STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| LOCAL NO. 167 OF THE INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, | | |
| Complainant, | : | Case II No. 19403 Ce-1618 |
| vs. | : | Decision No. 13847-A |
| BILL SEATON d/b/a GRAND THEATRE, | | |
| Respondent. | | |

Appearances:
Dempsey, Magnusen, Williamson and Lampe, Attorneys at Law, by Mr. Nicholas J. Meeuwsen, appearing on behalf of the Complainant.
Mr. James Manske, Attorney at Law, appearing on behalf of the Repondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Byron Yaffe, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Oshkosh, Wisconsin on September 23, 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, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local No. 167, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, hereinafter referred to as the Complainant or Union, is a labor organization having its principal office at 407 Monroe Street, Amro, Wisconsin; and that Mr. John Siebold, Business Agent, has been the representative of said Union at all times relevant herein.

2. That Bill Seaton, d/b/a Grand Theatre, hereinafter referred to as the Respondent or Employer, is the sole proprietor of a motion picture theater located at 100 High Avenue, Oshkosh, Wisconsin.

3. That the Union and the Employer were signators to a collective bargaining agreement covering the terms and conditions of employment for moving picture machine operators for the period January 1, 1975 through January 1, 1976.

4. That said agreement provided in relevant part:

"(1) This Agreement shall apply to and cover moving picture machine operators employed by the Employer in the city of Oshkosh, Wisconsin.

Such moving picture machine operators shall, unless otherwise specifically designated be referred to hereinafter as 'employees.'

. . .

(5) The Employer agrees not to discriminate against any employee or applicant for employment by reason of membership in the Union or because of anything said or done in furtherance of the Union.

. . .

A. Projectionist salaries: 8.00 A.M. to 12.00 Midnite: [sic] $3.75 per hour
12.00 Midnite [sic] to 8.00 A.M. $5.63 per hour.
Projectionists time to include Thirty (30) Minutes prior to actual starting time for preparation of equipment.

. . .

E. Employees covered by this contract shall receive two weeks salary, (vacation pay) in addition to their regular salary, at their request, during each year of this contract."

5. That said collective bargaining agreement contains neither a grievance nor an arbitration procedure for the resolution of contractual disputes.

6. That until July 1975, the Respondent employed five projectionists, three on a regular basis; and that said employes maintained and operated two 35 millimeter projectors during the Employer's regular hours of operation.

7. That on or about July 17, 1975, the Employer implemented a change in operation with the installation of a 16 millimeter projection system; and that approximately six weeks prior to said implementation, the Employer gave notice to the Union of the contemplated change and offered to renegotiate the existing agreement to establish working conditions for one operator one day per week to oil and clean the new 16 millimeter projectors and to have an operator on hand in case the 35 millimeter projectors had to be run; and that the Employer on several occasions thereafter made similar offers to the Union's Business Representative and to several of the projectionists.

8. That subsequent to the foregoing notice of change and offer to negotiate, after the Union's Business Agent discussed the matter with the local membership, the Union advised the Employer that it would not renegotiate the contract.

9. That thereafter the Employer advised the Union and the projectionists that said employes' employment would be terminated, and further provided two weeks' notice thereof; and that, however, said terminations were effectuated four weeks after notice to said employes.

10. That one of the three terminated projectionists inquired of the Employer's assistant manager with regard to the disposition of his vacation pay; but that no employe's request for vacation pay was made to Mr. Seaton directly.

11. That on or after July 17, 1975, the 16 millimeter equipment has been operated by Mr. Seaton (the proprietor), the theater manager, or one of the assistant managers, all of whom have performed such work in addition to their regular duties, which include, at various times, the running of the entire theater operation with the assistance of a cashier; and that

since mid-July no projectionists have been employed to operate or service said equipment; and that on one occasion since said date, Mr. Seaton has operated the 35 millimeter equipment.

12. That one of the reasons the Employer changed to the 16 millimeter equipment was his dissatisfaction with the work performed by all but two of the projectionists provided by the Union.

13. That the new 16 millimeter projector requires less time, attention and skill in its operation than does a 35 millimeter projector in that the film on the 16 millimeter equipment needs to be changed only once each hour and fifteen minutes whereas the 35 millimeter equipment requires film changing, framing, and carbon cleaning every 20 minutes; that the Union projectionists are qualified to operate and maintain said projector; and that said projector can be operated with minimal attention by Mr. Seaton, his manager or assistant managers even though said individuals have other responsibilities in running the theater.

