STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED HOSPITAL & NURSING HOME EMPLOYEES FEDERATION, LOCAL 222, Complainant,	:	Case II No. 15268 Ce-1392 Decision No. 11809
vs.	:	
SURFSIDE MANOR, Respondent,	:	Case III No. 15267 Cw-327 Decision No. 11810
and	:	
HOSPITAL AND SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 150, AFL-CIO, Respondent.	:	

Appearances:

Mr. William L. Smith, appearing on behalf of Complainant United Hospital & Nursing Home Employees Federation, Local 222.

Quarles, Herriott, Clemons, Teschner & Noelke, by Mr. Laurence E. Gooding, Jr., Attorney, and Mr. George K. Whyte, Attorney, appearing on behalf of Respondent Surfside Manor.

Goldberg, Previant & Uelmen, by Mr. Kenneth R. Loebel, Attorney, appearing on behalf of Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaints of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matters, and hearing on said complaints having been held at Milwaukee, Wisconsin, on March 8, 1972, Commissioners Zel S. Rice II and Joseph B. Kerkman being present; and the Commission having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That United Hospital & Nursing Home Employees Federation, Local 222, hereinafter referred to as the Complainant, is an organization existing for the purpose of representing employes for purposes of collective bargaining, and has its offices at 1118 North 22nd Street, Milwaukee, Wisconsin.

2. That Surfside Manor, hereinafter referred to as the Respondent Employer, operates a nursing care facility at 1522 North Prospect Avenue, Milwaukee, Wisconsin; and that the Respondent Employer is either owned or operated by Unicare Health Service, Inc., hereinafter referred to as Unicare, 105 West Michigan Street, Milwaukee, Wisconsin.

3. That Hospital and Service Employees' International Union, Local 150, AFL-CIO, hereinafter referred to as Respondent 150, has its offices at 135 West Wells Street, Milwaukee, Wisconsin.

4. That on January 11 and 18, 1972 William Smith and Roger Jacobson, temporary President and temporary Secretary-Treasurer respectively of the Complainant, conducted meetings at the Northside YWCA, Milwaukee, Wisconsin, which meetings were attended by certain employes of Respondent Employer, as well as employes of two other nursing care facilities operated by Unicare, during which discussions were had concerning, among other things, the fact that a collective bargaining agreement existing between the Respondent Employer and Respondent 150 contained an all-union agreement, which, as was contended by Smith, had not been authorized in a referendum as required by the Wisconsin Employment Peace Act; that at said meeting employes of Respondent Employer, who were in attendance, authorized Smith and Jacobson, as representatives of the Complainant, to seek legal redress resulting from the alleged unlawful all-union agreement existing between Respondent Employer and Respondent 150, including the recovery of dues deducted from the wages of the employes of Respondent Employer and forwarded to Respondent Local 150; and that in said regard Complainant, on January 20, 1972, filed with the Commission, separate complaints alleging that Respondent Employer and Respondent 150 had each committed unfair labor practices by enforcing an all-union agreement in violation of the Wisconsin Employment Peace Act.

5. That following a referendum conducted by it, among "all regular full-time and regular part-time employes of National Convalescent Hospital, Milwaukee, Wisconsin, excluding supervisors, confidential, managerial, professional and office employes, licensed practical nurses, registered nurses and registered occupational therapists", the Commission on November 10, 1967 certified that the required number of such employes in the aforementioned collective bargaining unit authorized an all-union agreement between Respondent 150 and National Convalescent Hospital, which was owned and operated by Unicare.

6. That on January 1, 1971 Respondent Employer and Respondent 150 entered into a collective bargaining agreement covering employes of Respondent Employer, effective from January 1, 1971 through at least December 31, 1974, which agreement contained among its provisions the following material herein:

"ARTICLE I

Section 1. The Nursing Home recognizes and acknowledges that the Union is the duly authorized collective bargaining representative for all regular full time and regular part time employees excluding supervisors, confidential, managerial, professional and office employees, licensed practical nurses, registered nurses and registered occupational therapists.

