

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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RICHARD KRAUSE,

Complainant,

vs.

MILWAUKEE MUSICIANS ASSOCIATION LOCAL  
NO. 8, DICK SPILMAN and AMERICAN  
FEDERATION OF MUSICIANS OF THE UNITED  
STATES AND CANADA,

Respondents.  
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Case I

No. 16019 Cw-336

Decision No. 11305-A

Appearances:

Weber, Burke & Hicks, Attorneys at Law, by Mr. Richard D. Hicks,  
appearing on behalf of the Complainant.

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. David Leo  
Uelmen, appearing on behalf of Respondent AFM and Respondent  
Local 8.

Mr. Richard J. Spilman, appearing in his own behalf.

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 authorized George R. Fleischli, a member of the Commission's staff to act as Examiner and 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 a hearing on such complaint having been held at Milwaukee, Wisconsin, on October 31, 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 the Complainant, Richard Krause, hereinafter referred to as Complainant Krause or Krause, is an individual residing at 37796 Sunset Lane, Oconomowoc, Wisconsin, and a musician who plays the drums and related instruments as a sideman for band leaders at various locations in the State of Wisconsin.

2. That the Respondent, American Federation of Musicians of the United States and Canada, hereinafter referred to as the Respondent AFM or AFM is an international labor organization having offices at 641 Lexington Avenue, New York, New York.

3. That the Respondent, Milwaukee Musicians Association Local No. 8, hereinafter referred to as Respondent Local 8 or Local 8 is a labor organization and the local affiliate of Respondent AFM for an area which includes all of Milwaukee County, Wisconsin, having offices at 2200 North 45th Street, Milwaukee, Wisconsin.

No. 11305-A

4. That the Respondent Dick Spilman (a/k/a Richard J. Spilman), hereinafter referred to as Respondent Spilman or Spilman, is an individual who is a singer and band leader in the business of contracting for the services of his band with purchasers of musical performances and a member of Respondent Local 8.

5. That Complainant Krause has since about 1962 been a member of the Waukesha Musicians Association Local No. 193, hereinafter referred to as Local 193, which is a labor organization and the local affiliate of Respondent AFM for the Waukesha, Wisconsin area which includes Oconomowoc, Wisconsin; that at no time relevant herein has Complainant Krause been a member of Respondent Local 8; that beginning about January 1972 and continuing thereafter Complainant Krause sought employment as a sideman-drummer with various band leaders working in the Milwaukee area.

6. That at all times relevant herein Respondent Local 8 maintained certain By-Laws which apply to its members and read as follows:

#### "ARTICLE XII

##### Duties of Members

. . .

Sec. 2. Members are not allowed under any circumstances to engage non-members. Any member violating this law shall be fined at the discretion of the Board.

. . .

Sec. 4. Before engaging a musician from another local (not on transfer) or sending out of the jurisdiction, if competent men can not (sic) be procured from the Association, a leader must apply to the President or Board of Directors.

Sec. 5. Members must not allow themselves to be engaged singly by any person who is not a member of this Association, except where only one musician is required. Members found guilty of violation shall be fined or expelled.

. . .

#### ARTICLE XIV

. . .

Sec. 22. Any member found guilty of violating the Constitution, By-Laws or Price List, shall be fined or expelled at the discretion of the Board.

. . ."

7. That beginning on or about February 1, 1972 Krause obtained employment as a sideman-drummer with a band then known as the "Bob LaPaz Trio" which was performing four nights per week at the Eastbrook in Milwaukee, Wisconsin under a contract with the Eastbrook on forms provided by Respondent Local 8 and signed by Bob LaPaz (a/k/a Robert LaPaz) as band leader; that the "Bob LaPaz Trio" which was "backing up" the singing of Respondent Spilman was considered a "traveling band" by Respondent Local 8 since the band leader listed on said forms,

Bob LaPaz, was not then a member of Local 8 but was a member of Local 193; that because the "Bob LaPaz Trio" was considered a "traveling band" by Respondent Local 8 it expressed no objection to LaPaz about his employment of Complainant Krause.

