STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KEARNEY & TRECKER CORPORATION, Complainant, vs. LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Respondents.	Case XI No. 15745 Cw-333 Decision No. 11083-A

Appearances:

Peck, Brigden, Petajan, Lindner, Honzik & Peck, S.C., Attorneys at Law, by Mr. Egon W. Peck, appearing on behalf of the Complainant.

Gratz, Shneidman and Myers, Attorneys at Law, by Mr. Robert E. Gratz, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A 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 Orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Milwaukee, Wisconsin, on July 14, 1972 and August 3, 1972 before the Examiner, and the Examiner having considered the evidence and arguments 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 Kearney & Trecker Corporation, hereinafter referred to as the Complainant, is a corporation engaged in the manufacture of machine tools at several Milwaukee area plants and an employer within the meaning of Section 111.02(2) of the Wisconsin Statutes; that Complainant is engaged in a business affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board referred to in Section 14(c)(1) of that Act, as amended.

2. That Lodge 76 of District #10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent Lodge is a labor organization having offices at 11000 Theodore Trecker Way and 8022 West Becher Street, Milwaukee, Wisconsin, and represents all hourly employes employed by the Complainant at its Milwaukee area plants including leadmen, set-up men, and group leaders but excluding officers of the Corporation, department heads, foremen,

assistant foremen, salaried office and salaried shop clerical employes, safety men, students, time study men and all other salaried professional and technical employes, guards and supervisors for purposes of collective bargaining on questions of wages, hours and working conditions; that the Respondent Lodge is affiliated with the Respondent District #10 of the International Association of Machinists and Aerospace Workers, AFL-CIO.

3. That District #10 of the International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Respondent District is a labor organization with offices at 624 North 24th Street, Milwaukee, Wisconsin.

4. That on May 14, 1969, the Complainant and the Respondent Lodge entered into a collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the prior agreement, effective from 11:00 p.m. March 3, 1969 until 11:00 p.m. on February 28, 1971, and thereafter unless either party gave timely notice of its intent to terminate said agreement; that the Complainant gave the Respondent Lodge timely notice of its intent to terminate said agreement on June 19, 1971 and said agreement was terminated on that date; that representatives of the Complainant and Respondent Lodge met on numerous occasions beginning in October 1970 and continuing until on or about July 23, 1972 for the purpose of negotiating with regard to certain proposed modifications or changes in said agreement; that on August 9, 1972 the Complainant and the Respondent Lodge entered into a new collective bargaining agreement covering the wages, hours and working conditions of the employes represented by the Respondent Lodge, hereinafter referred to as the current agreement, effective from 11:00 p.m. on July 23, 1972 until 11:00 p.m. on July 22, 1973 and thereafter unless either party gives timely notice of its intent to terminate said agreement.

5. That in accordance with the terms of the prior agreement and in conformity with a practice extending over a number of years the basic work week for employes represented by the Respondent Lodge consisted of seven and one-half hours per day, Monday through Friday, for a total of thirty-seven and one-half hours per week and that all hours worked in excess of seven and one-half hours per day or thirty-seven and one-half hours per week were compensated at overtime rates; that at the outset of the negotiations leading up to the current agreement the Complainant proposed inter alia that the basic work week for employes represented by the Respondent Lodge be changed to consist of eight hours per day, Monday through Friday, for a total of forty hours per week and that in the future all hours worked in excess of eight hours per day or forty hours per week would be compensated at overtime rates; that said proposed change in the basic work week, which was accompanied by an offer to increase the hourly rate of pay and improve certain fringe benefits, was deemed unacceptable by the representatives of the Respondent Lodge and the parties reached an impasse in their negotiations with regard to said proposal and certain other proposals; that on June 22, 1971 the Complainant advised the Respondent that even though an impasse had been reached in the negotiations and the prior agreement had been terminated it intended to continue to follow the provisions of the prior agreement "except as you may be notified otherwise by us in advance of any contemplated changes"; that the Complainant further advised the Respondent Lodge of its intent to make certain changes, not affecting the basic work week, effective with the beginning of the work week of June 28, 1971 and that said changes were thereafter made.