14. That the Union, on July 28, 1975, filed the instant complaint with the Wisconsin Employment Relations Commission alleging that the Respondent has committed and is committing unfair labor practices within the meaning of Sections 111.06(1)(a), (c) and (f) of the Wisconsin Statutes by the unilateral termination of the collective bargaining agreement between the parties, the resultant discharge of three projectionists, and the failure to make vacation payments pursuant to said agreement to the three terminated projectionists.

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

## CONCLUSIONS OF LAW

1. That because the pertinent collective bargaining agreement contains no arbitration provisions providing for a final and binding mechanism to resolve the dispute over the alleged contractual violation filed herein, the Commission has and will assert its jurisdiction to resolve said dispute.

2. That the Respondent, by converting to a 16 millimeter projector operation and discharging all of the Union projectionists because of said change in operations, after having offered to negotiate the impact of said change in operations with the Union, did not commit unfair labor practice within the meaning of Sections 111.06(1)(a), (c) or (f) of the Wisconsin Employment Peace Act.

3. That the Respondent, by failing to pay the terminated projectionists vacation pay pursuant to the parties' collective bargaining agreement has not committed unfair labor practices within the meaning of Sections 111.06 (1)(f) of the Wisconsin Employment Peace Act.

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

## ORDER

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 17th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In the complaint filed on July 28, 1975, the Complainant alleged that the Respondent had committed unfair labor practices in violation of Sections 111.06(1)(a), (c) and (f) of the Wisconsin Employment Peace Act (WEPA). In particular the Complainant alleged that the Respondent violated the parties' collective bargaining agreement by unilaterally terminating said agreement, by terminating the projectionists, and by failing to provide the three terminated projectionists with two weeks vacation pay for 1975.

Whereas the Complainant alleges the commission of unfair labor practices in violation of Sections 111.06(1)(a), (c) and (f) of the WEPA, the testimony and evidence adduced during the course of the hearing conducted on September 23, 1975, essentially relate only to the alleged violation of Section 111.06(1)(f); specifically that certain actions of the Employer violated the terms of the parties' collective bargaining agreement. No allegations were made that the Employer unlawfully refused to negotiate the impact of said change and accordingly no findings need be made with respect to said issue.

The gist of the Complainant's argument is that the parties' agreement obligates the Employer to employ Union projectionist tasks to operate moving picture projectors, whether they be 16 or 35 millimeter. The Union contends that there are still projectionist tasks to be performed, and thus, at least for the duration of the pertinent contract, the projectionists are entitled to perform them.

The Union also argues that because the Employer admitted that one of the reasons he made the change was to get rid of some Union projectionists with whom he was dissatisfied and that he would have liked to have retained two of the projectionists if possible, the Employer's argument that the projectionists' termination resulted from the fact that the new equipment no longer requires projectionists cannot be credited.

Lastly, with respect to the allegation concerning the Employer's alleged failure to pay projectionists the vacation pay which they were due, the Union contends that the agreement clearly entitled the three full time projectionists to vacation pay for 1975; that they have not received such pay, and thus the Employer has violated their contractual and statutory rights under 111.06(1)(f), Wisconsin Statutes.

The Employer, on the other hand, contends that because there has been a basic change in operation to a 16 millimeter projector system, he no longer needs projectionists. Furthermore, he argues that he is not obliged to continue using them pursuant to the agreement in question. In addition, the Employer submits that the projectionists are not entitled to vacation pay pursuant to the agreement since no request for such pay was made, and secondly, since they did not work a full year, which would have been necessary for them to have been entitled to the vacation pay benefit.

There are several issues which must be resolved in the proceeding in order to determine whether the parties' collective bargaining agreement was violated by the Employer's termination of the Union projectionists when he began using the 16 millimeter projector.

The first issue is whether the change to the 16 millimeter projector constituted a basic change in operation, and if so, whether such a change justified the Employer's decision to terminate all of the projectionists and to have the new equipment operated by his manager, assistant managers or by himself.

It is clear from the record that the 16 millimeter projector could have been operated by the formerly employed projectionists; it is also clear that the 16 millimeter projector requires substantially less attention during its operation than the 35 millimeter projector, and furthermore, that said equipment requires substantially less skill in its operation. This seems apparent by virtue of the fact that the 16 millimeter equipment is currently being operated by the same individuals who manage the theater, while previously, when the 35 millimeter projectors were being used, the Employer conceded that he needed a projectionist in addition to another person (either himself or a manager) to operate the theater. The individual responsible for operating the theater can now also operate the projector since there are now substantially fewer film change-overs necessary (approximately one per hour as opposed to three per hour on a 35 millimeter projector). In addition, the 16 millimeter projector does not require framing nor must the carbons be cleaned as is necessary on the 35 millimeter projector.

