STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL NO. 606, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES 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-C

ORDER REVISING EXAMINER'S FINDINGS OF FACT, AFFIRMING CONCLUSIONS OF LAW AND ORDER

Examiner Peter G. Davis having, on January 19, 1979, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein said Examiner concluded that the above-named Employer committed an unfair labor practice in violation of Section 111.06(1)(d) of the Wisconsin Employment Peace Act by refusing to bargain and by unilaterally ceasing to make pension payments, but that said Employer did not commit any unfair labor practices by discharging Van Pierre McGreck and by failing to give advance notice of the vacancy created by the discharge to the Union; and the Examiner having ordered the Employer to cease and desist from refusing to bargain with Complainant Union regarding wages, hours and working conditions of employes represented by said Union and to make retroactive pension payments on behalf of eligible employes from July 1977 until it bargains to impasse or agreement; and the above-named Complainant having timely filed a petition with the Wisconsin Employment Relations Commission, pursuant to Section 111.07(5) of the Wisconsin Employment Peace Act, requesting the Commission to review the Examiner's decision and to reverse the Examiner's conclusion that the doctrine of necessity justified the unilateral change made by the Employer with regard to giving advance notice of vacancies to the Union; and the above-named Respondent having filed a response thereto; and the Commission having reviewed the entire record, the Examiner's decision, the petition for review and the briefs filed in support and opposition thereof, makes and issues the following

ORDER

IT IS HEREBY ORDERED:

A. That the Examiner's Finding of Fact No. 3 is hereby modified by adding the following:

3. That Fox had knowledge in July of 1977 that the last written contract between the Complainant and Respondent was the 1972-1973 contract which expired November 1973; and that the normal practice was for the Complainant to have written contracts and that

all other theatres having contracts with the Complainant have written contracts.

B. That the Examiner's Finding of Fact No. 4 is hereby modified to read as follows:

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 without giving the Complainant advance notice of said vacancy; 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. (Emphasis supplied to added language).

C. That the balance of the Examiner's Findings of Fact, as modified, are hereby affirmed.

D. That the Examiner's Conclusions of Law and Order are hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Morris Slavney, Chairman

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Herman Torosian, Commissioner

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Gary L. Covelli, Commissioner

WAUSAU THEATRES COMPANY, INC., I, Decision No. 16488-C

MEMORANDUM ACCOMPANYING
ORDER REVISING EXAMINER'S FINDINGS OF FACT,
AFFIRMING CONCLUSIONS OF LAW AND ORDER

In its complaint initiating the instant proceeding the Union alleged that the Employer had committed unfair labor practices in violation of the Wisconsin Employment Peace Act by refusing to meet and bargain with the Union as the representative of the projectionists in the employ of the Employer, and by making unilateral changes in wages, hours and conditions of employment of said employes, including the failure of the Employer to notify the Union of a vacancy of a position and to make pension contributions as was required in an alleged collective bargaining agreement existing between the parties. The Union also alleged that the Employer had discriminatorily discharged a projectionist.

The Examiner's Decision:

In his decision the Examiner concluded that a collective bargaining agreement did not exist between the parties at the time of the occurrence of the acts alleged to have been committed by the Employer. However, the Examiner found that the Employer had made a unilateral change in a condition of employment, in violation of its duty to bargain with the Union, by ceasing to make pension payments to the Union on behalf of projectionists. Further the Examiner also concluded that the Employer had not met its legal obligation to bargain with the Union, after so being requested. The Examiner concluded that the discharge of the projectionist was not discriminatorily motivated. The Examiner also concluded that the failure to give the Union notice of the vacancy, resulting from said discharge, did not constitute such a unilateral change in conditions of employment so as to constitute an unfair labor practice, since the doctrine of "necessity" justified such change without bargaining. The Examiner ordered the Employer to make the required pension payments and to bargain with the Union with regard to wages, hours and working conditions of the projectionists.

The Petition for Review:

The Union excepts to the Examiner's conclusion that even if the Employer's failure to give advance notice to the Union of the vacancy was a unilateral change in working conditions that such action was justified by the doctrine of "necessity." The Employer, in response to the Union's petition for review, argues that the Examiner's conclusion should be sustained because the language regarding "advance notice" had not survived subsequent oral collective bargaining agreements or, in the alternative, that the unilateral change was excused under the doctrine of "necessity."

Discussion:

With respect to the issue on review, the Examiner set forth his rationale as follows:

> 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 [sic]

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.

The Union argues that the doctrine of "necessity" as a defense to a unilateral change in working conditions is rare and should be restricted to extraordinary circumstances. The Union alleges that an existing condition of employment was that the Employer give the Union advance notice of all vacancies and that there was no "necessity" in this case for the Employer to permanently fill the vacancy without prior notice to the Union of the vacancy.

The Employer argues that there is no basis upon which to conclude that paragraph three of the 1972-1973 collective bargaining agreement 1/ which provided for advance notice of all vacancies survived and was in effect in June 1978, when the vacancy at issue occurred. The Employer contends that since the Examiner found that the Employer entered into several oral collective bargaining agreements upon the expiration of the written contract covering wages, hours and vacation benefits, the only consistent conclusion one can reach is that either the parties: 1) discussed the notice provision and it was not included in the post-1973 oral contracts; or 2) by failing to include it in the oral agreements, the Union waived its right to claim that the notice provision survived the post-1973 oral agreements as a part of the status quo.

