STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL NO. 606, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYES AND MOVING PICTURE MACHINE OPERATORS OF THE UNITED STATES AND CANADA, Complainant, vs. WAUSAU THEATRES COMPANY, INC., Respondent.	Case I No. 23330 Ce-1786 Decision No. 16488-B

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, appearing on behalf of the Complainant.
Ruder, Ware, Michler & Forester, S.C., Attorneys at Law, by Mr. Arnold J. Kiburz III, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission on July 28, 1978 alleging that the above-named Respondent had committed certain unfair labor practices within the meaning of Sections 111.06(1)(a),(c) and (d) of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Peter G. Davis, 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 hearing on said complaint having been held before the Examiner in Wausau, Wisconsin on August 29, 1978; and briefs having been filed until November 15, 1978; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local 606, International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, herein Complainant, is a labor organization which functions as the collective bargaining representative of certain stage hands and projectionists employed by various movie theaters in and around Wausau, Wisconsin; and that Burton S. Fox has served as Complainant's business agent since at least the fall of 1973.

2. That Wausau Theatres Company, Inc., herein Respondent, is a corporate entity which operates the Grand Theater in Wausau, Wisconsin; and that for the last 30 years Lawrence Beltz has been employed by Respondent as the general manager of the Grand Theater and at all times material herein acted as Respondent's agent.

3. That from 1949 until November, 1973, Complainant and Respondent were parties to a series of written collective bargaining agreements which set forth the terms and conditions of employment of the stage hands and projectionists employed by Respondent; that the 1972-1973 collective bargaining agreement between Complainant and Respondent contained the following provisions:

. . .

(2) The Employer shall give the Union sufficient advance notice of all vacancies for positions coming within the scope of this Agreement; but it is agreed between the parties hereto that hiring of employees hereunder shall not be inconsistent with any applicable State or Federal laws.

. . .

(4) In hiring persons to perform services covered by the terms of this Agreement, the Employer shall grant preference of employment to those persons who have previously been employed as

stage employes)
moving picture) within the following described geographical
machine operators) area Wausau & Stevens Point, Wis

. . .

11. The Employer, the Wausau Theatres Company, and Local 606, Wausau, Wisconsin agree to participate in the International Alliance of Theatrical Stage Employes and Moving Picture Machine Operators of the United States and Canada Film Exchange Employes Pension Fund, Plan B, at a fixed rate of 60¢ per day for five days of each week for a total of $3.00 per week to be contributed by the Employer into said Pension Fund.

. . .

that in the fall of 1973, Woodrow Bierbrauer, president of Complainant and a long time employe of Respndent's, informed Fox that he would bargain with Respondent to arrive upon new conditions of employment which would take effect after the November 4, 1973 expiration of the existing contract; that Bierbrauer then approached Beltz and they reached an oral agreement sealed by a handshake regarding a wage increase for Bierbrauer and his fellow projectionist Martin Imm; that there was no discussion regarding the status of any other condition of employment established by the soon to expire 1972-1973 contract; that the oral agreement between Bierbrauer and Beltz regarding the wage increase was never reduced to writing; that between November 4, 1973 and June 1, 1977, Bierbrauer and Beltz reached other oral agreements with respect to wages, hours and vacation benefits which altered that reached in the fall of 1973; that during said period the working conditions of Bierbrauer and Imm remained substantially unchanged from those which existed under the 1972-1973 bargaining agreement between Complainant and Repondent; that in 1975 or 1976 Fox filled in for Bierbrauer during a vacation period; that Respondent continued to make contributions to Complainant's pension fund until Bierbrauer's June 1, 1977 retirement; that Respondent did not bargain with Complainant prior to the cessation of pension contributions and did not notify Complainant that contributions were ending; and that between November 1973 and June 1, 1977 Respondent had no contact with any individuals connected with Complainant other than Bierbrauer and Imm who retained their union membership during this period.

4. That when Bierbrauer retired, Beltz, acting upon a recommendation from Bierbrauer, hired Joe Withpalek as a full time replacement; that historically the full time projectionist was responsible for procuring a relief operator and in July 1977 Withpalek selected Van Pierre McGreck as his relief operator; that McGreck and Withpalek were both members of Complainant; that in early September 1977 Withpalek quit and Beltz hired McGreck as a full-time projectionist; and that on several occasions during casual discussions with Beltz, McGreck commented on how easy it would be to sabotage a theater's projection equipment and indicated that he had switched some wires before leaving the employ of another local theater in order to cause them some difficulty.