8. That on or about February 25, 1972, Complainant Krause obtained employment as a sideman-drummer for Frank Charles (a/k/a Frank J. Palleria), a band leader performing on weekends at the English Room and Pub of the Pfister Hotel in Milwaukee, Wisconsin under a contract with the Pfister Hotel on forms provided by Local 8 and signed by Charles who was then and remains a member of Respondent Local 8; that before employing Krause, Charles called the offices of Respondent Local 8 to see if it had any objection to his employment of Krause and was advised that it was all right to hire Krause since Charles needed a drummer on short notice and Krause's previous employment in the jurisdiction of Local 8 had been with a "traveling band"; that Krause played for Charles for one weekend and was offered steady employment provided Krause joined Local 8 but Krause quit voluntarily because he desired to obtain employment which would provide work for more than two days per week; that sometime shortly thereafter Respondent Local 8's Executive Board asked Charles to appear before it and explain why he had employed a drummer who was not a member of Local 8; that Charles advised the Executive Board that he thought that Respondent Local 8 had no objection to his employment of Krause because of the telephone conversation referred to above and that no action was taken against Charles by the Executive Board.

9. That beginning sometime in March Krause obtained employment as a sideman-drummer for four weeks with the "Dick Spilman Group" which was performing weekends at the Holiday Inn South in Milwaukee, Wisconsin under a contract with the Holiday Inn South on forms provided by Respondent Local 8 and signed by Bob LaPaz as band leader; that because the "Dick Spilman Group", which was comprised of the same musicians which had been billed as the "Bob LaPaz Trio", was again considered a "traveling band" by Respondent Local 8 it expressed no objection to LaPaz about the employment of Krause but that Spilman advised Krause that it would be desirable if Krause took steps to become a member of Local 8 because Spilman was aware that Local 8 would "prefer" that he be listed as the band leader and that he employ musicians who were members of Local 8.

10. That beginning sometime in April 1972 Krause obtained employment as a replacement sideman-drummer with Cherie Lee (a/k/a Cherie Lee Parchar) a singer and band leader performing under contract with the Layton Place North in Milwaukee, Wisconsin; that Cherie Lee who was then and remains a member of Local 8 asked Krause if he was a member of the "Musicians Union" before she agreed to employ him but that she did not ask him if he was a member of Local 8; that shortly after employing Krause, Cherie Lee had a telephone conversation with Robert Couey, Secretary-Treasurer of Local 8 who advised her that it was a violation of the by-laws of Local 8 for a member, who was acting in the capacity of a band leader, to hire a non-member; that Cherie Lee advised Couey that she was not aware that Krause was not a member of Local 8 and asked if it would be alright if she continued to employ Krause because she could not find a suitable drummer who was also a member of Local 8 on short notice; that Couey advised Cherie Lee that she could continue to employ Krause for the balance of the month until her regular drummer, who was a member of Local 8, returned from an out-of-state engagement; that shortly after her telephone conversation with Couey, Cherie Lee's contract at the Layton Place North was terminated for reasons unrelated to Krause's non-membership in Local 8 and Krause's employment with Cherie Lee was terminated.

11. That on or about May 1, 1972 Spilman contacted Krause and advised Krause that he had contracted with the Red Carpet Inn to perform six nights per week from May 22, 1972 until September 9, 1972 and that he wanted to hire Krause as a sideman-drummer since he was planning on hiring the same trio that had backed up Cherie Lee at the Layton Place North; that Spilman advised Krause that if he wanted the job he should join Local 8 in order to "avoid any problems"; that when Krause attempted to join Local 8 he was advised that he was ineligible to join since he was not a resident of the area included within Local 8's jurisdiction; that Krause asked for an opportunity to appear before Local 8's Executive Board for the purpose of requesting a waiver of the residency requirement and Spilman agreed to hold the position of sideman-drummer open pending the outcome of said request; that on or about May 15, 1972 Krause appeared before Local 8's Executive Board and asked for a waiver of the residency requirement based on a claim of financial hardship and other personal reasons; that shortly after May 15, 1972 Local 8 advised Krause by letter that his request for a waiver had been denied by its Executive Board; that thereafter on May 22, 1972 and on another occasion in June 1972 Spilman refused to hire Krause as a sideman-drummer for said engagement at the Red Carpet Inn because Krause was not a member of Local 8.

12. That during this period of time and on or about May 1, 1972 and on another occasion in June, 1972 Spilman advised Couey that he wanted to hire Krause as a sideman-drummer and Spilman was advised by Couey that he would be in violation of the by-laws of Local 8 if he were to employ Krause as a sideman-drummer; that when Spilman refused to employ Krause as a sideman-drummer on May 22, 1972 and on a second occasion in June 1972 he did so because he was acting out of fear that Local 8 might take certain unspecified disciplinary action against him which could result in a fine or loss of membership and consequent economic harm.