Section 2. All present employees covered by this agreement who are members of the Union on the effective date of this provision shall remain members in good standing as a condition of employment. All present employees who are not members of the Union on the effective date of this provision shall become members of the Union within thirty days of the effective date of this provision.

Section 3. Employees will be hired on a probationary basis. This probationary period will be ninety days in length and the employees may be discharged for any cause, without recourse, during this period. Upon satisfactory completion of their probationary period, an employee shall become a Union member as of the thirty-first day of employment, and shall remain members in good standing of the Union as a condition of continued employment.

Section 4. The Nursing Home agrees to deduct from the wages of all employees covered by this agreement, after receipt of a signed authorization from each such employee, dues and initiation fees of Local No. 150. The Employer shall have no obligation to obtain such authorization."

7. That at no time either prior to or from the effective date of the aforementioned agreement to the date of this Order the provisions in ARTICLE I, requiring present and former employes to become and remain members of Respondent 150, had not been authorized in a referendum conducted by the Commission, as required in Section 111.06 (1)(c)1 of the Wisconsin Employment Peace Act, among the employes of the Respondent Employer covered by the aforementioned collective bargaining agreement; 1/ that, however, Respondent Employer, at all times material herein, required such employes, as a condition of employment, to remain or become members of Respondent 150, and in said regard Respondent Employer required employes to execute cards authorizing Respondent Employer to deduct, from the wages of said employes, sums equal to monthly membership dues of Respondent 150; and that the dues so deducted from the wages of said employes were forwarded by Respondent Employer to Respondent 150.

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

CONCLUSIONS OF LAW

1. That United Hospital & Nursing Home Employees Federation, Local 222, having been authorized by certain employes of Surfside Manor, to file a complaint of unfair labor practices on their behalf with the Wisconsin Employment Relations Commission, is a proper party complainant within the meaning of Sec. 111.07(2) of the Wisconsin Employment Peace Act.

2. That the fact that Surfside Manor is engaged in commerce within the meaning of the Labor Management Relations Act, as amended, and thereby is generally subject to the jurisdiction of the National Labor Relations Board, does not deprive the Wisconsin Employment Relations Commission of its jurisdiction to determine whether Surfside Manor and/or Hospital and Service Employees' International Union, Local 150, AFL-CIO, has, or have, committed unfair labor practices within the meaning of Section 111.06(1)(c) and 111.06(2)(a) of the Wisconsin Employment Peace Act, with respect to the application of the all-union agreement

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1/ The Commission takes judicial notice of its own records, which indicate that on August 17, 1972 the Commission conducted a referendum among the employes of Marina View Manor, Inc., 1522 N. Prospect Avenue, Milwaukee, operated by Unicare, and apparently the successor to Surfside Manor, wherein the employes failed to authorize an all-union agreement.

incorporated in the collective bargaining agreement existing between Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO.

3. That the Certification of Referendum issued by the Wisconsin Employment Relations Commission on November 10, 1967, following a referendum conducted among employes of National Convalescent Hospital and Hospital and Service Employees' International Union, Local 150, AFL-CIO, to enter into an all-union agreement, did not, and does not, have the effect of authorizing an all-union agreement between Surfside Manor, a separate and distinct facility operated by Unicare Health Services, Inc., and Hospital and Service Employees' International Union, Local 150, AFL-CIO, as contemplated in Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

4. That, since the all-union agreement incorporated in the collective bargaining agreement existing between Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO from January 1, 1971 through at least the date of this Order, has never been authorized in a referendum conducted by the Wisconsin Employment Relations Commission, the application of said all-union agreement by Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO, from at least January 21, 1971 to the date of this Order, by requiring employes to become and remain members of Hospital and Service Employees' International Union, Local 150, AFL-CIO, and to pay monthly dues to the benefit of Hospital and Service Employees' International Union, Local 150, AFL-CIO, Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO have:

(a) In the case of Surfside Manor, discriminated against and interfered with the rights of, its employes in violation of Sections 111.06(1)(c) and (a) of the Wisconsin Employment Peace Act, and

(b) In the case of Hospital and Service Employees' International Union, Local 150, AFL-CIO, coerced employes in violation of Section 111.06(2)(a) of the Wisconsin Employment Peace Act.

