STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL, MOTEL RESTAURANT EMPLOYEES AND BARTENDERS UNION LOCAL NO. 122, AFL-CIO, Complainant, vs. FULL BELLY DELI - EAST LIMITED, 1/ Respondent.	Case I No. 24627 Ce 1825 Decision No. 17071-A

Appearances:
Goldberg, Previant & Uelmen, S.C., Attorneys at Law, by Mr. Alan L. Levy, on behalf of Complainant.
Mr. Michael L. Dubin, Attorney at Law, on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: Hotel, Motel, Restaurant Employees and Bartenders' Union Local No. 122, AFL-CIO, herein the Union, filed the instant complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Full Belly Deli-East Limited, herein the Employer, has committed certain unfair labor practices under the Wisconsin Employment Peace Act, herein WEPA. The Commission on June 11, 1979, appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Section 111.07(5) of the Wisconsin Statutes. Hearing on said matter was held in Milwaukee, Wisconsin on September 27, 1979. The parties waived the filing of briefs.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Union is a labor organization which maintains its principal offices at 135 West Wells Street, Milwaukee, Wisconsin. The Business Manager for the Union is Phil L. Valley.

2. The Employer, which is not engaged in interstate commerce, operates a restaurant at 609 North Plankinton Avenue, Milwaukee, Wisconsin. The restaurant is located in the Plankington House Hotel, which is located at the same address. Bruce Baxter is a co-owner of said restaurant.

1/ Respondent's name was corrected at the hearing.

3. For a number of years, Town Realty operated the Town House coffee shop in the Plankington House Hotel. At that time, the Union represented certain employes employed in the restaurant and it was party to a collective bargaining agreement covering said employes, which ran from June 16, 1976 to June 15, 1979. Said agreement did not have a successor clause which provided that any successor would assume the terms of the contract.

4. In early 1979, the Employer took over, via a lease, the operations of the Town House coffee shop. Prior to the takeover, there were approximately twelve or fourteen employes in the Town House bargaining unit. The Employer hired approximately eight of those employes. The only one turned down for a job was a busperson, who was not hired because there was no need for his services. The Employer did not discuss the Union with any job applicants and union considerations played no role whatsoever in its hiring decisions. After the takeover, the Employer maintained an employe complement of approximately twelve non-supervisory employes.

5. Shortly after assuming control, the Employer altered the motif of the restaurant from its former status as a standard coffee shop to a delicatessen-type restaurant. Although the Employer made several physical changes in the restaurant--such a putting in a new grill and utilizing the grill more than the kitchen--the continuity of the operation remained the same in that the restaurant still served food and the Employer kept the old kitchen equipment, the stoves, the washing equipment and furniture.

6. The lease originally proposed to the Employer by Verlal Investments, Inc., which apparently owned the Plankington House Hotel, provided in part:

> 14. Union Agreements.
>
> The parties hereby agree and acknowledge that the premises, as currently operated, are subject to a contract, by and between the Lessor and Union Local #___, which contract governs the responsibilities of Lessor with respect to the employment of personnel at the Leased Premises. Lessee has agreed, and hereby covenants and agrees, to conform with the provisions of said union agreement and to utilize only union employees and personnel in the operations of his business upon the Leased Premises, provided that Lessee shall not be obligated to utilize any personnel which is not necessary, in Lessee's opinion, in the operation of his business.

After said lease was proposed, the parties held subsequent discussions and thereafter agreed upon a lease which was completely silent on the question of whether the Employer would honor the terms of the Union's contract.

7. In early 1979, after the Employer had taken over the coffee shop, Ben Barwick, the Union's President and Business Manager, asked Baxter to recognize the Union as the collective bargaining representative of the restaurant employes. Barwick then also demanded that the Employer assume all of the provisions of said contract. At that time, Baxter did not indicate whether he would recognize the Union and, instead, asked Barwick for a copy of the collective bargaining agreement.

8. On February 19, 1979, Valley sent the following letter to Baxter:

> As per your discussion with Mr. Barwick from my office, I am enclosing a copy of the current contract with the Plankington House, and also a copy of the current Health and Welfare Fund and Pension booklets.