For the foregoing reasons the Examiner concludes that the change-over to the 16 millimeter projector clearly allows the Employer to operate the theater and the projector without a projectionist, absent a finding that the Employer made a contractual committment guaranteeing the projectionists job security under such circumstances.

Related to the above is the fact that the record also demonstrates that the Employer made the change-over, at least in part, because he was dissatisfied with the performance of several of the projectionists. Thus, the question of the amount and kind of job security afforded by the parties' collective bargaining agreement becomes critical to the disposition of this aspect of the complaint.

The agreement in question covers "moving picture machine operators" employed by the Employer. It is clear from the record that it does not cover individuals functioning in a managerial capacity, i.e., the owner, manager, and assistant manager who are at least on occasion responsible for the operation of the entire theater. It establishes the working conditions of covered employes and affords them protection against Employer discrimination "by reason of membership in the Union or because of anything said or done in furtherance of the Union". There are no other provisions in the agreement providing any measure of job security for the projectionists it covered.

Upon the basis of the foregoing, it would appear that the agreement protects the jobs of the projectionists only to the extent that they are protected against discrimination because of Union activity and to the extent that the recognition clause affords them some protection in their work jurisdiction. Only the latter form of contractual protection is relevant to this proceeding. 1/

There is little agreement amongst arbitrators as to how much job security a recognition clause affords employees covered by a collective bargaining agreement when an employer assigns work formerly performed by employes in the bargaining unit to others, i.e., to supervisors or sub-contractors. Clearly, where agreements contain other provisions restricting the employer's right to make such assignments, greater job security to bargaining unit employes is afforded.

Even absent specific provisions in an agreement restricting an employer's right to assign bargaining unit work to others, some arbitrators have ruled that the recognition clause itself affords employes at least

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1/ There is no allegation nor evidence that the Employer made the change in question because of the Union activities of the affected employes.

some protection against the loss of bargaining unit work by virtue of the assignment of said work to others. 2/ In such cases, however, the employer's right to assign unit work to others has often been conditioned by a requirement that the employer demonstrate good cause for such action, 3/ thus requiring that the employer's decision be ". . . made in the honest exercise of business judgment, and not arbitrarily, capriciously, or in bad faith." 4/

The Examiner believes that the above standard is a reasonable one to apply in the instant matter. Thus, applying that standard, the critical question which must be answered is whether the Employer in this instance has demonstrated by a clear and satisfactory preponderance of the evidence that its decision to assign duties formerly performed by projectionists covered by the agreement to others is supported by legitimate business reasons, thus satisfying the good cause standard.

This dispute arose because the Employer made a basic change in his operation which resulted in the loss of the bargaining unit personnel's jobs. It is clear from the record that the Employer's decision was based upon economic considerations as well as his dissatisfaction with the work of several of the projectionists who were in the bargaining unit. As noted earlier, the record is void of any allegation or evidence that the Employer's decision was based upon the Union affiliation or activities of any of the affected employes.

Although the record indicates that the decision in question was motivated at least in part by the Employer's dissatisfaction with the work of some of the affected employes, the pertinent agreement contains no "just cause" standard nor for that matter does it contain any standard at all which would afford said employes protection against discipline or discharge based upon unfair or unsubstantiated reasons. Thus, the Employer has no responsibility in this proceeding to demonstrate that his dissatisfaction was well founded, and accordingly, his decision to utilize the 16 millimeter equipment at least in part to avoid utilizing the employes with whom he was dissatisfied, may not be properly reviewed or questioned in this proceeding.

However, a second and more difficult issue remains, and that is whether the remaining economic and business considerations were sufficient to justify the Employer's decision to assign essentially all of the bargaining unit's work to other individuals.

One consequence of the decision clearly supports its economic legitimacy, and that is that the Employer can now operate the theater with one less employe, since before the change a projectionist was needed to operate the 35 millimeter equipment and since now a projectionist is clearly no longer needed.

A more troublesome consequence has arisen however, and that is the fact that the Employer now employs two assistant managers to operate the theater and the 16 millimeter projector. These individuals are fully

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2/ KIRO-TV, Inc., 51 LA 1221 (Peck); Virginia Electric and Power Co. 48 LA 305 (Porter); Kroger Co. 33 LA 188 (Howlett).

3/ Cotton Bros. Baking Co. 51 LA 220 (Herbert); Great Lakes Pipe Line Co. 27 LA 748 (Merrill).

