STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL 695 a/w INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA Involving Certain Employes of BARABOO JOINT SCHOOL DISTRICT NO. 1	Case VII No. 20708 ME-1338 Decision No. 14885-B

Appearances:
Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas J. Kennedy, appearing on behalf of the Union.
Melli, Shiels, Walker and Pease, Attorneys at Law, by Mr. Dennis M. White, appearing on behalf of the Employer.

ORDER DISMISSING OBJECTIONS TO CONDUCT AFFECTING RESULTS OF ELECTION

Pursuant to a direction previously issued by it, the Wisconsin Employment Relations Commission, on September 10, 1976, conducted an election among certain employes of Baraboo Joint School District No. 1, hereinafter referred to as the employer, to determine whether said employes desired to be represented by Drivers, Salesmen, Warehousemen, Milk Processors, Cannery, Dairy Employees and Helpers Union Local 695 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, hereinafter referred to as the union or petitioner, for the purposes of collective bargaining. The results of the election were as follows:

1.	Total number eligible to vote	25
2.	Total ballots cast.	23
3.	Total ballots counted	23
4.	Ballots cast for the above-named union.	12
5.	Ballots cast against the above-named union. . .	11

On September 17, 1976, the employer filed timely objections to the conduct of the election, alleging that the above-named union had engaged in election conduct that interfered with the laboratory conditions of the election which prevented a fair and free election from being held. A hearing on said objections were held on October 19, 1976, at Baraboo, Wisconsin before Hearing Examiner Stephen Schoenfeld, a member of the commission's staff; and subsequent to said hearing, the employer filed amended objections to the conduct of the election; and the employer and union thereafter having filed briefs; and the commission being fully advised in the premises and having considered the objections, the record, and the arguments and briefs of counsel, and being satisfied for the reasons hereinafter noted that the employer's objections and amended objections are without merit and should be denied and dismissed;

NOW, THEREFORE, it is

ORDERED

That the objections and amended objections filed by said employer be, and the same hereby are, denied and dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 10th day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner

BARABOO JT. SCHOOL DISTRICT NO. 1, VII, Decision No. 14885-B

MEMORANDUM ACCOMPANYING ORDER
DISMISSING OBJECTIONS TO CONDUCT AFFECTING
RESULTS OF ELECTION AND CERTIFYING RESULTS OF ELECTION

On September 17, 1976, the employer filed three objections to the conduct of the election. The grounds to said objections are as follows:

> "1. During the pre-election period, Petitioner and its agents promised that part time employees would never have to pay dues or initiation fees if Petitioner won the election in order to induce the part time employees to vote for Petitioner and/or to refrain from voting. Full time employees were not promised a waiver of dues and initiation fees. 1/
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> "2. During the pre-election period, Petitioner and its agents deliberately induced, encouraged and conspired with the officers of the incumbent union, the Committee for Custodian and Maintenancemen, to have the incumbent union disclaim interest in representation of employees and to renounce a desire to appear on the ballot, all for the purpose of inducing employees to desert the incumbent union and to vote for Petitioner.
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> "3. By the above and similar acts, Petitioner has interfered with the laboratory conditions of the election and has prevented a fair and free election from being held."

A hearing was held on these objections on October 19, 1976, and subsequent thereto, and based upon the evidence adduced at the hearing, the employer filed additional grounds with the commission for setting the election aside. These grounds are as follows:

> "(1) That the officers of the Committee for Custodian and Maintenancemen had resigned and had no authority to communicate on behalf of the Committee to the WERC that the Committee disclaimed interest in representing employees or that the Committee did not wish to appear on the ballot and that the disclaimer of interest of August 30, 1976, was therefore invalid, and
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> "(2) That the alleged officers of the aforesaid Committee misinterpreted the aforesaid disclaimer of interest and were not aware of the legal impact of the aforesaid disclaimer that they signed and that the aforesaid disclaimer was therefore invalid."

Amending Objections

The union contends that the attempt to amend the objections at the hearing and the submission of two additional objections after the termination of the hearing violate the union's due process rights. The union argues that for the commission to condone such a practice would merely

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1/ At the hearing the employer amended this objection by maintaining that this allegation gives rise to alternative legal theories:

encourage employers to file specious objections, whereby the hearing would be utilized as a general fishing expedition to delay certification.

On the other hand, the employer maintains that since the hearing is an investigatory proceeding, the commission should examine all pertinent evidence presented, especially when, as the employer contends, the additional objections arise out of facts elicited from testimony at the hearing--facts that the employer could not have known before the hearing.

