STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, LOCAL NO. 444, AFL-CIO, Complainant, vs. S & O, INC. d/b/a PAUL'S IGA FOODLINER, Respondent.	Case VI No. 15278 Ce-1397 Decision No. 10762-A

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 in Madison, Wisconsin, on 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 S & O, Inc., a corporation hereinafter referred to as the Respondent, is engaged in the operation of a retail food store known as Paul's IGA Foodliner, which is located in Edgerton, 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 Paul Sanderson and Fred Oreel are individuals who, at all times material herein, have owned 75% and 25% respectively of the outstanding stock in the Respondent corporation.

4. 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 Edgerton, Wisconsin; that at least since 1951 the Complainant or its predecessors had been recognized by Kroger as the collective bargaining agent for all Meat Department employes employed by Kroger at its Edgerton 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 the provisions 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; that for purposes of the wage schedule, the Respondent's store is located in the Janesville-Beloit area.

5. That on or about July 14, 1971, Kroger agreed to sell all of the tangible personal property, except cash, checks and Kroger signs located at its Edgerton 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 a "operating and security agreement" with Gateway Foods, Inc., 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 Edgerton 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 Edgerton store at the end of the regular business day; that on Wednesday, July 28, 1971 at Noon, the Respondent opened its retail food operation in the Edgerton store; that during the period of time between said closing and opening, the Respondent cleaned and washed down the various fixtures and aisles in the store and restocked the shelves with food items it had purchased, since the inventory purchased from Kroger only constituted approximately 40 to 50% of capacity; 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 including groceries, produce and meat.

6. That when Kroger operated the Edgerton store, its Zone Manager, who was responsible for several stores in Wisconsin, 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 Sanderson has 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, Wisconsin area, where it broke down carcasses or halves into primal cuts before delivery to its Edgerton store; that although the Respondent is free to purchase its meat from whatever sources it chooses, it in fact purchases all its meat items from Gateway and breaks down

the carcasses or halves into primal cuts and then into saleable portions at its Edgerton store before packaging for sale; that Kroger employed two meat cutters and one wrapper in its Meat Department when Kroger operated the Edgerton store; that since July 28, 1971, the Respondent's Meat Department has been operated by Paul Sanderson, his son Thomas Sanderson and George Nichols, a meat cutter with the skill of a journeyman, who was employed by Kroger at its Mauston store, but who has never been a member of the Complainant Union or covered by any collective bargaining agreement negotiated by the Complainant, and Barbara Nelson, a meat wrapper who was formerly employed by Kroger at the Edgerton store as a checker and a member of another labor organization.

8. That prior to purchasing Kroger's Edgerton store, Sanderson was a Store Manager for Kroger at its Mauston, Wisconsin store, and Oreel was a Zone Manager for Kroger in the Mauston-Reedsburg-LaCrosse zone; that prior to opening the Edgerton store, the Respondent hired nine employes including Barbara Nelson who were formerly employed by Kroger at its Edgerton store who performed work outside of the Meat Department and who were members of another labor organization.

9. That George Nichols is paid a weekly wage rate equal to the wage rate paid Jim Wedeward, Assistant Store Manager, which wage rate is slightly less than the wage rate provided for journeymen meat cutters and substantially less than that provided for head meat cutters under the terms of the Complainant's agreement with Kroger; that the Respondent relies on the judgment of Nichols in making recommendations as to purchasing and merchandising of meat items, but that Sanderson retains final authority in that regard; that Nichols does not have the authority to hire or fire employes or to effectively recommend same; that Nichols has no responsibility for personnel or labor relations matters; that Nichols is primarily engaged in the activity of cutting and displaying of meat items.

