

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RETAIL STORE EMPLOYEES UNION LOCAL	:	
NO. 214 AFFILIATED WITH RETAIL CLERKS	:	
INTERNATIONAL ASSOCIATION,	:	
	:	
Complainant,	:	Case II
	:	No. 16863 Ce-1487
vs.	:	Decision No. 11955-A
	:	
HOWARD AEH & ASSOCIATES OF FOND DU	:	
LAC, INCORPORATED,	:	
	:	
Respondent.	:	
	:	

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Gerry M. Miller, for the Complainant.
Dr. Lynas G. Moore, Optometrist, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission alleging that Howard Aeh & Associates of Fond du Lac, Incorporated, Fond du Lac, Wisconsin, committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and hearing having been conducted on July 19, 1973, at Fond du Lac, Wisconsin; 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 Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, hereinafter referred to as the Complainant, is a labor organization with offices at 316 Court Street, Oshkosh, Wisconsin; and that Richard Eiden and David Tesch are representatives of the Complainant.

2. That Howard Aeh & Associates of Fond du Lac, Incorporated, hereinafter referred to as the Respondent, operates an optical business at 29 South Main Street, Fond du Lac, Wisconsin; that Dr. Lynas G. Moore is the President of the Respondent; and that the Respondent employs various employes in the conduct of its business.

3. That in early April 1973, 1/ the Complainant was contacted by an employe of the Respondent regarding possible representation of Respondent's office and clerical employes for the purposes of collective bargaining; that in response thereto, on April 12, Tesch met with three of Respondent's employes, namely, Phyllis Hicken, Randee John and Sharon Urquhart, at which time said three individuals executed the authorization cards reading as follows:

1/ Unless otherwise noted, all dates hereinafter referred to are in the year 1973.

". . . hereby authorize Retail Clerks International Association, AFL-CIO, or its chartered Local Union (hereafter called 'Union') to negotiate my rates of pay, hours of work and other working conditions in collective bargaining with my employer. I also authorize the Union to use this card as proof that I want it to represent me in negotiations for a labor agreement for any lawful purpose, and in particular, as the basis for it to obtain recognition by my employer as bargaining agent, without there first being an NLRB election among the employees. In addition, I favor the making of an 'All Union' (also known as union shop) agreement that will require all employees to join and remain members of the Union in order to keep their jobs."

4. That on April 19 and April 25, two additional employees of the Respondent, namely, Elizabeth Sippel and Kris Higgins, respectively, also executed identical authorization cards, and that, however, Phyllis Hicken was not employed as an office or clerical employee.

5. That thereafter, and prior to April 27, Richard Eiden telephoned Moore, wherein he advised Moore of the foregoing execution of authorization cards and requested to meet with Moore; that Moore agreed to meet with Eiden on April 27; and that prior to the April 27 meeting, Tesch met with Respondent's employees to discuss their demands concerning wages, working hours, health and welfare benefits, and other conditions of employment, which would be presented to the Respondent at the scheduled April 27 meeting.

6. That during the meeting conducted on April 27, attended by Eiden, Tesch and Moore, Moore was presented with the aforementioned authorization cards; and that Moore, upon examining each of said cards, advised the representatives of Complainant that employe Hicken, along with other employes not involved herein, was represented by another labor organization in a collective bargaining unit consisting of "bench employes" in the employ of the Respondent; that, however, Moore indicated that he was satisfied that the Complainant represented a majority of the five office and clerical employes of the Respondent; and that prior to the close of the meeting Eiden and Moore executed the following document:

"RECOGNITION AGREEMENT

Dr. Lynas G. Moore, proprietor, hereby agrees to recognize Retail Store Employees Union Local No. 214 chartered by the Retail Clerks International Association, AFL-CIO, as the exclusive bargaining representative of the employees working for the Company, Dr. Lynas G. Moore, Fond du Lac, Wisconsin in the following appropriate bargaining unit:

All employees working for the Employer in the above named operation excluding supervisors, dispensing opticians, and employees whose work is solely restricted to bench, surface and stockroom duties."