13. That sometime in the summer or early fall, probably in August 1972, Ron Martinson, a member of Respondent Local 8 who had played piano as a sideman at the Layton Place North with Cherie Lee and at the Red Carpet Inn with Dick Spilman, had a discussion with Krause regarding an engagement that Martinson had contracted to play at the Crown Room at the Pfister Hotel in Milwaukee; that during the course of said conversation Martinson, who was the band leader, told Krause that "it would be nice" if Krause could play for him at the Crown Room but that he couldn't due to Krause's non-membership in Local 8; that at the time of said conversation Martinson was aware that Krause was then employed as a sideman-drummer with a "traveling band" known as "Zamboanga"; that Martinson did not, during the course of said conversation, refuse to employ Krause at the Crown Room because of his non-membership in Local 8, but Martinson did indicate his intent to refuse employment to Krause in the future because of his non-membership in Local 8, if Krause were to seek employment with Martinson within the jurisdiction of Local 8; that there is no evidence of record that anyone acting on behalf of Local 8, contacted Martinson with regard to his possible employment of Krause to perform as sideman-drummer at the Crown Room or elsewhere.

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

### CONCLUSIONS OF LAW

1. That Frank Charles, Cherie Lee, and Respondent Dick Spilman were employers within the meaning of Section 111.02(2) of the Wisconsin Statutes with respect to their employment of sidemen to perform musical services under their respective contracts with the Pfister Hotel, the Layton Place North and the Red Carpet Inn.
2. That the Respondent Milwaukee Musicians Association Local 8, by the action of its Executive Board of requesting Frank Charles to appear before it shortly after February 26, 1972 and explain why he had employed a non-member, i.e. Complainant Richard Krause, coerced, intimidated and induced an employer to interfere with the legal rights of Richard Krause and committed an unfair labor practice within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes.
3. That Respondent Milwaukee Musicians Association Local 8, by the action of its agent Robert Couey, Secretary-Treasurer, of advising Cherie Lee that she would be in violation of its By-laws if she continued to employ Krause after her regular drummer returned, coerced, intimidated and induced an employer to interfere with the legal rights of Richard Krause and committed an unfair labor practice within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes.
4. That Respondent Milwaukee Musicians Association Local 8, by the action of its agent, Robert Couey, Secretary-Treasurer, of advising Respondent Richard Spilman that he would violate the By-laws of Respondent Milwaukee Musicians Association Local 8 if he hired Krause in spite of his non-membership in Respondent Milwaukee Musicians Association Local 8, coerced, intimidated and induced Respondent Richard Spilman into discriminatorily refusing to hire Krause in violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes and thereby committed an unfair labor practice within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes.
5. That Respondent Dick Spilman by refusing to hire Complainant Richard Krause as a sideman-drummer on May 22, 1972 and again in June 1972 because he was not a member of Respondent Milwaukee Musicians Association Local 8, committed acts of discrimination in employment and unfair labor practices within the meaning of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes.
6. That Respondent Milwaukee Musicians Association Local 8, did not in any way attempt to coerce, intimidate or induce Ron Martinson to interfere with the legal rights of Richard Krause and in that regard has not committed any unfair labor practices within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes.
7. That the Respondent American Federation of Musicians of the United States and Canada did not in any way attempt to coerce, intimidate or induce Frank Charles, Cherie Lee, Richard Spilman or any other employer to interfere with the legal rights of Richard Krause and therefore has not committed any unfair labor practices within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

### ORDER

IT IS ORDERED, that Milwaukee Musicians Association Local 8, its representatives, officers and agents shall immediately:

1. Cease and desist from enforcing or threatening to enforce any provisions of its Constitution, By-laws or other regulations which purport to require that employer-members, or members who sometimes act as employers, only employ musicians who are members of Milwaukee Musicians Association Local 8.