In Washington County (7694-C) 9/67, the commission said:

> "A hearing on objections to the conduct of an election is technically a non-adversary proceeding. The purpose of filing of objections with the Commission, within a certain specified time, is to preclude the Commission from automatically issuing a certification of the results of the election. The timely filing of objections puts the Commission on notice not to issue its certification. Upon receiving such notification, and upon the filing of objections which, on its face, contains allegations, if proven, would establish improper pre-election conduct, the Commission sets a hearing in the matter, as an investigation to solicit facts to determine whether or not the pre-election conduct affected the employes' free choice.
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> "* * * An election to determine bargaining representatives implements the public policy with respect to collective bargaining and any conduct, either by an employer, employe or labor organization which may interfere with an election conducted by the Commission must stand the scrutiny of the Commission, which has the duty to conduct elections in an atmosphere where employes may cast a free choice. Therefore the Commission will examine any pertinent evidence which is claimed to interfere with that choice. The reason for denying the receipt of evidence with respect to matters not alleged in either of the objections would be due to a possible denial of due process to the party who was alleged to have committed the objectionable conduct. * * *"

In Washington County an objection was raised to evidence of an alleged wage increase promise and its revocation, which was not pleaded in the objections. The commission considered that evidence because there was no claim of a violation of due process, the objection having been based on procedural compliance with commission rules, and because there was no request for an adjournment.

Here, while the union makes no request for an adjournment, it argues that its due process rights are at stake. To cure the due process problems, the union argues that the commission should disregard the evidence in support of the amendment at the hearing and the additional objections filed after the hearing.

Assuming, arguendo, that the union is entitled to due process in this quasi-legislative proceeding, there would be no violation of due process in considering the disputed evidence and objections. Once it is decided that due process is due, the question becomes, what process is due? In answering that question, we must weigh three factors: (a) the interests which are at stake; (b) the risk of an erroneous deprivation under present procedures and the probable value, if any, of other safeguards; and (c) the government's interest. See Mathews v. Eldridge, __ U.S. __, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976).

The union's interest is to be certified as the representative of the employes for purposes of collective bargaining. That interest, however, is wholly derivative of, and subordinate to, the desires of the employes freely expressed. There is little risk of an erroneous denial of the union's interests, since it had full opportunity to cross-examine the

witnesses relative to the disputed evidence. There is no probable value in disregarding said evidence, since the union has not shown that it is inherently incredible or that there probably is available other evidence, not produced, which might affect the result. The government's interest is that ". . . the Commission . . . conduct elections in an atmosphere where employes may cast a free choice." Washington County, supra. On balancing these considerations, the commission concludes that it may and should consider the evidence in order to discharge its responsibility of assuring that the election reflected the free choice of the employes.

Even were there prejudice to the union, it has waived it by failing to seek an adjournment to meet the new evidence. In effect, the commission is permitting an amendment of the pleadings to conform to the evidence. The additional amendments arise out of and are connected with the subject on which the original objections were based. See Smith v. Gould, 61 Wis. 31, 20 N.W. 369 (1884), 31 W.S.A. p. 551. Any prejudice could be cured by allowing the union time to meet such evidence, see sec. 802.09(2), Stats., but the union does not seek such a postponement.

As to the union's argument that it would be bad policy for the commission to entertain these amendments, since to do so would foster specious objections, fishing expeditions, amendments and further delay, suffice it to say that the commission will control such abuses if and when they arise. Nothing in this record suggests that the employer was dilatory or that it sought to surprise petitioner by springing the additional objections at hearing. The additional objections concern matters to which the union had much easier access than the employer. Absent evidence of any such abuses, it would be an abuse of discretion for the commission to disregard evidence evolving at the hearing which bears directly on the commission's fundamental responsibility to ascertain that the employes' choice was a free choice.