6. That the parties remained at an impasse in their negotiations with regard to the Complainant's proposal to change the basic work week and certain other proposals until March 1, 1972 on which date the Complainant notified the Respondent Lodge by letter of its intent to implement said proposal; that said letter, which was subsequently sent to all production and maintenance employes along with a letter of explanation on March 3, 1972, read as follows:

> "One of the items which was negotiated to an impasse was the Company's '40-hour work week proposal; concerning which our production and maintenance employees were advised in a communication we sent to them May 13, 1971. In it we stated, with reference to the 40-hour work week proposal, that it is the Company's intention to put the 40-hour week into effect 'when the increase in production would otherwise make recalls necessary.'
>
> As you know, we are now working overtime in many areas. Under these circumstances, we can no longer delay putting the 40-hour work week into effect. In the light of the above, we hereby notify you that effective with the work week beginning on March 13, 1972 (with the third shift starting at 11:00 p.m. on Sunday, March 12, 1972), the 40-hour work week proposal will become effective.
>
> This decision will have the following effect:
>
> (1) The wage rate of all employees will be increased by seven cents (7¢) per hour.
>
> (2) The regular weekly work schedule will be 40 hours instead of the previous 37-1/2 hours and the daily work schedule will be 8 hours instead of 7-1/2 hours. (With a 24-minute unpaid lunch period instead of the previous 30-minute unpaid lunch period.)
>
> (3) Time and one-half at the new higher rate will be paid for all hours worked in excess of 8 per day, instead of the previous 7-1/2 hours per day, and for all time in excess of 40 hours per week instead of the previous 37-1/2 hours per week.
>
> (4) In order to make this effective within the terms of the terminated Labor Agreement of 1969, all references and computations based on the 7-1/2 hour day and the 37-1/2 hour week must be changed to 8 hours per day and 40 hours per week. Among the items so affected are these:
>
> (a) Vacation benefits will be increased to 8 hours pay for each allowable day.
>
> (b) Holidays occurring after the effective date of the 40-hour week will be paid at 8 hours pay at the employee's vacation hourly rate.
>
> (c) Jury duty pay will be increased to 8 hours per day.

(d) Military active duty pay reimbursement will be at 40 hours per week less military pay.

(5) As stated above, instead of the 30-minute unpaid lunch period provided for in paragraph 60 of the terminated Labor Agreement, except for the third shift, will be 24 minutes. There will be no assigned lunch period for employees working on the third shift.

(6) In conformity with our proposal that the third shift premium would be increased to make the pay for the third shift employees equivalent to 40 hours, we are increasing the third shift premium from 8% to 18%.

(7) To conform to the new 40-hour work week the schedule of hours will be as follows:

SHIFT	SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY
First						
Start		7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
End		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
Hours		8.0	8.0	8.0	8.0	8.0
TOTAL					40.0 Hours	
Second						
Start		3:24 pm	3:24 pm	3:24 pm	3:24 pm	3:24 pm
End		11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
Hours		8.0	8.0	8.0	8.0	8.0
TOTAL					40.0 Hours	
Third						
Start	11:00 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm	11:48 pm
End	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am	7:00 am
Hours	8.0	7.2	7.2	7.2	7.2	7.2
					36.8 Hours*	

*(Shift premium will make pay equivalent to 40 Hours.)

As stated in our letter to the Union dated June 22, 1971, 'The Company wants to have a Labor Agreement and will continue to negotiate to get one.' We also stated that we will otherwise continue to operate as we did previously, except for those changes which we listed and that 'if more of the changes which were proposed in the Company's letter of May 13 are to be instituted, you will be notified of them in advance.' This letter is in conformity with that promise."

7. That on or about March 3, 1972 representatives of the Respondent Lodge distributed a handbill at the plant gates which disputed certain assertions contained in the Complainant's letters of March 1, 1972 and March 3, 1972 and concluded as follows:

"ADVANCE NOTICE

A MASS MEETING IS BEING CALLED FOR TUESDAY, MARCH 7, 1:30 P.M. - SERB HALL - STRIKE SANCTION VOTE WILL BE TAKEN.

LODGE 76, IAMAW
Educational Committee"

8. That on or about March 6, 1972 representatives of the Respondent Lodge posted a notice, a copy of which was given to representatives of the Complainant which read as follows:

"LODGE 76 IAM

MASS
MEETING
MARCH 7
1:30 P.M.
SERB HALL
5101 W. Oklahoma Ave."

9. That the membership of the Respondent Lodge met at Serb Hall in Milwaukee, Wisconsin, at 1:30 p.m. on Tuesday, March 7, 1972, for the purpose of taking a strike sanction vote; that a strike sanction vote was taken at said meeting and that subsequently during said meeting two resolutions were presented to the membership and unanimously adopted which resolutions directed that no member of the Respondent Lodge should perform work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week and that no member of the Respondent Lodge should work overtime.

