STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 122, HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, AFL-CIO, Complainant, vs. SPENCER FRANK FOOD SERVICE, INC., Respondent.	Case II No. 16708 Ce-1483 Decision No. 11774-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Frank & Hiller, Attorneys at Law, by Mr. M. P. Frank, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Marshall L. Gratz, a member of its staff, to act as an examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Sec. 111.07(5) of the Wisconsin Employment Peace Act, and a hearing on said complaint having been held at Milwaukee, Wisconsin on June 6, 1973 before the Examiner, and the Examiner having considered the evidence and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, referred to herein as Complainant, is a labor organization having offices at 723 North 3rd Street, Milwaukee, Wisconsin; and that Alan J. Craskamp and Ben Barwick are authorized bargaining agents of Complainant.

2. That Spencer Frank Food Service, Inc., referred to herein as Respondent, is an employer having offices at 4435 West Fond du Lac

Avenue, Milwaukee, Wisconsin; that Mrs. Florence Frank is President of Respondent; and that Mr. Harley Frank is Vice President-Secretary of Respondent.

3. That at all times material hereto and prior to February 5, 1973, Canteen Corporation operated the Cafeteria at the Administration Building of the Milwaukee Board of School Directors, referred to herein as the Cafeteria, pursuant to a service contract let through a bid procurement procedure; that Canteen Corporation and Complainant were parties to a series of collective bargaining agreements covering a bargaining unit consisting of all Canteen Corporation employes employed at the Milwaukee School Board Administration Building, the most recent of which agreements, referred to herein as the Canteen Agreement, had an expressed duration of November 15, 1971 to and including November 14, 1973 and thereafter as provided therein; and that Canteen Corporation employed approximately five employes in its operation of the Cafeteria, which operation involved the on-site preparation and service of hot meals primarily to the persons working in said Administration Building.

4. That in September, 1972, the Milwaukee Board of School Directors put the operation of the Cafeteria up for bids by issuing a request for bids; that said request specified the numbers of customers and times of School Board employe eating periods but permitted bidders to determine and describe the form of food service operation offered and afforded the opportunity for negotiation of the details of a service contract between the School Board and a bidder and permitted renegotiation of certain of the terms of a service contract during the term thereof; but that said request did not give notice of the existence of a collective bargaining agreement between Complainant and Canteen Corporation; and that on January 30, 1973 Respondent entered into an agreement with the Milwaukee Board of School Directors to operate the Cafeteria commencing on February 5, 1973.

5. That Respondent commenced operation of the Cafeteria on February 5, 1973, immediately upon the termination of Canteen Corporation's operation thereof; that within two or three weeks of that date, Respondent had set about to hire a complement of employes for the Cafeteria, and, in doing so, offered employment to two persons who had been employed by Canteen Corporation at the Cafeteria immediately theretofore; of those two, one employe chose to remain in the employ of Canteen Corporation, and the other worked for Respondent for a few days and voluntarily terminated thereafter; that in offering employment at

the Cafeteria, Respondent established initial terms and conditions of employment similar to those paid by it to its employes at other locations, which terms and conditions of employment were, for some employes, higher, and for other employes, lower than those which were or would have been paid under the terms of the Canteen Agreement; that Complainant has not proven by a clear and satisfactory preponderance of the evidence that any former employe of Canteen Corporation was forced to terminate employment with Respondent on account of the differences between Respondent's initial terms of Cafeteria employment and those provided in the Canteen Agreement.

6. That Respondent has operated the Cafeteria with five employes except during the first two or three weeks of operations when employes from other of Respondent's locations assisted in start-up activities; that Respondent's operation of the Cafeteria has served the same clientele, utilized the same School Board equipment and dishes, and operated at the same general times as did Canteen Corporation, but Respondent has prepared the food served at a separate plant and Respondent has utilized none of Canteen Corporation's equipment, supplies or assets and has had no business relationship with Canteen Corporation with respect to the Cafeteria.

7. That Barwick and Graskamp met with Mrs. Frank on February 6, 1973, at which time they asserted that they represented the Cafeteria employes, demanded that Respondent honor and execute the Canteen Agreement and left a copy thereof with Mrs. Frank; and that said demand was the first knowledge Respondent had of the existence of the Canteen Agreement or of Complainant's claim to represent the Cafeteria employes.