Waiver of Initiation Fees and Dues for Part-time Employes

The employer argues that the union, through its agents, Robert Dunse and Erwin Gaetzke, promised to waive union dues and initiation fees for part-time employes, and that such a promise impaired the free choice of the employes and upset the laboratory conditions surrounding the election. The evidence is not sufficient, however, to persuade the commission that such a promise was made. Fred Steinke, a full-time custodian, testified originally that Dunse told him part-time employes would not have to pay dues, but on further examination Steinke was not sure whether Dunse had said part-timers would not have to pay dues or would not have to join the union. Mrs. Steinke, a part-time custodian, understood Dunse, in the same conversation with Mr. Steinke, to have said that part-timers would not have to join the union, and she testified that Dunse said nothing about dues. Carl Getschmann, a part-time custodian, testified that Gaetzke told him that "they say" part-timers would not have to pay anything. Gaetzke, however, credibly testified that he told Getschmann part-timers may not have to pay dues, but that the issue was bargainable. In crediting Gaetzke's version, we note that Dunse, whom we also credit, testified that he also told others a dues requirement was a negotiable matter. While some persons evidently quoted Dunse or Gaetzke as saying that part-timers would be excused from paying dues, the testimony as a whole persuades us that this misunderstanding is not attributable to any errors in representation by Dunse or Gaetzke. 2/

2/ Because we conclude that no such representations were made by Dunse and Gaetzke, we do not reach the question of whether they were acting as agents of the union.

Furthermore, the record indicates that at a September 2, 1976, meeting, Baker told employes that under Wisconsin law no municipal employe was required to pay initiation fees, nor would employes have to pay dues unless a fair-share agreement was negotiated. 3/ There is no misrepresentation embodied in Baker's statement. Assuming, arguendo, that Baker's statement may have caused some confusion and misunderstanding among the rank-and-file part-time employes about their respective responsibilities concerning the requirement to join the union or pay union dues and initiation fees, the test of whether a union statement is proper is an objective one, based on the representations made to the employes and not predicated upon the subjective consideration of what employes may have believed or understood. 4/

Having found that no promise to excuse part-time employes from dues was made and that Baker made no material misrepresentation, it is unnecessary to discuss the employer's arguments that it was not able adequately to rebut the alleged misinformation and that said promise constituted such interference with free choice so as to require setting aside the election results.

Based on the aforesaid, the commission denies and dismisses the employer's objection relating to the waiver of dues and initiation fees for part-time employes.

Withdrawal of Incumbent Organization

On August 30, 1976, a disclaimer letter was submitted to the commission informing it that the committee did not desire to bargain or participate in the negotiations for 1977, did not wish to represent the members any longer, and did not wish to appear on the ballot if an election for representation was held. The letter was signed, "Committee for Custodial and Maintenance Employees, Robert Dunse, Chairman, Erwin Gaetzke, Secretary." A copy of said letter was sent to all custodial and maintenance employes by the employer. The committee did not appear on the ballot.

The employer asserts that the union and the officers of the committee conspired to have the committee off the ballot so that the employes would abandon the committee and vote for the union. Furthermore, the employer avers that because the committee's officers did not have the authority to withdraw its name from the ballot and since the committee never voted to authorize the disclaimer, and inasmuch as said officers were not cognizant of the legal impact of the disclaimer, the disclaimer is therefore invalid. The employer also contends that since the committee never notified the employer that it was disbanding or that the collective bargaining agreement was terminated and inasmuch as the committee never voted to abolish itself, the committee continues to exist and should have an opportunity to appear on the ballot. 5/

3/ Evidence was introduced that the union's bylaws do not allow any waiver of fees for members, and any promise to the contrary would have constituted a misrepresentation. The record, however, does not indicate that any union representative promised a waiver of union fees for those who joined the union.

4/ Jefferson Food Mart, Inc., d/b/a Call-A-Mart, 214 NLRB No. 30, 88 LRRM 1388 (1974).

5/ The commission concludes that the employer lacks standing in this proceeding to challenge the committee's compliance or lack thereof with its own internal rules. See Madison Jt. School Dist. #8, City of Madison et al, (14814-A) 12/76.

On the other hand, the union argues that the committee became defunct after its last meeting on July 27, 1976, and that the disclaimer letter executed by Dunse and Gaetzke reflected the wishes of the membership of the organization.

The testimony at the hearing revealed that on July 27, 1976, in an employe meeting, the committee met and took a vote on whether the members thereof desired to be represented by the union. Such representation was rejected by a vote of 9 to 6. The officers of the committee pointed out that they did not want to continue representing the employes since there was dissatisfaction with the job they had done in the past and a member of the school board's negotiating team had suggested they establish a new negotiating team. The committee's officers resigned and asked for volunteers to fill their positions. Only one person volunteered and his candidacy was not acted upon. The maintenancemen walked out of the meeting, but the custodians remained. After the conclusion of the meeting, Baker arrived, 6/ authorization cards were distributed and employes were asked to distribute cards to those not present. The union filed a petition for an election with the commission on July 29, 1976. There were no further meetings of the committee. 7/

Subsequent to the July 27, 1976 meeting, Baker prepared a letter which indicated that the committee did not desire to continue to represent the employes and did not desire its name on the ballot. Baker took it to the home of Dunse and Gaetzke, who signed same. Prior to the election, said letter was sent to the commission and a copy thereof was sent by the employer to all custodial and maintenance employes.