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

a. Physically expunge paragraphs 2 and 4 of Article XII from its By-laws and all copies thereof in its possession, or, in the alternative, add a provision to each of said paragraphs which indicates that the provisions contained therein shall not be effective until such time as said provisions have been authorized by a referendum conducted by the Wisconsin Employment Relations Commission.

b. Notify all its employer-members, or members who sometimes act as employers, that it will not enforce or threaten to enforce the provisions of paragraphs 2 and 4 of Article XII of its By-laws until such time as said provisions have been authorized by a referendum conducted by the Wisconsin Employment Relations Commission by either mailing a copy of the notice attached hereto marked "Appendix A" to said members at their last known address of record or by publishing said notice conspicuously in the next edition of any publication which is regularly sent to all its membership.

c. Post the notice attached hereto marked "Appendix A" in a conspicuous place on its premises where notices to its membership are usually posted. Said notice shall remain posted for thirty (30) days and reasonable steps shall be taken by Milwaukee Musicians Association Local 8 to insure that said notice is not altered, defaced or covered by any other material.

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

IT IS FURTHER ORDERED that Dick Spilman, shall immediately:

1. Cease and desist from refusing employment to Richard Krause or any other musician or otherwise discriminating against Richard Krause or any other musician in regard to hiring, tenure or other terms and conditions of employment because of their non-membership in Milwaukee Musicians Association Local 8 except as permitted by Section 111.06 (1)(c)1 of the Wisconsin Statutes.

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

a. Notify Richard Krause, in writing, that he will not refuse employment or otherwise discriminate with regard to hiring, tenure or other terms and conditions of employment in violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes because of Richard Krause's non-membership in Milwaukee Musicians Association Local 8 if, in the future, said Richard Krause seeks employment with him.

b. Upon written demand received within twenty (20) days of the date of this Order, pay Richard Krause a sum of money equal to the wages Richard Krause would have earned playing for him as a sideman-drummer at the Red Carpet Inn from May 22, 1972 until September 9, 1972, less any money Richard Krause may have earned or received during said period which he would not have otherwise earned or received had Spilman not refused employment to Richard Krause because of Krause's non-membership in Milwaukee Musicians Association Local 8.

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

Dated at Madison, Wisconsin, this *23d* day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *George R. Fleischli*  
George R. Fleischli, Examiner

"APPENDIX A"

N O T I C E

Pursuant to an Order of an Examiner of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify ALL MEMBERS OF MILWAUKEE MUSICIANS ASSOCIATION LOCAL 8 WHO EMPLOY SIDEMEN OR SOME-TIMES EMPLOY SIDEMEN THAT:

WE WILL NOT threaten to enforce or enforce paragraphs 2 and 4 of Article XII of the By-laws or any other provisions of the Constitution, By-laws or Regulations of this organization which provide that members of Milwaukee Musicians Association Local 8 may not employ musicians who are not members of Milwaukee Musicians Association Local 8 against any member of Milwaukee Musicians Association Local 8 unless the enforcement of said provisions has first been authorized by a referendum conducted by the Wisconsin Employment Relations Commission.

WE WILL physically expunge paragraphs 2 and 4 of Article XII of the By-laws from all copies of the By-laws in our possession, or, in the alternative, we will add a provision to each of said paragraphs indicating that the provisions contained therein shall not be effective until such time as said provisions have been authorized by a referendum conducted by the Wisconsin Employment Relations Commission.

Milwaukee Musicians Association  
Local 8

By \_\_\_\_\_  
[Principal Officers]

Dated \_\_\_\_\_



MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant Krause alleges that Respondent Local 8 and Respondent AFM have, by maintaining paragraphs 2 and 4 of Article XII of the By-laws and threatening their enforcement, coerced, intimidated and induced certain employers including Dick Spilman and Ron Martinson in violation of Section 111.06(2)(b) of the Wisconsin Statutes and that, as a result of said violations, Respondent Spilman and Martinson discriminated against Krause because of his non-membership in Local 8 by refusing to hire Krause in violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes. In addition, Krause argues that Respondent Local 8 and Respondent AFM have acted together as an "association of employers" to deny employment to the Complainant solely because of his non-membership in Local 8 in violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes. In a similar vein, Krause alleges that Respondent Local 8 and Respondent AFM have, by maintaining and threatening to enforce certain By-laws which apply exclusively to employer-members and require employer-members to discriminate against non-members in their employment practices, violated Section 111.06(2)a and Section 111.06(2)b of the Wisconsin Statutes.

