STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA UNIFIED SCHOOL DISTRICT NO. 1, Complainant, vs. KENOSHA EDUCATION ASSOCIATION, Respondent.	:	Case XXIX No. 16978 MP-258 Decision No. 12029-E

Appearances:
Davis, Kuelthau, Vergeront, Stover & Leichtfuss, S.C., Attorneys at Law, by Mr. Walter S. Davis, appearing on behalf of the Complainant.
Lawton & Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner, and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held at Kenosha, Wisconsin, on November 15, 1973, and February 12, 1974, before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Kenosha Unified School District No. 1, hereinafter referred to as the Complainant or District, is a public school district organized under the laws of the State of Wisconsin and a municipal employer within the meaning of Section 111.70(1)(a) of the Municipal Employment Relations Act (MERA).

2. That Kenosha Education Association, hereinafter referred to as the Respondent or Association, is a labor organization within the meaning of Section 111.70(1)(j) of MERA and is the certified representative of certain teaching personnel employed by the Complainant for purposes of collective bargaining on questions of wages, hours, and working conditions.

3. That prior to December 26, 1972, the Complainant and Respondent entered into a collective bargaining agreement establishing wages, hours, and working conditions for the employes represented by the Respondent for the 1972-73 school year; that among the provisions of said agreement was a school calendar and a salary schedule; that the school calendar contained in said agreement provided, inter alia, that the teachers represented by the Respondent were required to teach students or perform other classroom work (hereinafter "contact days") on 179 days during the 1972-73 school year and the salary schedule contained in said agreement provided that a teacher, without credit for any prior

teaching experience, holding a Bachelor's degree would be compensated in the annual salary of $7,750 (hereinafter "salary base").

4. That on December 26, 1972, the Complainant and Respondent commenced negotiations for an agreement to replace the 1972-73 collective bargaining agreement which was due to expire on June 30, 1973; that the meeting on December 26, 1972, was the first of approximately 18 such meetings which occurred before the Complainant and Respondent reached an impasse in their negotiations; that during the first negotiation meeting on December 26, 1972 and the second negotiation meeting on January 10, 1973, the Complainant and Respondent discussed the implementation and possible modification of their "Professional Negotiation Agreement" which established the negotiation procedures to be followed in attempting to reach agreement on the wages, hours, and working conditions to be included in the collective bargaining agreement replacing the 1972-73 agreement; that although the minutes of the meeting on January 10, 1973 indicate that agreement was reached on the procedure to be followed, the Respondent, by the actions of its spokesman, Arcangelo Romano, refused to sign a document purportedly setting out said agreement at the next negotiation meeting which occurred on February 14, 1973.

5. That at the third negotiation meeting, which occurred on February 14, 1973, the Association presented its initial proposal for changes in wages, hours, and working conditions to be included in a new collective bargaining agreement which included, inter alia, a proposal that the school calendar provide for 177 contact days and a salary base of $8,200; that at the fourth negotiation meeting which occurred on February 28, 1973, the Complainant presented its proposal for changes in wages, hours, and working conditions to be contained in a new collective bargaining agreement which included a proposed school calendar providing for 182 contact days and a $7,850 salary base.

6. That because of the Respondent's belief that the Complainant had acted in bad faith in prior years by adopting school calendars even though final agreement had not been reached in collective bargaining, its agents at the bargaining table indicated at the outset of negotiations, and at various times throughout the negotiations, that it considered the number of contact days and related provisions in the school calendar inseparable from its salary demands; that, although the Complainant's negotiating team indicated that they would prefer to deal with one issue at a time and that the School Board would like to reach agreement on the school calendar by the first of May, they acquiesced in the Respondent's demand that the salary and calendar issues be negotiated simultaneously until shortly before June 5, 1973, when the Complainant's Board adopted a calendar proposal which had been presented at the bargaining table and accepted by the Respondent, contingent upon the Complainant's acceptance of its base salary proposal; that the various proposals and counterproposals offered by the Complainant and Respondent on the calendar and salary issues during the negotiations were as follows:

Date	Meeting Number	Party	Contact Days	Salary Base
2/14/73	3	Association	177	$8,200
2/28/73	4	District	182	7,850
3/14/73	5	Association	179	8,350
3/21/73	6	District	181 or 180	7,900 or 7,875
5/2/73	12	Association	180	8,450
		District	180	7,900
5/16/73	14	District	180	8,000
5/25/73	16	Association	180	8,000(1973-74) 9,000(1974-75)
		Association	180	8,000(1973-74) 7% (1974-75)
5/30/73	17	District	180	8,000(1973-74) 8,200(1974-75)