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

ORDER

1. IT IS ORDERED that Respondent Surfside Manor, its officers, representatives, agents, successors and assigns, and Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO, its officers, representatives and agents shall immediately:

a. Cease and desist from:

(1) Entering into, performing, maintaining, or otherwise giving effect to any agreement between them, which requires membership in Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO, as a condition of employment, except as authorized in a referendum conducted among employes of Respondent Surfside Manor pursuant to Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

b. Take the following action which the Commission finds will effectuate the policies of the Wisconsin Employment Peace Act:

(1) Physically expunge Sections 2 and 3 of ARTICLE I in the collective bargaining agreement existing between them, and from all copies thereof in their possession, or in the alternative, add a Section 5 to such Article which indicates that Sections 2 and 3 shall not become effective until such time that the all-union agreement set forth in such Sections have been authorized by the employes in a referendum conducted by the Wisconsin Employment Relations Commission.

2. IT IS ALSO ORDERED that Respondent Surfside Manor, its officers, representatives, agents, successors and assigns, shall preserve and produce at a supplemental hearing to be scheduled by the Commission, all dues check-off authorizations executed by former and present employes from at least January 21, 1971, to the date of this Order, as well as all payroll records, time cards, personnel records and reports from January 21, 1971, to the date of this Order, which are necessary to determine the identity of the former and present employes who are entitled to reimbursement under the terms of this Order, as well as those records necessary to determine the amounts of reimbursement due said former and present employes.

3. IT IS ALSO ORDERED that Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO, preserve and produce at a supplemental hearing to be scheduled by the Commission all records pertaining to dues received by it, directly or indirectly from former and present employes of Respondent Surfside Manor, for the period from January 21, 1971 to the date of this Order, which are necessary to determine the identity of the former and present employes who are entitled to reimbursement under the terms of this Order, as well as those records necessary to determine the amounts of reimbursement due said former and present employes.

4. IT IS ALSO ORDERED that Respondent Surfside Manor and Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO, post in conspicuous places on the premises of said Respondent Employer and in the offices of said Respondent Employer, where notices to employes and members are usually posted, copies of the notice attached hereto marked Appendix "A" after being duly signed by representatives of Respondent Employer and Respondent Union. Such notices shall be immediately posted upon receipt thereof and remain posted for sixty (60) consecutive days. Reasonable steps shall be taken to insure that said posted notices shall not be altered, defaced or covered by any other material.

5. IT IS FURTHER ORDERED that Respondent Surfside Manor and Respondent Hospital and Service Employees' International Union, Local 150, AFL-CIO, each separately in writing, within 10 days of the receipt

of a copy of this Order, notify the Commission as to what steps they have taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 8th day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

_____
Ze. S. Rice II, Commissioner

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Jos. B. Kerkman, Commissioner

APPENDIX "A"

NOTICE TO ALL PRESENT AND FORMER EMPLOYES OF SURFSIDE MANOR WHO WERE EMPLOYED AT ANY TIME BETWEEN JANUARY 21, 1971, TO MAY 8, 1973.

Pursuant to the Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Wisconsin Employment Peace Act we hereby notify you that:

WE WILL NOT enter, perform, maintain or otherwise give effect to any agreement or arrangement between Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO, which requires membership in such labor organization as a condition of employment, except as authorized in a referendum conducted by the Wisconsin Employment Relations Commission, pursuant to Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

WE WILL physically expunge Sections 2 and 3 of Article I in the collective bargaining agreement existing between us and from all copies thereof in our possessions, or in the alternative we will add a Section 5 to such Article which indicates that Section 2 and 3 shall not become effective until such time that the all-union agreement set forth in such sections has been authorized by the employes in a referendum conducted by the Wisconsin Employment Relations Commission.