8. That Complainant's February 6, 1973 claim to represent the Cafeteria employes was not supported by its agents' prior knowledge that a majority of the employes then employed by Respondent at the Cafeteria had manifested a desire for representation by Complainant.

9. That Graskamp and Barwick met and negotiated with one or both of the Franks about the Canteen Agreement on February 15, March 7, once between March 7 and March 22 and on March 22, 1973; that during those discussions, Respondent's representatives never questioned the majority status of Complainant and conducted themselves in such a manner as to confer voluntary recognition upon Complainant as the representative of a majority of Respondent's employes employed at the Cafeteria.

10. That on March 22, 1973, Graskamp and Barwick presented the Franks with copies of the Canteen Agreement retyped with Respondent's

name in place of Canteen's; that at that meeting, the Union reiterated an earlier offer to accept any insurance carrier designated by the Respondent so long as insurance benefits remained the same; that the Union further dropped its demand for a retroactive effective date and indicated assent to the parties' agreement being made effective on March 26, 1973, the following Monday; at that meeting it was orally agreed that Harley Frank would determine and designate the carrier desired by the Employer and return the copies of the retyped agreement complete with authorized signatures on behalf of the Respondent.

11. That subsequent to March 22, 1973, Respondent has refused to acknowledge the oral agreement reached between the parties as binding upon it and has failed and refused to sign such agreement in written form.

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

CONCLUSIONS OF LAW

1. That Respondent Spencer Frank Food Service, Inc., by establishing terms and conditions of employment offered and paid to its employes at the Milwaukee Board of School Directors Administration Building did not constructively discharge any former employe of Canteen Corporation at said location and did not, thereby, commit an unfair labor practice in violation of Sec. 111.06(1)(c)1 or any other provision of the Wisconsin Employment Peace Act.

2. That Respondent Spencer Frank Food Service, Inc., by failing and continuing to refuse to execute and comply with the terms of an oral agreement entered into between said Respondent and Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, the voluntarily recognized representative of all employes of said Respondent employed at the Milwaukee Board of School Directors Administration Building, has committed and is committing unfair labor practices within the meaning of Secs. 111.06(1)(d) and (f).

3. That in view of the determination herein that Complainant Local 122, Hotel, Motel, Restaurent Employees and Bartenders Union, AFL-CIO and Respondent Spencer Frank Food Service, Inc. entered into an oral agreement on March 22, 1973 in which said parties agreed that the agreed-upon terms and conditions would not be retroactive, but rather that they would take effect from and after March 26, 1973, the underlying purposes of the Wisconsin Employment Peace Act would not be served by further adjudication of Complainant's additional allegations: 1)

Respondent Spencer Frank Food Service, Inc. unlawfully refused to submit to arbitration the question of what provisions, if any, of the collective bargaining agreement in existence between Canteen Corporation and Complainant on February 4, 1973 are enforceable as against Respondent as an alleged successor to Canteen Corporation and 2) that Respondent violated its duty to bargain collectively by unilaterally establishing, for the period February 5, 1973 through March 25, 1973, terms and conditions of employment for its employes at the Milwaukee Board of School Directors Administration Building which terms and conditions differed from those enjoyed by employes of Canteen Corporation employed at said location immediately prior to February 5, 1973.

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 Respondent Spencer Frank Food Service, Inc., its partners, officers and agents shall immediately:

1. Cease and desist from refusing to execute the terms and conditions of employment agreed upon between itself and Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO on March 22, 1973, and thereby cease and desist from refusing to bargain collectively with said labor organization.

2. Cease and desist from refusing to comply with the terms and conditions of employment agreed upon between itself and Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO on March 22, 1973, and thereby cease and desist from violating the terms of a collective bargaining agreement.

3. Take the following affirmative action designed to effectuate the policies of the Wisconsin Employment Peace Act:

(a) Execute the written form of the oral agreement agreed upon between itself and Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO on March 22, 1973 and deliver a copy of such executed document to said labor organization; Appendix A attached hereto constitutes said written form except that the agreed-upon effective date of March 26, 1973 should be substituted, and Article VII may be modified at said Respondent's discretion so long as the

coverage and benefits provided therein remain equivalent to those set forth in Appendix A.

(b) Comply with the terms and conditions set forth in said written agreement, such compliance including making whole employes for the benefits due them under said agreement for the period from and after March 26, 1973.