The Respondent Unions contend that there is insufficient evidence of record to support a finding that either Respondent Union has coerced Spilman, Martinson or any other employer into refusing employment to Krause or terminating Krause's employment because of his non-membership in Local 8 and that the By-laws in question are established for the purpose of preserving work for local residents and not for any illegal purpose. According to the Respondent Unions, any action taken by agents of Respondent Local 8 in this case amounts to efforts at persuasion rather than "coercion, intimidation or inducement" within the meaning of Section 111.06(2)(b) of the Wisconsin Statutes. The Respondent Unions contend that the Complainant's dissatisfaction is with the residency requirement which constitutes an internal union dispute and that he is required by Wisconsin law and Federal law to exhaust the internal remedies at his disposal before seeking legal redress. At the hearing, the Respondent Unions raised some question with regard to the alleged employer status of the band leaders involved; however, this point was not argued in their brief.

Respondent Spilman represented himself at the hearing and did not make an oral or written argument even though he was afforded an opportunity to do so.

DISCUSSION

The evidence and arguments in this case raise several legal issues which were presaged by the Examiner's decision in the case of the Wisconsin Orchestra Leaders' Association, et al. (WOLA) 1/ In that case, the Complainants alleged that by "adopting, promulgating, enforcing and maintaining" some of the same By-laws referred to herein, the Respondent unions violated a number of the provisions of Section 111.06(2) including those provisions alleged herein. In that case, the Examiner found that there was no "controversy concerning unfair labor practices" to which the complainants were a "party in interest" and dismissed so much of the complaint dealing with those allegations. In his memorandum the Examiner stated in relevant part:

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1/ (8392-A) 3/70, aff'd. (8392-D) 11/70.

" . . . If and when they administer any of their rules so as to commit any unfair labor practice, any proper party may file a complaint with regard thereto within the one-year period. It is not a proper function of this quasi-judicial agency to conduct an investigatory procedure even in the form of a hearing or trial.

. . . .

Rules are seldom offensive unless they are enforced, or their enforcement is threatened. If such enforcement would be an unfair labor practice, usually so is the threat of same and such a threat may be complained of, by a party in interest in a timely manner." 2/

#### Alleged Employer Status

There would appear to be no question that Spilman and the other band leaders were acting as employers when they hired sidemen to work for them under their contracts with the various purchasers of musical performances. The facts in this case do not vary in any significant way from facts in the WOLA decision wherein it was determined that the band leader was the employer of his sidemen. As band leader Spilman and the other band leaders entered into contracts, in the capacity of independent contractors, to provide musical performances, with the understanding that they would hire and pay their own sidemen over whom they maintained control. Because of the uniqueness of the trade practices existing among musicians affiliated with the AFM, Spilman and the others were not asked or expected to enter into a collective bargaining agreement covering the wages, hours and working conditions of their employees. Even so, the wages, hours and working conditions applicable to their employees were understood by them to be those wages, hours and working conditions required by the Constitution, By-laws and Regulations of Local 8 including the minimum "price list" established by it.

The practice of unions affiliated with AFM of setting wages, hours and working conditions by action of their membership (which includes employer-band leaders and musicians who sometimes act as employer-band leaders) was found to be a legitimate means of settling labor disputes and therefore exempt from anti-trust legislation in the Carrol case, 3/ which was extensively discussed in the WOLA decision. As the Examiner pointed out in the WOLA decision, neither the uniqueness of the Respondents' trade practices nor the exemption enjoyed by the Respondents from anti-trust legislation exempts the Respondents from the application of the provisions of the National Labor Relations Act or the Wisconsin Employment Peace Act. To the extent that the Respondent Unions have attempted in this case to secure and enforce a form of union security, their efforts must not contravene the provisions of the Wisconsin Employment Peace Act; and to the extent that Respondent Spilman has agreed to a form of union security by virtue of his membership in Respondent Local 8, he is subject to the provisions of the Wisconsin Employment Peace Act applicable to all Wisconsin employers.

#### Alleged Coercion, Intimidation and Inducement

The evidence of record clearly establishes that Respondent Local 8 has threatened to enforce certain By-laws which, in essence, forbid

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2/ Id. at page 14.

3/ AFM v. Carrol, 391 U.S. 99, 68 LRRM 2230 (1968).

band leader-members to employ musicians who are not members of Local 8, in an effort to cause said employers to interfere with Krause's legal right not to join Local 8. Although Local 8 took no action in the two instances where Krause was employed as a sideman-drummer with the "traveling band" nominally led by a Bob LaPaz, the evidence indicates that Local 8 was probably aware of the subterfuge <sup>4/</sup> and Krause was advised by Spilman that Local 8 would "prefer" that Spilman be listed as the band leader and that he employ musicians who were members of Local 8.

