdiction under Section 111.70(1)(f) to determine whether the Respondent has violated the terms of a collective bargaining agreement. 5/ The question of whether the Respondent is the legal successor to Kroger for purposes of determining if it is bound by some or all of the provisions of the agreement between the Complainant and Kroger is a preliminary question which federal and state tribunals must decide when actions are brought for the enforcement of collective bargaining agreements against alleged successors. 6/ The Supreme Court recognized the potential for conflict between the decisions of the National Labor Relations Board on questions over which it exercises primary jurisdiction and the decisions of state and federal tribunals when they enforce the provisions of collective bargaining agreements and for that reason, among others, made it clear that, where there is a conflict between federal and state policy, the federal policy must prevail. 7/

Res Judicata Argument

Even if there were no ambiguity in the reasons given by the National Labor Relations Board for dismissing the charges filed, the Respondent's Res Judicata argument would not be persuasive. The fact remains that there has been no adjudication of the alleged unfair labor practices under Sections 8(a)(1), 8(a)(3) and 8(a)(5) of the National Labor Relations Act and, because of the results dictated by the application of the federal pre-emption doctrine in this case, there may never be an adjudication of those allegations. 8/ As the Complainant points out in its brief, the Respondent confuses elemental principles when it contends that the Complainant seeks to obtain a determination of those allegations by alleging a violation of Section 111.06(1)(f) of the Wisconsin Statutes. The Commission's longstanding jurisdiction to consider allegations that employers in commerce have violated the terms of a collective bargaining agreement has not been pre-empted by the enactment of subsequent federal labor legislation since it is not a subject over which the National Labor Relations Board has primary jurisdiction or the federal courts have exclusive jurisdiction. 9/

5/ Section 301, Labor Management Relations Act; Textile Workers Union v. Lincoln Mills 353 US 448, 40 LRRM 2113 (1957). See also Parkwood IGA (10761-A) 2/72 and cases cited therein.

6/ John Wiley & Sons, Inc. v. Livingston 376 US 543, 55 LRRM 2769 (1965).

7/ Local 174, Teamsters v. Lucas Flour 369 US 95, 49 LRRM 2717 (1962).

8/ Unless the alleged refusal to bargain is found to be a continuing violation, the six month period of limitation found in Section 10(g) of the National Labor Relations Act has run.

9/ Tecumseh Products Co. 23 Wis 2d 118 (1964); American Motors Corp. 32 Wis 2d 237 (1966). See discussion above under Jurisdiction.

At most the Respondent's argument constitutes an allegation that the Complainant should be collaterally estopped from arguing that the Respondent is a successor in this action when it failed to appeal the dismissal of its charges by the National Labor Relations Board. However, looking at the reasons given by the National Labor Relations Board for its action, it is not clear that the Board decided that the Respondent is not a successor; in fact, the opposite appears to be the case.

Question of Successorship in Section 301 Actions

The question of successorship in labor cases can arise in several contexts. It can arise in the context of a question concerning representation or the duty to bargain. Similarly, it can arise in other unfair labor practice cases or enforcement proceedings where the question is, to what extent the alleged successor should be held responsible for the commission of unfair labor practices or be required to comply with any remedial order. The question can also arise in the context of a Section 301 action brought to enforce the provisions of a collective bargaining agreement.

The question of whether a successor employer is bound by some or all of the provisions of a collective bargaining agreement between a union and the employer's predecessor in business was decided by the United States Supreme Court in the landmark Wiley case. 10/ In that case the contract in question contained a provision for arbitration and the Union sought to compel the successor employer, Wiley, to arbitrate a number of questions with regard to the applicability of various provisions of the agreement to the new employer. The Court held that in a Section 301 action seeking to enforce the provisions of a collective bargaining agreement against an alleged successor employer, the question of whether the employer is a successor is for the court to determine upon application of the relevant federal law. If it is concluded that the employer is a successor employer the successor may be compelled to arbitrate questions of the applicability of the various provisions of the agreement to the successor. Presumably, the Section 301 tribunal would have to decide the applicability of the various provisions of the agreement where the agreement does not provide for arbitration.

