STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL, MOTEL, RESTAURANT EMPLOYEES AND BARTENDERS UNION, LOCAL 122, Complainant, vs. THE WISCONSIN CLUB, Respondent.	Case II No. 21545 Ce-1728 Decision No. 15428-B

Appearances:
Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Mr. Gary M. Williams, appearing on behalf of the Complainant.
Quarles & Brady, Attorneys at Law, by Mr. Fred G. Groiss, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainant having on April 7, 1977 filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent committed an unfair labor practice within the meaning of Sections 111.06(1)(a) and (d) of the Wisconsin Employment Peace Act; and the Commission having appointed Duane McCrary, a member of its 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 Statutes; and a hearing on said complaint having been held in Milwaukee, Wisconsin on July 22, 1977, before the Examiner; and the Examiner having considered the evidence and arguments of Counsel makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Hotel, Motel, Restaurant Employees and Bartenders Union, Local 122, hereinafter referred to as the Complainant, is a labor organization having its principal office at 231 Brumder Building, 135 West Wells Street, Milwaukee, Wisconsin 53203, and represents for purposes of collective bargaining certain employes employed by the Wisconsin Club.

2. That the Wisconsin Club, hereinafter referred to as the Respondent, is an employer having its principal office at 900 West Wisconsin Avenue, Milwaukee, Wisconsin 53233.

3. That the Complainant and Respondent have been parties to several collective bargaining agreements, the last of which expired on June 1, 1976 and since have been engaged in bargaining for a successor agreement.

4. That the parties have met from seven to nine times exchanging offers and proposals since the expiration of the agreement, the last meeting occurring on May 11, 1977 and have failed to agree to a successor collective bargaining agreement.

5. That Complainant offered to extend the parties' former collective bargaining agreement for the following year but received no response to said proposal from the Respondent.

6. That the Complainant failed to prove by a clear and satisfactory preponderance of the evidence that the Respondent has engaged in surface bargaining with no good faith intention of reaching an agreement.

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

CONCLUSION OF LAW

That since it has not been demonstrated that the Respondent has engaged in surface bargaining with no good faith intention of reaching an agreement, the Respondent has committed no unfair labor practice within the meaning of Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

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

ORDER

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

Dated at Madison, Wisconsin this 13th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary
Duane McCrary, Examiner

THE WISCONSIN CLUB, II, Decision No. 15428-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

At hearing the parties stipulated that the issue before the Examiner was whether the Wisconsin Club has engaged in surface bargaining with no good faith intention of reaching an agreement, in violation of the Wisconsin Employment Peace Act. The Complainant asserts that the Respondent although having made minor concessions during the course of bargaining, has rigidly adhered to certain positions with the intent of not reaching an agreement. The Respondent denies that it refused to bargain in good faith, but argues that it made proposals which are important to its operation in light of dire financial straits.

Respondent objected to the admission of Union Exhibits numbered 6 and 10 on the bases of irrelevancy and immateriality. Union Exhibit No. 6 is a copy of a letter addressed to Mr. Phil L. Valley, Business Manager, Hotel, Motel, Restaurant & Bartenders Employees Union, Local 122 from Attorney Irving A. Lore representing the Greater Milwaukee Hotel - Motel Association concerning its proposal for settlement of a labor agreement commencing June 16, 1976 and extending through June 15, 1979 which had been approved by the members of Local 122 on June 18, 1976. Union Exhibit No. 10 is a copy of the proposed 1976-1979 agreement between Local 122 and the Greater Milwaukee Hotel - Motel Association. Complainant asserts that the two exhibits were offered to show the labor costs that other employers are being asked to meet. Respondent asserts that it is not negotiating as a group but is negotiating separately and independently and that the restaurant industry has no bearing on the issue before the Commission. Section 904.01 of the Wisconsin Statutes defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Irrelevant evidence is not admissable by authority of Section 904.02 of the Wisconsin Statutes. As will be later developed, the issue of whether a party has engaged in surface bargaining goes to the good faith of the parties while engaged in collective bargaining. It has more to do with the relationship between the parties as opposed to what kind of relationship one party and another related association enjoy. Here, relevant evidence would appear to be that which would tend to make facts bearing on the issue of surface bargaining more or less probable. The information contained in Exhibits No. 6 and 10 do not have direct probative value to the issue before the Commission. The documents contain information concerning the nature of settlement proposals in the industry, but do not directly bear on the issue. Consequently, Exhibits No. 6 and 10 will not be admitted into the record.

The term "collective bargaining" is defined in Section 111.02(5) of the Wisconsin Employment Peace Act as "the negotiating by an employer and the majority of his employes in a collective bargaining unit (or their representatives) concerning representation or terms and conditions of employment of such employes in a mutually genuine effort to reach an agreement with reference to the subject under negotiation." Further, Section 111.06(1)(d) of the Wisconsin Statutes condemns as an unfair labor practic the refusal of an employer to bargain collectively with a majority of his employes in any collective bargaining unit. The collective bargaining so ordered by the statute does not compel either party to surrender to the

At the parties' last negotiating session on May 11, 1977, the major topics at issue were wages, union security, seniority, minimum hour guarantee, daily and weekly overtime and management rights. The Complainant desired a continuation of the Union Security clause which provided that the Complainant was the bargaining representative for the bargaining unit and that as a condition of employment all employes after their thirty-first day of employment become and remain a member of the Union. The Respondent sought the elimination of the Union Security provision because its inclusion "ties the hands" of the Respondent and that Respondent did not feel it should insist that employes join the Union as a condition of employment. The Complainant's last position in this area was to propose a "modified union shop" which provided that all present union members shall remain members, that present non-members will not have to become members, but that those employes hired after the signing of the agreement must become members. Respondent did not change its position concerning Union security.