10. That on Friday, March 10, 1972, and Saturday, March 11, 1972 representatives of the Complainant met with representatives of the Respondent Lodge for the purpose of discussing the issues in bargaining including the work week; that during the course of the first meeting representatives of the Complainant offered to defer implementation of its forty-hour work week proposal if the Respondent Lodge would agree "that daily overtime (in excess of 7-1/2 hours a day) shall be part of the regular work schedule" . . . and that "employees may refuse Saturday and/or Sunday overtime as in the past", and that the Respondent Lodge responded that the Complainants offer to defer the implementation of its forty-hour work week proposal "on the basis stated" was "completely unacceptable"; that during the course of the second meeting representatives of the Complainant offered to continue the existing thirty-seven and one-half hour work week "unless and until" an agreement was reached on the basic work week if the representatives of the Respondent Lodge would agree that employes could be required to work up to thirty minutes of overtime per day and that any Saturday or Sunday overtime could be refused "on the same basis as in the past" and that the representatives of the Respondent Lodge indicated that the Complainants' offer to continue the existing thirty-seven and one-half hour schedule until an agreement was reached on the basic work week was acceptable but that the other aspects of the Complainants proposal were "not related" and "not acceptable" and indicated its intent to continue the "moratorium on overtime".

11. That the Complainant did not implement its forty-hour work week proposal on March 12, 1972 or at any time thereafter; that representatives of the Complainant met with representatives of the Respondent Lodge on March 13, 1972 and on several dates thereafter in an effort to resolve the dispute over the work week and the other issues in the negotiations; that during the course of said negotiations representatives of the Respondent Lodge consistently and frequently referred to the resolutions of March 7, 1972 as a "mandate" or a "mandate of the membership"; that at no time after March 11, 1972 and before July 14, 1972 did representatives of the Respondent Lodge agree to ask the membership to rescind the resolutions of March 7, 1972 even though they were asked to do so by representatives of the Complainant and that

on or about March 16, 1972 representatives of the Respondent Lodge made the following statement, relevant herein, in a report distributed to its membership:

> "The Educational Committee wishes to remind you that even though the talks with the Company are continuing, the Policies voted on by the Production and Maintenance Employees WILL continue in effect until a Labor Agreement is signed."

12. That by custom and understanding none of the employes represented by the Respondent Lodge had been required to work daily or weekend overtime prior to March 7, 1972 but that the average refusal rate of overtime amounted to five percent of those employes offered overtime work; that prior to March 11, 1972 employes represented by the Respondent Lodge were performing a substantial amount of daily and Saturday overtime work and that as many as 354 employes performed overtime work on Saturday, March 4, 1972; that beginning on or about March 11, 1972 and continuing thereafter until on or about July 23, 1972 none of the employes represented by the Respondent Lodge would accept daily or Saturday overtime work (with the exception of three employes who accepted overtime work on Saturday, May 13, 1972) even though the Complainant scheduled many of said employes for daily and Saturday overtime work on numerous occasions.

13. That the refusal by the employes represented by the Respondent Lodge to work overtime, beginning on or about March 11, 1972 and continuing thereafter until on or about July 23, 1972, was a concerted effort to interfere with the production of machine tools at the Complainant's Milwaukee area plants and that such refusal did in fact interfere with said production at the Complainant's Milwaukee area plants; that the Respondent Lodge authorized, encouraged and condoned said concerted refusal to work overtime; that the record does not establish that the Respondent District in any way authorized, encouraged or condoned said concerted refusal to work overtime.

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

CONCLUSIONS OF LAW

1. That the Complainant's claim that the Respondent Lodge and the Respondent District have engaged in unfair labor practices in violation of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Statutes is based on existing facts and involves a real controversy over rights which may be presently asserted and is therefore not moot.

2. That the activity complained of, the concerted refusal to work overtime, is not an activity which is arguably protected under Section 7 or arguably prohibited under Section 8 of the National Labor Relations Act, as amended, and that, therefore, the Wisconsin Employment Relations Commission is not preempted from asserting its jurisdiction to regulate said conduct.

3. That the Respondent Lodge, by authorizing, encouraging and condoning the concerted refusal to work overtime beginning on or about March 11, 1972, and continuing thereafter until on or about July 23, 1972, has engaged in a concerted effort to interfere with production and has committed an unfair labor practice within the meaning of Section 111.06(2)(h) of the Wisconsin Statutes; that the Respondent District

did not, in any way, authorize, encourage or condone said concerted refusal to work overtime and has not committed any unfair labor practices within the meaning of Section 111.06(2)(h) or Section 111.06(3) 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 the Respondent Lodge, its officers and agents shall:

1. Immediately cease and desist from authorizing, encouraging or condoning any concerted refusal to accept overtime assignments at the Complainant's Milwaukee area plants.