7. That also at the meeting of April 27, representatives of the Complainant presented Moore with a copy of a proposed collective bargaining agreement covering the employees involved; that Moore indicated that he did not have the time necessary to review said proposed agreement during the meeting; that thereupon the parties scheduled another meeting for May 4; and that, however, said meeting was canceled at the request of Moore.

8. That on May 9, Eiden, Tesch and Moore met again, during which meeting Moore presented to Complainant's representatives written changes with respect to certain proposals contained in the Complainant's proposed agreement, including a modification in the description of the appropriate collective bargaining unit, which modification read:

"All employees working for the Employer in the above named operation [Dr. Lynas G. Moore, Fond du Lac, Wisconsin] excluding supervisors, dispensing opticians, and employees whose work is solely restricted to bench, surface and stock-room duties."

and that, after extensive discussion, agreement was reached on all provisions to be included in a collective bargaining agreement to be effective from April 29, 1973, through March 31, 1974, with the understanding that the wages agreed upon, which were less than \$3.50 per hour, were contingent upon Moore receiving documentation from the Complainant that the wage increases reflected in the agreement conformed to the then existing federal wage guidelines.

9. That on May 10, Eiden directed a letter to Moore, which was received on May 11, wherein he enclosed a copy of the final draft of the collective bargaining agreement, previously agreed upon by the parties on May 9; and that in said letter Eiden stated, in part, as follows:

"With reference to our discussion of pay increases, please be advised as follows:

The Congress amended the Economic Stabilization Act, Section 203D to add the following sentence:

'The President shall prescribe regulations defining for the purposes of this subsection the term 'substandard earnings', but in no case shall such term be defined to mean earnings less than those resulting from a wage or salary rate which yields \$3.50 per hour or less.'

Passed by Congress and signed by the President on Monday, April 30, 1973.

This should answer any questions you have with regard to implementing the pay increases as set forth in the Labor Agreement effective 4/29/73 through 3/31/74."

10. That at no time after the receipt of said letter did Moore respond thereto; that on May 11, Moore met with employes Kris Higgins and Elizabeth Sippel for approximately 45 minutes, and during the discussion therein, inquired as to why the employes had joined the Complainant, why they were dissatisfied with present conditions, and why they felt that he had been unfair to them; that during said meeting, Moore questioned said two employes as to their wages and hours, and stated that it would be difficult to raise wages to the level requested by the Complainant in light of the then existing wage price guidelines; that Moore stated that he could not understand why the employes had taken their problems to the Complainant rather than to him; and that, subsequent to an ensuing emotional discussion, Sippel indicated that she would withdraw from the Complainant.

11. That between May 11 and May 14, Higgins also decided to withdraw from Complainant, and advising Sippel of the same on May 14, which conversation was overheard by Moore; and that Moore advised Sippel that in the event the two employes had decided to withdraw from the Complainant, that they should inform Complainant of the fact by mail with proof of service; that on May 17, Moore filed a petition with the Commission requesting the conduct of an election among the office and clerical employes to determine whether they desired to be represented by the Complainant; that on May 21 the Complainant held a meeting among the employes involved to ratify the agreement previously reached with Moore; that the one employe who attended said meeting voted to ratify the agreement; that

thereafter the Complainant sent a certified letter to Moore notifying the latter that the agreement had been ratified and requesting that Respondent execute the agreement; and that, however, Moore did not respond to the Complainant regarding same.

12. That on May 23 and May 24 the Complainant received separate letters from employes Sippel, Higgins and Urquhart 2/ stating that they desired to withdraw from the Complainant; and that on May 24 the Complainant also received a copy of the petition filed by Moore accompanied by a notice of hearing thereof from the Commission.

13. That subsequent to the filing of the election petition, Moore unilaterally made changes in certain working conditions affecting Respondent's office and clerical employes, which included: (1) reduction of the number of hours worked by employe Randee John; (2) installation of a time clock; and (3) inclusion of a written statement setting forth the number of hours worked, wages earned and deductions with employes' pay checks; and that the latter two changes conformed with proposals made by the Complainant during negotiations.

14. That subsequent to May 21, Moore has refused to acknowledge the May 9th agreement between the parties as binding, has failed and refused to sign such agreement in written form and has also failed to continue to recognize the Complainant as exclusive bargaining representative of the office and clerical employes in the employ of the Respondent.