10. That on or about July 20, 1972, Charles F. Zalesak, Financial Secretary-Treasurer and Business Manager of the Complainant, having been advised that Sanderson and Oreel had agreed to purchase Kroger's Edgerton store, attempted to call Sanderson at his home but was unsuccessful; that Zalesak thereafter visited the Respondent's store on Sunday, January 25 and Monday, January 26, 1971, and that on the latter date Zalesak had a conversation with Sanderson at the Respondent's store; that Zalesak asked Sanderson if he intended to honor and enforce the collective bargaining agreement which had been negotiated by the Complainant with Kroger and that Sanderson advised Zalesak that he was uncertain with regard to his intentions but that he would give Zalesak an answer after he had an opportunity to read a copy of the contract which Zalesak had given him and discuss it with his "partner" in the Meat Department, George Nichols; that thereafter on or about August 4, 1971, Zalesak called Sanderson and asked Sanderson whether he intended to honor and enforce the collective bargaining agreement and Sanderson stated that he had not read the agreement and did not intend to because he had been advised that he did not have to abide by any of the terms of the agreement, and he did not intend to do so; that on August 20, 1971, Complainant's counsel wrote Sanderson asking Sanderson to honor and enforce said agreement and Sanderson failed to respond to that request; that on August 30, 1971, Zalesak wrote the Respondent asking the Respondent to either sign the agreement or meet for the purpose of discussing any desired changes in the contents of the agreement and Sanderson never responded to that letter; that on January 7, 1972, Zalesak again asked Sanderson if he intended to honor and enforce the agreement and Sanderson indicated that he would discuss it with his "partner" George Nichols and let Zalesak know about his decision but that Sanderson did not thereafter advise

Zalesak about his decision; that thereafter and continuing to date, the Respondent has refused to honor or enforce any provisions of the collective bargaining agreement.

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

CONCLUSIONS OF LAW

1. That George Nichols does not now have and has never had any proprietary interest in the retail food store or the Meat Department located therein operated by S & O, Inc. in Edgerton, Wisconsin, and that George Nichols is not a supervisor within the meaning of Section 2(11) of the National Labor Relations Act, as amended.

2. That the Wisconsin Employment Relations Commission lacks jurisdiction over S & O, Inc., for the purpose of determining whether or not S & O, Inc., 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.

3. That the Wisconsin Employment Relations Commission has jurisdiction over S & O, Inc., for the purpose of determining whether or not S & O, Inc., has committed any unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

4. That S & O, Inc., is not a successor to the Kroger Company for the purpose of allowing Amalgamated Meat Cutters & Butcher Workmen of North America, Local No. 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.

5. That S & O, Inc., 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 No. 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 not violated and is not violating the terms of a collective bargaining agreement, and has not committed and is not 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

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

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

The pleadings and arguments in this case are substantially similar to the pleadings and arguments in a companion case decided today. That case1/, referred to herein as the Parkwood case, discusses many of the same legal arguments raised in this case, and the discussion of those arguments will not be repeated herein except insofar as factual differences require different legal conclusions.

Jurisdiction

The uncontradicted evidence of record indicates that the Respondent's volume of business exceeds $500,000 on an annual basis. Therefore, just as was the case in Parkwood, 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 unless it can be said that the National Labor Relations Board lacks jurisdiction because the complaint involves a one-man bargaining unit. The Complainant filed charges against the Respondent herein with the National Labor Relations Board, which charges were dismissed by a letter which read substantially the same as the letter sent to the Respondent in the Parkwood case.

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:

> "Regarding the S & O case, the Region found that even if it were found that Rowley made an equivocal offer of employment Sanderson had valid business reasons for not retaining him because Sanderson had hired a meat cutter from the Mauston store (where he had been manager) whose work record he knew and who also invested money in the business. Further, it appears that Sanderson was not anti-union since he hired grocery employees who had been members of the Retail Clerks Union. The Region further found that no successorship obligation to recognize the Union and honor the contract existed because there were no employees formerly in the unit who were retained or hired by Sanderson. Alternatively, even if a successorship obligation had been found, the Employer could not have been ordered to bargain with the Union, as the evidence indicates that the meat cutter is a part owner thus leaving the single wrapper as a one man unit."

From this correspondence, it would appear that the National Labor Relations Board was satisfied on the basis of their investigation that even if there was a violation of the National Labor Relations Act, it lacked jurisdiction in this case because of the existence of a one-man bargaining unit. The evidence of record in this case is at odds with that conclusion.

The Examiner is satisfied that Sanderson misrepresented certain facts to Zalesak and, perhaps, to investigators from the National Labor Relations Board. Sanderson claimed on at least two occasions, those

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1/ Dorrance J. Benzschawel & Terrence D. Swingen, Partnership, d/b/a Parkwood IGA. (10761-B) 9/72.

being July 26, 1971 and January 7, 1972, that George Nichols was a part owner of the business, and therefore, excluded from the bargaining unit. The evidence of record in this case establishes that George Nichols does not now have and never has had any interest in the Respondent's business. Nichols loaned Sanderson $500 about the time that the Respondent purchased the Edgerton store. The terms of that loan, which was repaid within a few weeks, did not in any way give Nichols a proprietary interest on the Respondent's store.