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

(a) Send a copy of the letter marked "Exhibit A" and attached hereto to all employes of the Complainant, who are members of the Respondent Lodge. Said letter should be signed by the principal officer of the Respondent Lodge and directed to the employes' last known address.

(b) Immediately upon resumption of bargaining for a successor to the current collective bargaining agreement, post written notices in conformity with "Exhibit B", attached hereto, in its offices and in any places provided by the Complainant for the posting of notices. Said notices shall be signed by the principal officer of the Respondent Lodge and shall remain posted throughout said negotiations. Respondent Lodge shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.

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

IT IS FURTHER ORDERED that so much of the complaint that alleges that the Respondent District has engaged in conduct violative of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Statutes shall be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

"EXHIBIT A"

To the membership:

Pursuant to an Order of the Wisconsin Employment Relations Commission all members of Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO are hereby notified that the action taken by the membership, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that hereafter Lodge 76 will not in any way authorize, encourage or condone such conduct on the part of its membership.

_____

[Principal Officer]

"EXHIBIT B"

NOTICE

Pursuant to an Order of the Wisconsin Employment Relations Commission all employes of Kearney & Trecker Corporation represented by Lodge 76, International Association of Machinists and Aerospace Workers, AFL-CIO, are hereby notified that the action taken by the membership of said organization, of engaging in a concerted refusal to work overtime during the period beginning on March 11, 1972, and continuing until on or about July 23, 1972, constituted a violation of Section 111.06(2)(h) of the Wisconsin Employment Peace Act, and that all members of said organization are hereby asked to refrain from engaging in any concerted refusal to accept assignments of overtime work throughout the negotiations currently in progress with Kearney & Trecker Corporation.

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[Principal Officer]

KEARNEY & TRECKER CORPORATION, XI, Decision No. 11083-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pleadings

In its complaint which was filed on June 15, 1972, the Complainant alleged that the Respondent called a meeting of its membership on March 7, 1972 at which a resolution was adopted which directed the membership to refuse to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week 1/ and that although a substantial amount of work in excess of seven and one-half hours per day and in excess of thirty-seven and one-half hours per week has been scheduled for said employes since March 7, 1972 said employes have engaged in a concerted refusal to work the additional hours as scheduled. The Complainant further alleged that the purpose and effect of said resolution and concerted action was to interfere with the production of the Complainant and that said action was therefore in violation of Section 111.06(2)(h) and Section 111.06(3) of the Wisconsin Employment Peace Act which provides:

> "111.06
>
> (2) It shall be an unfair labor practice for an employe individually or in concert with others:
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> . . .
>
> (h) To take unauthorized possession of property of the employer or to engage in any concerted effort to interfere with production except by leaving the premises in an orderly manner for the purpose of going on strike.
>
> . . .
>
> (3) It shall be an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations any act prohibited by subsections (1) and (2) of this section."

In its prayer for relief the Complainant asks that the Respondents be ordered to cease and desist from the action complained of and that they be affirmatively ordered to perform whatever acts are necessary and appropriate to insure that the employes are advised that the action complained of is illegal and that, in the future, employes should perform their obligations as employes without regard to the action taken on March 7, 1972. Hearing on the complaint was set for July 14, 1972.

On June 23, 1972 the Respondents filed a written motion to dismiss the complaint and in their motion requested that the hearing scheduled in the matter be limited to the evidence relevant to any factual issues

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1/ The evidence presented at the hearing establishes that two similar resolutions were passed. However, the effect of both resolutions was the same. See Finding of Fact numbered 9 and discussion infra, under "Violation Found".

raised by their motion. That motion alleged: (1) That the Wisconsin Employment Relations Commission lacked jurisdiction over the subject matter of the complaint in that the activity complained of was "arguably prohibited" by the National Labor Relations Act as amended and (2) that the Wisconsin Employment Relations Commission has no jurisdiction over the subject matter of the complaint in that the provisions of the Wisconsin Employment Peace Act alleged to have been violated are unconstitutional to the extent that they are in conflict with the National Labor Relations Act as amended. The Complainant objected to the Respondents' request that the hearing be limited to any factual issues raised by the Respondents' motion since there were no factual issues raised by the Respondents' motion and alleged that the Complainant was suffering severe economic harm as a result of the action complained of. At the Examiner's request the Respondents filed their answer so as to more clearly delineate the issues of fact raised by the pleadings.