5. That Imm continued serving as a part-time projectionist during the tenure of Withpalek and McGreck; that in March 1978 Respondent's bookkeeper began to notice what appeared to be discrepencies in the payroll reports submitted by McGreck for himself and Imm which she believed had the effect of shortchanging Imm; that the bookkeeper informed Beltz of her observations and was instructed to make periodic reports regarding this situation; that Beltz also instructed McGreck to submit advance work schedules and began to check the door reports kept by the theater doorman in an effort to verify the actual hours worked by McGreck and Imm; and that the apparent discrepencies in payroll reports continued during April and May 1978 and were reported by the bookkeeper to Beltz.

6. That on May 11, 1978 Fox was informed by Complainant's pension fund that Respondent had not made any contributions since June 1977; that this information caused Fox to meet with Beltz and Willis Lueck, Complainant's current president, on June 16, 1978; that during said meeting Fox indicated that the Complainant was interested in bargaining a written contract with the Respondent to update the oral agreements which it now discovered had existed between Beltz and Bierbrauer; that Beltz displayed no interest in entering into a written contract with Complainant and resisted the Complainant's attempt to schedule another meeting; that Beltz also indicated that he was considering automating theater operations; that during said meeting Beltz did not state that he doubted Complainant represented the projectionists employed by Respondent; that although Complainant gave Beltz no objective evidence at said meeting that it did represent the projectionists, Beltz was aware that both McGreck and Imm, who constituted a majority if not the entire complement of Respondent's employees who held positions that were in the bargaining unit covered by the 1972-1973 contract, were members of Complainant; and that historically Respondent's projectionists have also worked concurrently at other theaters who have bargaining agreements with Complainant which required that employes be members of Complainant.

7. That in late May 1978 McGreck called in Imm to work the opening night of a film; that Imm was suffering from a nervous condition at that time; that due to said condition and certain technical difficulties with the theater screen Imm became upset during the show and failed to project a portion of the film which ultimately resulted in some refunds being made to customers by Respondent; that on June 5, 1978 McGreck appeared at the theater after having consumed several beers to see if his brother, who he had called in as a relief operator, had arrived; that his brother was not present and McGreck therefore proceeded to function as the projectionist until his brother, who had also been drinking, arrived later in the evening; that Respondent received complaints from patrons that the picture was out of focus while both McGreck and his brother were functioning as projectionists; and that Beltz was aware of this incident and others when McGreck either worked after having consumed alcoholic beverages or consumed same while in the projection booth.

8. That on June 18, 1978 McGreck mistakenly shipped out a reel of a movie which was still being shown at the theater; that as a result of this error, which was discovered on the evening of June 19, Respondent was forced to issue passes and refunds to customers; that on June 20, 1978 Beltz discharged McGreck; that Beltz gave no advance notice of the discharge or the resultant vacancy to the Complainant; that shortly after McGreck's discharge, Beltz changed the locks on the theater doors; that Beltz hired a replacement for McGreck without contacting Complainant; that upon Complainant's request Beltz sent the following letter, dated June 26, 1978, to Willis Lueck:

> This is to confirm that Van McGreck has been discharged as an employee of the Grand theatre. The reasons are many and impossible to enumerate fully by letter so I will give some highlights begining with Van's last day, which was Monday June 19th, 1978. That night we had to refund the first show and cancel the second show because part of the feature had been shipped out the night before. One reel had been switched with an outgoing featurette. I was not able to recover this film until 8:00 P.M. the next day, after I had to get

on stage and apologive for the interuption because we were "waiting for the next reel to arrive from the airport momentarily". Fortunately we were able to hold our audience until it did arrive.

The needless trauma, time and considerable expense on top of the lost income of the day's receipts is nothing compared to the damage to our public image and reputation for professional-like presentations. I really don't know what kind of image we actually have since this is the third no-show situation where an irritated audience demanded refunds because of Projectionist's errors in recent months.

As recent as June 5, 1978, Van came to work after drinking. At approximately 9:00 P.M. he was relieved by his brother but the entire evening was one of out-of-focus bad projection which caused complaints by our patrons.

Just prior to Martin Imm's nervous breakdown Van had Martin working an entire week for him(except for 2 1/2 hrs.) Martin was not well then and not really able to work efficiently for very long periods and on one of these nights left out a reel of film which again caused a refund situation. On the week referred to above, Van submitted payroll time for most of the week for himself and only about 40% of the pay for Martin. I think that Martin was not receiving the full amount due him from Van.

I could go on but I will summerize by saying that the quality of services (since Woodward Bierbrauer left) by your new members of Local 606 has been attrocious and a burden on me. I have a full schedule of work without having to be concerned with the show, paying for damaged film and complaints from our audience. Our image has been seriously damaged.