(c) Notify the Wisconsin Employment Relations Commission within twenty (20) days after receipt of a copy of the instant Order as to what steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 5th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz

Marshall L. Gratz
Examiner

APPENDIX A

AGREEMENT

between

[illegible] LOCAL UNION

for the employees within the unit of

Milwaukee School Board Administration Building,
Milwaukee, Wisconsin

and

[illegible] OF THE [illegible], AFL-CIO

[illegible], AFL-CIO

November 25, 1972 - December 31, 1973

EX2-MG-6-6-73

AGREEMENT

This Agreement, made and entered into by and between Spencer Frank Food Service, party of the first part, hereinafter referred to as the "Company" and Local 122 of the Hotel, Motel, Restaurant Employees and Bartenders Union, affiliated with American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), party of the second part, hereinafter referred to as the "Union.".

WITNESSETH

ARTICLE I

WHEREAS, It is the desire of the parties of this Agreement to establish and continue a relationship of cooperation whereby the mutual interests of both parties may be promoted by attainment of the highest degree of efficiency so as to produce the best possible quality, and,

WHEREAS, It is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationship between the Company and the Union, and to set forth herein rates of pay, hours of work, and working conditions of employment to be observed between the parties hereto.

NOW, THEREFORE, It is mutually agreed that the following conditions of employment covering within the unit of MILWAUKEE SCHOOL BOARD ADMINISTRATION BUILDING, 5225 West Vliet Street, Milwaukee, Wisconsin, shall become effective.

ARTICLE II

The Company agrees to recognize the Union as the sole and exclusive bargaining representative for all employees of the Company at the location covered by this Agreement, with the exception of Managers, Assistant Managers, Chef Manager, office employees and supervisors. It is understood and agreed that no person or agency other than the Union shall be dealt with or recognized for bargaining in regard to wages, hours, or working conditions of such persons.

ARTICLE III - UNION SECURITY

Section 1. It is understood and agreed that as a condition of continued employment, all persons employed by the Company in the bargaining unit which is the subject of this Agreement shall become members of the Union on the thirty-first (31st) day following the beginning of their employment or the thirty-first (31st) day following the signing of this agreement, whichever is the later; that the continued employment by the Company in said unit shall be conditioned upon the payment of the periodic dues of the Union. The failure of any employee to become a member of the Union not later than the thirty-first (31st) day of employment, or the thirty-first (31st) day after the signing of this agreement, whichever shall be later, shall obligate the Company, upon written notice from the Union to such effect and to the further effect that Union membership was available to such person on the same basis as to other members, to forthwith discharge such person. Further, the failure of an employee to maintain his membership in good standing by his failure to pay the periodic dues of the Union shall, upon written notice to the Company by the Union to such effect, obligate the Company to discharge such person.

Section 2. New employees shall be on probation for the first thirty (30) days. During this probationary period, the Company can discharge the employee, and the Union agrees not to oppose such discharge.

Section 3. There shall be no individual agreements between the Company and the employees other than as contained in these Articles of Agreement.

ARTICLE IV - SENIORITY

It is agreed that the Company shall and does hereby recognize seniority rights according to classification, from the employee's date of hire, and that the employees shall be promoted according to length of service if they are qualified. Company's decision as to qualification is to be final. Layoffs are to be made by seniority within classification, the employee with the least amount of seniority within the given classification

to be laid off. Recall of laid off employees shall be in reverse order of layoff, by classification.

ARTICLE V - STRIKES AND LOCKOUTS

During the term of this Agreement, neither the Union nor any employees, individually or collectively, shall authorize or take part in any unauthorized strike or other interruption or any impeding of production at any operation of the Company covered by this Agreement. Any employee who violates the provision of this section may be discharged from the employ of the Company. The Union agrees that it will not oppose the discharge or discipline of anyone who instructs, leads or induces another employee to take part in any unauthorized strike or work stoppage. The Company agrees that there shall be no lockouts or interference in the terms and provisions of this Agreement.

ARTICLE VI - GRIEVANCE AND ARBITRATION

In case a grievance or complaint arises, the following steps set forth herein shall be followed in this order.

1. A grievance or complaint shall be presented to the Manager.

2. In order for the Company to give consideration to the grievance or complaint, it must be presented to the local manager of the Cafeteria within five (5) days from the date of said grievance or complaint.