7. That the Complainant accompanied its offer of 180 contact days at a $7,900 salary base on May 2, 1973 with four specific 1973-74 school calendars, none of which were ever accepted by the Respondent; that at the May 16, 1973 meeting wherein the Complainant offered 180 contact days at a salary base of $8,000, the Complainant made a fifth proposal for a 1973-74 school calendar; that on May 25, 1973 the Respondent accepted that Complainant's fifth calendar proposal contingent on the Complainant's acceptance of its various salary base proposals at that meeting; that the parties did not reach agreement on a combined, calendar and salary base proposal prior to June 5, 1973, when the Complainant adopted its fifth calendar proposal which had been presented on May 16, 1973 and conditionally accepted by the Respondent on May 25, 1973, contingent upon the Complainant's willingness to accept its salary base proposals on that date.

8. That at various times during the negotiations the Complainant indicated to the Respondent's negotiation team that it might adopt a calendar for the 1973-74 school year at or near the end of the 1972-73 school year even if the parties had not reached final agreement before that date; and both parties negotiated in an effort to reach agreement on all issues in negotiations prior to that date; that at various times during the negotiations the Respondent advised the Complainant's negotiating team that unilateral adoption of the 1973-74 school calendar prior to reaching agreement on the salary base or other issues in negotiations was unacceptable to the Respondent because of the Respondent's opinion that the Complainant had acted in bad faith in adopting school calendars unilaterally in the past; that at the eighteenth negotiation meeting which occurred on June 6, 1973, the Association's spokesman, Arcangelo Romano, advised the Complainant's spokesman, Gerlach, that, because of the Board's action on the prior evening of adopting a 1973-74 school calendar, only a "substantial change" in the Complainant's bargaining position would make further negotiations possible at that time and ended the discussion, which took approximately one-half hour, with the following statements which are reflected in the Board's minutes of that meeting:

> "Mr. Gerlach said do you want to clarify your position, are you saying that if we make no movement on the base . . . Mr. Romano interrupted and said there will be no more negotiations until the Board calls them and say they are willing to move. Mr. Romano also said now the ball is in the Board's court, as they made the last move. Mr. Romano then said outside of that, he had nothing more to say to them."

9. On June 7, 1973, Herbert Lepp, President of the Complainant's Board, sent Janice M. Virlee, President of the Respondent Association, a letter which read as follows:

> "We wish to reaffirm that the Board negotiations committee is desirous of continuing bargaining in good faith so that agreement can be reached on the 1973-74 and 1974-75 contracts.
>
> Since it was your team that left the table and indicated that they had nothing further to discuss, we feel it is your responsibility to indicate a readiness to resume bargaining and we stand ready to meet with you at any mutually-acceptable time.
>
> We further feel that the education of the children of this community must be considered important enough to continue the attempt to resolve the issues before us and that these issues can be resolved only through good faith bargaining.
>
> We reiterate that the Board negotiations committee stands ready to meet with your committee and awaits an indication that you wish to meet."

10. On Sunday, June 10, 1973, the Respondent Association held a meeting of its membership for the purpose of discussing the status of negotiations and conducting a strike authorization vote; that Romano and others explained the status of negotiations from the point of view of the Association's negotiating committee and asked the membership to authorize the negotiating committee and Executive Board to call a strike if they deemed it appropriate to do so; that approximately 300 members of the Respondent Association were in attendance at the meeting and voted by secret ballot (by a 9 to 1 margin) to authorize the negotiating committee and Executive Board to call a strike; that, although there may have been some discussion about the legality of strikes and the value of other possible alternatives during the course of the meeting, there is no evidence that any coercive statements were made with regard to what pressures, if any, ought to be brought to bear against any teachers who did not wish to strike or what tactics ought to be employed against such teachers if they chose not to strike; that the results of the strike authorization vote were publicized by the media in the Kenosha area.