I am an Independent theatre operator in a highly competitive situation. My opposition enjoys many advantages because they are large circuit operations. Marcus has three screens in Wausau, all automated and operated by their managers. The Wausau Theatre is operated by United Artists which is the second largest circuit in the United States. I have to compete for films with men who are specialists and do nothing else but buy films. Whereas I have to do my own buying and booking, advertising and theatre management.

Obviously the Grand cannot stay in business unless it can get on more equal footing. We have therefor decided to automate the projection booth as soon as equipment can be installed. I think that you must agree its an economic necessity long overdue. It's a matter of survival....to do otherwise would mean the demise of the Grand and loss of jobs for everyone connected with it.

Kindest regards.

9. That on or about June 30, 1978 Fox contacted Beltz and attempted to schedule a bargaining session; and that Beltz refused to meet with Fox.

Based upon the above and foregoing Findings of fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That Respondent Wausau Theatres Company, Inc., by discharging Van Pierre McGreck, did not commit an unfair labor practice within the meaning of Sections 111.06(1)(a) or (c) of the Wisconsin Employment Peace Act.

2. That Respondent Wausau Theatres Company, Inc., by refusing to bargain with Complainant Local 606, has committed and continues to commit an unfair labor practice within the meaning of Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

3. That Respondent Wausau Theatres Company, Inc., by unilaterally ceasing to make pension payments on behalf of those eligible employes represented by Complainant Local 606, has committed and continues to commit an unfair labor practice within the meaning of Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

4. That Respondent Wausau Theatres Company, Inc., by failing to give Complainant Local 606 advance notice of the vacancy created by McGreck's discharge, did not commit an unfair labor practice within the meaning of Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

That Respondent Wausau Theatres Company, Inc. and its officers and agent should immediately:

1. Cease and desist from refusing to bargain with Complainant Local 606 regarding the wages, hours and working conditions of employes represented by Complainant Local 606.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes of the Wisconsin Employment Peace Act.

(a) Make retroactive pension payments on the behalf of eligible employes from July 1977 to the International Alliance of Theatrical Stage Employes and Moving Picture Operators of the United States and Canada Film Exchange Employes Pension Fund, Plan B at the rate specified in Article 11 of the parties 1972-1973 bargaining agreement and continue to make said payments until it bargains to impasse or agreement over said subject with Complainant Local 606.

(b) Bargain in good faith upon the request of Complainant Local 606 regarding the wages, hours and working conditions of employes represented by Complainant Local 606.

IT IS FURTHER ORDERED that all remaining portions of the instant complaint should be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 19th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent committed unfair labor practices within the meaning of Section 111.06(1)(a),(c) and (d) of WEPA by discriminatorily discharging Van Pierre McGreck, refusing to bargain about the terms of a new collective bargaining agreement, and unilaterally changing conditions of employment by ceasing to make pension contributions and failing to give Complainant advance notice of vacant positions. Respondent denies Complainant's allegations and asserts that McGreck was discharged because of dissatisfaction with his job performance; that since November 4, 1973 it has not been party to any collective bargaining agreement with Complainant; and that it therefore has no current duty to bargain with Complainant with respect to the terms of a new contract or any unilateral changes which may have been made.

DISCRIMINATORY DISCHARGE

Complainant contends that Respondent discharged McGreck because he was engaged in lawful concerted activity protected by Section 111.04 of WEPA and that said discharge thus runs afoul of Sections 111.06(1)(a) and (c) of WEPA which prohibit such interference and discrimination. To meet its burden of proof with respect to the allegedly discriminatory nature of the discharge, Complainant must prove by a clear and satisfactory preponderance of the evidence that McGreck was engaged in concerted activity which is protected by WEPA; that Respondent was aware of said activity and hostile thereto; and that the discharge was motivated at least in part by Respondent's hostility toward said activity. 1/

Inasmuch as Section 111.04 of WEPA states in pertinent part that "Employes shall have the right to...join...labor organizations....", it is clear that through his membership in Complainant, McGreck was engaged in statutorily protected activity. The testimony of Beltz and the content of his June 26, 1978 letter to Lueck establish Respondent's awareness of this protected activity. However, the question of whether Respondent was hostile toward McGreck's membership in Complainant is not quite so easily resolved. Beltz appears to have had a long and amiable relationship with Complainant which lasted at least until the expiration of the 1972-1973 written collective bargaining agreement. In addition, there is no evidence of hostility toward employes Bierbrauer, Imm or Withpalek all of whom Beltz knew to be members of Complainant. The foregoing evidence creates an inference of no animus. On the other hand, Beltz's comment in his June 26, 1978 letter to Lueck about the low quality of services provided by Complainant's members and his desire to avoid bargaining with Complainant arguably demonstrate a hostility toward Complainant which might extend to its members. However such evidence, when balanced against the earlier discussed inference of no animus which is present in the record, is insufficient to establish hostility by the requisite clear and satisfactory