There is no evidence that Dunse and Gaetske were in any way coerced, threatened, induced or promised any benefits if they signed the letter. They testified that they did not desire to represent the employes in the forthcoming negotiations and signed the letter to "make it legal". 8/

Although the commission does not in a proceeding involving a representation election petition inquire into the internal affairs of a labor organization, 9/ it will inquire into circumstances surrounding the filing of a petition to determine the integrity of the petition. 10/ Therefore, the focus of the commission's inquiry should be whether the withdrawal of the incumbent organization was proper and whether such withdrawal inhibited the employes' freedom of choice in the election.

6/ At a July 22, 1976 meeting, the committee unanimously voted to invite Baker to the July 27, 1976 meeting because the committee was thought to be ineffective.

7/ The official minutes of the committee, which were taken by Gaetzke, indicate that the meeting of July 27, 1976 was the committee's final meeting and Gaetzke confirmed, through his testimony, that he thought this was the final meeting of the committee.

8/ Baker had been advised by Mr. Peter Davis, a member of the commission's staff, that such a disclaimer would be necessary in order for the committee's name to be deleted from the ballot inasmuch as a collective bargaining agreement existed between the committee and the employer.

9/ Milwaukee County, (8765) 11/68; Elmbrook Schools (7361) 11/65.

10/ City of Menasha (8989) 4/69.

The commission has allowed a labor organization to withdraw from an election if it indicated to the commission that it does not desire to appear on the ballot and does not desire to represent the employes. 11/ In Rock County, the commission said it cannot "compel a labor organization to represent employes against its wishes." Clearly a labor organization which indicates no desire to represent a group of employes has no interest in the bargaining unit and it would be improper to include its name on the ballot. Only organizations whose present purposes and functions are to represent the employes in collective bargaining should appear on the ballot and defunct organizations should not appear on the ballot. 12/

To characterize the committee as loosely structured is an understatement. It was without any constitution or by-laws, and could best be described as amorphous. After the July 27, 1976 meeting of the members of the committee and the resignation of officers, no subsequent meetings were held, no new officers were elected and no new negotiating team was chosen. No one objected when the disclaimer letter was circulated by the employer. No employe requested the commission to have the committee appear on the ballot. No one appeared at the hearing on objections claiming to represent the committee. There is no evidence that the committee still exists and is ready and willing to represent the employes in collective bargaining. Mr. Perry Ramsey, a member of the committee who challenged the authority of Dunse and Gaetzke to execute a disclaimer without the vote of the membership, testified that after the July 27, 1976 meeting, he thought the committee ceased to exist.

The evidence points to the inevitable conclusion that after July 27, 1976, there was no longer any organization or any organized group of employes who desired to represent the employes involved and it was reasonable that if anyone was going to execute a disclaimer, it would be the two former officers, Dunse and Gaetzke, who signed the disclaimer of interest letter as their last gesture as former officers of a defunct organization. Although they may not have been cognizant of the full legal impact of such a disclaimer, the record clearly indicates that they, along with the other two officers, no longer desired to be officers, no one else assumed their responsibilities, and it was their perception that it was the will of the membership that the committee no longer represent them. Dunse and Gaetske's reflections are buttressed by the fact that no one has demonstrated that the committee is still viable or wishes to represent the employes. The simple fact is that as of the date of the direction, the committee was not willing or able to represent the employes in collective bargaining.

Inasmuch as there is no evidence that leads the commission to conclude that the committee was unduly influenced or coerced in disclaiming interest in the election, or that such removal impaired any employe's freedom of choice, and since there is no evidence that any employe sought to have the committee placed on the ballot, and because the employer lacks standing in this proceeding to challenge the committee's compliance or lack thereof with its own internal rules, the commission concludes that the withdrawal of the committee from the election process was not improper and had no adverse effect on the freedom of choice of the employes; and consequently does not constitute a basis for setting aside the election.

11/ Rock County (9865) 8/70; Ashland Motor Co. (4107) 11/55; Shadur Paper Box Co. (3400) 3/53.

12/ London Hat Shop (7023) 2/65.

Based on the aforesaid, we are today issuing a certification of the results of the election.

Dated at Madison, Wisconsin this 10th day of March, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Charles D. Hoornstra, Commissioner