The first occasion on which Krause overtly took employment with a band leader who was a member of Local 8 was the occasion of his employment by Frank Charles for one weekend at the Pfister. Even though it is clear that Krause voluntarily left his employment with Charles, Charles was subsequently called before Local 8's Executive Board and asked to explain why he had employed a drummer who was not a member of Local 8. This action on the part of Local 8 amounted to a threat to enforce the By-laws in question even though it did not actually cause Charles to discriminate against Krause. <sup>5/</sup>

In the case of Krause's employment with Cheri Lee, Local 8 again threatened to enforce the By-laws in question by the action of its agent, Couey, of advising Cheri Lee that Local 8 would tolerate her temporary employment of a non-member due to her exceptional situation but that she would be expected to terminate Krause's employment upon the return of her regular drummer. Again, because of intervening events this action on the part of Local 8 did not result in a completed act of discrimination; however, it did constitute economic coercion in the form of a threat to enforce the By-laws for the purpose of persuading an employer to interfere with Krause's legal rights.

Finally, Local 8, by the action of its agent, Couey, on or about May 1972 and on at least one other occasion in June 1972, advised Respondent Spilman that he would be in violation of the By-laws of Local 8 if he employed Krause. Spilman, who was generally aware of the prohibitions contained in the By-laws with regard to the employment of musicians who were not members of Local 8, felt that it would not be "healthy" for him to violate those provisions and did in fact discriminate against Krause by refusing to hire him initially and refusing to hire him as a replacement drummer because of his non-membership in Local 8.

The conduct of Local 8 in these situations clearly amount to "coercion, intimidation or inducement" rather than mere "persuasion" since the consequences of a violation of the By-laws included the possibility of fines or expulsion from the Union. <sup>6/</sup> The coercive

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<sup>4/</sup> LaPaz was required to file a copy of the contract with the Union and when Frank Charles called about employing Krause for a weekend engagement the party on the other end indicated that the Union was aware of the arrangement.

<sup>5/</sup> It is not necessary to show that conduct which is inherently coercive actually had the intended result. Allis-Chalmers Mfg. Co. 243 Wis. 332 6/43.

<sup>6/</sup> This is not a case of protected free speech as was found to be the case in WERB v. Journeymen Barbers 272 Wis. 84 (1956). The threatened enforcement of the By-laws in question is more akin to the conduct which was found to be "coercion" in the companion case of WERB v. Journeymen Barbers 272 Wis. 95 (1956). The statute contemplates economic coercion as well as other forms. Sears Roebuck & Co. 246 Wis. 26 12/42.

effect of a threatened fine is obvious and the coercive effect of threatened expulsion, though less obvious, is even more profound. Expulsion from Local 8 would make it difficult if not impossible for Spilman and the others to employ any musicians who are members of Local 8 (Article XII, paragraph 5 of the By-laws provides that members may not work for non-member band leaders) or holding themselves out as "Union" employers to the public. Although it may be true, as the Respondents contend, that "non-Union" musicians are able to perform and do perform in the Milwaukee area, they would clearly have suffered economic harm by virtue of their "non-Union" status.

### Alleged Discrimination

The Examiner is satisfied that only Spilman actually refused to employ Krause because of Krause's non-membership in Local 8. Even though Spilman was, in the Examiner's view, "coerced, intimidated and induced" into refusing employment to Krause by the action of Local 8, his refusal to hire Krause constituted a violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes.

Section 111.06(1)(c)1 provides that an employer may enter into and enforce an "all-union agreement" if it complies with the statutory requirement that the agreement be authorized by a referendum among his employees. In this case, Spilman's undertaking (as a member of Local 8) to hire musicians who are members of Local 8 amounted to an agreement to maintain a closed-shop (or a union-shop with no waiting period) 7/ which constitutes an "all-union agreement" within the meaning of Section 111.02(1)(a) of the Wisconsin Statutes. Because there is no showing that Spilman's activities as an employer are sufficient to bring him within the jurisdiction of the National Labor Relations Act, as amended, his undertaking to maintain a closed-shop would appear to be valid and enforceable under Wisconsin law if such agreement had been authorized by a referendum.