In their answer, which was filed on June 30, 1970, the Respondents admitted that a resolution was adopted at the meeting on March 7, 1972 wherein the employes agreed not to work in excess of seven and one-half hours per day or thirty-seven and one-half hours per week but denied knowledge concerning the amount of overtime scheduled subsequent to said resolution and denied the other allegations of the complaint. The answer affirmatively alleged that the Complainant was engaged in an industry affecting commerce; that the activity complained of was the subject of an unfair labor practice charge pending before the National Labor Relations Board wherein the Complainant herein alleged that said activity constitutes an unfair labor practice under Section 8 of the National Labor Relations Act, as amended; and that the complaint ought to be dismissed since it was arguably prohibited by that Act and therefore the Wisconsin Employment Relations Commission was preempted from asserting jurisdiction.

In order to expedite the handling of the case and at the same time accommodate the Respondents' request for a delay because certain witnesses were unavailable on the hearing date set, the hearing was opened as scheduled on July 14, 1972 for the purpose of allowing the Respondents to present any evidence they desired in support of their motion and to permit the Complainant to present its evidence and arguments on the merits. At the outset of the hearing, the Respondents orally renewed their motion to dismiss and the parties stipulated to the relevant jurisdictional facts. It was agreed at the conclusion of the Complainant's case that the hearing would adjourn and be reconvened if necessary at a later date at which time the Respondents would be afforded an opportunity to present any evidence they desired to offer on the merits. The hearing was reconvened on August 3, 1972 at which time the Respondents declined the opportunity to present evidence but renewed their motion to dismiss on the additional ground that the controversy was now moot in that, after the first day of hearing and before the second day of hearing, the parties had agreed upon the terms of a new collective bargaining agreement. The parties stipulated that such agreement had been reached but the Complainant denies that the controversy is moot as a result of that agreement.

The Facts

There is no dispute over the facts relating to the question of jurisdiction. At the hearing the parties stipulated that the Complainant is engaged in an industry affecting commerce within the meaning of the National Labor Relations Act, as amended, and is covered by the self-imposed jurisdictional standards of the National Labor Relations Board. With regard to the allegation in the Respondents'

answer that the subject matter in dispute is currently pending before the National Labor Relations Board, the evidence adduced at the hearing indicates that so much of the charges filed with the National Labor Relations Board 2/ which alleged that the activity complained of herein constitutes a violation of the National Labor Relations Act, as amended, has been dismissed and that dismissal has not been appealed. In dismissing the charges pending before the National Labor Relations Board the Regional Director said 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.
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> . . .
>
> As to the adoption by the Union on March 7, 1972 of a policy prohibiting overtime work by its member employees, this action does not appear to be in violation of the Act. N.L.R.B. v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477. Dismissal by this Agency does not necessarily preclude the Charging Party from pursuing its rights under statutes other than the National Labor Relations Act on matters not covered by said Act. I am therefore refusing to issue complaint at this time.
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> . . ."

The Complainant introduced substantial evidence supporting its allegations that the employes represented by the Respondent Lodge engaged in a concerted refusal to work overtime hours in excess of seven and one-half hours per day or thirty-seven and one-half hours per week; that said concerted refusal was in compliance with the resolutions presented and adopted by the membership of the Respondent Lodge at its meeting on March 7, 1972; and that said concerted refusal imposed severe economic hardship on the Complainant in its efforts to deal with temporary "pulse" varieties of production thereby endangering its relationship with its customers through an inability to meet production deadlines and the incurring of financial penalties contained in their contracts with the government. The Respondents introduced no evidence contradicting the Complainant's evidence regarding the impact of the concerted refusal; however, the Respondents brought out, through cross-examination of the Complainant's witnesses, the fact that certain forms of economic pressure were brought to bear on the Respondent Lodge by the Complainant through the cancellation of a lease held by the Respondent Lodge on office space in one of the Complainant's plants and the unilateral implementation of certain proposals in bargaining, including a proposal to eliminate the practice of compensating representatives of the Respondent Lodge for conducting certain representation activities during working hours.

POSITIONS OF THE RESPONDENTS:

The Respondents argue that, in their view, there are two legal issues to be resolved at this juncture: (1) Should the complaint be dismissed by the Wisconsin Employment Relations Commission on the claim that the controversy is now moot?; and (2) When an activity is neither protected nor prohibited under the federal act, may a state regulate any or all such activities? The Respondents do not deny that

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2/ Case No. 30-CB-527.

the activity complained of constituted an interference with production but argue that the controversy is now moot and that therefore the Commission ought to dismiss the complaint. However, if the Commission does not dismiss the complaint as moot the Respondents ask that it be dismissed for lack of jurisdiction citing a number of United States Supreme Court decisions dealing with the Constitutional doctrine of preemption.