3. Should the grievance or complaint not be settled with the manager, a representative of the local Union office shall be called in to assist in settling such difficulty or difference.

4. When a dispute cannot be settled between the Local Union office and the local manager, then the Union shall notify the National Office of the Company, located in Milwaukee, Wisconsin. Such notice shall be given as soon as is practical after it is agreed that a settlement cannot be reached at the local level.

5. Should the dispute not be settled within five (5) days from the date of the above notice referred to in step 4 above by the local Union office and the National officeof the Company, the grievance or complaint arising out of or relating to the interpretation or application of this Agreement may be submitted to arbitration through the Federal Mediation and Conciliation Service, or any other mutually agreed upon Mediation and Conciliation service. The decision of the arbitrator is to be final and binding upon both parties. The cost the arbitrator shall be paid equally by the Company and the Union.

6. If the grievance or complaint is not referred to arbitration within fifteen (15) days after Step 4 is exhausted, the issue shall be considered as closed, unless mutually agreed otherwise.

ARTICLE VII - CHECK-OFF

During the life of this Agreement, the Company agrees to deduct Union membership initiation fees, dues or reinstatement fees levied by the the International Union or local Union in accordance with the Constitution and By-laws of the Union, from the pay of each employee who executes or has executed an "Authorization for Check-off of Dues" form, providing this form meets all the requirements of the Labor Management Relations Act, and said form has been presented to the Company for its files.

ARTICLE VIII - HOURS OF WORK

Section 1. The standard work week shall consist of forty (40) hours, Monday through Friday, and the standard work day shall consist of eight (8) hours. Such standard work week and work day shall be used solely as a basis for computing overtime pay and shall not be construed as a guarantee of any number of hours of work per week or per day, respectively.

Section 2. The Company agrees to pay one and one-half (1½) times the regular rate for all hours worked in excess of eight (8) hours in any work day, all hours worked in excess of forty (40) in any work week, and for work performed on Saturday.

Section 3. Should any of the following listed holidays occur upon a regularly scheduled work day, the employee shall be paid his regularly scheduled day's pay for not working, or two (2) times his regular rate for all hours worked on said holidays, providing the employee has completed his thirty (30) day probationary period prior to the holiday, and otherwise meets the requirements as outlined in Article X of this Agreement.

New Year's Day	Thanksgiving Day
Memorial Day	One-half (½) Day Christmas Eve
Fourth of July	Christmas Day
Labor Day	One-half (½) Day New Year's Eve

ARTICLE IX - VACATIONS

Section 1. Regular employees who have been in the employ of the Company for a period of one (1) year or more shall be deemed to have earned a paid vacation for each twelve (12) months of continuous service as indicated in Section 2 of this Article. Vacations shall be with pay at the employee's current hourly rate, based on the average number of hours worked per week in the six (6) months preceding the date of vacation.

Section 2. Vacation allowances are as follows:

One year but less than three years' service - One (1) week
Three years but less than ten years' service - Two (2) weeks
Ten or more years' service - Three (3) weeks

ARTICLE X - HOLIDAYS

Each employee shall be entitled to the following holidays: New Year's Day, Memorial Day, Fourth of July, Labor Day, Thanksgiving Day, One-Half (½) day Christmas Eve, Christmas Day, and One-half (½) day New Year's Eve, off with pay at their average pay, provided they have been in the employ of the Company Thirty (30) days or longer, and the employee would have been scheduled to work if the day had not been observed as a holiday. In addition each employee shall be entitled to one (1) personal day off with pay each year of the agreement. Said day off must be with the approval of management, and must be requested sufficiently in advance to enable management to plan for the continued efficient operation of the cafeteria. The employee must have worked the last scheduled work day prior to, and the next scheduled work day after such holiday not worked. In case of absence on either of these days, the employee shall not be paid for such holiday not worked unless such absence was due to illness of employee and supported by a recognized physician's statement; and provided further that if an employee fails to report to work on any of the holidays mentioned above as requested to do so by the Company, unless on vacation, he shall not be paid for such holiday not worked.

