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-C

ORDER AMENDING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING ORDER

Examiner Marshall L. Gratz having, on April 5, 1974, issued Findings of Fact, Conclusions of Law and Order in the above-entitled matter, and on April 11, 1974, having further issued Order modifying same; and the Respondent, Spencer Frank Food Service, Inc., having, pursuant to Section 111.07 of the Wisconsin Employment Peace Act, timely filed a petition with the Wisconsin Employment Relations Commission for review of the Examiner's Findings of Fact, Conclusions of Law and Order, and his Order modifying same; and the Commission, having reviewed the entire record, said Findings of Fact, Conclusions of Law and Order, and Order modifying same, and the Petition For Review, being fully advised in the premises, makes and files the following Order amending the Examiner's Findings of Fact and Conclusions of Law and reversing Examiner's Order.

AMENDED FINDINGS OF FACT

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

2. That Spencer Frank Food Service, Inc., referred to herein as the Respondent, is an Employer having offices at 4435 West Fond du Lac Avenue, Milwaukee, Wisconsin; that Mrs. Florence Frank is President of the Respondent; and that Mr. Harley Frank is Vice President-Secretary of the Respondent.

3. That 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 Administra-

tion 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 the Canteen Corporation employed approximately five employes in the 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 allotted as School Board employe eating periods, but permitted bidders to determine and describe the form of food service operation and afforded the opportunity for negotiation of certain of the terms of a service contract during the term thereof; and that on January 30, 1973, the Respondent entered into an agreement with the Milwaukee Board of School Directors to operate the cafeteria commencing on February 5, 1973.

5. That the 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; that of these two, one employe chose to remain in the employ of Canteen Corporation and the other worked for the Respondent for a few days and voluntarily terminated thereafter; that in offering employment at the cafeteria, the 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 had been paid under the terms of the canteen agreement; and that no former employe of Canteen Corporation was forced to terminate employment with the 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 operation when the Respondent's employes from other locations assisted in start-up activities; that the 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 the Canteen Corporation, but the Respondent has prepared the food served at the cafeteria in a separately located kitchen, has utilized none of Canteen Corporation's equipment, supplies or assets and has no business relationship with Canteen Corporation with respect to the cafeteria; and that the Respondent, at all times relevant herein, has not been, and is not, a successor to the Canteen Corporation.

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

8. That the 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 the Respondent at the cafeteria had manifested a desire for representation by the Complainant.

9. That subsequent to leaving a second copy of the Canteen agreement with Harley Frank on February 15, 1973, Barwick and Graskamp met with both Franks on March 7, 1973, and discussed "what was necessary to be in compliance" with the Canteen agreement, whereupon the Complainant suggested that an addendum to the Canteen agreement be executed which would state that the terms of the Canteen agreement were applicable to the Respondent; and that during a review of the terms of the Canteen agreement Harley Frank indicated that the Respondent preferred an employes' insurance program other than that set forth in the Canteen agreement, to which Graskamp replied that the insurance carrier could be changed as long as the employes' benefits, including premium payment by the Respondent, remained the same; that however, Frank specified that the Respondent would neither pay for said insurance coverage, nor agree to do so; and that Graskamp indicated that the effective dates of agreement could be amended in order to eliminate retroactive wage increases.

10. That between March 7 and March 22, 1973, Barwick telephoned Harley Frank and was advised that the Respondent desired that the Canteen agreement be redrafted with the name "Spencer Frank Food Service, Inc." appearing in the body of the agreement, rather than in an addendum; and that during the same period of time, Barwick, in the presence and upon the suggestion of Mrs. Frank, met with four employes, one of whom was a member of the Complainant, and reviewed the terms of the proposed agreement; that after such meeting, representatives of the Complainant left membership cards with the Franks for distribution, and that subsequently the Franks inquired of employes whether they had returned such cards and indicated they did not object to the employes doing so.