With respect to seniority, the Complainant sought its continuation which essentially provided that Respondent agreed to recognized classification seniority in layoffs and rehiring. The Respondent remained opposed to any form of seniority clause throughout the negotiations. The parties engaged in discussions concerning employes who were purportedly performing at a less than desirable level. The Union argued that the Club had the option of discipline or the discharge of the employe.

The Complainant in negotiations asserted that the minimum hour guarantee, whereby the full-time employe who reports for work shall be guaranteed four (4) hours work per day or four (4) hours pay in lieu thereof, should be continued. A similar guarantee existed for banquet waitresses. Respondent proposed to eliminate this provision but later indicated that if the Union accepted their February 7, 1977 proposal (Exhibit No. 9), it would give the minimum hour guarantee some consideration. The Complainant indicated it might accept something less in this area. Concerning overtime, the Union offered the continuation of the expired contract's guarantee that employes receive overtime pay for all hours worked in excess of eight (8) hours per day and forty (40) hours per week. Respondent offered the receipt of overtime pay in accordance with the minimum guarantee of Section 13(b)(8) of the Fair Labor Standards Act, i.e., after forty-six (46) hours. The Respondent essentially indicated that it could not afford to pay employes the extra wage, but presented nothing to support this. However, the Union did not request any justification for Respondent's position. Later, Complainant offered up to five hours on the sixth day at straight time rates.

Respondent proposed a management rights clause which, among other things, reserved to it the right to contract or sub-contract work when it can be done more economically or efficiently by persons outside of the bargaining unit. It asserted a need to allow the manager to run the establishment as he sees fit with respect to economics. The Complainant proposed deletion of the provision giving Respondent the power to sub-contract work, but was not opposed to the inclusion of a management right's provision, per se.

It appears that there was some discussion concerning wages. Complainant indicated that it might accept no wage increase or a small one. Respondent, in its proposal of February 7, 1977, proposed a wage schedule which indicated some increases. Respondent indicated at hearing that the Complainant's pay scale is low and that it is difficult to hire personnel to work at that scale. Otherwise, Respondent's proposals were made with the purpose of effecting savings.

The failure to concede or make a counter-proposal, though possibly indicative of bad faith, is not in all cases subject to that construction. Webster Outdoor Advertising Company, 170 NLRB 1395 (1968). However, an uncompromising attitude may be an indication of a purpose not to reach agreement, and a predetermined intention not to yield, without giving

reasons or listening to opposing reasons shows a disposition not to bargain. Roy E. Hanson Jr. Mfg., 137 NLRB 251, 50 LRRM 1134 (1962). Here, the Respondent sought to eliminate the union security, seniority and minimum hour guarantee provisions which had been in the previous contract. It had no flexibility in its position with respect to these issues except when it offered to consider the minimum hour guarantee in exchange for acceptance of Respondent's February 7, 1977 proposal. The February 7, 1977 proposal contained a management rights clause which gave the Respondent the right to sub-contract work and contained an overtime provision which essentially provided for overtime pay after forty-six hours. There was no management rights provision in previous contracts giving Respondent the right to sub-contract work. Previously, employes received overtime pay for all hours worked in excess of eight (8) hours per day and forty (40) hours per week.

The Examiner concludes on the basis of this record, that Complainant has not met its burden of proof to demonstrate that Respondent refused to bargain collectively in violation of Section 111.06(1)(d) of the Wisconsin Employment Peace Act. With respect to its proposals concerning union security, seniority and the minimum hour guarantee, Respondent was attempting to remove provisions which were in previous collective bargaining agreements. Arguably, Respondent's positions concerning union security and seniority work to undermine Complainant's status as majority representative of the bargaining unit and would diminish the job security afforded bargaining unit members by previous collective bargaining agreements. However, Respondent's positions concerning overtime, management rights and the minimum hour guarantee appear to relate to its avowed penurious condition which the Complainant did not challenge. Retrenchment in overtime and the minimum hour guarantee may effect savings which would assuage Respondent's financial condition. Acceptance of Respondent's management rights provision by the Complainant could have the same result. Further, although Complainant offered more compromise positions concerning the issues in dispute, Respondent, on at least one occasion offered to consider Complainant's proposal concerning the minimum hour guarantee in exchange for favorable consideration of its February, 1977 package proposal. Lastly, there appears in the record no union animus on Respondent's part.

Here, Respondent's positions do not indicate an intent not to reach agreement, but rather they indicate an intent to reach an agreement consistent with its financial condition which Complainant made no attempt to dispute. Absent persuasive evidence of the Respondent's desire not to reach an agreement, of union animus, or a lack of reasonableness with respect to the positions taken on the issues in dispute, in light of the Respondent's economic condition the Examiner must conclude that Complainant has failed to adequately demonstrate that Respondent engaged in bad faith bargaining in violation of the Wisconsin Employment Peace Act, and accordingly, the complaint must be dismissed.

Dated at Madison, Wisconsin this 13th day of July, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Duane McCrary
Duane McCrary, Examiner