11. That, on June 11, 1973, Virlee and Romano answered Lepp's letter of June 7, 1973 with a letter which read as follows:

> "At the time of the last negotiations meeting we informed members of the Board team that when they were ready to move on the calendar-salary issue they should call us. Your letter of June 7 gave no indication that the Board was willing to move. The KEA made the last move on the calendar-salary issue. We do not intend to make two moves to the Board's one.
>
> Since the last negotiations meeting the KEA has held a membership meeting. At this meeting the members authorized the KEA Board of Directors to call a strike if they deem it necessary. Without a contract Kenosha teachers will not return to the classroom in the fall.
>
> Because your letter gives no indication of willingness on the part of the Board to move we feel we are at impasse. At such time as the Board is willing to move on the calendar-salary issue please call us."

12. That on or before June 6, 1973 the parties reached an impasse in their negotiations, which impasse lasted for several weeks before negotiations resumed; that in the fall of 1973 a strike occurred; that, during the negotiations that preceeded the strike and occurred during the strike, both parties made proposals and counterproposals with regard to the number of contact days to be contained in the school calendar and the base salary as well as the other issues in negotiations and they ultimately agreed on a two-year agreement with a calendar providing for 179 contact days and a salary base of $8,100 for the first year of the two-year agreement.

Based on the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSIONS OF LAW

1. That, by tying the issue of the number of contact days to be contained in the school calendar to the issue of what salary base should be contained in the salary schedule and pursuing those two issues jointly to an impasse in negotiations, the Respondent did not pursue a permissive subject of bargaining to the point of an impasse in negotiations and did not otherwise refuse to bargain collectively as that term is defined in Section 111.70(1)(d) of MERA or commit a prohibited

practice within the meaning of Section 111.70(3)(b)3 of MERA; and that the other evidence of record will not support a finding that the Respondent, by its conduct in bargaining, otherwise refused to bargain collectively as that term is defined in Section 111.70(1)(d) of MERA or committed a prohibited practice within the meaning of Section 111.70 (3)(b)3 of MERA.

2. That, by conducting a strike authorization vote by secret ballot, of its membership in attendance at the meeting of June 10, 1973, the Respondent did not coerce or intimidate municipal employes in the enjoyment of their legal rights within the meaning of Section 111.70 (3)(b)1 of MERA; and that, by conducting said strike authorization vote and otherwise threatening to strike in violation of Section 111.70(4)(1) of MERA, the Respondent did not refuse to bargain collectively as that term is defined in Section 111.70(1)(d) of MERA and did not commit a prohibited practice within the meaning of Section 111.70(3)(b)3 of MERA.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that the complaint herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 31st day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Complainant alleges, inter alia, that the Respondent (1) improperly tied a mandatory subject of bargaining (wages) to a permissive subject of bargaining (calendar) and bargained on those issues jointly to the point of an impasse and then insisted that it would not negotiate further unless substantial concessions were made and (2) took a vote of its membership to authorize its negotiating committee and Executive Board to call an illegal strike and used that authorization vote as a threat to obtain concessions in bargaining. According to the Complainant, this conduct constitutes bad faith bargaining in violation of Section 111.70(3)(b)3 of the Municipal Employment Relations Act (MERA). In addition, the Complainant contends that by taking the strike authorization vote and using it as a threat in bargaining the Respondent has coerced and intimidated employes in violation of 111.70(3)(b)1 of MERA.

The Respondent denies that its conduct constituted bad faith bargaining or coercion and intimidation of employes. In addition, the Association contends that the Complainant is guilty of bad faith bargaining because of certain conduct on the part of its agents; however, the Respondent never filed a complaint or counter-claim to that effect for proper service on the Complainant under Section 111.07(1) of the Wisconsin Statutes and the Examiner concludes that the question of the Complainant's good faith is not otherwise an issue herein. 1/

Calendar-Salary Issue

First of all, it must be observed that the Complainant's argument regarding the impropriety of tying the salary and calendar issues together for purposes of bargaining is founded on a faulty premise, that is, that the school calendar is a permissive subject of bargaining. The Complainant's argument relies on the Supreme Court's decision in the Madison school calendar case 2/ and does not attempt to reconcile the decision in that case with the Commission's recent declaratory ruling in the Beloit case 3/ which was decided after the briefs had been filed herein.