Upon careful reading of the Supreme Court's opinion in Wiley and the discussion of that opinion by the majority in Burns 11/ the Examiner is satisfied that the question presented in Wiley was not of the same genre as the questions freqently presented in representation cases or duty to bargain cases. As the Court pointed out, the Union in Wiley was not contending that it still represented a majority of the employes in the bargaining unit or that Wiley had a duty to bargain on behalf of employes not represented by the union. In other words, the Court found that there was a duty to arbitrate claims under the agreement made by the union on behalf of the employes of the predecessor employer who had been hired by Wiley. This duty exists where the evidence of successorship is strong even though there is no evidence of majority status to support a finding of a duty to bargain.

10/ John Wiley and Sons, Inc. v. Livingston, supra, note 6.

11/ NLRB v. Burns International Security Services, Inc., ____ U.S. ____, 8 LRRM 2225 (1972)

From a review of the cases, it is not entirely clear whether the new employer must actually employ a majority of the old employer's employes to be characterized as a "successor" for purposes of the duty to bargain by the National Labor Relations Board. 12/ The fact that the successor did employ a majority of the predecessor's employes was given considerable emphasis if not controlling importance in the majority opinion in Burns. 13/ The majority in that case went on to hold that, even though Burns was a successor for purposes of the duty to bargain the National Labor Relations Board did not have the statutory authority to order a successor to adopt the agreement negotiated between the union and its predecessor and that Wileydid not authorize such a broad extension of the Board's remedial powers.

The Examiner concludes that the percentage of bargaining unit employes of the predecessor that are hired by the alleged successor, which is an important if not controlling consideration in representation and duty to bargain cases, is merely one significant fact to be considered in a section 301 enforcement action which seeks to enforce the provisions of the collective bargaining agreement on behalf of the employes who are hired by the successor.

Parkwood as a Successor
to Kroger's Contract

In the Wiley case the Supreme Court held:

> ". . .that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." 14/

The test established by the Court for determining whether an employer is a successor employer is whether there is a "substantial continuity of identity in the business enterprise" before and after the change in ownership and whether there is a "relevant similarity and continuity of operation across the change in ownership." 15/ The fact that Wiley did not employ a majority of the former Interscience employes and that, therefore, the Union did not claim any bargaining rights independent of the agreement, did not affect the determination that the former employes of Interscience who became employes of Wiley had vested rights enforceable through arbitration with Wiley. 16/

12/ The reluctance to enunciate such a rule is explained in part by the fact that it would encourage the new employer to refuse to hire the predecessor's employes. See Monroe Sander Corp. v. Livingston 262 F. Supp 129, at 136, 63 LRRM 2273 (SD NY 1966). A refusal to hire the predecessors employes because of their representation by a union is an unfair labor practice and their continued status as employes would support a presumption of majority status. See Chemack Corp. 15 NLRB 1074, 58 LRRM 1582 (1965)

13/ NLRB v. Burns International Security Services, Inc., supra, note 11. This was an unfair labor practice case alleging, inter alia, that Burns refused to bargain.

14/ John Wiley and Sons, Inc. v. Livingston, supra, note 6 at 55 LRRM 2772

15/ Ibid at 55 LRRM 2773

16/ Id. In this case one employe of Kroger, who was covered by the contract between Kroger and the Complainant was employed in the Respondent's Meat Department.

The question then, is whether the Respondent is a successor to Kroger for purposes of allowing the Complainant to attempt to enforce the provisions of the existing agreement under the test of the Wiley case. The Examiner is satisfied that it is.

In making determinations as to whether the employing industry is substantially the same, the National Labor Relations Board has in related cases looked at the following factors:

1) Whether there has been a substantial continuity of the same business operations;

2) Whether the new employer uses the same plant;

3) Whether the new employer has the same or substantially the same work force;

4) Whether the same jobs exist under the same working conditions;

5) Whether the new employer employs the same supervisors;

6) Whether the new employer uses the same machinery, equipment and methods of production; and

7) Whether the new employer manufactures the same product or offers the same services. 17/

These factors appear in sufficient combination and degree in this case to support the conclusion that the Respondent is a successor to Kroger. The Respondent is engaged in the operation of a retail food store in the same building and location as Kroger and there was no significant hiatus between the termination of the Kroger operation and the beginning of the Respondent's operation. It utilizes the same fixtures, tools and equipment, both in its grocery and produce sections and in its meat department. It employed several former Kroger employes including the only employe in the meat department from the time of the takeover until September 25, 1971.