Hospital and Service Employees' International Union, Local 150, AFL-CIO, will be primarily responsible, and Surfside Manor will be secondarily responsible, in the manner and to the extent as shall be subsequently ordered by the Wisconsin Employment Relations Commission, for reimbursement to our former and present employes for dues exacted from the wages of such employes and paid to Hospital and Employees' International Union, Local 150, AFL-CIO, pursuant to the unlawful all-union agreement which existed between Surfside Manor and Hospital and Service Employees' International Union, Local 150, AFL-CIO, from January 21, 1971, to May 8, 1973.

SURFSIDE MANOR

By_____

Dated_____

SERVICE EMPLOYEES' INTERNATIONAL UNION, LOCAL 150, AFL-CIO

By_____

Dated_____

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDERS ISSUED IN:

(1) Surfside Manor, Cases II & III
(2) Hearthside Nursing Home & Rehabilitation Centers, Cases I & II
(3) Madison Convalescent Center, Cases II & III
(4) Jackson Center, Cases I & II
(5) Care Center East, Care Center West, Cases I & II

United Hospital & Nursing Home Employees Federation Local 222, hereinafter referred to as Local 222, the Complainant in the instant matters, on January 20, 1972 filed a total of ten complaints alleging that five separate employers, operating nursing care facilities, and Hospital and Service Employees' International Union, Local 150, AFL-CIO, hereinafter referred to as Local 150, which was a party to five separate collective bargaining agreements with said five separate employers, committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act.

The five separate employer respondents are as follows:

Surfside Manor - Milwaukee, Wisconsin
Madison Convalescent Center - Madison, Wisconsin
Hearthside Nursing Home & Rehabilitation Center - Brown Deer, Wisconsin
Jackson Center - Milwaukee, Wisconsin
Care Center East, Care Center West - Fond du Lac, Wisconsin.

The individual complaints filed against said separate employer respondents were identically worded, and in material part alleged as follows:

> "...that since on or about December 2, 1971, and continuing to date the above named employer has in violation of Chapter 111.06(1)(a)(b)(c)(e) of thy Wisconsin Statutes, interferred with, coerced, and intimidated employees in the exercise of their right to be represented by a labor organization, or further their right to refrain from such activity. This, by enforcing an all-union agreement without a referendum as called for by Chapter 111.06(1)(c) of the Wisconsin Statutes; that the contract was negotiated and signed without the knowledge or consent of the employees and further that no employees at any time authorized any union to represent them."

The separate complaints filed against Local 150 were also indentically worded, except for the identification of each of the individual named employer respondents, and in material part said complaints alleged as follows:

> ".....that since on or about December 2, 1971 and continuing to date the above named Union has, in violation of Chapter 111.07(2)(a)(b) of the Wisconsin Statutes, interfered with, coerced and intimidated employes of (Name and Address of Particular Employer Respondent), in the exercise of their right to be represented by a labor organization of their choice or to refrain from such activity. This, by signing a contract without the employees' knowledge or consent, further that prior to signing of said contract no employees had authorized said Union to represent them.

That the above named Union has enforced an all-union agreement without a referendum as called for by Chapter 111.06 (1)(c) of the Wisconsin Statutes."

All individual Respondent Employers were represented by same Counsel and each filed identical answers, denying any violation of the Wisconsin Employment Peace Act as alleged by Local 222, and further denied knowledge or information sufficient to form a belief (a) with respect to whether the collective bargaining agreement was negotiated without the knowledge or consent of the employes covered by said agreements, and (b) with respect to the allegation that none of the employes of the Respondent Employers at any time had authorized any union to represent them.

Local 150 filed identical answers, wherein it denied any violations as alleged in the complaints, and affirmatively alleged that Local 222 was not a party in interest within the meaning of Sec. 111.07(2)(a) of WEPA or Rule ERB 2.01 "in that the Complainant had no legal capacity to bring any actions in its own name since as a matter of law it is not an entity that the law recognizes."

All cases were consolidated for the purpose of hearing, which was conducted on March 2, 8 and 23, 1972. Final briefs were received October 31, 1972.