11. That on March 22, 1973, Graskamp and Barwick delivered five copies of a collective bargaining agreement, redrafted with the name "Spencer Frank Food Service, Inc." to the Franks; that said document contained no changes in the effective date nor in the insurance provisions; that the parties reviewed the proposed agreement page by page and proceeded to discuss again the issues of health insurance and retroactivity, with both parties basically restating their positions of March 7, 1973 on the issues; that Frank stated that he wanted to look further into the insurance issue, but that he would sign copies of the agreement and forward same to the Complainant by noon of the following day; that Complainant suggested that the agreement could be effective on the following Monday, March 26; and that however, no "meeting of the minds" occurred during the meeting on March 22, 1973, on a complete oral or written collective bargaining agreement.

12. That the Respondent did not execute or return copies of the proposed agreement to the Complainant; and that approximately one week subsequent to the meeting on March 22, 1973, Graskamp telephoned Frank and was advised that the Respondent was still undecided on the insurance issue; that during the conversation Frank requested that the Complainant provide a Union authorization card check of the Respondent's employes in order to ascertain whether the employes desired to be represented for purposes of collective bargaining by the Complainant; and that the Complainant has, at no time relevant herein, complied with the Respondent's request.

13. That on March 30, 1973, the Respondent filed a petition with the Wisconsin Employment Relations Commission requesting the conduct

of an election and referendum among the employes herein; and, that said petition was withdrawn by the Respondent during the course of the hearing in the instant proceeding.

14. That on March 30, 1973, the Complainant directed a letter to the Respondent indicating that "since a dispute still exists regarding insurance coverage and wage schedule in your contract . . . you are hereby notified that the Union requests that the issues in dispute be submitted to arbitration in accordance with the terms of the contract."; and that the Respondent at no time responded to said request.

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

AMENDED CONCLUSIONS OF LAW

1. That Respondent Spencer Frank Food Service, Inc. is not a successor to Canteen Corporation in the operation of the cafeteria at the Administration Building of the Milwaukee Board of School Directors, and therefore the Respondent is not required to recognize the Complainant Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, as the exclusive collective bargaining representative of the employes at said cafeteria, based upon Canteen Corporation's recognition of the Complainant as the representative of the employes at said cafeteria at such time as the Canteen Corporation had an agreement with the Milwaukee Board of School Directors to operate said cafeteria; and that accordingly, the Respondent did not become and is not a party to the collective bargaining agreement executed by Canteen Corporation and the Complainant.

2. That Respondent Spencer Frank Food Service, Inc., by refusing to honor the collective bargaining agreement which had existed between Canteen Corporation and the Complainant Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, did not, and has not, committed an unfair labor practice within the meaning of Section 111.06 (1)(f), or any other section, of the Wisconsin Employment Peace Act.

3. That since Complainant Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO and Respondent Spencer Frank Food Service, Inc., at no time material herein, reached no full agreement on matters to be incorporated in a collective bargaining agreement covering the wages, hours and working conditions of Respondent's employes employed in the cafeteria in the Administration Building of the Milwaukee Board of School Directors, the Respondent, by failing and continuing to refuse to execute and comply with the terms of the collective bargaining agreement forwarded by the Complainant to the Respondent, including Respondent's refusal to proceed to arbitration, has not committed, and is not committing, any unfair labor practices within the meaning of Sections 111.06(1)(d) and (f), or any other section, of the Wisconsin Employment Peace Act.

4. That the Respondent Spencer Frank Food Service, Inc., by establishing terms and conditions of employment affecting its employes at the cafeteria in the Administration Building of Milwaukee Board of School Directors did not constructively discharge any employe or unilaterally change the terms and conditions of employment in violation of Sections 111.06(1)(c), (d) or (f) of the Wisconsin Employment Peace Act.

5. That the Respondent Spencer Frank Food Service, Inc., by its action of inquiring as to whether certain of its employes at the cafeteria

in the Administration Building of the Milwaukee Board of School Directors had sent Union authorization cards to the Complainant Local 122, Hotel, Motel, Restaurant Employees and Bartenders Union, AFL-CIO, did not commit, and is not committing, unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Employment Peace Act.

