STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of RETAIL STORE EMPLOYEES UNION LOCAL NO. 214, a/w RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO For a Declaratory Ruling Involving Certain Employes of AUSTIN'S SUPER MARKETS, INC. Sheboygan Falls, Wisconsin	Case I No. 17409 DR-50 Decision No. 12362-A

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Gerry Miller, on behalf of Retail Store Employees Union Local No. 214, a/w Retail Clerks International Association, AFL-CIO.

Mr. Charles E. Austin, Jr., appearing on behalf of Austin's Super Markets, Inc.

DECLARATORY RULING

Retail Store Employees Union Local No. 214, a/w Retail Clerks International Association, AFL-CIO, having filed a petition requesting a Declaratory Ruling as to whether the parties herein could lawfully enter into and enforce an all-union agreement in the absence of a referendum conducted by the Commission pursuant to Section 111.06 (1)(c) of the Wisconsin Employment Peace Act; and the matter having been heard before Hearing Officer Amedeo Greco on January 25, 1974, at which time the parties offered evidence and arguments; and the Union thereafter having filed a brief; and the Commission having considered the record in its entirety, makes and files the following Findings of Fact and Declaratory Ruling.

FINDINGS OF FACT

1. That Retail Store Employees Union Local No. 214, a/w Retail Clerks International Association, AFL-CIO, herein the Union, is a labor organization and maintains its offices at 316 Court Street, Oshkosh, Wisconsin.

2. That Austin's Super Markets, Inc., herein Austin's or the Employer, is a Wisconsin corporation which operates a retail grocery store at 321 Broadway, Sheboygan Falls, Wisconsin; and that it is engaged in interstate commerce and therefore is subject to the jurisdiction of the National Labor Relations Board.

3. That in the early part of 1972, the Union commenced organizational activity among certain of the Employer's grocery department employes; that at about the same time, another labor organization, the Amalgamated Meat Cutters and Butcher Workmen of North America, Local No. 73, AFL-CIO, attempted to organize the Employer's meat department employes; and that during the course of the Union's campaign, nine of the approximately 13 or 14 employes in the grocery department signed union authorization cards which stated that the undersigned:

> "hereby authorize[s . . . the 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 . . . 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." (Emphasis added)

4. That in response thereto, the Employer vigorously opposed the two union-organizing campaigns which were taking place among its employes.

5. That these unions thereafter jointly filed an unfair labor practice charge with the National Labor Relations Board, herein NLRB.

6. That after a formal hearing was held, at which time the Employer was accorded full opportunity to present its case, the NLRB found that the Employer had violated the National Labor Relations Act, (NLRA), as amended, by threatening employes with loss of employment, by interrogating employes, and by discharging nine employes because of their concerted activity; and that to remedy these unlawful acts, the NLRB Administrative Law Judge who heard the case ruled that:

"The facts in this case show that as soon as the Union began to organize the Respondent, the Respondent began to undermine their organizational efforts. Supervisors held meetings with their respective employees and on these occasions threatened changes and discharges, and Supervisor Carpenter also interrogated employees. Nine illegal discharges then occurred immediately after the presentation of the authorization cards and the demand for recognition. These unfair labor practices were directed at undermining the strength of the Unions and impeding an election process. Applying the standards of N.L.R.B. v. Gissel Packing Co., supra, the considerations are whether there is still a possibility of ensuring a fair election. I believe that possibility is slight because of the lingering coercive effect of the unfair labor practices, and I therefore find that the employees' majority designation of the Unions as expressed in their authorization cards provides a more reliable measure of the employees' true desires than would be provided by an election and in accordance therewith, I shall recommend that Respondent bargain upon request with the Union not only to remedy its violation of Section 8(a)(5), but also its violation of Section 8(a)(1) of the Act." (Emphasis added)

7. The following affirmance of the Administrative Law Judge's findings and conclusions by the NLRB, and apparently also by the United States Court of Appeals, the Employer thereafter recognized the Union as the official representative of its employes and engaged in collective bargaining negotiations with the Union for the purpose of attempting to reach an agreement covering its grocery department employes; that during the course of said negotiations, (which as of the date of the instant hearing had not been completed), the parties agreed to a Union shop provision which provides:

"All present employes who are members of the local union on the execution date of this agreement shall remain members of the local union in good standing as a condition of employment; all present employes who are not members of the local union on the effective date of this agreement and all employes who are hired after the effective date of this agreement shall become and remain members in good standing of the local union as a condition

of employment on or after the 31st day following the execution date of this agreement or on and after the 31st day following the beginning date of their employment, whichever is later. This paragraph shall become effective upon compliance with section 111.06(1)(c) 1. of the Wisconsin Statutes or upon order of the WERC." (Emphasis added)

8. That as of the date of the instant hearing, only one of the nine employes who signed the above-mentioned union authorization cards was still employed by the Employer.

