STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL 122, AFL-CIO Complainant, vs. PAUL LA POINTE, Respondent.	Case I No. 18446 Ce-1570 Decision No. 13140-A

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan M. Levy, for the Complainant.
Cahill & Fox, Attorneys at Law, by Mr. Bruce C. O'Neill, for Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Hotel, Motel, Restaurant Employees and Bartenders Union Local 122, AFL-CIO, herein referred to as Complainant, having filed a complaint on October 31, 1974 with the Wisconsin Employment Relations Commission wherein it alleged that Paul La Pointe, herein referred to as Respondent, has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Stanley H. Michelstetter II, a member of the Commission's staff to act as Examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07 (5) of the Wisconsin Statutes; and a hearing on such complaint having been held at Milwaukee, Wisconsin on January 15, 1975, before the Examiner, and the Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Complainant Hotel, Motel, Restaurant Employees and Bartenders Union Local 122, AFL-CIO is a labor organization having offices at 723 North Third Street, Milwaukee, Wisconsin.

2. That at all relevant times prior to May 1, 1974 Respondent Paul La Pointe has been an employer within the meaning of the Wisconsin Employment Peace Act and the agent of Frenchy's Restaurant, Incorporated, also an employer within the meaning of the Wisconsin Employment Peace Act; that for at least the past twenty-six years Respondent, through Frenchy's Restaurant, Incorporated operated a restaurant in the City of Milwaukee until May 1, 1974.

3. That the following persons in the left column of the following list are representatives of, or, employers operating the restaurants listed in the right column opposite their names.

Werner Strothmann	Boulevard Inn	Casper Bartley	Time-Out Restaurant
Paul	Boulevard Inn		
Karl Ratzsch	Ratzsch's Restaurant	John Ernst	John Ernst Cafe
Victor Mader	Mader's Restaurant	Morris Friedman	Eugene's Restaurant

4. That for the past twenty-six or more years the employers [1/] listed in Finding of Fact 3 above, herein referred to as the association, have recognized Complainant as the representative of certain of their employees in a multi-employer unit; that Respondent has never been a member thereof; that in that regard the association has negotiated numerous collective bargaining agreements with Complainant on behalf of its members; that Respondent has always executed substantively identical agreements with Complainant, but has always reserved, though never exercised, the right to negotiate separate and different terms from those negotiated by the association; that at least on one occasion Respondent reached agreement with Complainant on a successor collective bargaining agreement and that the association thereafter accepted a substantively identical agreement; that both the association and Respondent have always agreed to, and made, collective bargaining agreements retroactive to the expiration date of previous agreements when negotiations extended beyond those expiration dates; and that at all relevant times all relevant representatives of Complainant, the association and Respondent were aware of the foregoing facts.

5. That during the period 1971 to 1973 Respondent experienced increasing losses and in response thereto elected to sell his business; that in November, 1973 Respondent negotiated a sale of all of the assets of Frenchy's Restaurant, Incorporated to Frenchy's Cafe and Bull Dog Pub, Incorporated, an unrelated entity, which sale was then scheduled to be closed December 31, 1973, but which was not closed until shortly prior to May 1, 1974 and which became effective May 1, 1974.

6. That pursuant to Complainant's sixty-day notice to negotiate a successor agreement, Complainant and the association scheduled their first negotiation session in early December, 1973; that a representative of the association without Complainant's knowledge invited Respondent to attend; that at the agreed time representatives of the association, Respondent himself and Complainant attended the scheduled meeting during which Complainant's representatives requested that the previous collective bargaining agreement be renewed for the term December 1, 1973 to June 15, 1976 with a thirty-five cent across-the-board increase in existing wage rates, that the employers pay the insurance premium increase, that the employers pay an increase in the number of paid holidays; and that during the course of the meeting Respondent told Complainant's representatives that his business was up for sale and that they responded that at the right price all of the employers' businesses were for sale.

7. Thereafter, on December 20, 1973 the same representatives met to continue negotiations; that on the basis of business lost as a result of the gasoline shortage the association's representatives proposed that the previous agreement be extended without change for a one year period without any wage increase or other change; that Complainant's agent testified that the association's spokesman agreed to pay the increase in insurance premium and make whatever settlement was agreed upon retroactive to December 1, 1973 and that Respondent acquiesced in both agreements by silence; that Respondent never authorized the association to bargain on his behalf in his absence; and that no agreement was reached at the foregoing or any meeting prior to May 1, 1974 with respect to a successor agreement to the 1971-1973 collective bargaining agreement; and that the

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1/ During the course of the hearing the parties stipulated that the Time-Out Restaurant was out of existence during the negotiations for the 1973-1976 agreement.

December 20, 1974 meeting ended with the parties thereto in disagreement as to at least the term of the successor agreement, possible wage increase and possible increase in the number of paid holidays.

8. That thereafter Respondent participated in no further negotiation sessions of any kind with Complainant.

9. That Complainant was notified of the completion of the sale of Respondent's business in spring, 1974 prior to facts stated in Finding of Fact 10 below.