We agree, and therefore affirm, the Examiner's conclusion that a collective bargaining agreement did not exist at the time of the occurrence of the acts alleged to have been committed by the Employer. We further agree with the Examiner, under the facts of this case, that the Employer, until it discharges its statutory duty to bargain by negotiating to impasse, must maintain the status quo vis-a-vis mandatory subjects of bargaining upon the expiration of the contract which

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1/ The 1972-1973 collective bargaining agreement expired on November 4, 1973, and was the last written agreement between the Union and Employer. Paragraph three of said agreement provided " . . . the employer shall give the Union sufficient advance notice of all vacancies . . . ."

established said status quo, unless the Union has waived its rights to bargain or the necessity for a unilateral change in the status quo can be demonstrated.

Without deciding whether a waiver of the advance notice had occurred the Examiner concluded that even in the absence of such a waiver "the doctrine of necessity" justified the unilateral change even though bargaining had not occurred.

We agree with the Examiner that the Employer did not commit an unfair labor practice by not bargaining a change of the advance notice requirement, but we do so on different grounds. Assuming, as did the Examiner, that advance notice was required, we agree with the Union, contrary to the Examiner's finding, that there was no "necessity" in this case that would justify the Employer's permanently filling the vacancy without advance notice to the Union of the vacancy. However, we conclude that the advance notice required was no longer a condition of employment.

The Commission has consistently held that the party alleging an unfair labor practice has the burden of proving such a violation by a clear and satisfactory preponderance of the evidence. 2/ The Complainant here has not established by the requisite clear and satisfactory preponderance of the evidence that an obligation to give advance notice of all vacancies existed on June 20, 1978.

The contract which contained the advanced notice provision expired in November 1973 and the subsequent oral agreements did not specifically contain the continuation of the contract in toto or the advance notice provision in particular. In fact, there is evidence in the record that this provision was not continued after November 1973, since the Employer's agent, Beltz, did not give notice to the Union of the vacancies created when Bierbrauer retired in June 1977, and when Withpalek resigned in September, 1977. 3/

The general rule is that absent impasse, an employer may not unilaterally implement a change in a mandatory subject of bargaining and must maintain the status quo upon expiration of the contract. 4/ This rule is not absolute. Thus, as noted by the Supreme Court in NLRB v. Katz, 369 U.S. 736 (1962), 50 LRRM 2177, 2182: ". . . there might be circumstances which the Board could or should accept as excusing or justifying unilateral action . . . ." In the circumstances of this case, the Commission concludes that such justification existed with regard to advance notice of vacancies.

The last contract either oral or written to contain the advance notice provision expired on November 4, 1973. Mr. Fox was the Complainant's Business Agent when the contract expired and has continued in that position at all times material herein. Mr. Fox testified that it was normal practice to have written collective bargaining agreements and that all other theatres that have agreements have written agreements. He also testified that he had knowledge since July 1977, that the last written agreement between the

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2/ Paul LaPointe, 13140-A, 9/75; Tiran Industrial Travels, Inc., 7438, 1/66.

3/ Transcript, pp. 39-40.

4/ City of Greenfield, 14026-B, 11/77; Racine Unified School District No. 1, 11313-B, D, 4/74; NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177, (1962).

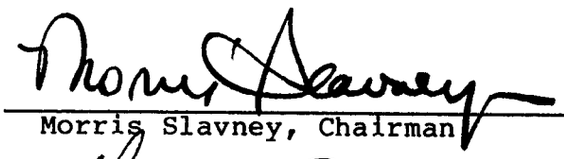
Complainant and Respondent was the 1972-1973 agreement. 5/

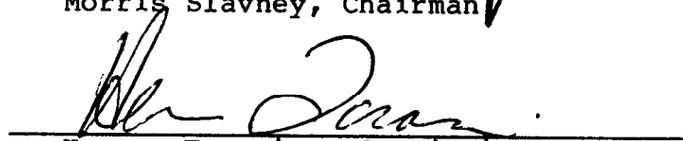
The Union failed for four and one-half (4 1/2) years to exercise its right to negotiate a written collective bargaining agreement which included a provision providing for advance notice of vacancies. We believe that it was incumbent upon the Union to exercise its right to demand a written contract and having failed to do so for four and one-half (4 1/2) years, and otherwise led the Employer to believe that such notice was unnecessary, may not now effectively claim that the Employer's action regarding the failure to give advance notice of the vacancy created by the discharge was unlawful. 6/

With regard to the Examiner's rationale to the effect that the provision which provided the Union with advance notice of all vacancies is a mandatory subject of bargaining, we find it unnecessary to make that determination and defer deciding whether this subject is a mandatory or permissive subject of bargaining to a more appropriate case.

Dated at Madison, Wisconsin, this 23rd day of August, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Morris Slavney, Chairman


Herman Torosian, Commissioner


Gary L. Covelli, Commissioner

5/ Transcript p. 10.

6/ The NLRB has made similar rulings when the Union has failed to exercise its right to negotiate for periods of time substantially less than the four and one-half year period herein. See, for example, Hartmann Luggage Co., 173 NLRB 1254, 1255-56 (the union had four and one-half days); Lakeland Cement Company, 130 NLRB 1365, 1374-75 (the union had six months); Motoresearch Company, 138 NLRB 1490, 1492-93 (the union had eight months).