In upholding the Commission's determination that the school calendar was a proper subject for collective bargaining and fact finding under Section 111.70 of the Wisconsin Statutes as that section read before it was amended by MERA, the Supreme Court observed:

> ". . . However under Section 111.70 the school board need neither surrender its discretion in determining calendar policy nor come to an agreement in the collective bargaining sense. The board must, however, confer and negotiate and this concludes a consideration of the suggestions and reasons for the teachers. But there is no duty upon the school board to

---

1/ The Commission has rejected the "clean hands" argument in prohibited practice cases. City of Portage (8378) 1/68; St. Francis Jt. School District No. 6 (9546-A & B) 10/71.

2/ Joint School District No. 8, City of Madison, et. al., v. WERB, 37 Wis. 2d 483 (1967), aff. Joint School District No. 8, City of Madison, et. al., (7768) 10/66.

3/ City of Beloit by the Beloit City School Board (11831-C) 9/74, motion for reconsideration denied (11831-D) 10/74.

agree against its judgment with the suggestions and it is not a forbidden practice for the school board to determine in its own judgment what the school calendar should be even though such course of action rejects the teachers' wishes . . ." 4/

The Complainant relies on this particular aspect of the Supreme Court's rationale to support its argument that the obligation to bargain collectively subsequently imposed by Section 111.70(3)(a)4 and defined in Section 111.70(1)(b) is not as extensive on the issue of calendar as it is on "issues which strictly come within the terms 'wages, hours and conditions of employment'". However, this argument ignores the fact that, as the Supreme Court observed in that case, the Legislature had not yet seen fit to define the scope of collective bargaining in municipal employment or to impose a mandatory bargaining obligation on municipal employers. The decision of the Commission and the decision of the Court consequently made no distinction between permissive or mandatory subjects of bargaining in their discussion of the calendar issue.

In the Madison school calendar case the Commission found that the calendar issue had "a direct and intimate relationship to salaries, hours and working conditions" 5/ and the Supreme Court specifically upheld that finding. 6/ Any doubt as to whether the Commission's view of that relationship was such as to treat the calendar issue as a permissive rather than mandatory subject of bargaining under MERA was put to rest by its declaratory ruling in the Beloit case referred to above. In that case the Commission said:

> "We conclude that the school calendar is a mandatory subject of bargaining, since it establishes the number of teaching days, inservice days, vacation periods, convention dates, and the length of the school year directly affecting 'hours and conditions of employment.'
>
> With respect to the Association's proposal pertaining to In-Service Days, we determine that the number of such days and the day of the week on which such days will fall are mandatory subjects of bargaining because, with the teaching days, they comprise the teachers' work days. However, we conclude that the type of programs to be held on such days, and the participants therein are not subjects of mandatory bargaining, since we are satisfied that such programs and the participants therein have only a minor impact on working conditions, as compared to the impact on educational policy." 7/

The conclusion that the school calendar is a mandatory subject of bargaining is not at odds with the quoted passage from the Supreme Court's decision in the Madison school calendar case set out above. As Section 111.70(1)(d) makes explicitly clear, the duty to bargain on a mandatory

---

4/ Joint School District No. 8, City of Madison, et. al., v. WERB 37 Wis. 2d 483, at p. 494.

5/ Joint School District No. 8, City of Madison, et. al., (7768) 10/66, at p. 8.

6/ Joint School District No. 8, City of Madison, et. al., v. WERB 37 Wis. 2d 483, at p. 494.

7/ City of Beloit by the Beloit City School Board (11831-C) 9/74, at p. 22.

subject does not compel either party to agree to a proposal and, absent agreement after a good faith effort to reach agreement, a municipal employer, like its private counterpart, can take the necessary steps to implement its proposals. The question of whether the Complainant acted lawfully in adopting a school calendar under the conditions extant on May 5, 1973 is not at issue in this proceeding.

In view of the fact that the calendar issue was a mandatory subject of bargaining, it was not a per se violation for the Respondent to pursue that issue to the point of an impasse in bargaining. Because there is an obvious relationship between the number of days of work and the annual compensation to be paid, the Respondent's insistence that any agreement on the number of contact days in the calendar would be dependent on the salary base offered was not a tactic which, in itself, evidenced bad faith.

While it is true, as the Complainant argues, that there is evidence of an escalation in the per diem rate of compensation under the three basic offers made by the Respondent (177 days at $8,200 = $46.32; 179 days at $8,350 = $46.64; 180 days at $8,450 = $46.94), such evidence is not necessarily an indication that the Respondent was seeking to avoid agreement. It could just as easily be interpreted as an effort to avoid agreeing to a calendar containing more than 177 contact days or an attempt to extract whatever bargaining advantage there was in the legislative and regulatory pressures that were on the Complainant to increase the number of contact days in its school calendar to 180.

