STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROOFERS LOCAL NO. 212, UNITED SLATE, TILE AND COMPOSITION DAMP AND WATERPROOF WORKERS ASSOCIATION, AFL-CIO and JOHN MEZERA, Complainants, vs. TILSEN ROOFING COMPANY, INC., Respondent.	Case II No. 23284 Ce-1782 Decision No. 16473-A

Appearances:
Lawton & Cates, Attorneys at Law, by Ms. Jean H. Lawton, appearing on behalf of the Complainants.
Stroud, Stroud, Willink, Thompson & Howard, Attorneys at Law, by Mr. Robert R. Stroud, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainants having, on July 17, 1978, filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent had committed certain unfair labor practices within the meaning of Section 111.06(f) of the Wisconsin Employment Peace Act; and the Commission having appointed Douglas V. Knudson, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion 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 Madison, Wisconsin on August 10 and September 5, 1978 before the Examiner; and Complainants thereafter having filed a brief on December 8, 1978; and Respondent having filed a reply brief on February 2, 1979; and the Examiner having considered the evidence and arguments, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Roofers Local No. 212, United Slate, Tile and Composition Damp and Waterproof Workers Association, AFL-CIO, herein Union, is a labor organization, which at all times material hereto has been the exclusive collective bargaining representative of certain employes of Respondent Employer, including John Mezera.

2. Tilsen Roofing Company, Inc., herein Respondent, is an Employer with its offices located in Madison, Wisconsin.

3. The Union and Respondent were parties to a collective bargaining agreement for the period from May 1, 1975 through April 30, 1978. Said agreement contained a grievance procedure which did not provide for binding arbitration of grievances. Further, said agreement also contained the following provisions:

ARTICLE VIII

> The Union will appoint a shop steward in each shop and will notify the employer in writing of such appointment. The shop steward shall not be discriminated against or discharged by the employer for performance of his duties as Union shop steward. A business agent employed by Roofers Local #212 or Official of Local #212 acting as business agent shall be allowed to visit the employer's job site and shops where Union members are employed.

ARTICLE XVII

The employer may discharge an employee for just cause and moonlight or jackleg activities.

. . .

4. John Mezera began working for Respondent in May of 1973 and was laid off in late 1973 for the winter season. Mezera returned to work for Respondent in the spring of 1974. Said pattern was repeated annually, until the spring of 1978 when Mezera was informed by Respondent that he would not be recalled to work. Mezera had been the Union shop steward for Respondent's employes for approximately three years.

5. The contract does not contain any provisions to provide either for the accumulation of seniority, or, for the recall by seniority of laid-off employes.

6. Article 17 of the contract, which contains a just cause standard for discharge, did not apply to Respondent's failure to recall Mezera from layoff in March 1978.

7. An employe has no contractual recall rights. Therefore a layoff, without subsequent recall, is the equivalent of a discharge, and is subject to the contractual standard of just cause.

8. Mezera's layoff in January, 1978 resulted from the seasonal lack of work customarily experienced by Respondent, and, was for just cause.

9. The statements concerning the Union, made to Mezera by Respondent's agents, were not sufficient to prove Respondent's allegedly discriminatory motiviation for Mezera's layoff and lack of recall.

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

CONCLUSION OF LAW

Respondent did not violate the contract, when it laid off, but did not recall Mezera, and therefore, said action was not an unfair labor practice within the meaning of Section 111.06(f) of the Wisconsin Employment Peace Act.

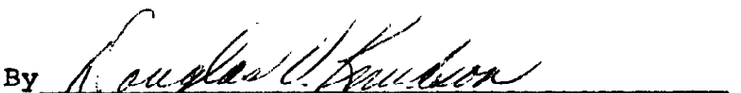
Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

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

Dated at Madison, Wisconsin this 29th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Union alleges that Mezera's discharge violated the contractual standard of just cause, since the only previous discipline he had received were verbal admonitions to "knock it off", when he was talking too much on the job. Further, the Union believes the motivating factor behind Mezera's discharge was the Respondent's desire to eliminate the shop steward, which also constituted a violation of the contract.

Respondent contends that it had no contractual duty to reemploy Mezera since he was laid off for good cause and the contract is devoid of any seniority or recall provisions. Therefore, the layoff actually constituted a termination of Mezera's employment. Further, Respondent felt it had good cause to not reemploy Mezera.

The contract does not contain any seniority language to govern the layoff and recall of employes. Rather, the contract merely requires the employer to give preference in hiring to trainees and journeymen who have previously worked at the trade for employers in the Union's area. Such a requirement cannot be equated with a contract provision requiring an employer to recall laid-off employes in seniority order. The contract, relevant herein, is silent with respect to the subject of the recall of employes from layoff. In fact, the contract requires employes, immediately after being laid off, to report their availability for employment to the Union. That requirement, is not commonly found in contracts which contain a recall by seniority provision, thereby further highlighting the absence of a recall provision. A conclusion that the relevant contract contained recall rights would constitute an addition to the provisions of the contract which had been negotiated by the parties. The fact that Mezera had been recalled from seasonal layoffs in four previous years does not overcome the absence of a recall provision in the contract. Additionally, the contract does not contain any other provisions, such as vacations or job bidding, which would imply that seniority is accrued with an employer. Accordingly, it must be concluded that the contract does not apply to, nor govern, the recall of employes who were laid off by an employer. Since an employe has no contractual recall rights, a layoff is tantamount to a discharge. Such a conclusion means that an employe's layoff is subject to the contractual standard of just cause for discharge. In the instant matter, the Union does not contend, nor is there any evidence to indicate, that Mezera's layoff in January, 1978 was for a reason other than the normal seasonal lack of work which condition resulted in annual layoffs by the Respondent of its employes. Therefore, Mezera's layoff met the contractual standard of just cause. Further, said standard did not apply to Respondent's failure to recall Mezera from layoff.

During the time when contract negotiations were occurring in 1975, Respondent's President made certain comments to Mezera to the effect that the Union was not worth too much and maybe Respondent should go non-union. Subsequently, Respondent did enter into a collective bargaining agreement with the Union. On one occasion during the summer of 1978, Respondent's Vice-President told Mezera "to take the Union and shove it." The foregoing incidents are insufficient to establish that Mezera's activities as the Union shop steward, motivated his layoff by Respondent. To sustain its burden of proof with respect to the Respondent's alleged discrimination against Mezera, the Union must demonstrate by a clear preponderance of the evidence that the foregoing statements contained a threat of reprisals which would interfere with Mezera's activities as the shop steward. While the statements, were critical of the Union, it is the undersigned's conclusion that the statements did not contain threats of punitive

action which would have a reasonable tendency to interfere with Mezera's activities as a steward, and therefore, the Union failed to meet its burden of proof as to Respondent's allegedly discriminatory motivation.

Dated at Madison, Wisconsin this 29th day of March, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Douglas V. Knudson
Douglas V. Knudson, Examiner