Spilman, who was not represented by Counsel at the hearing herein and did not file a brief, might have argued that his undertaking to maintain a closed-shop and his enforcement of that undertaking did not constitute a violation of the statute in question if he was able to show that a referendum had been conducted or that he is exempt from the referendum requirement. The Examiner has consulted the records of the Commission and hereby takes official notice that no referendum has been

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7/ A "closed-shop" which has been defined as "a union-security arrangement where the employer is required to hire only employees who are members of the union" in Roberts, Dictionary of Industrial Relations (BNA 1971) is not illegal per se under Wisconsin law. Wisconsin employers who are covered by the provision of the National Labor Relations Act are prohibited from entering into "closed-shop" agreements or "union shop" agreements which do not include a statutory waiting period by the provisions of Section 8(a)(3) of that Act. Even though the closed-shop is not illegal under Wisconsin law if authorized by a referendum, a union may not "unreasonably refuse" to receive as a member any employee of the employer with whom the agreement is made. This latter provision appears to make the closed-shop more akin to a union shop without a statutory waiting period. Because the "closed-shop" agreement herein is found to be invalid it is unnecessary to determine if Respondent Local 8 has "unreasonably refused" membership to Krause because he is not a resident of the area covered by Local 8's jurisdiction. It is undisputed that Local 8 had no other reason for denying membership to Krause.

conducted authorizing Spilman to enter into an all-union agreement. 8/ In the absence of a valid referendum authorizing an all-union agreement or a statutory exception to the referendum requirement, the Examiner is compelled to conclude that Spilman has, by his enforcement of his undertaking to maintain a closed-shop, violated the provisions of Section 111.06(1)(c)1 and Section 111.06(1)(a) of the Wisconsin Statutes.

#### Alleged Association of Employers

There is not sufficient evidence of record in this case to support the conclusion that the Respondent Unions have acted together as an "association of employers". Although it is true and there is some evidence of record to establish that Respondent Local 8 has invited into membership a number of employer-members and has a number of members who sometimes act as employers, it would be oversimplification and contrary to the provable facts to conclude that the Respondent Unions are an "association of employers". As the Carrol 9/ case pointed out the activities of the Respondent Unions complained of herein are essentially those of resolving labor disputes. Because of the somewhat unique trade practices extant in the music industry in the case of short term engagements it requires a certain amount of Procrustean analysis to fit some of the Respondent Unions' operations within the framework of the labor laws of the United States and the State of Wisconsin which are in large part based on an industrial model. Even so, under the laws administered by this Agency, employers are free to join the Respondent organization 10/ and participate in the establishment of wages, hours and working conditions through internal union procedures in lieu of more conventional collective bargaining methods.

By virtue of their membership, employer-members undertake to abide by the By-laws which apply to employers and their agreement to do so would appear to be enforceable to the extent that the By-laws are not contrary to law. This process is similar to the process where numerous small contractors in the construction industry (many of whom are also union members) choose to adhere to the terms of a collective bargaining agreement which has already been negotiated with their larger competitors or with associations of employers. One major difference is that under this system, the employers are guaranteed participation in the establishment of the terms of the "agreement" by virtue of their membership and they are free to terminate their "agreement" if they find the terms to onerous, by terminating their membership.

In fact, Respondent Local 8 functions more like a collective bargaining mechanism comprised of employers and employees and encompassing all of the functions of a union as well as an employer association. The

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8/ Any party may contest the validity of this notice within twenty days of the Order herein in accordance with Sec. 227.10(3) of the Wisconsin Statutes. Because of the ephemeral nature of Spilman's employer status and the potential turnover of his employees, the referendum requirement would seem to pose several practical problems particularly with regard to voter eligibility if the Commission attempts to carry out the legislative intent of the referendum requirement. It was no doubt for similar reasons inter alia, that the Legislature saw fit to make an exception for employers engaged in the building and construction industry. Because the Statute sets forth no exception for musicians engaged in the practice of their profession, the Commission would have to attempt to overcome those practical problems if a petition for a referendum were filed by Spilman or by Local 8 or by the band leader-members of Local 8.

9/ Supra, Note 3.