ARTICLE XI - HOURLY WAGE RATES

The established wage rates are as follows:

Effective November 15, 1972:

Classification	Start	30 Days	90 Days
Cooks Helper	$1.91	$1.99	$2.08
General Cafeteria	1.61	1.69	1.90

ARTICLE XII - INSURANCE AND BENEFITS

The employer agrees to be bound by and hereby assents to all of the terms of the Trust Agreement creating the Milwaukee Hotel Industry Health and Welfare Fund, all of the rules and regulations heretofore and hereafter adopted by the trustees of said Trust Fund pursuant to such Trust Agreement and all of the actions of the trustees in administering such Trust Fund in accordance with the Trust Agreement and rules adopted. The employer hereby accepts as employer trustees the present employer trustees appointed under such Trust Agreement and all such past or succeeding employer trustees as shall have been or will be appointed in accordance with the terms of the Trust Agreement.

The employer agrees to contribute to the account of the Hotel and Restaurant Workers of Milwaukee Welfare Benefit Plan at the Bank of Commerce, 570 W. Wells Street, Milwaukee, Wisconsin, the sum of eighteen dollars and seventy-five cents ($18.75) per month for each employee covered by this agreement who meets the eligibility requirements listed below. The Company agrees to bear any increase in the premium for the present insurance program during the life of the agreement.

1) Six (6) months of service with any employer in the hotel and restaurant industry in Milwaukee County. After an employee has once served six (6) months with any such employer, he shall thereafter immediately be eligible to have contributions made to the Fund on his behalf by his current employer from his first day of employment with such employer, provided he is otherwise qualified.

2) Employment regularly three (3) or more days a week with an employer who is a party to this Agreement.

The employer shall continue to make the above contributions for such employees for a period of one (1) year from the time the employee becomes disabled by said sickness, provided such employee furnished satisfactory evidence of such disability.

ARTICLE XXIII - SICK LEAVE

After the completion of one (1) full year of service, and employee shall be credited with three (3) days/sick leave.

After the completion of two (2) full years of service, an employee shall be credited with an additional three (3) days sick leave.

In the event an employee entitled to such sick leave with pay is absent from work because of a bona fide illness of a nature which would reasonably prevent performance of his regular duties, he shall receive, upon proper written application, one (1) day's straight-time pay at his regular straight-time rate, for each regular work day beginning with the second day of absence he is so absent during each illness but not in excess of the total number of days of sick leave standing to his credit at the beginning of such absence. Upon return to work, sick leave shall be re-accumulated at the rate of one-half (½) day of each month of employment thereafter, up to the maximum accumulation of three (3) days for those employees with service of one (1) year but less than two (2), and up to a maximum accumulation of six (6) days for those employees with two or more years service.

Unused sick leave may be carried over from year to year only in the manner described herein, but shall not be applied at any time in the form of termination or vacation pay, nor as compensation for any purpose other than for absences occasioned by bona fide illness as defined above.

ARTICLE XXV - BEREAVEMENT PAY - DEATH IN FAMILY

An employee who has completed one (1) year's service will be granted up to a three (3) day leave of absence in the event of death in the immediate family. For purposes of this paragraph, a member of the

immediate family shall mean only the persons who occupy the relationship to the employee of parents, spouse, sisters, brothers, children, mother-in-law and father-law. In the event of leave of absence for the death in the immediate family, the employee shall be paid his regular straight-time hourly rate for his scheduled working hours on any day during such three (3) day leave on which he would otherwise have been scheduled to work.

No employee shall be paid under the provisions of this paragraph where (a) the employee does not attend the funeral of the deceased relative or (b) the employee fails upon request to furnish the Company with reasonable proof of death and evidence of the employee's attendance at the funeral.

ARTICLE XV - MISCELLANEOUS

Section 1. MEALS: All employees shall be furnished one (1) wholesome meal each day they work, without cost to the employee. No employee shall be compelled to work more than five (5) hours without a meal period.

Section 2. CALL-IN: When the Company orders an employee to report for work, or fails to notify an employee not to report for work for any reason, and said employee is not permitted to work, the Company shall pay the employee a minimum of four (4) hours' pay.

Section 3. PAY DAY: Employees shall be paid weekly.

Section 4. BREAKAGE: Unavoidable or accidental breakage or destruction of merchandise or equipment shall not be charged against an employee.

Section 5. Employees are not to smoke while on duty, except in designated areas.

Section 6. If regular uniforms are required, it is agreed that the Company shall, at its own expense, furnish and maintain said uniforms. The employees on their part, however, are to launder and maintain nylon uniforms if furnished, and are to wear same only in the course of their duties during regular working hours.