9. On March 5, 1979, Valley sent the following letter to Baxter:

> Please be advised that Hotel, Motel, Restaurant Employees & Bartenders Union, Local 122, AFL-CIO is the representative of the food service employees, and have a Labor Agreement covering the wages, hours working conditions and other conditions of employment for your employees at the Plankinton House. A copy of that agreement was given to you by Mr. Ben Barwick, President of Local 122.
>
> Since you are now in operation of the above food service operation, Hotel, Motel, Restaurant Employees & Bartenders Union, Local 122 hereby requests that you recognize the Union and honor the Labor Agreement now in effect, on behalf of your employees.
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> Should there be any questions with regards to the Labor contract, Local 122 shall be happy to meet with you to clear up any questions you may have.

10. On March 13, 1979, Michael Dubin, the Employer's attorney, sent the following letter to Valley:

> Please be advised that I am attorney for the above listed corporation and am responding to your letter to Bruce Baxter dated March 5, 1979.
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> It was the decision of my clients not to use union employees in the Full Belly Deli and all the employees were so informed. Those who wished to remain were allowed to do so with the understanding that it would be without the benefit of the union.
>
> Those who did not desire to remain were given their proper severance pay pursuant to the union contract.
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> If you have any further questions please contact me.
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> Your cooperation is appreciate.

11. At the instant hearing, the Employer maintained that it would not recognize the Union unless its employes first vote to be represented by the Union, and, as a result, it has refused to recognize and bargain with the Union.

12. The Employer will apparently cease doing business at its present location in the Spring of 1980, at which time it will apparently move to a new location.

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

CONCLUSIONS OF LAW

1. The Employer has not violated Sections 111.06(1)(c)(1) and (f) the Wisconsin Employment Peace Act by discriminating against employes because of such union activities or by refusing to adhere to the terms a collective bargaining agreement.

2. The Employer has violated Section 111.06(1)(d) by refusing to recognize and bargain with the Union.

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

ORDER

It is ordered that those parts of the complaint which allege that the Employer discriminated against employes because of their union activities and violated the terms of a collective bargaining agreement are hereby dismissed.

IT IS FURTHER ORDERED that the Employer, its officer's, agents, successors, and assigns, shall immediately:

1. Cease and desist from refusing to recognize and bargain with the Union as the collective bargaining representative of its employes.

2. Take the following affirmative action which will effectuate the policies of the Wisconsin Employment Peace Act:

   a. Immediately cease and desist from refusing to recognize and bargain with the Union as the collective bargaining representative of its employes.

   b. Notify all employes by posting in conspicuous places in its offices where employes are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by the Employer and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Employer to insure that said notices are not altered, defaced or covered by other material.

   c. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 18th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

APPENDIX A

NOTICE TO ALL EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. We will recognize and bargain with Hotel, Motel, Restuarant Employees and Bartenders' Union Local No. 122, AFL-CIO, as the collective bargaining unit of our employes.

Signed,

Full Belly Deli-East Limited

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union primarily argues that: (1) the Employer is a successor to Town Realty and that, as a result, the Employer is obligated to recognize and bargain with the Union; (2) the Employer violated the terms of the collective bargaining agreement which existed between the Union and Town Realty and (3) the Employer discriminated against employes because of their union activities.

The Employer denies all of these allegations and maintains that the Union throughout this matter has refused to negotiate with the Employer over the terms of a new contract and that, moreover, the Employer would be willing to recognize the Union if its employes voted to select the Union as their representative in a properly conducted election.

With reference to the question of anti-union discrimination, the Union relies exclusively on Dublin's March 13, 1979 letter which states in part:

> It was the decision of my clients not to have union employees in the Full Belly Deli and all the employees were so informed. Those who wished to remain were allowed to do so with the understanding that it would be without benefit of the Union.
>
> Those who did not desire to remain were given their proper severance pay pursuant to the union contract.

If, in fact, the record bore out these statements, there would be no question whatsoever but that the Employer had unlawfully discriminated against its employes.

At the hearing, however, Baxter testified that the foregoing statements were the result of a misunderstanding between him and Dublin. Going on, Baxter stated that he never discussed the Union with any of his employes and that union considerations played no role in his hiring decisions. While such testimony is, of course, somewhat self serving and therefore subject to very close scrutiny, the record here is totally barren of any evidence that the Employer even discussed the Union with prospective hires. Moreover, the Employer in fact hired eight of the approximately nine former Town House employes who applied for jobs with the Employer, and it refused to hire the ninth only because it did not need an additional busboy. Accordingly, and because the Union was unable to present any witnesses who claimed that the Employer discussed the Union with them, this complaint allegation is dismissed.