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

DECLARATORY RULING

Where a majority of employes in an appropriate collective bargaining unit execute documents authorizing a labor organization to represent them for the purposes of collective bargaining, and further authorizing said labor organization and their employer to enter into an all-union agreement; and thereafter, where said employer, as a result of unfair labor practices found to have been committed by him, is ordered by the National Labor Relations Board, or the Wisconsin Employment Relations Commission, to recognize and bargain with said labor organization as the exclusive collective bargaining representative of said employes on the basis that the Employer's unlawful activity may have dissipated the "majority status" of the labor organization; such does not permit the Wisconsin Employment Relations Commission to authorize the labor organization and the Employer to enter into an all-union agreement without the necessity of a referendum conducted among the appropriate employes, as required by Section 111.06(1)(c)1 of the Wisconsin Employment Peace Act, wherein it is required that at least a majority of the employes voting, provided such majority also constitutes a majority of the employes in the collective bargaining unit, must authorize same.

Given under our hands and seal at the City of Madison, Wisconsin this 9th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman
Howard S. Bellman, Commissioner

MEMORANDUM ACCOMPANYING DECLARATORY RULING

The Union primarily argues that parties should be allowed to voluntarily enter into an all-union agreement without there first being a referendum in situations where, as here, an employer has committed pervasive, lingering unfair labor practices which render it unlikely that a free and fair referendum election can now be held. In support thereof, the Union points out that both the Commission and the United States Supreme Court have held that certain employer unfair labor practices may warrant the imposition of a bargaining order, even though the union has not received a majority of votes in an election, if those unfair labor practices tend to preclude the holding of a fair representation election where employes are not influenced by the employer's prior conduct. The Union maintains the same reasoning underlying such bargaining orders is also applicable to referenda cases. In raising this issue, the Union makes clear that the only issue posed herein is whether the parties can enter into such an agreement, when the Employer is willing to do so. Thus, the Union acknowledges that were the Union seeking to have the Commission force the Employer to agree to an all-union agreement, another question would be presented under NLRB v. H.K. Porter Co., Inc., 397 U.S. 99 (1970) and NLRB v. Burns International Detective Agency, Inc., 406 U.S. 272 (1972).

The Employer, on the other hand, stated at the hearing (it did not file a brief) that in its opinion, employe sentiment regarding an all-union agreement could best be determined by having those employes vote on the matter in a secret ballot election. In this connection, the Employer argues that since only one of the original nine card signers is still employed, the cards are not a true indication of present employe sentiment on the ground that its present employes have not had an opportunity to voice their views on whether they desire an all-union agreement.

We have interpreted the statutory provisions with regard to questions covering representation as not always requiring an election to establish a collective bargaining relationship. There is nothing in the statute which precludes an employer from voluntarily granting recognition to a labor organization. Furthermore, Section 111.05(3) of the Wisconsin Employment Peace Act provides in pertinent part as follows:

> "Whenever a question arises concerning the representation of employes in a collective bargaining unit the commission shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers." (Emphasis added)

Where, during an organizational campaign, a union obtains properly executed authorization cards from a majority of employes in an appropriate bargaining unit, and thereafter the employer involved engaged in unfair labor practices which would tend to destroy the union's "majority status", as reflected in said authorization cards, the Commission deems that, under such circumstances, no question of representation exists, and, therefore, in the unfair labor practice case, it may order the employer to recognize the union as the collective bargaining representative for the employes in the unit on the basis of its majority standing prior to the unlawful conduct by the employer. 1/

1/ Colonial Restaurants, Inc., (7605-C) 1/67.

The statutory language contained in Section 111.06(1)(c)1 states in part as follows:

> "An employer shall not be prohibited from entering into an all-union agreement with the representatives of his employes in a collective bargaining unit, where at least a majority of such employes voting (provided such majority of the employes also constitute at least a majority of the employes in such collective bargaining unit) have voted affirmatively, by secret ballot, in favor of such all-union agreement in a referendum conducted by the commission." (Emphasis added)

The above language is clear and unambiguous. It succinctly sets forth that an employer and a union may enter into an all-union agreement only when at least a majority of the eligible employes in the bargaining unit involved have voted by secret ballot to authorize the parties to enter into such an agreement. It is significant to note that the section also provides that any all-union agreement in effect prior to the adoption of the Act (May 5, 1939) be deemed valid and enforceable without a referendum. Further, the same section permits certain employers, primarily engaged in on-site building and construction, as well as over-the-road trucking, to enter into all-union agreements which have "not been subjected to a referendum vote as provided in this subchapter." Had the legislature intended that the Commission could authorize an employer and union to enter into an all-union agreement, as a result of an employer's unfair labor practices which might affect the results of a referendum, the legislature could have made such an exception in the same provision, which includes exemption to the referendum requirement.

Therefore, in order to secure a valid authorization for an all-union agreement there must be a referendum conducted among the employes involved, wherein at least a majority of those employes voting, provided such majority also constitutes at least a majority of the employes in the unit, vote in favor of authorizing an all-union agreement between the Employer and the Union.

Dated at Madison, Wissonsin this 9th day of July, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Zel S. Rice II, Commissioner

Howard S. Bellman
Howard S. Bellman, Commissioner