Section 7. Space on the bulletin board shall be provided for use by the

Union for official Union notices of Union meetings, Union recreational and social affairs, Union elections, etc.

Section 8. Employees must be in uniform at the beginning of the shift and at the end of the shift.

ARTICLE XVI - NON-DISCRIMINATION

The Company and the Union agree to comply with Title VII of the Civil Rights Act of 1964 and Executive Order 11246, which prohibits discrimination because of race, sex, color, creed, political or religious affiliation or national origin.

ARTICLE XVII - DURATION

This Agreement shall be in full force and effect from November 15, 1971, to and including November 14, 1973, and shall automatically continue in full force and effect for yearly periods thereafter, unless notice is given in writing by either party, the Company or the Local Union, to the other party, at least sixty (60) days prior to November 14, 1973, or any yearly anniversary date thereafter, indicating its desire to modify, amend or terminate this Agreement.

Any such notice shall specify the text of any proposed modifications or amendments, and the party giving it shall otherwise follow the provisions of Section 8 (d) of the Labor Management Relations Act, 1947.

It is understood that the authority of this agreement is Local Union #[illegible], a subordinate local union of the Hotel and Restaurant Employees and Bartenders International Union, which is affiliated with the American Federation of Labor and the Congress of Industrial Organizations.

IN WITNESS WHEREOF, the said Company has hereunto affixed its hand and signature and the within named Union has affixed its hand and seal in behalf of its members as duly authorized officers of said Union.

SANICEN FRANK FOOD SERVICE

By_____

By_____

By_____

Date_____

HOTEL, MOTEL, RESTAURANT EMPLOYEES & BARTENDERS UNION, LOCAL [illegible], AFL-CIO

By_____

By_____

By_____

Date_____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant Complaint was filed on April 16, 1973. It alleges that Respondent has violated Secs. 111.06(1)(a), (c)1, (d) and (f) of the Wisconsin Employment Peace Act. [1/] The substance of Complainant's allegations are detailed in Positions of the Parties section below. The instant Complaint case was consolidated for hearing with Petitions for Election and Referendum filed by Respondent on March 30, 1973. [2/] Hearing was held on May 6, 1973, at which time Respondent withdrew the aforesaid Petitions [3/] and entered its Answer orally on the Record. In its Answer, Respondent denies that it had committed or was committing any unfair labor practice.

After transmittal of the transcript of the proceedings to the parties on September 5, 1973, the parties each submitted a brief and Complainant a reply brief, the last of which was received by the Examiner on October 22, 1973.

The factual background is set forth in the Findings of Fact and requires no further elaboration herein.

POSITIONS OF THE PARTIES

The Complainant argues as follows:

1. That representatives of Complainant approached Respondent on February 6, 1973, claimed to represent the Cafeteria employes, presented bargaining demands upon Respondent (in the form of a demand that Respondent sign the Canteen Agreement), bargained with Respondent with each side moving from its initial position, and reached an oral agreement on March 22, 1973 with the Franks; and that Respondent has refused and failed to sign that agreement in written form, thereby violating

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[1/] During the course of the hearing, Complainant sought to amend its Complaint to conform to Mrs. Frank's testimony concerning certain supervisory interrogations of employes concerning membership in Complainant. Such motion was withdrawn, however, when it was stipulated that Respondent would post a mutually agreeable notice to the employes concerning such conduct.

[2/] Case I, No. 16664, E-2789, R-5476

[3/] A formal dismissal thereof followed. Dec. No. 11925 (6/73)

Sec. 111.06(1)(d) of WEPA. [4/]

2. That since Respondent had no good-faith doubt as to Complainant's majority status, Respondent was subject to the duty to bargain in good faith ". . . upon its taking over of the cafeteria . . .", and that, therefore, Respondent committed a refusal to bargain in violation of Secs. 111.06(1)(d) and (1)(a) and discouraged membership in Complainant in violation of Sec. 111.06(1)(c)1 by engaging in bargaining sessions with an admitted intent to delay agreement, by unilaterally changing the wages and other conditions of employment that had existed for employes of the Cafeteria prior to February 5, 1973 and by forcing the constructive discharge of certain former Canteen employes by its unilateral changes in their wages and working conditions.