Turning to the successorship issue, the Union rightfully notes that the United States Supreme Court in N.L.R.B. v. Burns Int'l Security Services 1/ held that a new employer must recognize and bargain with a

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1/ 80 LRRM. 2225.

union where there was a continuity of operations between it and the prior employer and where a majority of the employes hired by the new employer were represented by a certified bargaining agent which nad represented the employes of the predecessor employer. .In this connection, the Court noted that:

> It has been consistently held that a mere change of employers or of ownership in the employing industry is not such an 'unusual circumstance' as to affect the force of the Board's certification within the normal operative period if a majority of the employees after the change of ownership or mangement were employed by the preceeding employer. (footnote citations omitted)

The Court there refused, however, to order the successor employer to honor the terms of the pre-existing collective bargaining contract finding, instead, that a successor employer was free to bargain over the terms of a new contract.

The Commission itself has long held that a successor employer is under certain obligations to deal with a union. Liedtke Vliet Super Inc., 8685 C (7/69, Parkwood IGA, 10761-C (2/73), Albert J. Janich, 8165-B, (1/68), and Lake States Leasing Corp., 7282 D (12/65). This same principle has been recognized by the Wisconsin Supreme Court in Driver's Warehouse & Dairy Employees Local 75 v. W. E. R. B. 29 Wis 2d 272, (1965). Thus, the Commission has held that question of successorship turns on whether there is "a substantial continuity of identity in the business enterprise before and after a change..." and whether there is a "relevant similarity and continuity of operation across the change in ownership . . ." 2/

Applying that test here, it must be concluded that the Employer is a successor since: (1) a majority of its present employe complement was formerly employed at the Town House coffee shop; (2) it, like the Town House, is in the restaurant business; (3) it utilized much of the same equipment which was formerly used by the Town House; (4) it did not significently alter the physical appearance of the restaurant; and (5) there was no break in continuity between the Employer's operation and that of the Town House. By virtue of these factors, it is therefore not controlling that the instant dispute centers on the lease of a business, as the Supreme Court in Local 75, supra, noted that "the form of a transfer is not controlling . . ." and that "the answer to the problem does not rest on any one element but the combination of many." While the Court there went on to hold that a lease may indicate a lack of "substanial continuity of identity in the business enterprise," the Court's conclusion was apparently based on the unique factors of that case, ie. (1) no continuity of operation across the change; (2) different production processes; and (3) the failure to hire a majority of the predecessor's employes. Here, since the instant facts are to the contrary, the Examiner concludes that the lease arrangement,

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2/ Parkwood, supra, citing Norms I.G.A., Dec. No. 7399 (12/65).

standing alone, is insufficient to outweigh the other factors which establish successorship. 3/

At the same time, however, the Examiner finds that although the Employer is a successor, the Employer nonetheless is only required to recognize and bargain with the Union, and that, contrary to the Union's claim, it need not assume all of the terms of the Union's contract with Town Realty. For, that contract does not require a successor to assume the terms of the contract if it takes over the business. If the Union wanted such protection in its collective bargaining relationship, it was, of course, free to bargain for the inclusion of such a clause in the contract. Since the contract in fact is silent on this issue, there is no reason for the Commission to unilaterally impose such a requirement. In addition, when the Employer entered into a lease for the restaurant, the Employer and leasor then agreed that the Employer would not be required to honor the terms of the Union's contract.

Combined, these two factors show that when the Employer assumed operations it did so with the understanding that it would not be required to adhere to the terms of the Union's contract with Town Realty. In such circumstances, and in accord with the Supreme Court's additional holding in Burns, supra, that a successor does not automatically assume the terms of a pre-existing collective bargaining agreement, it must be concluded that the Employer was not required to assume the terms of the contract which the Union had negotiated with Town Realty.

In so finding, the Examiner is aware of the Union's contention that the Employer should be required to honor the contract because of the Employer's supposed refusal to hire union adherents, conduct which the Union argues makes this "an extraordinary case". Since, as noted above, the Employer in fact did not discriminate against employes because of their union activities, this contention is rejected.