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1/ St. Joseph's Hospital, (8787-A, B) 10/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage, (9781-A,B,C) 3/71, 4/71, 7/71; and A.C. Trucking Co., Inc., (11731-A) 11/73.

preponderance of the evidence. This failure of Complainant to meet its burden of proof requires that its allegations regarding McGreck's discharge be dismissed. 2/

DUTY TO BARGAIN

Respondent admits that it had recognized Complainant as the bargaining representative of its projectionists and stage hands since at least 1949. It now contends that inasmuch as no collective bargaining agreement existed between it and Complainant after November 4, 1973, there is no legal basis for Complainant to suddenly assert that Respondent must begin to bargain. However, the existence of a contract or the lack thereof is not determinative with respect to Respondent's duty to bargain. Unless Respondent possessed a good faith doubt as to Complainant's continuing status as the collective bargaining representative, it is obligated to bargain upon demand with Complainant regarding the wages, hours and working conditions of its employes. 3/ The Examiner finds that Respondent could not have entertained such a good faith doubt when it knew that both McGreck and Imm were members of Complainant at the time that Complainant attempted to bargain. Indeed, Respondent's desire to avoid bargaining with Complainant would appear to stem from its distaste for McGreck and its desire to maintain a freedom to alter its operation in a manner which would allow it to compete with other theaters. It is therefore concluded that Respondent's refusal to bargain with Complainant constitutes an unfair labor practice within the meaning of Section 111.06(1)(d) of WEPA. Thus, Respondent has been ordered to bargain with Complainant.

UNILATERAL CHANGE

Complainant alleges that Respondent failed to bargain before it ceased making pension payments and providing advance notice of vacancies to Complainant and thereby committed an unfair labor practice under Section

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2/ Assuming arguendo that the record did establish Respondent's hostility toward McGreck's protected activity, it is concluded that no clear and satisfactory preponderance of the evidence exists to demonstrate that Respondent's discharge of McGreck was in any part motivated by said hostility. McGreck's testimony that Beltz told him one reason for the discharge was a desire to get rid of "the Union" was not credible and Beltz's concerns about McGreck's payroll reports, drinking and June 18 misplacement of film provide an alternative explanation for the June 20 discharge decision. Complainant's contention that a negative inference should be drawn from Respondent's failure to present the tape of the discharge interview is rejected inasmuch as Complainant could also have presented said tape if it desired to have it considered by the Examiner. Complainant's argument that discriminatory motivation should be inferred from Beltz's allegedly disparate treatment of McGreck and Imm for similar misplacement of film is unpersuasive inasmuch as Imm's status as a long term employe with no record of other conduct which concerned Respondent presents a highly plausible explanation for Beltz's differing reaction. Additionally, Complainant's assertion regarding the inference which should be drawn from the timing of the discharge in relation to Complainant's June 16 meeting with Respondent falls short in light of the timing of McGreck's discharge vis-a-vis his June 18 shipment of the wrong film reel.

3/ Buckley Laundry Company (8943-C) 7/70; Blue Ribbon Enterprises (12998) 10/74.

111.06(1)(d) of WEPA. Complainant contends that Respondent was obligated to make pension payments and provide notice under the terms of a series of oral contracts which existed between it and Respondent. Respondent denies that any such contracts existed and thus asserts that it was free to alter the terms and conditions of employment applicable to its employes.

Respondent admits that it entered into an oral agreement with Bierbrauer upon the expiration of the 1972-1973 contract which established a new wage rate applicable to both Bierbrauer and Imm. Respondent also admits that said agreement was periodically updated to provide for adjustments in wages, hours and vacation benefits, and that from November 1973 to the present, it continued to maintain many of the terms and conditions of employment established by the 1972-1973 contract. Inasmuch as said oral agreements applied to both of the employes formerly covered by the 1972-1973 contract and was "bargained" by an employe who was also president of Complainant, the Examiner must reject Respondent's protestations that said agreements were simply gentlemen's understandings which lacked status as collective bargaining agreements. However, the lack of any evidence in the record as to the period covered by any of those agreements prevents the extension of the general finding that collective bargaining agreements between Complainant and Respondent continued to exist after November 1973 to a specific determination that a collective bargaining agreement existed when Respondent ceased making pension payments in July 1977 or failed to give Complainant advance notice of the vacancy created by McGreck's June 1978 discharge. Furthermore, even if it were concluded that contracts did exist at the time the alleged unilateral changes occurred, the record would not support a conclusion that said contracts included terms which required the Respondent to make pension payments or give advance notice of vacancies. Given the paucity of supporting evidence, the fact that Respondent made pension payments on Bierbrauer's behalf until his June 1977 retirement does not definitively establish either that said payments were made pursuant to a contractual obligation or that a contractual obligation, if it existed, extended beyond the retirement date. Thus Complainant's assertion that Respondent unilaterally altered contractual terms and conditions of employment must be rejected. However, that does not resolve the question of whether the alleged unilateral changes constituted an illegal refusal to bargain.