3. That in view of the relevant similarity and continuity of operations across the change in Cafeteria operators, Canteen to Respondent, Respondent is a "successor employer" such that it has a duty to arbitrate at Complainant's request the question of which, if any, of the provisions of Complainant's agreement with Canteen are applicable and binding upon Respondent; and that by refusing Complainant's request that it submit to such arbitration, Respondent violated Sec. 111.06(1)(f).

By way of remedy, the Complaint requests the following:

> "WHEREFORE, Complainant demands that this Commission order the Employer-Respondent:
>
> 1. To recognize Complainant as the collective bargaining representative of its employees at the Milwaukee School Board Cafeteria.
>
> 2. To acknowledge, sign and comply with the collective bargaining agreement covering these cafeteria employees.
>
> 3. To reinstate all employees who were forced to terminate as a result of the employer's misconduct.
>
> 4. To compensate all employees for any and all economic loss they may have suffered due to the employer's misconduct.
>
> 5. To effectuate such other and further relief as this Commission may deem necessary and appropriate."

Respondent argues that it ought not be bound by any alleged agreement reached orally between the Franks and representatives of Complainant because the Franks are novices to labor-management relations and therefore did not know that they had a right to question the majority

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[4/] The Wisconsin Employment Peace Act.

status of the Complainant and because representatives of Complainant misled the Franks by asserting on February 6, 1973, without a factual basis for doing so, that it represented a majority of the employes then working in the Cafeteria; that Respondent is, in no sense, a "successor employer" of Canteen since the two enterprises are competitors between whom there were no negotiations or business relations leading to the change in Cafeteria operators, because Respondent utilizes none of Canteen's equipment or supplies but only its own and that of the School Board and because Respondent's operation significantly differs from Canteen's in that the food served by Canteen was prepared on the premises but that served by Respondent is prepared at another location; that no Canteen employes were forced to leave Cafeteria employment by reason of Respondent's reductions in wages from Canteen levels; that Respondent was under no duty to refrain from unilateral establishment of the initial terms and conditions of employment of its Cafeteria employes, nor was it under any duty to bargain with Complainant at any time because such a duty arises only with respect to the representative of a majority of its employes in an appropriate bargaining unit, and Complainant has at no time satisfactorily shown itself to be such a representative; and that for the foregoing reasons, Respondent cannot be found to have committed any unfair labor practice, and the Complaint should be dismissed in its entirety.

DISCUSSION

Allegation of Refusal to Execute and Comply with Oral Agreement

As is indicated in Finding of Fact 10, the Examiner has found that Respondent entered into an oral agreement with representatives of Complainant on March 22, 1973 which agreement was to be effective from and after March 26, 1973. For the reasons set forth below, the Examiner has found that oral agreement to have been clearly established. It may therefore ". . . be enforced in the same manner and to the same extent that a written agreement might be." 5/

Complainant's representatives Barwick and Craskamp met with a representative of Respondent (on that occasion, Mrs. Frank) for the first time on February 6, 1973, Respondent's second day of operation of the Cafeteria. They informed her of the existence of a collective bargaining agreement between Complainant and the previous operator of the

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5/ Kaufman's Lunch Co., Dec. No. 1632-A (6/48).

Cafeteria, Canteen Corporation, gave her a copy of that agreement, asserted that they represented the Cafeteria employes and demanded that Respondent enter into the same agreement with Complainant as Canteen had.

Thereafter, Barwick and Graskamp met with Harley Frank on March 7. At that meeting, Complainant's representatives informed Mr. Frank that Respondent could become a party to a contract containing the same terms as the Canteen Agreement by either signing a one-page substitution-of-names amendment to be attached to a copy of the Canteen Agreement or by signing a copy of the Canteen Agreement retyped with Respondent's name substituted for that of Canteen throughout. Insurance benefits were also discussed, and the Complainant offered to permit Respondent to substitute the carrier of its choice so long as coverage remained equivalent to that in the Canteen Agreement. Sometime after March 7 but before March 22, Barwick delivered to Mr. Frank a one-page substitution-of-names amendment to the Canteen Agreement though the record is unclear as to whether Mr. Frank requested that Complainant do so. Mr. Frank's response to Barwick's presentation of the amendment page was that he (Frank) preferred that the entire agreement be retyped with Respondent's name substituted for Canteen's throughout.