At the same time, the Examiner also finds without merit two of the Employer's assertions. One centers on the Employer's allegation that a majority of employes no longer want the Union to represent them. In support thereof, Baxter asserted at the hearing that some employes had tried to resign from the Union and that some were unhappy with the contractual benefits negotiated by the Union. But, Baxter did not identify any of those employes, and he did not indicate how many wanted to resign. Indeed, Baxter elsewhere testified that when he hired employes, "We did not discuss the Union with the employes at all." As to the alleged disatisfaction with contractual benefits, that factor certainly is insufficient to warrant the withdrawal of recognition of a union, as employes frequently are unhappy with some, or all, of their contractual benefits. In this connection, the National Labor Relations Board has held:

> An employer may lawfully refuse to bargain with a union if it affirmatively establishes that, at the time of the refusal,

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3/ In this connection, it should be noted that the successor employer in Burns, supra. did not purchase or merge a business, but rather, was awarded a contract to provide plant protection services. Accordingly, it appears that the United States Supreme Court also does not find the form of transfer to be controlling.

> the union no longer commanded a majority or that the employer's refusal was predicated on a reasonably based doubt as to the continuing majority. 4/

Furthermore, in considering the question of majority status, the NLRB has noted:

> . . .a showing as to employee membership in, or actual financial support of, an incumbent union is not the equivalent of establishing the number of employees who continue to desire representation by that union. (footnote citation omitted) There is no necessary correlation between membership and the number of union supporters since no one could know how many employees who favor union bargaining do not become or remain members thereof. 5/

This principle--that an employer needs objective considerations before it can question the continued majority status of a certified representative--has also been adopted by the Commission. 6/

Here, the record does not reveal whether the Union has been certified by the Commission to represent the instant employes. In addition, the Commission's records do not establish that a separate election has ever been held for the former employes of the Town House Restaurant. But, said records do indicate that the Union did represent certain employes of the Plankington House Hotel in 1938. 7/ However, the instant record does not establish whether the Union has continued to represent those employes, including the coffee shop employes, up to the present.

As a result, there is no basis for finding that the Union was ever certified to represent the instant employes. Nonetheless, the absence of that fact does not relieve the Employer of its duty to continue to recognize the Union, as such bargaining duty should not hinge on whether a union has been certified. Indeed, if one were to hold to the contrary, that in effect would mean that the Employer has carte blanche to withdraw recognition from a union for any reason whatsoever, no matter how arbitrary it might be. Since such a result would be disruptive of a collective bargaining relationship, the Examiner finds that an employer must demonstrate objective considerations in questioning a union's majority, irrespective of whether said union has been certified. Here, since no evidence has been presented, the Employer's claim is hereby dismissed.

In addition, the Employer at the hearing also claimed that when Barwick first approached Baxter and asked for recognition, that Barwick then also demanded that the Employer assume all of the terms of the contract which the Union had negotiated with Town Realty. Although Barwick denied making this demand, the Examiner credits Baxter's testimony that such a demand was made.

4/ Orion Corporation, 210 NLRB 633.

5/ Terrell Machine Co., 173 NLRB 1480.

6/ Wausau Hospitals, Inc., (11343) 11/72 and Wauwatosa Board of Education (8300-A) 2/68.

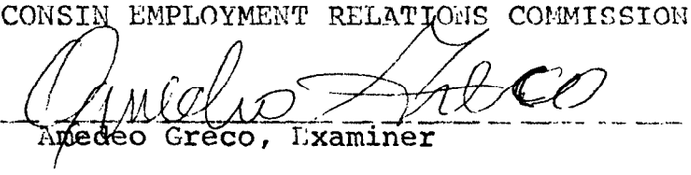
7/ Hotel & Restaurant Employees International Alliance, Local 122, (42) 2/40, affirmed Wisconsin Supreme Court, 236 Wis. 329 (1940).

The Employer rightfully notes that the Union had no right to make such a demand. That question, however, is a separate question of whether the Employer is a successor who is obligated to recognize and bargain with the Union. As a result, and for the reasons noted above, the Employer is obligated to recognize the Union even though Barwick initially insisted that the Employer was required to honor the terms of the contract. At the same time, it should be made clear that although the Employer is obligated to recognize and bargain with the Union, the Employer nonetheless is not required to accept the terms of the Union's contract with Town Realty as it, too, is free to bargain over the terms of any contract which is to cover its employes.

Lastly, the record shows that there is a strong possibility that the Employer will move out of its present location in the early part of 1980, and that it will then move to other quarters. Since the Employer intends to stay in business, albeit perhaps at a different location, there is no basis for withholding the instant bargaining order.

Dated at Madison, Wisconsin this 18th day of January, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
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