While the Examiner would not necessarily recommend either side's techniques of bargaining, as reflected in the minutes of the first eighteen bargaining sessions or as measured by the results which included an agreement on 179 contact days at $8,100 after a bitter strike of some length and notariety, as a model of negotiations for others to follow, it is not possible to say that the Respondent's employment of the tactics herein described constitutes bad faith bargaining or supports a finding that it engaged in a course of conduct evidencing bad faith. 8/

Strike Vote and Threat

The Complainant's contention that the Respondent coerced and intimidated employes in the enjoyment of their legal rights by taking a strike vote is not a novel one. What is novel is the Respondent's contention, contained in its Motion to Strike, that the Complainant is not a party in interest with sufficient standing to raise the issue on behalf of its own employes. By Order dated October 16, 1973, the Examiner deferred ruling on this motion pending presentation of evidence and argument pursuant to the requirements of Section 227.01 of the Wisconsin Statutes. 9/

The Respondent cites no authority in its brief for the proposition that an employer lacks standing to raise an issue alleging that a labor organization has coerced or intimidated its own employes and the law is

---

8/ The Complainant also contends that the Respondent refused to sign an alleged agreement on bargaining procedure in support of its claim of bad faith bargaining. The record is inadequate to show whether there was actual agreement on the wording of the document tendered and the Complainant specifically declined the opportunity to amend the complaint for the purpose of alleging this conduct as an independent violation of the Respondent's duty to bargain in good faith.

9/ Kenosha Unified School District No. 1 (12029-B) 10/73.

most certainly to the contrary. An employer would seem to have no less an interest in protecting the rights of its own employes guaranteed under Section 111.70(2) than the labor organization which seeks to represent them. 10/

However, on the record presented there is no evidence that will support a finding that the Respondent coerced or intimidated the Complainant's employes by taking a strike authorization vote. Under Section 111.70 of the Wisconsin Statutes, as it read before it was amended by MERA effective November 11, 1971, the Commission held that, while strikes are expressly prohibited by Section 111.70(4)(l) of the Wisconsin Statutes, the Legislature did not intend that a strike should be considered a prohibited practice under Section 111.70(3)(b)1 which was the predecessor to Section 111.70(3)(b)1 of MERA. 11/ Similarly, the Commission has held that the mere threat to engage in a strike or the prediction that a strike might be called was not a prohibited practice under Section 111.70(3)(b)1 as that provision read before the enactment of MERA. 12/

While it is clear that municipal employes have no less a right to refrain from engaging in unlawful activities, such as a strike, than they have to refrain from engaging in lawful activities, such as informational picketing, there is no evidence of any act of coercion or intimidation having been applied to any employes of the Complainant. It must be assumed that those employes who attended the meeting at which the strike vote was taken were there voluntarily and a secret ballot was used for the purpose of taking the strike vote. There is no evidence that any improper pressure was brought to bear on any employe at the meeting and a number of those employes who attended the meeting apparently voted against the strike authorization. Under these circumstances, it cannot be said that the Respondent attempted to coerce or intimidate employes in the exercise of their legal rights.

The Complainant's contention that the Respondent bargained in bad faith by taking a vote to authorize its negotiating team and Executive Board to call an illegal strike and then using the threat of that illegal strike in an attempt to extract concessions in bargaining, presents a question which appears to be one of first impression. The only case involving a strike or strike threat that has been decided by the Commission since the enactment of MERA is a case involving a "job action" by deputy sheriffs employed by Walworth County. 13/ In that case the Commission reaffirmed the rule of the Wauwatosa and Brown County cases and again held that the Legislature did make strikes or threats to engage in strikes prohibited practices when it enacted MERA. There was no specific contention in that case that an illegal strike or threat to engage in an illegal strike while engaged in bargaining could constitute a refusal to bargain in good faith.

The Complainant cites a number of NLRB cases in support of this argument. One group of cases holds that it is bad faith bargaining to

---

10/ See Surfside Manor (11809 & 11810) 5/74.

11/ Wauwatosa Board of Education (8638) 7/68.