At the outset of the hearing, after the parties conceded that the individually named Respondent Employers were engaged in businesses affecting interstate commerce to the extent that normally the National Labor Relations Board would exercise jurisdiction over said Respondent Employers and Respondent Local 150, the latter in its relationship with said Respondent Employers, the parties were advised during the course of the hearing that the Commission would only consider those allegations in the complaints relating to matters not within the jurisdiction of the NLRB, namely, those matters relating to the alleged unlawful application of the all-union agreement provisions included in the collective bargaining agreements existing between the Respondent Employers and Respondent Local 150.

There are three basic issues A/ to be determined by the Commission in the instant matters, namely:

I. Is Local 222 a proper party in interest as the complainant in all, or any, of the cases involved herein?

II. Have the individual Respondent Employers and Respondent Local 150 entered into and applied unlawful all-union agreements?

III. What Order is appropriate to remedy the application of the unlawful all-union agreements?

ISSUE NO. I

The first issue is premised on the contention of Respondent Employers and Respondent Local 150 that Local 222 "does not have the legal capacity to bring the complaint in that it is not a legal entity", and thus does not exist, and further, that Local 222 is not "a party in interest" within the meaning of Sec. 111.07 of the Wisconsin Employment Peace Act.

A/ It may be that all issues need not be determined in each of the cases involved.

Even assuming that Local 222 was not a "legal entity" as claimed by the Respondents, that fact alone would not necessarily preclude Local 222 from being considered as a "party in interest" for the purpose of filing complaints of unfair labor practices with the Commission. Be that as it may, the Commission has put to rest the contention that Local 222 is not a "legal entity" or a labor organization, such a determination having been made in Manitowoc County (Park Lawn Home) B/, in a Direction of Election issued by the Commission in a proceeding initiated by a petition for an election filed by Local 222 on January 14, 1972, just six days prior to the filing of the complaints in the instant matters. During the hearing in said election case Respondent Local 150 was permitted to intervene, and during the hearing Respondent Local 150 contended that Local 222 was not a labor organization and therefore should not be permitted on the ballot. On March 29, 1972 the Commission issued the above noted Direction of Election and therein, with respect to the status of Local 222, determined that the Local 222 was in fact a labor organization. However, the issue as to whether Local 222 is a proper party complainant does not rise or fall on whether Local 222 is a labor organization. Sec. 111.07(2)(a) requires that complaints of unfair labor practices be filed by "any party in interest....". Such requirement is reiterated in Rule ERB 2.01. The term "party in interest" is not defined in the Wisconsin Employment Peace Act (WEPA). We believe that the definition of certain other terms of WEPA is material to the issue as to whether Local 222 is a proper party complainant. Said terms are as follows:

> "Sec. 111.02
>
> (1) The term 'person' includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees or receivers.
>
> ....
>
> (4) The term 'representative' includes any person chosen by an employe to represent him."

Further, we deem Sec. 111.05(1) is pertinent to the issue: Said Section reads as follows:

> "Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employes in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto."

To date the Commission has issued three decisions wherein it determined whether the "complainant" was a proper party, in filing complaints alleging that employers committed unfair labor practices within the meaning of WEPA. In Snap-On Tools Corp. (5762) 6/61, the Commission held

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B/ (10899) 3/72.

that an individual employe, who filed a complaint with the Commission alleging that the employer involved had violated the collective bargaining agreement covering the wages, hours and working conditions of its employes, including the complainant, was a proper party in interest. In Gerovac Wrecking Co., Inc. (8334) 12/67 (Aff. 51 Wis. 2d 391, 6/7/71), the Commission determined that the union, which filed the complaint, was not a proper party in interest since it did not represent, nor claim to represent, any of the respondent's employes. In Milwaukee Cheese Co. (5792) 8/61, the union, which had filed the complaint, claimed to represent the employes of the named respondent, and therefore the Commission found that the union, in the latter case, was a proper party complainant since it was a party to a "controversy as to employment relations". Both in Gerovac and Milwaukee Cheese, the complaint alleged that the employers therein had committed misdemeanors in connection with controversies in employment relations. It should be noted that in a footnote included in the Gerovac decision the Commission stated that the determination of a party in interest in any particular complaint case might depend on other considerations in cases based on alleged violations of sections of WEPA other than Section 111.06(1)(1).