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

REVERSED ORDER

IT IS ORDERED that the Order previously issued in this proceeding by the hearing Examiner be, and the same hereby is, set aside; and

IT IS FURTHER ORDERED that the complaint filed in the instant proceeding be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 16th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING ORDER AMENDING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND REVERSING ORDER

The Complainant alleged that the Respondent had violated Sections 111.06(1)(a), (c)1, (d) and (f) of the Wisconsin Employment Peace Act. 1/ The instant unfair labor practices case was consolidated for hearing with petitions for election and referendum filed by Respondent on March 30, 1973. 2/ Hearing before Examiner Marshall L. Gratz was held on May 6, 1973, at which time Respondent withdrew the aforesaid petitions 3/ and entered its answer orally on the record, wherein Respondent denied that it had committed, or was committing, any unfair labor practices.

THE EXAMINER'S DECISION

On April 5 and 11, 1974, respectively, the Examiner issued Findings of Fact, Conclusions of Law and Order, and an Order modifying the same, wherein he concluded that the Complainant was the voluntarily recognized collective bargaining representative of the Respondent's employes and that the parties had, on March 22, 1973, entered into an oral collective bargaining agreement covering the terms and conditions of employment, with the exception of the initial effective date of agreement and the name of the health and welfare insurance carrier(s). The Examiner found that the Respondent by failing, and continuing to refuse, to execute and comply with the terms of said oral agreement had committed unfair labor practices within the meaning of Sections 111.06(1)(d) and (f) of the Wisconsin Employment Peace Act. The Examiner found that the Respondent had not constructively discharged any former employe of the Canteen Corporation at the cafeteria by establishing the terms and conditions of employment offered and paid to its employes employed at the cafeteria at the Milwaukee Board of School Directors' Administration Building, and accordingly did not violate Section 111.06(1)(c) or any other section, of the Act. On the basis of his conclusion that an oral collective bargaining agreement existed, the terms of which were explicitly not retroactive, the Examiner concluded that the Act would not be served by further adjudication of the Complainant's allegation with regard to either the Respondent's refusal to proceed to arbitration or whether certain provisions of the Canteen agreement, if any, were enforceable against the Respondent, as a successor to the Canteen Corporation, or the Respondent's alleged violation of its duty to bargain by unilaterally establishing the terms and conditions of employment for the period of February 5, 1973, through March 25, 1973, which differed from those afforded Canteen Corporation employes at the cafeteria immediately prior to February 5, 1973.

The Examiner ordered that the Respondent cease and desist from refusing to 1) execute the terms and conditions of employment agreed

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1/ During the course of the hearing, Complainant sought to amend the complaint to conform to Mrs. Frank's testimony concerning certain 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. Decision No. 11925 (6/73).

upon between itself and the Complainant on March 22, 1973, and thereby cease and desist from refusing to bargain collectively with said labor organization; and 2) comply with the terms and conditions of employment agreed upon between itself and the Complainant, and thereby cease and desist from violating the terms of a collective bargaining agreement.

Accordingly, the Examiner directed the Respondent to execute the oral agreement agreed upon on March 22, 1973, and deliver a copy of such executed document to the Complainant; with the effective date of March 26, 1973, substituted, and that the insurance coverage provision could be modified at the Respondent's discretion, so long as the coverage and benefits provided therein remained equivalent to those set forth in the Canteen agreement.

The Examiner further ordered that the Respondent comply with the terms and conditions set forth in said written agreement (except that the Union security provision in Article III, Section 1 should not be implemented until such time as a majority of the employes in the bargaining unit recognized in said agreement shall have affirmatively voted, by secret ballot, in favor of an all-union agreement in a referendum conducted by the Wisconsin Employment Relations Commission); such compliance including the making whole of employes for the benefits due them under said agreement for the period from and after March 26, 1973.