4/ Chrysler Corp. 36 LA 1018, 1022 (Smith).

responsible for the operation of the theater when the owner or his manager are not present. The assistant managers, at least during their "training period" (which is for an indefinite term) earn substantially less than the projectionist rate specified in the pertinent agreement. It is clear that the assistant managers spend much less time operating the projectors than did the projectionists, and that they have many other responsibilities, at least some of which are managerial in nature, since they have the sole responsibility for operating the theater when the owner or manager are not present.

The Employer's employment of the two assistant managers makes the determination as to whether the change to the 16 millimeter operation constituted a basic change in the operation which eliminated the need for individuals to be employed to operate the projection equipment significantly more difficult. Clearly, had the owner and manager operated the new equipment exclusively, the Examiner would have had no problem concluding that the Employer had the right to abolish the projectionist jobs and perform the work himself. However, in this case, a legitimate question has been raised as to whether the major function and content of the projectionists' jobs are still in existence, and if in fact these functions have been improperly assigned to others.

Concededly, this is a close case; however, the Examiner is persuaded that the record as a whole supports a finding that the reassignment of the projector operation work to non-bargaining unit personnel resulted from a bona fide change in operation which eliminated in large part the need for the projectionists. It is evident that the operation of the new projector is significantly easier, thus requiring substantially less time than did the operation of the 35 millimeter equipment. Although some of the tasks required in the 35 millimeter operation must still be performed, those tasks appear to be minimal and of a de minimis nature, 5/ and therefore, the Examiner concludes that such tasks may properly be assigned to other non-bargaining unit personnel who have major responsibilities other than the performance of bargaining unit work.

In this case, the operation of the new 16 millimeter equipment requires someone's attention only a few minutes each hour, thus allowing that individual to perform a variety of other tasks required in the operation of the theater during the showing of a film.

In view of the finding that the abolishment of the projectionist jobs resulted from a bona fide change in operation resulting from good faith and legitimate business considerations, and in view of the lack of any restrictions in the parties' collective bargaining agreement on the Employer's right to take such action, other than the recognition clause, the Examiner finds that the Employer, by so acting, has not violated said agreement and, therefore, has also not violated Section 111.06(1)(f) of the Wisconsin Statutes.

The Union also alleges that the Employer violated the parties' collective bargaining agreement by failing to pay the projectionists covered by the agreement the vacation pay to which they were entitled pursuant to the agreement.

The agreement provides for two weeks' salary (vacation pay) at the employe's request during each year of the contract. The only evidence on the record with respect to this issue was that one of the projectionists covered by the agreement asked one of the assistant managers about the

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5/ See Blow-Knox Company 66-2 ARB, paragraph 8430 (Cohn).

vacation pay due him. The record does not indicate whether he ever received a response to the inquiry.

There was no evidence of bargaining history or past practice presented at the hearing. Accordingly, the rights of the employes to such pay must be determined on the basis of the most reasonable interpretation of the pertinent contractual language standing alone.

In the first place, it is clear that a request for such pay must be made before the Employer is obligated to pay the benefit. It is not clear to whom the request must be made, but the record demonstrates that only one of the projectionists made such a request to any of the Employer's representatives, and, therefore, it is only with respect to that employe that a determination must be made.

The Examiner is persuaded that the most reasonable interpretation of the vacation pay benefit entitles employes covered by the agreement to such benefit upon request at the completion of the contractual year. This construction is primarily based upon the fact that the benefit is in the form of additional compensation rather than paid time off. Had the agreement provided for two weeks' vacation during the year, it would have been reasonable to construe such a provision as allowing for two weeks' vacation to be taken during the course of the year, at least on an as-earned basis. Such a benefit would be neither unusual nor unmanageable for the Employer. In this case, however, because the vacation benefit provided for two weeks' additional salary, even though the agreement specifies that the benefit shall be paid during each year of the contract, it is more reasonable to construe said provision in a manner which would entitle employes to the benefit at the conclusion of the year, since payment of the benefit would be most unwieldy if the benefit were due and owing on an "as earned" basis during the course of the year. For the foregoing reason, the Examiner concludes that the contractual right to vacation pay of the employe who requested such pay and who was lawfully terminated before he became entitled to such pay was not violated. Accordingly, since the Examiner has found that the Employer has not violated the collective bargaining agreement by failing to pay the terminated projectionists vacation pay, it must also be found that the Employer has not violated Section 111.06(1)(f) of the Wisconsin Statutes.

Dated at Madison, Wisconsin this 17th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Byron Yaffe
Byron Yaffe, Examiner