POSITION OF THE COMPLAINANT:

The Complainant contends that the controversy in question is not moot within the meaning of the case of WERB v. Allis-Chalmers Workers Union, Local 248, UAWA-CIO 3/ and that unless a cease and desist order is issued there is reason to believe that the same tactic may be employed during the negotiations for a successor to the current collective bargaining agreement. The Complainant argues that the activity complained of is clearly a prohibited interference with production under the rationale of the Stolper 4/ case and that there is no issue of preemption in this case in that the Briggs-Stratton 5/ case held that state regulation of the conduct complained of is not preempted by the National Labor Relations Act, as amended. The Complainant relies upon a number of the same cases relied upon by the Respondents in support of its position with regard to the question of preemption.

Mootness

It is clear that the matter in controversy is not moot. The Wisconsin Supreme Court has defined a moot case as

> ". . . one which seeks to determine an abstract question which does not rest upon existing facts or rights or which seeks a judgment in a pretended controversy when in reality there is none or one which seeks a decision in advance about a right before it has actually been asserted or contested, or a judgment upon some matter which when rendered for any cause cannot have any practical legal effect upon the existing controversy." 6/

If the Complainant is correct in its view of the law, the activity in question violates the public policy of Wisconsin as expressed in the Wisconsin Employment Peace Act and it has a legal right to ask that the Respondents be directed to cease engaging in that activity and take such affirmative action as might be appropirate to insure its non-recurrence. The controversy is certainly not "pretended" and the Complainant is not seeking a "decision in advance" since the complaint in this case was not filed until after the conduct had actually taken place. The only possible basis on which the controversy could be found to be moot would be on the claim that a judgment in the matter would not have any "practical legal effect".

3/ 252 Wis. 436, 21 LRRM 2699 (1948).

4/ Stolper Steel Products Corp., (2109) 5/49, aff'd. 258 Wis. 481, 27 LRRM 2418 (1951).

5/ International Union, UAW v. WERB, 336 U.S. 245, 23 LRRM 2361 (1949).

6/ WERB v. Allis-Chalmers Workers Union Local 248, UAWA-CIO, 252 Wis. 436, 21 LRRM 2699 at p. 2701 (1948).

Even though the activity complained of has ceased, the terms of the current collective bargaining agreement will be subject to renegotiation beginning in March 1973, and the agreement can be terminated by either party as early as July 22, 1973. If the Commission were to dismiss the case as moot at this point in time, the Respondents could engage in the same conduct in the future with the foreknowledge that there would be a considerable time lag between the filing of the complaint and a decision in the matter. Such conduct could frustrate the public policy expressed in the Wisconsin Employment Peace Act and would have the "practical legal effect" of leaving the Complainant with an effective remedy.

The Wisconsin Supreme Court has specifically recognized that a case that might be said to be moot by reason of the fact that the unfair labor practice complained of has ceased is not moot if it can be said that interests of a public character are asserted under conditions that may be immediately repeated. 7/ This case clearly falls within the rule of that case and the Commission ought to assert its jurisdiction to make a determination in the matter.

Preemption

In the Briggs-Stratton 8/ case the United States Supreme Court held, in a divided opinion, that Wisconsin was not preempted from prohibiting a union from engaging in "quickie" strikes in violation of Section 111.06(2)(h) even though the conduct involved was concerted and arose on the context of a labor dispute with an employer engaged in interstate commerce, since the conduct involved was "not regulated" by the federal law. The majority opinion held that it was within Wisconsin's police power to prohibit such activities and that nothing in the National Labor Relations Act or the Labor-Management Relations Act "forbid" or "legalized" the conduct in question which was either "governable by the states . . . or entirely ungovernable". The two dissenting opinions in that case focused on the claim that the "quickie" strikes were a form of protected concerted activity and therefore unlike the situation presented in the Allen Bradley 9/ and the Fansteel 10/ cases which involved criminal violations and plant seizure.

The Briggs-Stratton case was one of the earliest cases involving the question of preemption and the Respondents argue that the Briggs-Stratton case must be read in the light of the many decisions rendered subsequent to that decision particularly the Garmon decision. 11/ In the Garmon case the Supreme Court reviewed the numerous prior decisions dealing with the impact of the federal scheme of labor legislation on the state's authority to regulate employer and union conduct. In an effort to distill the collective wisdom of those prior cases the Supreme Court set out the following test for preemption:

> "When it is clear or may fairly be assumed that the activities which the state purports to regulate are protected by Section 7 of the Taft-Hartley Act or constitute an unfair labor practice under Section

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7/ Ibid. at p. 441.

8/ Supra, footnote 5.

9/ Allen Bradley Local v. WERB, 315 U.S. 740, 10 LRRM 520 (1942).

10/ NLRB v. Fansteel Metallurgic Corp., 306 U.S. 240, 4 LRRM 515 (1939).