THE PETITION FOR REVIEW

The Respondent, in its Petition For Review, argued that the agreement found by the Examiner should be declared null and void on the basis that Complainant fraudulently induced the Respondent to agree to such contract by claiming to represent a majority of Respondent's employes without knowledge of the same; and further on the basis that a union security provision in the agreement was illegal since no referendum had been conducted by the Commission.

DISCUSSION

Contrary to the Examiner's conclusion that the Respondent entered into an oral agreement with representatives of the Complainant on March 22, 1973, we find that the parties had not, at any time relevant herein, reached a "meeting of the minds" with respect to all the provisions of the alleged agreement. The Examiner acknowledged that an oral agreement between the parties existed on all matters relating to the terms and conditions of employment with the exception of the designation of an insurance carrier. However, the record discloses no agreement with respect to either the name of the health and welfare insurance carrier or as to whether the payment of insurance premiums was to be made by the employes or the Respondent.

Furthermore, the proposed agreement drafted by the Complainant does not reflect any change of effective dates as the Complainant alleges the parties to have agreed upon. The five copies of the proposed agreement left with the Franks by Graskamp on March 22, 1973, were incomplete with regard to agreement on payment of insurance premiums, specification of insurance carrier and inclusion of effective contract dates.

On March 22, 1973, Frank stated that he wanted to look further into the insurance issue and that he would return the agreement, signed, to representatives of the Complainant the next day. During the same discussion, Graskamp suggested that the agreement could take effect the following Monday, March 26, four days forthwith. There is no indication that Frank concurred with the proposal of the March 26 effective date. Furthermore, the written agreement, as prepared by the Complainant and anticipated to have been returned signed, contained the same effective dates as set forth in the Canteen agreement which is in contradiction

to the oral agreement specifying an effective date of March 26 alleged by representatives of the Complainant. In its letter of March 30 requesting that the Respondent proceed to arbitration, the Complainant acknowledged that a "dispute still exists regarding insurance coverage . . ." Thus it is apparent that the parties did not reach a full agreement on the terms of the collective bargaining agreement being considered.

In addition, we do not find that Frank's refusal to execute the proposed agreement constituted a violation of the Respondent's duty to bargain. An employer's freedom to refuse to make an agreement relates to its terms in matters of substance and not, once an agreement is reached, to its expression in a signed contract. 4/ The evidence adduced has not established that all matters of substance had been resolved or that it was the Respondent's intention to refuse to execute such a final agreement had it been reached. In the absence of evidence showing that the parties had reached a complete agreement, the fact that the Respondent refused to sign the document presented by the Complainant does not warrant a finding of a refusal to bargain.

The Examiner also concluded that the Respondent had participated in negotiations with the Complainant on several occasions, throughout which the Respondent did not question the majority status of the Complainant. Thereby the Examiner reasoned that the Respondent had extended voluntary recognition to the Complainant as exclusive collective bargaining representative of the Respondent's employes. Having reviewed the entire record, we are satisfied that the Franks, on the basis of the Complainant's unsubstantiated claim to represent Respondent's employes initially dealt with representatives of the Complainant in an attempt to ascertain what their obligations as the Employer of said employes were. We note that the first meeting between the parties consisted of the Complainant's demand that the Respondent succeed to the Canteen agreement, whose existence was theretofore unknown by the Respondent. The second meeting was limited to the resubmission of the same agreement to the Franks. It appears that on two occasions the parties discussed the substance of the Canteen agreement and the Respondent's inability or unwillingness to meet certain provisions therein. Such discussions appear premised on the Respondent's alleged obligation to abide with the predecessor's contract, not on the parties' attempts to reach a bilateral collective bargaining agreement.

The Respondent subsequently requested that the Complainant provide an authorization card check to substantiate its claim to represent a majority of the Respondent's employes for the purposes of collective bargaining. The Respondent's request was ignored by the Complainant. The record does not disclose that the Complainant did, in fact, represent a majority of the employes as evidenced by the testimony that only two employes, employed during different periods of time, were members of Complainant, 5/ and that representatives of the Complainant left membership applications with the Franks for distribution among the employes. We are satisfied that such solicitation justified the Franks' subsequent inquiries as to whether the employes submitted their application for membership to the Complainant. The fact that the Respondent, during the course of the hearing, agreed to post notices regarding interference with the employes' exercise of their rights under Section 111.04 does not establish a violation of the same.