15. That the activity of Respondent, through its agent, Dr. Lynas G. Moore, by refusing to honor the recognition agreement of April 27, by interrogating employes concerning the reasons for designating the Complainant their bargaining representative, following which certain employes, identified above, in writing, indicated that they desired to withdraw from the Complainant, by unilaterally changing conditions of employment, and by refusing to execute the collective bargaining agreement agreed upon between Respondent and the Complainant, was designed to, and engaged in, for the purpose of undermining the prestige and authority of the Complainant as the collective bargaining representative of Respondent's office and clerical employes; and that thereby the Respondent engaged in conduct, which was calculated to interfere with, restrain and coerce its employes in their right to engage in concerted activity in, and on behalf of, the Complainant; and that by such activity and by the failure of the Respondent to execute the collective bargaining agreement agreed upon between the Respondent and the Complainant, the Respondent engaged in conduct designed to reject the principle of collective bargaining, and also thereby refused to bargain collectively with the Complainant.

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

CONCLUSIONS OF LAW

1. That all employes of the Respondent, Howard Aeh & Associates of Fond du Lac, Incorporated, (namely office and and clerical employes), excluding supervisors, dispensing opticians, opticians and employes whose work is solely restricted to bench, surface and dispensing duties, constitute a unit appropriate for the purpose of collective bargaining, within the meaning of Section 111.05 of the Wisconsin Employment Peace Act; and that at least since April 27, 1973, and continuing at all times thereafter, the Complainant, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association has been, and is, the exclusive representative of the employes in said unit for the purposes of collective bargaining within the meaning of Section 111.02(5) of the Wisconsin Employment Peace Act.

2/ Urquhart temporarily discontinued employment on May 11 due to pregnancy.

2. That the Respondent, Howard Aeh & Associates of Fond du Lac, Incorporated, through its agent, Dr. Lynas G. Moore:

- (a) After May 9, 1973, by refusing to recognize Complainant, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, as the exclusive collective bargaining representative of its office and clerical employees, and by refusing to execute the collective bargaining agreement reached between it and said labor organization, and by unilaterally changing working conditions, committed, and continues to commit, unfair labor practices in violation of Sections 111.06(1)(d) and (a) of the Wisconsin Employment Peace Act.
- (b) By interrogating its employees with regard to their activity and membership in, and on behalf of, the Complainant, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, in such a manner as to result in aiding and encouraging employees to withdraw from membership in said labor organization and, therefore, cease their support of said labor organization, interfered with, restrained and coerced its employees in the exercise of their right to engage in lawful concerted activity within the meaning of Section 111.04 of the Wisconsin Employment Peace Act, and by such activity, has engaged in, and continues to engage in, unfair labor practices in violation of Section 111.06(1)(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 and issues the following

ORDER

IT IS ORDERED that Respondent, Howard Aeh & Associates of Fond du Lac, Incorporated, its officers and agents, immediately:

1. Cease and desist from:
 - (a) Refusing to recognize Complainant, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, as the exclusive collective bargaining representative of its office and clerical employees and refusing to execute the collective bargaining agreement reached between it and said labor organization.
 - (b) Interrogating employees concerning their membership in, and activity on behalf of, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, or any other labor organization.
 - (c) Changing wages, hours and other terms and conditions of employment without negotiating same with Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association.
 - (d) Aiding and encouraging employees to withdraw their membership from Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, or any other labor organization.
 - (e) In any other manner interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the Complainant, Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or to refrain from any and all such activities, except as authorized in Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

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

- (a) Immediately execute the collective bargaining agreement reached between it and Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, and upon such execution, forward a signed copy thereof to said labor organization, and immediately comply with the terms of said agreement, retroactive to April 29, 1973, except Article II, A thereof.
- (b) Notify its employes by posting in conspicuous places on its premises, where notices to all its employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A." Such copy shall be signed by Dr. Lynas Gordon Moore and shall be posted immediately upon receipt of a copy of this Order, and shall remain posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by Respondent, Howard Aeh & Associates of Fond du Lac, Incorporated, to insure that said Notice is not altered, defaced or covered by other material.
- (c) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days of the receipt of a copy of this Order what steps it has taken to comply herewith.