10. That in July, 1974 representatives of the association concluded a collective bargaining agreement for the term December 1, 1973 to June 15, 1976, providing for wage increases to be added to existing wage rates.

11. That Complainant ratified the aforementioned agreement in the fall of 1974 and, thereafter, Complainant requested the Respondent pay the aforementioned wage increase for the period December 1, 1973 to May 1, 1974 but never requested that Respondent execute the agreement prior to the filing of the instant complaint on October 31, 1974.

On the basis of the above and foregoing Finding of Fact, the Examiner makes and files the following

CONCLUSION OF LAW

That since there is no collective bargaining agreement in existence between Complainant Hotel, Motel, Bartenders and Restaurant Employees Local 122 and Respondent Paul La Pointe, that Respondent did not, and is not, violating Section 111.06 (1) (f) of the Wisconsin Employment Peace Act by failing and refusing to pay the retroactive wage increase agreed to by the multi-employer association and Complainant.

Upon the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and files the following

ORDER

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 26th day of September, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

by Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Respondent participated in two sessions in the multi-employer association's negotiatiations with the Complainant. The facts and circumstances are set out in the Findings of Fact and will not be restated here.

POSITIONS OF THE PARTIES

Complainant takes the position that there exists a collective bargaining agreement between the parties and that Respondent is refusing to pay the retroactive wage increase thereunder for the period December 1, 1973 to May 1, 1974. It argues that Complainant attended two negotiation sessions of the multi-employer bargaining unit and, although it never became a member thereof, the circumstances establish that a collective bargaining agreement was reached thereat or, in the alternative, Respondent by his conduct authorized the multi-employer association to bargain on his behalf thereafter and obligated himself to accept their agreement. It primarily points to Respondent's and the multi-employer association's long past history of accepting each other's agreement and paying retroactivity. As evidence of Respondent's intent to be bound it points to his asserted acceptance of the asserted multi-employer's agreement to pay the increase in insurance premium and his payment thereof. In this context Complainant argues Respondent's asserted agreement to make retroactive any agreement which would thereafter be reached must be understood to have been acceptance of terms thereafter to be negotiated by the association and Complainant.

Respondent argues that Complainant's representatives knew that for twenty-six years it has never been a member of the multi-employer unit and that Respondent by its attendance at the meetings or any other conduct never actually or implicitly designated the association as his representative. In this context it asserts that if the Examiner finds that retroactivity and health insurance were discussed at the December 20, 1973 meeting, that neither would be grounds for concluding delegation of authority. It argues that first, the increase in insurance was paid merely because Respondent was unaware of his right to do otherwise. Secondly, it points to the agreement for retroactivity in the context of an employer position not to grant increases as being evidence of a lack of meeting of the minds of the parties.

DISCUSSION

Complainant must prove that there is a collective bargaining agreement in existence by a clear and satisfactory preponderance of the evidence 2/ by showing that the parties had a "meeting of the minds" on

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2/ Tiran Industrial Towels, Inc. @ p. 7 (7438) 1/66.

each and every item in dispute. 3/ At the outset of the December 20, 1973 meeting the association and Respondent disagreed with Complainant as to what, if any, wage increase was to be granted; the term of the successor agreement; payment of the insurance premium increase; increase, if any in number of paid holidays and retroactivity. It is undisputed that the session ended with disagreement over the possibility of a wage increase among other items. There was testimony, if believed, that Respondent acquiesed in an agreement to pay retroactivity and the insurance premium increase. 4/ Thus, the parties did not reach agreement on a successor agreement. The Examiner will not supply for Respondent the missing disputed terms on the basis of his agreement to make the successor agreement retroactive 5/ or on the basis of past practice.

Thus, the primary issue is whether Respondent delegated authority to the association to bargain in his behalf in his absence. The only evidence of delegation is Respondent's payment of the increased insurance premium, his participation in the multi-employer negotiations and past acceptance of the association's agreements. Even if Complainant's agents had relied thereon, the increased premium payment is insufficient to establish actual intent. 6/ Complainant's representative Barwick testified to the effect that he assumed from Respondent's attendance at the aforementioned meetings that Respondent intended to be bound by the multi-employer's actions. However, after agreement was reached Complainant only asked Respondent to pay the retroactivity, not execute the agreement. The Examiner is satisfied from the facts and circumstances of this case that Respondent did not depart from his twenty-six year pattern of retaining the right to negotiate a different agreement by authorizing the association to bargain in his behalf in his absence; nor did Complainant's agents believe that he had. 7/

Dated at Milwaukee, Wisconsin, this 26th day of September, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

by Stanley H. Michelstetter II

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Examiner

3/ Giant Grip Mfg. Company, (3218) 2/50.

4/ Respondent later paid the insurance premium assertedly only because he did not realize that he could do anything other than pay the carrier's bill.

5/ Tiran Industrial Towels, Inc., supra.

6/ Cargil Heating and Air Conditioning Company, Inc., (11319) 9/72; Tiran Industrial Towels, Inc., supra.

7/ cf. Walter Evans & Sons Trucking, (6347) 5/63.