11/ San Diego Building Trades v. Garmon, 359 U.S. 236, 43 LRRM 2838 (1959).

8 due regard for the federal enactment requires that state jurisdiction must yield." 12/

The Court further held that where it is not clear whether the particular activity regulated by the states is either protected under Section 7 or prohibited under Section 8, the primary authority to adjudicate the question is the National Labor Relations Board and that in the absence of a clear determination by the National Labor Relations Board, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board. Specifically repudiating the approach taken to the preemption question in the Briggs-Stratton case the Court said:

> "If the Board decides, subject to appropriate federal judicial review, that conduct is protected by Section 7 or prohibited by Section 8 then the matter is at an end, and the states are ousted from all jurisdiction. Or, the Board may decide that an activity is neither protected nor prohibited, and thereby raise the question whether such activity may be regulated by the States. . . In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for [the courts] to decide whether such activities are subject to state jurisdiction. . ." 13/

The fact that the Supreme Court repudiated the approach taken in deciding the preemption question raised in the Briggs-Stratton case is not the equivalent of a reversal of the result of that case and the power of Wisconsin to prohibit "quickie" strikes would appear to remain intact since it is neither a protected nor prohibited activity under the Garmon test.

The Supreme Court recently reviewed the Garmon test and affirmed its continued vitality and reiterated the unacceptability of the approach taken in the Briggs-Stratton case in deciding the question

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12/ Ibid. at p. 2841. At least two exceptions were specifically recognized to the general rule:

(1) Where the activity regulated is of "peripheral concern" such as was the case in International Association of Machinists v. Gonzales, 356 U.S. 617, 42 LRRM 2135 (1958); and

(2) Where the regulated conduct dealt with interests so deeply rooted in local feeling and responsibility that, in the absence of compelling Congressional direction, the Court was reluctant to find that Congress had deprived the states of the power to act such as was true in United Automobile Workers v. Russell, 356 U.S. 634, 42 LRRM 2142 (1958); United Construction Workers v. Laburnum, 347 U.S. 656, 34 LRRM 2229 (1954); Youngdahl v. Rainfair, 355 U.S. 131, 41 LRRM 2169 (1957) and Auto Workers v. WERB, 351 U.S. 266, 38 LRRM 2165 (1956).

13/ Ibid. at p. 2842.

of preemption. 14/ It appears then that the question that must be answered in this case is whether the state of Wisconsin is precluded from regulating the conduct in a question when the Garmon test is applied to the facts in this case in the manner required.

In this case the Complainant did file charges with the National Labor Relations Board which charges were dismissed as indicated above. Because those charges were dismissed without a decision by the Board itself it could be argued that there has not been a "clear determination" by the Board in this case. Therefore it could be argued that, in the absence of "compelling precedent applied to essentially undisputed facts", the Wisconsin Employment Relations Commission is without power to act in this case.

The Examiner is satisfied that the Board decision combined with the Supreme Court decision in the Insurance Agents 15/ case amounts to a holding that a concerted refusal to work overtime is neither a protected activity under Section 7 nor a prohibited activity under Section 8 of the Labor-Management Relations Act and that that case constitutes a compelling precedent. It may also be said that the facts are essentially undisputed in this case since the Respondents do not deny that there was a concerted refusal to work overtime. 16/

It has been persuasively argued by Archibald Cox, an acknowledged authority in the field of labor law, that the Garmon test is inadequate in that it tends to allow the states too great leeway to regulate the

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14/ Motor Coach Employees v. Lockridge, 403 U.S. 274, 77 LRRM 2051 (1971). The Court made a further delineation of the exceptions to the Garmon test and added the following examples:

(1) Where the concurrent jurisdiction of the state courts is allowed to help enforce the duty of fair representation as set out in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1957); and

(2) Where Congress had indicated an intent to allow concurrent jurisdiction such as is the case in court actions under Section 301 of the Labor-Management Relations Act.

Neither these exceptions nor the two referred to in Garmon and set out above in footnote 12 would appear to apply to the instant proceeding. If Wisconsin has jurisdiction in this case it is because the Garmon test has been met and not because this case constitutes an exception to that test.

15/ NLRB v. Insurance Agents International Union, 119 NLRB 768, 41 LRRM 1176, rev'd. 260 F 2d 736, 43 LRRM 2003 aff'd. 361 U.S. 477, 45 LRRM 2704 (1960). Although the Regional Director's refusal to issue a complaint on the charges filed by the Complainant before the National Labor Relations Board is not the equivalent of a "clear determination" that the activity is neither protected nor prohibited it is important to note that the National Labor Relations Board relied on the Insurance Agents case in finding no prohibited activity and dismissing the charges.