Given under our hands and seal at the
City of Madison, Wisconsin, this 25th
day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION


By



Morris Slavney, Chairman



Zel S. Rice II, Commissioner



Howard S. Bellman, Commissioner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL NOT refuse to recognize Retail Store Employees Local No. 214, affiliated with Retail Clerks International Association as the exclusive collective bargaining representative of our office and clerical employes.
2. WE WILL NOT interrogate our employes concerning their membership in, and activity on behalf of, Retail Store Employees Local No. 214, affiliated with Retail Clerks International Association.
3. WE WILL NOT encourage our employes to disaffiliate from membership in Retail Store Employees Local No. 214, affiliated with Retail Clerks International Association by unilaterally implementing changes in hours and other terms and conditions of employment.
4. WE WILL NOT in any other manner interfere with, restrain or coerce our employes in the exercise of their right to self-organization, to form, join, or assist Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining, or to refrain from any and all such activities, except as authorized in Section 111.06 (1) (c) of the Wisconsin Employment Peace Act.
5. WE WILL immediately execute the collective bargaining agreement reached between us and Retail Store Employees Union Local No. 214, affiliated with Retail Clerks International Association and forward a signed copy thereof to said labor organization, and immediately comply with the terms of said agreement retroactive to April 29, 1973, except Article II, A thereof.

Dated this _____ day of _____, 1974.

HOWARD AEH & ASSOCIATES OF
FOND DU LAC, INCORPORATED

By _____
Dr. Lynas Gordon Moore

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Pleadings

In the complaint initiating the instant proceeding the Union alleged that the Employer committed unfair labor practices by refusing to execute a collective bargaining agreement reached between the parties in negotiations, after the Employer had recognized the Union as the bargaining representative of office and clerical employes, and further that the Employer engaged in individual bargaining with unit employes and promised them benefits designed to destroy the majority status of the Union.

The Employer, in its answer, in material part denied that it committed any unfair labor practices and alleged that it had not reached an agreement with the Union, that Moore had given the Union's proposed contract to his attorney for review, that Moore had not heard from his attorney regarding same, that the Employer did not unilaterally bargain with its employes, that no promises of benefits were made to employes, and that the petition for election was filed after being advised by two employes that they were withdrawing from the Union.

The Union's Representative Status

The record reveals that, at all times material herein, five individuals were employed in office and clerical duties. Three of the five, namely Randee John, Sharon Urquhart and Elizabeth Sippel, prior to April 27, executed cards authorizing the Union to represent them for the purpose of collective bargaining. In the April 27 meeting, upon examining the authorization cards presented to him by the representatives of the Union, Moore, the President of the Employer, voluntarily executed an agreement recognizing the Union as the exclusive collective bargaining representative of its office and clerical employes.

The Negotiations

Also at the April 27 meeting the Union presented Moore with its written proposals affecting wages, hours and conditions of employment affecting the office and clerical employes. Moore took the proposed agreement, but indicated that he did not have time at such meeting to consider and discuss the proposed agreement. The parties agreed to meet again on May 4, however, Moore was unable to meet on such date.

The parties next met on May 9, at which time Moore presented to the Union certain corrections and changes to the Union's contract proposals. Following extended negotiation, agreement was reached by the parties on all parts of the proposed contract as noted above. The only matter left outstanding was Moore's request that the Union document its claim that its wage proposal fell within the then existing guideline of the wage and price controls. The following day Eiden advised Moore, by letter, that, in effect, the wages agreed upon by the parties did not violate the Federal wage guidelines, and that in said letter Eiden enclosed a typed agreement reflecting the matters agreed to in negotiations with Moore. Moore received said matters on May 11. During the hearing Moore testified that he had a telephone conversation with Eiden on May 17, wherein Moore advised that he was not ready to agree on the contract because he had not heard from his attorney, who was an officer of the Employer, to whom Moore had sent a copy of the contract for review. Eiden denied that he had such a conversation with Moore.

At the time of the hearing in the instant proceeding, the contract had not been returned by the attorney, although portions of the agreement had been discussed by Moore and his attorney telephonically. The

record discloses that the parties had reached an agreement on May 9 pending only confirmation of permissible wage increases under the Federal wage price guidelines. Such confirmation was provided to Moore by Eiden the following day, along with a copy of the finalized contract and the original proposal with Moore's handwritten revisions. The record does not establish that the acceptance of the agreement was conditioned on approval thereof by the Employer's attorney, and, therefore, the Employer's contention in that regard is immaterial.