In considering our previous decisions, related above, and the definitions contained in Section 111.02(1) and (4) and the language contained in Section 111.05(1), WEPA, the Commission determines that in order to be a proper party in interest in a complaint proceeding a labor organization or "person" must either (1) be authorized by the employes involved to represent them for the purposes of collective bargaining, or (2) said organization or "person" claims to represent those employes for the purposes of collective bargaining, and (3) or said labor organization or "person" may be the "representative" authorized by an employe or employes to seek legal redress with respect to alleged unfair labor practices affecting such employe or employes. Section 111.05(1) contemplates the latter conclusion, in that the section cited permits an individual employe, or any minority group of employes in any collective bargaining unit, to present grievances to their employer "in person or through representatives of their own choosing". . .

Therefore, in the instant cases, in determining whether Local 222 is a proper party in interest to file and prosecute complaints of unfair labor practices before the Commission, it is necessary that Local 222 establish that it either represents, or claims to represent, employes of each and every Respondent Employer involved herein, for the purposes of collective bargaining, or that any employe or employes of each Respondent Employer has or have authorized Local 222, as their representative for the purpose of filing and prosecuting the complaints which initiated the instant cases.

In the Ce and Cw cases involving Jackson Center, Milwaukee, and Care Center East, Care Center West, Fond du Lac, Local 222 presented no evidence whatsoever that any of the employes of said Employers had authorized Local 222 to represent them for the purposes of collective bargaining. Further, Local 222 did not claim to represent any of said employes of said Employers for the purposes of collective bargaining, and still further, Local 222 presented no evidence to establish that any employe of said two Employers authorized Local 222 to file a complaint of unfair labor practices on behalf of any employe of said two Employers with respect to any alleged unlawful all-union agreement existing between said two Employers and Respondent Local 150. Therefore, we have concluded that Local 222 is

not a proper party complainant in the cases entitled Jackson Center I and II, and Care Center East, Care Center West I and II, and as a result, we have dismissed the complaints filed in said four cases.

However, with respect to the complaints filed in Madison Convalescent Center II and III, we deem that Local 222 is a proper party complainant based on the fact that, as revealed in the election proceeding before the NLRB, that Local 222, filed a petition with that agency claiming to represent employes in a unit covered by the collective bargaining unit existing between Respondent Employer and Respondent Local 150. The Regional Director of the NLRB entertained such petition, and following an investigation therein, dismissed the petition as not being timely filed, as a result of the collective bargaining agreement existing between the Respondent Employer and Respondent Local 150. The fact that the Regional Director of the NLRB dismissed the petition on the basis that the collective bargaining agreement between the Respondent Employer and Respondent Local 150 constituted a bar to the further processing of the petition, did not determine that Local 222 did not claim to represent the employes of said Respondent Employer.

During the course of the hearing on the complaints filed in Madison Convalescent Center, an employe of said Respondent Employer testified that she had obtained a showing of interest among employes of said Respondent Employer which showing of interest was submitted in support of the representation petition filed by Local 222 with the NLRB.

Thus, we are satisfied that Local 222 is a proper party Complainant with respect to the complaint filed in the matters entitled Madison Convalescent Center II and III, since certain employes of said Respondent Employer had authorized Local 222 to represent them for the purposes of collective bargaining.

In the cases involving Respondent Employers Hearthside Nursing Home and Rehabilitation Center and Respondent Surfside Manor, the record discloses that certain employes of said Respondent Employers, during meetings conducted by representatives of Local 222, authorized Local 222 to seek legal redress, in the form of a complaint proceeding before the Commission, alleging the existence of unlawful all-union agreements between said Respondent Employers and the Respondent Local 150.