10/ Section 111.06(1)(b) of the Wisconsin Statutes. It is of course an unfair labor practice for a union to coerce or intimidate an employer to induce him to do so under Section 111.06(1)(m) of the Wisconsin Statutes.

fact that an agreement has been reached through that mechanism to maintain a closed-shop does not, by itself violate any of the provisions of Section 111.06 of the Wisconsin Statutes; however, to the extent that the closed-shop agreement has not been authorized by a referendum it is void and unenforceable under Wisconsin law. 11/

#### The Violations and the Appropriate Remedy

It is clear that the Respondent Local 8 has violated Section 111.06(2)(b) of the Wisconsin Statutes by "coercing, intimidating and inducing" several band leaders including Respondent Spilman and that such action in Spilman's case caused him to discriminatorily refuse to hire Krause in violation of Section 111.06(1)(c) and Section 111.06(1)(a) of the Wisconsin Statutes. This resulted in Krause's loss of an employment opportunity to perform as a sideman-drummer for Respondent Spilman at the Red Carpet Inn.

Although there is insufficient evidence to support a finding that Local 8 "coerced, intimidated or induced" Ron Martinson or that Martinson actually discriminated against Krause, 12/ Martinson was aware of Krause's problem with Local 8 and demonstrated his intent to discriminate against Krause in the future. Martinson was aware of the problem Krause had experienced with Local 8 because of their prior employment together and because he was aware of Spilman's unsuccessful efforts to employ all three members of the trio that backed up Cherie Lee.

It appears then that Local 8's threatened enforcement of paragraphs of the By-laws in question has caused one employer to deny employment to Krause and has convinced several other employers that they ought to deny employment to Krause. In addition, there is some evidence that the violations have radiated beyond the immediate recipients of the threats and convinced at least one other employer who was aware of the problem that he ought to refuse employment to Krause. Under these circumstances the Examiner is satisfied that it is appropriate to enter an order directing Local 8 to cease and desist from maintaining the By-laws in their present form or threatening to enforce or enforcing the By-laws and to take such affirmative action as is necessary to advise other employer-members that it will not threaten to enforce or enforce said By-laws until such time as the referendum provisions of Section 111.06(1)(c) have been complied with. 13/

In addition Krause is entitled to be made whole for any loss of wages that he may have suffered by virtue of these violations. In this regard the Complainant does not ask that Spilman be made to pay any backpay but argues that the Respondent Unions should be required to pay any backpay due and owing. The Respondent Unions contend that the law provides that an employer who discriminates in violation of Section 111.06(1)(c) is required to make an employee whole for any loss suffered by virtue of such violations.

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11/ See Unicare cases (11809, 11810, 11812, 11813, 11814, 11815, 11822, 11823, 11825 and 11826) 5/73. The fact that an employer who is covered by the provisions of the National Labor Relations Act probably violates Section 8(a)(3) of that Act by entering into a closed-shop agreement is immaterial since there is no allegation that the employer herein is subject to the provisions of that Act and that question is beyond the jurisdiction of the WERC.

12/ Any such violation on Martinson's part would be of no practical consequence herein since he was not named a respondent in this proceeding and therefore the order could not extend to him.

13/ A mere agreement to maintain a closed-shop is not a violation of Section 111.06(1)(c) if the agreement provides that it is conditioned on compliance with the referendum requirement. See Unicare cases, supra Note 11.

The question raised is not one of first impression in that the Wisconsin Supreme Court has already had occasion to consider a similar question and has held, contrary to the holding of the Wisconsin Employment Relations Board that the WEPA provides no statutory authority to order a union to partially reimburse an employer who is required to pay employees backpay who had been discriminatorily discharged at the insistence of the union. 14/ Therefore it would appear that the Commission is without statutory authority to order a union to help make whole an employee who has lost wages as a result of a discriminatory refusal of employment even though the discrimination may have been accomplished at the insistence of the union. If it were not for this precedent the Examiner might attempt to fashion a different remedy. 15/

Because the Complainant is legally entitled to backpay from Spilman for the wages he lost as a result of the discrimination even though he has not asked for such relief, the Examiner has entered an order that Spilman make Krause whole upon written demand received by Spilman within 20 days of the date of this Order.

Dated at Madison, Wisconsin, this **23d** day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli  
George R. Fleischli, Examiner

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14/ WERB v. International Union etc. 245 Wis. 417, 435 (1944). See also Marathon Corp. (4187-A) 11/56.

15/ The rule is apparently otherwise in proceedings before the NLRB. See e.g. Acme Mattress Co. 91 NLRB 1010, 26 LRRM 1611 (1950) where the employer and union were held jointly and severally liable.