On March 22, 1973 Barwick and Graskamp met with the Franks at the Cafeteria and presented them with five copies of a written agreement setting forth Respondent's name and nowhere mentioning Canteen. The Franks read over the document page by page. The Health and Welfare article was discussed and Complainant's representatives reiterated their demand that the coverage and benefits be equivalent to those stated but also their willingness to accept any carrier designated by the Respondent. The effective date of the agreement was also discussed. The Respondent indicated that it could not afford to agree to retroactivity to February 5, 1973 as was proposed by the Complainant. Complainant's representatives stated that they would drop their demand for retroactivity and that they would accept an effective date of the following Monday, March 26, 1973.

"At that point", according to Graskamp's testimony,"Mr. Frank said that he wanted to see about this insurance thing and that he would return the copies--signed--of the Agreement to the Local's office by 12:00 noon on Friday [the next day]." Mr. Frank's March 22, 1973 promise to deliver executed copies of the document which had been presented to him on March 22 is unrefuted and was admitted by Mr. Frank when examined

by his own Counsel [6] and by Complainant's Counsel.[7] Only in Graskamp's version (quoted above) does there appear a suggestion that Mr. Frank's promise may not have been an unequivocal expression of assent to the terms and conditions proposed by the Complainant. In some other context, Graskamp's version of Mr. Frank's statement could be read to mean that Respondent was not, on March 22, 1973, willing to agree to employer-paid health and welfare insurance benefits for its employes. [8] But in the context of the parties' March 7 and March 22 discussion of the Health and Welfare Article, the Examiner is satisfied that Mr. Frank's indication ". . . that he wanted to see about this insurance thing . . ." meant only that he wanted an additional day in which to select and designate an insurance carrier or carriers to be substituted into the Health and Welfare Article.

Thus, the Examiner is satisfied that the existence of an oral agreement between the parties has been clearly established and that the terms of that oral agreement are set forth in the document attached to the Order herein except that 1) the Health and Welfare Article may, at the Respondent's option, be modified so long as the insurance coverage and benefits described therein remain equivalent and 2) the effective date for the contract shall be March 26, 1973.

The Examiner rejects Respondent's defenses to the aforesaid agreement. First, Respondent's assertion that its agents were unaware of their rights to challenge the Complainant's claim to represent a majority of Respondent's Cafeteria employes is rejected on the grounds that ignorance of the law cannot be an excuse. Second, Respondent has cited no authority for the assertion that Complainant had an obligation to

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[6] Tr. 49-50.

[7] Tr. 53, 56.

[8] Since Respondent does not provide employer-paid insurance benefits to its employes at its other locations, the Franks may well have had reservations about agreeing to pay for such a benefit for the instant Cafeteria employes. Some of Mr. Frank's testimony suggests that the Franks in fact inwardly felt such reservations, even at the time of the March 22, 1973 meeting with Complainant's representatives (Tr. 53, 57). But it is upon their objective or outward manifestations of assent or non-assent and not upon their subjective feelings that the existence and nature of any agreement reached between the parties is to be decided.

inform Respondent of such rights and that assertion is also rejected by the Examiner. Third, and finally, it is not a good defense to the collective bargaining agreement entered into by Respondent on March 22, 1973 for Respondent to assert that it was not, on that date, under a duty to bargain since the enforceability of an agreement against a party thereto does not depend upon the existence of such party's duty to bargain at the time it entered into such agreement.

Constructive Discharge Allegations

Regardless of whether Respondent was, under the instant circumstances, subject to a duty to bargain prior to its fixing the initial terms of employment on which basis he hired employes, there is no evidence that any former Canteen employe quit his or her employment at the Cafeteria because of the nature of the wages, hours and conditions of employment established by Respondent for its Cafeteria employes.

Other Allegations

The Examiner rejects Complainant's other legal theories as bases for additional relief. Complainant's request for arbitration of matters under the Canteen Agreement and its assertion that Respondent unlawfully established unilaterally the terms and conditions of employment of certain persons in its employ are inconsistent with Complainant's affirmance of the collective bargaining agreement effective March 26, 1973 by which agreement Complainant waived retroactive benefits. Such theories are therefore rejected; for the underlying purposes of WEPA would not be served by further consideration thereof.

Dated at Milwaukee, Wisconsin, this 5th day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz
Examiner