Until it discharges its statutory duty to bargain by negotiating to impasse, an employer must maintain the status quo vis-a-vis mandatory subjects of bargaining upon the expiration of the contract which established said status quo 4/ unless the union has waived its right to bargain or the necessity for a unilateral change in the status quo can be demonstrated. 5/ The record indicates that the terms of the parties 1972-1973 contract obligated Respondent to make certain pension payments and provide Complainant with advance notice of vacancies. Thus if pension payments and notice of vacancies are mandatory subjects of bargaining, Respondent continued to have these obligations even after the expiration of the 1972-1973 contract and its replacements unless at some point it discharged its duty to bargain, or the Complainant waived its rights to bargain or some "necessity" justified a unilateral change in either area.

With regard to pension payments, it is clear that Respondent ceased making same in July 1977, did not bargain with Complainant prior to making

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4/ City of Greenfield (14026-B) 11/77, NLRB v. Katz 369 US 736, 50 LRRM 2177 (1962).

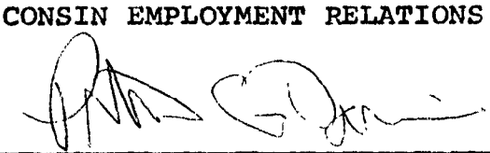
5/ Winter Jt. School District (14482-B) 3/77; City of Greenfield, supra; Boeing Airplane Co., 110 NLRB 147 (1954); A.V. Corporation 209 NLRB 451, 453 (1974).

this change in the status quo established by the 1972-1973 contract, refused Complainant's request to bargain about same in June 1978, and has not asserted any "necessity" for making this change unilaterally. Inasmuch as a contribution to a pension fund is clearly a mandatory subject of bargaining under WEPA, Respondent's refusal to bargain regarding the July 1977 end of said contributions must be found to constitute an unfair labor practice unless Complainant waived its bargaining rights by conduct. The record indicates that Complainant first became aware that Respondent had ceased making pension payments through the content of a May 11, 1978 letter from the pension fund. It is concluded that Complainant's June 16, 1978 demand to bargain about the pension payments and other subjects constituted a timely bargaining demand and thus no waiver by conduct occurred. Thus, Respondent has been found to have committed an illegal refusal to bargain and has been ordered to make pension payments from July 1977 until impasse or new agreement is reached.

With respect to the question of the alleged unilateral change regarding notice of vacancies, it is initially found that said matter is a mandatory subject of bargaining under WEPA. However, there would appear to be a question as to whether the clause in the 1972-1973 contract which established this requirement applies to vacancies occuring as a result of discharge. Thus real doubt exists as to whether Respondent's failure to give Complainant advance notice of McGreck's discharge in fact constituted a unilateral change. Indeed a finding that advance notice of vacancies created by discharge was required would in effect preclude the employer from summarily discharging an employe for even the most heinous offense. However, even if it were concluded that such a requirement existed and that Respondent's failure to give Complainant advance notice of the vacancy created by McGreck's discharge was a unilateral change, it is the undersigned's conclusion that the doctrine of "necessity" justified the unilateral change even though bargaining had not occurred. The record contains unrebutted testimony from Beltz that McGreck had discussed the ease with which a theater could be sabotaged and had indicated that he had once switched some wires on a former employer's equipment before leaving. Given these statements, Respondent could justifiably fear that damage would occur if McGreck or the Complainant received advance notice of the discharge and thus of the vacancy created thereby. Therefore the alleged unilateral change, even if it occurred, does not constitute an illegal refusal to bargain and no affirmative relief has been granted.

Dated at Madison, Wisconsin this 19th day of January, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

6/ With regard to any potential issue as to the timeliness of the instant complaint, even if one were to conclude that the one year statute of limitations established by Section 111.07(4) of WEPA began to run when Respondent actually ceased making pension payments by failing to submit a remittance report at the end of July 1977, the instant complaint would still be timely as it was filed on July 28, 1978.