Because of the differences between the multi-store structure of Kroger and the Respondent's single-store franchise arrangement, the supervisory situation is somewhat different. Where the Zone Manager exercised final authority in personnel and labor relation matters for Kroger, either one of the two partners who are both former Kroger supervisors now has the final authority.

The nature of the work is essentially the same -- the cutting, wrapping and displaying of meat items for retail purchase. The duties of the meat cutters have been expanded slightly, in that primal cuts which take only a few minutes are now made on the premises. Even so, Kroger did not always have a fabrication plant and the work is essentially the same as it was before Kroger's fabrication plant was opened in 1969.

17/ Fanning, "The Purchaser and the Labor Contract -- An Escalating Theory", Labor Relations Yearbook--1967, 284 (Washington: BNA 1968).

Most of the Respondent's arguments on the successorship question stem from the fact that it operates a single-store operation whereas Kroger had a multi-store operation. According to the Respondent, the consequential differences in the size of the bargaining unit and in the way its business is managed should result in a finding that it constitutes a different employing industry. 18/

The Supreme Court made it clear in the Wiley decision that the result in that case was not limited to cases where one entire enterprise is merged into another enterprise but encompassed other situations as well. The Court stated:

> "The objectives of national labor policy, reflected in established principles of federal law, requires that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employes from a sudden change in the employment relationship. The transition from one corporate organization to another would in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than 'the relative strength...of the contending forces.'" 19/

The Respondent cites the B & E Supermarket case, 20/ which involved the sale of one store of a multi-store operation to Willys L. Isaacson and Elaine K. Isaacson who thereafter operated it as a single-store operation. There are a number of factors that distinguish that case from the case at hand. In the first place the Respondent's situation is that of a franchisee. In addition, the new owners continue to operate all the same departments as were operated by Kroger whereas the Isaacsons' sublet the operation of the meat and bakery departments.

A more important distinction in the two cases lies in the fact that the B & E Supermarket case involved a petition for an election, and the question presented was whether the agreement should constitute a bar to an election. The question here is not one of representation but one concerning the obligations of an alleged successor under the collective bargaining agreement. As indicated above, the proportion of the predecessor's employes employed by the alleged successor in this type of case is not as critical as it is in duty to bargain or representation cases. The Isaacsons did not permanently employ any of their predecessor's employes. If, all other things being equal, the B & E Supermarket case had arisen in the context of a Section 301 suit seeking to compel arbitration over a question of the contractual rights of one

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18/ The Respondent also argues that the agreement cannot practically be applied because of these differences. This argument, which is more appropriate for the consideration of an arbitrator, is contradicted by the Complainant's evidence that a number of single store operators in the Madison area are signatories to the same agreement.

19/ Supra, note 6 at 55 LRRM 2772.

20/ 195 NLRB 67, 79 LEEM 1316 (1972).

or more employes who had been permanently hired by the Isaacsons, a different result would probably obtain.

In Norms IGA 21/ the Commission held, on very similar facts, that Norman Austvald d/b/a Norms IGA was the successor to Ladysmith Super Valu, a multi-store employer, for purposes of allowing the Union to compel the successor to arbitrate the applicability of the collective bargaining agreement. Chairman Slavney, in an opinion dissenting in part and concurring in part, pointed out that the alleged successor in that case employed none of the employes of its predecessor, a fact that would probably preclude a finding of successorship for representation purposes as well as for purposes of enforcing contract rights. The court in the Wiley case made reference to weighing the rights of employers to restructure their enterprises against the rights of employes to seek protection from sudden changes in their employment relationships. If the alleged successor employer fails to hire any employes of its predecessor, for reasons which are otherwise permissible, there would seem to be little reason to impose any obligations under the agreement on the successor under the Wiley test. 22/ (Of course the predecessor might still be obligated under some of the provisions of the agreement.)