The Complainant argues that even if Nichols is not excluded from the bargaining unit as a part owner, he should be excluded because of his alleged supervisory status. The evidence of record in this case indicates that Nichols exercises no substantial supervisory authority over any other employe, and therefore, he should be included in the bargaining unit of Meat Department employes at the Respondent's store.

In addition to Nichols, the Respondent has employed a full-time wrapper at all times material herein; therefore, it is clear that the bargaining unit of Meat Department employes at the Respondent's store is not a one-man bargaining unit; and therefore, the Wisconsin Employment Relations Commission lacks jurisdiction for the purpose of determining 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.

Res Judicata Argument

The Respondent makes the same Res Judicata argument in this case as was made in the Parkwood case. That argument is rejected herein for the same reasons that it was rejected in the Parkwood case. Even though the Board's Field Attorney indicates that the Respondent was not a successor that conclusion does not constitute an adjudication of the question presented herein.

Respondent's Alleged Successorship Status

For the reasons stated in the Parkwood case, the Examiner is satisfied that an employer may be found to be the successor to the collective bargaining agreement existing between a union and a predecessor employer if it can be said that the evidence of successorship is strong even though there is insufficient evidence of majority status to support a finding of a duty to bargain. However, this case presents the question of whether an alleged successor employer is obligated to arbitrate claims under the collective bargaining agreement negotiated with its predecessor even though the alleged successor has hired none of its predecessors' employes, who might have claims under that agreement.

Again, upon careful reading of the Wiley 2/ case and the majority opinion in the Burns 3/ case, the Examiner is satisfied that questions presented with regard to the obligation of alleged successors under the terms of collective bargaining agreements negotiated with their predecessors are of a different genre than those questions presented in representation or duty to bargain cases. In Wiley, the court laid heavy emphasis on the fact that the rights of employes to be pro-

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2/ John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM, 2769 (1965).

3/ NLRB v. Burns National Security Services, Inc., ___ U.S. ___, 8 LRRM, 2225 (1972).

tected from sudden changes in their employment relationship must be balanced against the rightful prerogative of owners to rearrange their businesses or eliminate themselves as employers.4/ The Burns majority decision made it clear that even where an employer is a successor for purposes of representation or the duty to bargain, the wholesale application of all of the terms of the collective bargaining agreement is not required in order to achieve the balance referred to. To allow a union to seek to enforce some of the terms of a collective bargaining agreement against an alleged successor where the successor does not employ any of the employes of its predecessor would likewise be unnecessary in order to achieve that balance.

The Examiner is not unmindful of the fact that labor organizations often have a stake in the enforcement of the provisions of a collective bargaining agreement independent of the rights of employes created therein. Even so, the Supreme Court in the Wiley case carefully avoided the implication that a successor employer was bound to enforce any provision of the agreement for the benefit of a labor organization per se and the majority's reference in Burns to the "narrow" holding of Wiley would not seem to authorize such an extension. One possible reason for this distinction is the fact that in many alleged successor situations, the successor employer may be under a duty to bargain with another labor organization. Even if there is no other labor organization, allowing a labor organization to enforce the provisions of a collective bargaining agreement where the alleged successor employer does not employ any members of said labor organization might interfere with the rights of employes to select a bargaining representative of their own choosing. This is especially true where the agreement contains a union shop provision which is the situation here.

For the above reasons, the Examiner concludes that even though the other evidence of successorship status in this case is strong, the Respondent may not be treated as a successor to Kroger for purposes of allowing the Complainant to seek to enforce the provisions of the collective bargaining agreement because the Respondent did not employ any employes in its Meat Department who were employed by Kroger in its Meat Department. The lack of any employes who may have a claim of vested rights under the agreement dictates that the balance be struck in favor of the Respondent's right to purchase Kroger's Edgerton store free of any obligations under the agreement.5/

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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4/ Supra, note 2, at 55 LRRM, 2772.

5/ A possible exception to this result might exist in the case of a successor employer whose predecessor entered into a prehire agreement authorized by Section 8(f) of the Labor Management Relations Act. However, that provision applies to employers in the construction industry and the issue, therefore, is not raised in this case. Cf. Overhead Door (9055-A and 9055-B) 6/70 and 9/70.