16/ This is not a case where there is a serious question of fact as to whether the activity in question is an unannounced strike. Cf. 1st National Bank of Omaha v. NLRB, 413 F. 2d 921, 71 LRRM 3019 (1969).

use of economic weapons by the parties thereby disturbing the relative balance of power established by the federal scheme. 17/ In this case the Respondents' power to engage in a concerted refusal to work overtime is an economic weapon unregulated by the federal law just as an employer's power to discipline employes for engaging in such activities is unregulated by the federal law. It cannot be denied that to the extent that the states are free to limit or prohibit the use of a particular economic weapon, state laws may have an impact on the relative balance of power in a given bargaining relationship. However the Examiner feels compelled to find in this case that the state of Wisconsin is not, under the Garmon test, preempted from effectuating its public policy which inter alia prohibits the use of the particular economic weapon employed in this case, that is interfering with production through a concerted refusal to work overtime.

Violation Found

The Examiner has been unable to find any prior Commission case specifically involving an effort to interfere with production through a concerted refusal to work overtime. However, the language of Section 111.06(2)(h) is quite broad and would appear to encompass any form of concerted action to interfere with production other than through the use of the traditional strike weapon. In the Stolper 18/ case the Commission held that a concerted refusal to work at a rate in excess of 100% of the established, acceptable production standard was an unlawful interference under Section 111.06(2)(h) even though the employes were free individually to so limit their production. In a series of Dry Cleaning Cases, 19/ the Commission held that enforcement of union bylaws prohibiting production in excess of union-established production standards constituted an unlawful interference with production.

It can hardly be argued that the activity involved herein is a form of protected concerted activity under Section 111.04 of the Wisconsin Peace Act in view of the similarity between that section and Section 7 of the National Labor Relations Act and the specific prohibition contained in Section 111.06(2)(h) of the Wisconsin Employment Peace Act. The fact that employes are free to engage in the conduct in question individually would not seem to affect the result. The employes in the Stolper case were individually free to limit their production to 100% of standard for whatever personal reasons they might have or for no reason. But when the employes in that case engaged in a concerted refusal to produce in excess of the established, acceptable standard in an effort to interfere with production they engaged in an unlawful activity. Section 111.06(2)(h) makes no distinction between concerted activities which are otherwise permissible and those which are otherwise impermissible but prohibits

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17/ Cox, Labor Law Preemption Revisited, 85 Harvard Law Review 1337 (1972).

18/ Supra, note 4.

19/ Ace Cleaners (2723), 2/51; American Dry Cleaners, et al (2724), 2/51; Artistic Dye Works, et al (2732), 2/51; and Bell View Dye Works (2734), 2/51.

all concerted activities which attempt to interfere with production other than the strike. 20/

The evidence of record is clear that the refusal rate of overtime offered increased from 5% to nearly 100% immediately after the Respondent Lodge passed the two resolutions which in effect said that no member of the Respondent Lodge would accept an overtime assignment. (Because the Complainant never implemented its proposed change in the work week, the two resolutions had the same practical effect). The inference that the increase in the refusal rate was the direct result of the two resolutions is inescapable because of the timing, the frequent reference to the resolutions by the representatives of the Respondent Lodge and the total absence of any evidence that would support a different conclusion.

On the other hand there is no indication that the Respondent District in any way authorized, encouraged or condoned the action of the Respondent Lodge. Although a Business Representative employed by the Respondent District was frequently present during the negotiations there is no showing in the record that he authorized or encouraged the Respondent Lodge in the activity in question. Although it could be argued that the Business Representative personally condoned the activity by his failure to repudiate the tactic, there is no showing in the record that he was acting as a representative of the Respondent District at the time. The labor dispute was between the Complainant and the Respondent Lodge and the only inference supported by the record would be to conclude that he was acting as a representative of the Respondent Lodge at the time.

For the above and foregoing reasons the Examiner has found that the Respondent Lodge has acted in violation of Section 111.06(2)(h) of the Wisconsin Statutes and entered an order directing the Respondent Lodge to cease and desist the practice and take appropriate remedial action to insure its non-recurrence and dismissing so much of the complaint that alleges that the Respondent District has acted in violation of Section 111.06(2)(h) or Section 111.06(3) of the Wisconsin Statutes.

Dated at Madison, Wisconsin, this 26th day of February, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
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20/ Of course, to the extent that Section 111.06(20(h) might prohibit activities which are arguably protected activities under Section 7 of the National Labor Relations Act as amended, the Wisconsin Employment Relations Commission is preempted from enforcing said provision.