In defining the term "representative" we see no difference between the situation wherein an individual employe or minority of employes designate a representative to meet with an employer for the purpose of presenting grievances. C/, as compared to the situation herein where a group of employes affected by an alleged unlawful all-union agreement authorize a labor organization, or any "person" as defined in Section 111.02(1), neither of whom may claim to represent employes for the purpose of collective bargaining, to seek legal redress in a complaint proceeding before the Commission as a result of the application of an alleged unlawful all-union agreement. Therefore, we conclude that Local 222 is a proper party Complainant in cases entitled Hearthside Nursing Home and Rehabilitation Center I and II and Surfside Manor II and III.

ISSUE NO. II

In the cases where we have concluded that Local 222 is a proper party Complainant, namely those complaints involving Hearthside Nursing Home and Rehabilitation Center, Surfside Manor, and Madison Convalescent Center, the Commission arrives at issue identified as Issue No. II,

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C/ Pursuant to Section 111.05(1).

namely whether the collective bargaining agreements existing between said Respondent Employers and the Respondent Local 150 contained unlawful all-union agreements.

The collective bargaining agreements in existence between said Respondent Employers and Respondent Local 150 each contained a form of an all-union agreement. The Respondent Employers are all owned and operated by Unicare Health Services, Inc., Milwaukee, Wisconsin, which at one time operated the National Convalescent Home at Milwaukee, Wisconsin. As early as 1967, National Convalescent Home and Respondent Local 150 were parties to a collective bargaining agreement which contained an all-union agreement, and in a referendum conducted among the employes of said Employer the required number of said employes authorized the all-union agreement between said Employer and Respondent Local 150, and on November 2, 1967 the Commission issued a certification in that regard.

Respondent Local 150 contends that the referendum conducted among the employes of the National Convalescent Home "authorizes" Respondent Employers Hearthside Nursing Home and Rehabilitation Center, Surfside Manor, and Madison Convalescent Center, and Respondent Local 150 to enter into all-union agreements, contending that the employes employed by said three Respondent Employers constitute an accretion to the unit of employes employed by National Convalescent Center.

The Commission cannot adopt such an accretion argument, for the simple reason that Unicare itself has recognized that the employes employed at each of the Employers' facilities constitute separate distinct units. The representatives of Respondent Local 150 also recognize the existence of such separate units. Such a conclusion is reflected in the fact that Respondent Local 150 has separate and distinct collective bargaining agreements covering the employes it each of the Respondent Employers' nursing care facilities. Furthermore, following the close of the hearing involving the complaints filed in the instant matters, the Commission conducted separate referenda among the employes of each of the three above-named Respondents. The employes in the unit employed by Hearthside authorized an all-union agreement between said Respondent and Respondent Local 150 and the results thereof were certified by the Commission on March 15, 1972. A referendum was also conducted among employes in the unit covered by the agreement existing between Respondent Surfside, X/ wherein the required number of employes failed to authorize an all-union agreement between said Respondent Employer and Respondent Local 150, the results of which were certified by the Commission on August 31, 1972. In addition, on March 29, 1973 the Commission conducted a referendum among the employes in the unit covered by the collective bargaining agreement existing between Respondent Madison Convalescent Center and Local 150. The required number of employes of said Employers failed to vote in favor of authorizing an all-union agreement between the Respondent Madison Convalescent Center and Respondent Local 150 and the results of such referendum were certified by the Commission on April 15, 1973.

Therefore, it is quite clear to the Commission that the employes employed in each of the Respondent Employers involved herein constitute appropriate bargaining units separate and distinct units, and therefore the certification of referendum issued by the Commission in National Convalescent Center in November 1967 has no application whatsoever to any of the Respondent Employers herein.

X/ Now known as Marina View Manor, Inc.