12/ Brown County (9537) 3/70. It should be noted that if MERA made any significant change in Section 111.70(3)(a)1 it was by making it more narrow by dropping the word "interfering" which appeared in the old Section 111.70 version. It is arguable that conduct which interefers does not necessarily amount to coercion and intimidation.

13/ Walworth County (12690 & 12691) 5/74.

insist to the point of an impasse that an employer agree to a provision that it is not obligated to agree to (a permissive subject) and another group of cases holds that it is bad faith bargaining to insist to the point of impasse that an employer agree to do what it is prohibited from doing (an illegal subject). These cases are clearly inapposite since they relate to the NLRB's enforcement of the rule that an employer can only be required to bargain about wages, hours and working conditions and have nothing to do with threats to engage in illegal conduct during the bargaining process.

The Complainant also relies on another group of cases 14/ to the effect that a Union bargains in bad faith when it threatens to engage in a strike without giving proper notice of intent to terminate the agreement under Section 8(d) of NLRA as amended. However, in these cases the threat was to engage in conduct which is directly violative of the duty to bargain in good faith as defined in Section 8(d) of the NLRA. Here the threat is to engage in conduct which is not expressly prohibited by Section 111.70(3)(b) or contrary to the definition of collective bargaining set out in Section 111.70(1)(d) of the MERA.

The Complainant argues, presumably by way of hyperbole, that if it is not a violation of the duty to bargain in good faith to threaten to engage in an illegal strike, "murder threats will soon be common place in the labor arena." First of all, it must be observed that the "illegality" of strikes stems from a statutory prohibition which does not include any civil or criminal penalties. While the prohibition is enforceable through court action, the only penalty that an illegal striker can be subjected to short of court action, is that which a municipal employer can lawfully impose in the form of self-help. In this sense strikes by municipal employes are no different from the various forms of concerted activity which are neither protected concerted activity under Section 7 of the NLRA nor prohibited unfair labor practices under Section 8 of the NLRA, such as quickie strikes, partial strikes, and slowdowns. Even so, there would still be merit to the Complainant's argument that strikes or threats to strike by public employes could constitute bad faith bargaining in view of the fact that they are prohibited by Section 111.70(4)(l), if it were not for the legislative history of that provision.

It must be assumed that when the Legislature totally revised Section 111.70 in 1971 it was aware of the Commission's interpretation of Section 111.70 in the Wauwatosa case, 15/ which specifically held that the Legislature did not intend to make strikes a prohibited practice when it chose to include the strike prohibition in Section 111.70(4)(l) rather than making it a prohibited practice as it had done in 1966 in the case of state employes under Section 111.84(2)(e) of the State Employment Relations Act. It is no more reasonable to assume that the Legislature intended to make strikes a prohibited practice when it

---

14/ Union Independeiente Telefonicos de Puerto Rico, 196 NLRB No. 156, 80 LRRM 1224 (1972); Zembrobt Express Inc., 193 NLRB No. 22, 78 LRRM 1188 (1971) and Melville Shoe Corp., 187 NLRB No. 107, 76 LRRM 1190 (1971).

15/ Wauwatosa Board of Education (8638) 7/68.

made a refusal to bargain a prohibited practice than to assume that it intended to make a refusal to bargain a prohibited practice when it made interference a prohibited practice. 16/ Subsequently, in 1972 it provided penalties for striking in violation of an injunction, an action which adds further support to the conclusion that the Legislature intended that the courts, rather than the Commission, should enforce the strike prohibition set out in Section 111.70(4)(l) of MERA. If the Commission were to find that a labor organization bargains in bad faith by striking or threatening to strike, without other evidence supporting a finding of subjective bad faith, it would in effect be holding a strike or strike threat to be a prohibited practice under the guise of condemning a tactic which, while unprotected under Section 111.70(2) of MERA, was clearly not intended to be prohibited practice under Section 111.70(3) of MERA. 17/

For the above and foregoing reasons, the Examiner concludes that the Respondent did not refuse to bargain collectively or coerce and intimidate employes by the conduct described and has dismissed the complaint.

Dated at Madison, Wisconsin, this 31st day of December, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli
George R. Fleischli, Examiner

16/ City of New Berlin (7293) 3/66.

17/ Cf. NLRB v. Insurance Agents International Union, 361 US 477, 45 LRRM 2704 (1960).