The problem alluded to by Chairman Slavney in Norms IGA is not present in this case. The Respondent did hire one of the former Kroger employes to work in its meat department which employe constituted 100% of the employe compliment at the time. In view of the other substantial evidence supporting a finding of successorship, it is appropriate in this case to find that the Respondent is a successor for purposes of allowing the union to seek to enforce the provisions of the collective bargaining agreement.

The conclusion that the Respondent is a successor employer for purposes of allowing the Complainant to seek enforcement of the collective bargaining agreement does not result in the conclusion that the Respondent is bound by each and every provision of the collective bargaining agreement. As the majority said in the Burns case Wiley merely held ". . . that the agreement to arbitrate 'construed in the context of national labor law' survived ther merger and left to the arbitrator, subject to judicial review, the ultimate question of the extent to which, if any, the surviving Company was bound by other provisions of the contract." 23/ The Respondent's claim that any obligations devolving upon it under the agreement were extinguished by the supplemental agreement entered into between the Complainant and Kroger constitutes a defense that could be appropriately raised in arbitration. The supplemental agreement does not purport to be a recision agreement--it merely states that it is intended to settle all issues and claims against Kroger arising out of the termination of Kroger's Wisconsin operations.

21/ (7399) 12/65.

22/ For a discussion of this point see S. & O. Inc. (10762-A) 9/72 decided today.

23/ Supra, note 12 at 80 LRRM 2230.

COMPLAINANT'S FAILURE TO SPECIFICALLY REQUEST ARBITRATION

The Complainant never specifically requested that the Respondent arbitrate the applicability of any particular provision of the agreement. However, the Complainant did ask the Respondent to honor and enforce the agreement in toto. The Respondent refused to honor and enforce the contract and disavowed any intent to comply with any of its terms. 24/

The Respondent's repudiation of the entire agreement including the provisions of Article XV calling for arbitration of disputes over the interpretation or application of the agreement constitutes a violation of Section 111.06(1)(f) of the Wisconsin Statutes which makes it an unfair labor practice for an employer to violate the terms of a collective bargaining agreement including an agreement to arbitrate.

Even though the Respondent has repudiated the entire agreement including the agreement to arbitrate, the rule of the Levi Mews 25/ case is not applicable to the facts in this case since the Respondent's rejection of the arbitration procedure is predicated on its argument that it is not the successor to Kroger for any purpose, including arbitration, and not a rejection of the arbitration process per se. 26/ Therefore, the Commission ought to defer to arbitration in accordance with its long-standing policy that the Commission will not exercise its jurisdiction to determine whether there has been a violation of a collective bargaining agreement where the agreement provides for binding arbitration.

For the above and foregoing reasons the undersigned has found that the Wisconsin Employment Relations Commission lacks jurisdiction over the Respondent for the purpose of determining whether or not the Respondent has committed unfair labor practices within the meaning of Sections 111.06(1)(a), 111.06(1)(c) and 111.06(1)(d) of the Wisconsin Statutes but that the Wisconsin Employment Relations Commission does have jurisdiction over the Respondent for the purpose of determining whether the Respondent has violated Section 111.06(1)(f) of the Wisconsin Statutes and has found that the Respondent has committed an unfair labor practice within the meaning of that section and has ordered the Respondent to cease and desist from said violation and to take appropriate remedial action.

Dated at Madison, Wisconsin, this 5th day of September, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

24/ At the hearing Swingen agreed that any compliance with the terms of the agreement was a "coincidence". The Complainant's request was predicated on its view that the Respondent was a successor for all purposes and obligated to honor and enforce the entire contact in accordance with NLRB policy before that policy was overruled in Burns.

25/ Levi Mews Redi-Mix (6683) 3/64. The Complainant argued in its brief that the Commission should not defer to arbitration in this case, based on the policy considerations expressed in that case.

26/ Cf. Rodman Industries (9650-A) 9/70