At no time material herein has the Employer executed the collective bargaining agreement agreed upon by the parties.

The Employer's Efforts to Dissipate the Union's Majority Status

The record clearly establishes Moore's activity with respect to the concerted activity of the employees, and the reason therefor, is found in paragraph 10 of the Findings of Fact. Moore did not deny his participation in this regard. The evidence disclosed that following the filing of the election petition by the Employer, Moore unilaterally made changes in various working conditions of office and clerical employees, as found in paragraph 13 of the Findings of Fact. Further, the Commission is satisfied that the evidence clearly established that Moore's interrogations and unilateral actions encouraged employees Sippel and Higgins to withdraw from the Union.

Despite the fact that Moore executed an agreement recognizing the Union as the representative of the office and clerical employees of the Employer, and reached an agreement on the terms of a collective bargaining agreement, Moore filed a petition requesting the Commission to conduct an election among said employees to determine their choice as to representation. It is clear to the Commission that Moore engaged in acts, prior to and after, filing of the petition, in order to influence the employees to reject representation by the Union through the utilization of the Commission's election process.

The Unfair Labor Practices

The Employer, after it had agreed to recognize the Union and after being satisfied of its representative status, on examination of authorization cards, executed by a majority of the employees in an appropriate bargaining unit, had a legal duty to continue such recognition 3/ and the failure of the Employer herein to continue such recognition constitutes a violation of Section 111.06(1)(d) and (a) of the Wisconsin Employment Peace Act. Further, the failure of the Employer to formally execute the collective bargaining agreement negotiated and agreed upon herein also constitutes unfair labor practices within the meaning of the same sections of the Act. In addition, the Employer, by attempting to dissipate the Union's majority status by unilaterally implementing changes in working conditions of the employees, also violated said provisions of the Act. 4/

The Remedy

The Order issued by the Commission herein succinctly sets forth activity which is required of the Employer to remedy the unfair labor practices found to have been committed by him. It is to be noted that while the Employer has been ordered to comply with the terms of the

3/ Stowe Plastic Products Co. (Milw. Co. Cir. Ct., 5/51).

4/ Tony's Pizza Pit (8405-A and B) 10/68 (Aff. Dane Co. Cir. Ct., 7/70).

collective bargaining agreement, we have indicated that Article II, A is an exception to that portion of the Order. Said provision reads as follows:

"ARTICLE II

UNION SECURITY

A. It shall be a condition of employment that all employees of the Employer covered by this Agreement who are members of the Union and in good standing on the date of execution of this Agreement shall remain members in good standing and those who are not members on the date of the execution of this Agreement shall on or after the thirty-first (31st) day following the beginning of such employment become and remain members in good standing in the Union.

. . . ."

We deem that Article VIII, which reads as follows, is applicable:

"ARTICLE VIII

SEVERABILITY OF CONTRACT

If any Article or Section of this contract or if any riders thereto should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this contract and of any rider thereto, or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

In the event that any Article or Section is held invalid or enforcement of or compliance with which has been restrained, as above set forth, the parties thereby shall enter into immediate collective bargaining negotiations, upon the request of the Union, for the purpose of arriving at a mutually satisfactory replacement pertaining to the same subject matter for such Article or Section during the period of invalidity or restraint. If the parties do not agree on a mutually satisfactory replacement, either party shall refer the matter to Arbitration as provided for under the provisions of Article V, Section 1, Sub-Section B. of this contract."

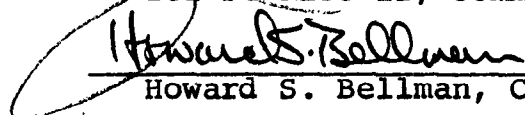
Since no referendum has been held among the employes involved to authorize any form of Union security agreement, said provision cannot be implemented. 5/

Dated at Madison, Wisconsin, this 25th day of October, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Zel S. Rice II, Commissioner


Howard S. Bellman, Commissioner

5/ Section 111.06(1)(c)1.