The Examiner held that the actions of the Franks at the bargaining table supported the conclusion that the Complainant was the voluntarily recognized collective bargaining representative. We are not of the same opinion. The record indicates that the so-called "collective bargaining sessions" were conducted on the level of "what was necessary [for the Respondent] to be in compliance with the Canteen agreement." The concept of successorship appears to have been central to such discussions. Rather than participating in "give and take" bargaining sessions consisting of proposals and counter-proposals, the record discloses that the Complainant proposed (but did not incorporate) a change in effective contract dates, stated a willingness to change the designation of the insurance carrier (without change of benefits to the employes) and offered a one-page substitution-of-names amendment to the Canteen agreement or the Canteen agreement retyped with the Respondent's name for the Respondent's execution. Such minor changes appear to have been offered by the Complainant in order to bring the Respondent into substantive compliance with the terms of the Canteen agreement. Therefore, contrary to the Examiner, we find a determination of the issue of successorship herein to be imperative.

Preceding the Complainant's allegations herein that the Respondent had voluntarily recognized the Complainant, commenced negotiations and subsequently entered into a collective bargaining agreement, Complainant averred that the Respondent was a successor to the Canteen Corporation and, therefore, was bound by the agreement between the Canteen Corporation and the Complainant. It is clear that if the Respondent is found to be a successor to Canteen Corporation, the Respondent would be obligated to recognize the Complainant as the representative of the Respondent's employes employed in the cafeteria and to abide with the terms of the collective bargaining agreement. The primary issue which has been raised is whether the Respondent is, in fact, a successor to Canteen Corporation. The critical question in determining whether the Respondent is the successor is whether there has been a "continuity of identity" in the transfer of the cafeteria operation from Canteen Corporation to Respondent. 6/

It is clear from the record that the operation of the cafeteria under both Canteen Corporation and the Respondent is similar, in that both operators provided essentially the same service at the same locations. However, this similarity, in and of itself, is not sufficient to find a continuity of identity in the business enterprise and continuity of operation across the change in ownership. We consider it essential to concluding that the Respondent is a successor to Canteen Corporation, to find a transaction between Canteen Corporation and Respondent, in which the former's interest in the operation, would be transferred to the Respondent. Without such a transaction and without any evidence that Canteen Corporation transferred any interest in the cafeteria operation to Respondent, there was not any continuity of identity in the transfer of the operation of the cafeteria.

It is clear that Canteen Corporation had no interest in the operation of the cafeteria which was transferred to the Respondent. Neither party had any interest in the premises itself, and there was no change in ownership of any of the equipment utilized in the cafeteria.

Although it is clear that both Employers essentially provided the same services at the same location, an essential prerequisite is missing, and that is a transaction by the Canteen Corporation and Respondent in which the former's interest in the operation, including its rights

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6/ Drivers, Warehouse and Dairy Employees Local 75 vs. WERB, 29 Wis (2d) 272.

and responsibilities would be transferred to Respondent. Because of a lack of any such transaction, and because both parties dealt solely with a third party, namely, Milwaukee Board of School Directors, the Respondent assumed none of the obligations or responsibilities of Canteen Corporation.

Since there was no continuity of identity in the transfer of the operation, it is clear that the Respondent is not a successor Employer and is not bound by the collective bargaining agreement which had existed between the Complainant and Canteen Corporation, nor is the Respondent required to recognize the Complainant as the representative of the cafeteria employes based upon the fact that Canteen Corporation recognized the Complainant as the representative of its employes in the cafeteria. 7/

Dated at Madison, Wisconsin, this 16th day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman, Commissioner

7/ Albert J. Janich (8165-A, B) 1/68.