ISSUE NO. III

Having concluded that by incorporating and applying an unlawful all-union agreement, the various Respondent Employers and Respondent Local 150 have committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act and as a result the Commission is confronted with the nature of the Order which it should issue to remedy the unfair labor practices committed by said Respondent Employers and Respondent Local 150. Counsel for both Respondent Employers and Respondent Local 150 contend that the appropriate Order should only require the Respondents to cease and desist from applying any unlawful all-union agreement provisions involved. Respondents contend that any Order which required the Respondents to reimburse the employes for the dues deducted from their wages and forwarded to Respondent Local 150 would constitute a "disgorgement" Order, which would be punitive in nature, rather than remedial. The Commission has considered the cases cited by Respondents in support of their position, as well as previous Commission decisions involving the application of unlawful union security agreements. In the previous cases processed by the Commission involving the application of unauthorized all-union agreements, the unlawful application of such agreement consisted of discharges or lay offs, and the remedy therein included orders to make the employes whole for wages and other fringes lost as a result of such unlawful lay offs or discharges. D/

The application of the unlawful union security agreements involved herein was not consummated by the discharge or lay off of any employes, but rather constituted coercion of employes to pay dues to the Respondent Local 150, as a condition of employment. Such dues payment was accomplished by the withholding of sums of money equal to dues from the wages of the employes by the Respondent Employer involved, and the Respondent Employer forwarded said sums to Respondent Local 150. A number of the employes of Respondents Hearthside Nursing Home and Rehabilitation Center, Surfside Manor and Madison Convalescent Center, testified that they were instructed by representatives of the specific Respondent Employer that, in order to retain their employment, it was necessary for said employes to pay dues to Respondent Local 150. E/

It should be made clear that the Commission has not found that the coercion of employes to execute check-off authorizations in order to retain employment constituted an unfair labor practice within the meaning of the Wisconsin Employment Peace Act, since the Commission is aware that such activity is regulated by the National Labor Relations Act and thus subject to the jurisdiction of the National Labor Relations Board. However, the requirement that employes remain and become members of Respondent Local 150 resulted from the application of the unlawful all-union agreement provision contained in the collective bargaining agreements existing between said Respondent Employers and Respondent Local 150. In addition to the specific testimony of certain employes of the various Respondent nursing homes, with regard to the application

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D/ Charles Wiechering (4187) 11/56; International Brotherhood of Paperworkers 249 Wis. 3/62.

E/ The employes involved were also at the same time required to execute check-off authorization, an activity subject to the jurisdiction of the National Labor Relations Board.

of the unlawful all-union agreements, there is an overwhelming inference because of the inclusion of the unlawful all-union security provision, that additional employes did not voluntarily become members and pay dues to Respondent Local 150, although some employes, when called in rebuttal by Respondent Local 150, admitted that they had voluntarily authorized the Respondent Employer involved to deduct from their wages a sum equal to monthly dues and pay same to Respondent Local 150.

We have concluded that, in order to remedy the unfair labor practices found to have been committed, present and former employes should be made whole in sums equal to the amount of dues which they were unlawfully required to pay ultimately to Respondent Local 150. Since Respondent Local 150 received said dues, although dues were originally deducted from the wages of the employes by their Respondent Employers, Respondent Local 150 shall be primarily responsible for the return of such dues to the employes entitled to same. Because they were parties to said unlawful all-union agreements, said Respondent Employers shall be secondarily liable for the repayment of such sums of monies to the present and former employes entitled to same.

As indicated in the Commission's order, the Commission will, as soon as practicable, set a hearing in the matter to determine the identity of present and former employes who are entitled to the return of their dues and the amount of such sums due and owing to them pursuant to the Commission's Order. At such hearing Respondent Employers and Respondent Local 150 will be expected to produce all necessary records material to such a determination.

Since the incorporation of the all-union agreement provisions in the collective bargaining agreement involved were not conditioned on approval of same in a referendum conducted by the Commission F/, and as a result of the manner in which the unlawful all-union agreement was applied, the burden of proof in establishing that former and present employes "voluntarily" joined Respondent Local 150 will rest upon Respondent Local 150 and Respondent Employers.

Dated at Madison, Wisconsin, this 8th day of May, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Jos. B. Kerkman, Commissioner

F/ Except Hearthside Nursing Home and Rehabilitation Center, subsequent to the close of the hearings herein.