STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Complainant, vs. AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION and its affiliated LOCAL 55, AFL-CIO, Respondent.	Case CXXIII No. 24466 PP(S)-58 Decision No. 16902-B
AFSCME, COUNCIL 24, WISCONSIN STATE EMPLOYEES UNION and its affiliated LOCAL 55, AFL-CIO, Complainant, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondent.	Case CXXXVI No. 24842 PP(S)-62 Decision No. 17148-A

Appearances:

Mr. Sanford N. Cogas, Division of Collective Bargaining, for the Complaint/Respondent State of Wisconsin, Department of Employment Relations.

Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, for the Respondent/Complainant AFSCME, Council 24, Wisconsin State Employees Union and its affiliated Local 55, AFL-CIO.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant State of Wisconsin, Department of Employment Relations (hereinafter the State of Wisconsin or the Employer) having filed a complaint with the Wisconsin Employment Relations Commission wherein it alleged that the Respondent AFSCME, Council 24, Wisconsin State Employees Union and its affiliated Local 55, AFL-CIO (hereinafter the Union) had committed unfair labor practices within the meaning of Sections 111.84(2)(a) and 111.84(3) of the State Employment Labor Relations Act (SELRA); and the Union having subsequently filed an answer and counter-complaint alleging that the State of Wisconsin had also committed unfair labor practices in violation of said Act; and the complaints having been consolidated for hearing; and the Commission having appointed Michael F. Rothstein, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5) of the Wisconsin Statutes; and the Union and the State of Wisconsin having mutually waived hearing on said complaints and having agreed to argue their

respective positions by briefs; and briefs having been filed through November of 1979; and the Examiner, having considered the evidence and arguments of Counsel, now makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant/Respondent State of Wisconsin, Department of Employment Relations, hereinafter referred to as the State of Wisconsin or the Employer, is an "employer" within the meaning of Section 111.81(16), Wis. Stats., and has its principal offices at 149 East Wilson Street, Madison, Wisconsin, 53702.

2. That Respondent/ComplainantAmerican Federation of State, County and Municipal Employees, Council 24, Wisconsin State Employees Union, AFL-CIO and its affiliated Local 55, hereinafter collectively referred to as the Union, is a "labor organization" within the meaning of Section 111.81(9), Wis. Stats., and is the certified exclusive collective bargaining representative for all employes in the Security and Public Safety unit, which unit includes State Patrol Troopers. The Union's principal address is 5 Odana Court, Madison, Wisconsin, 53719.

3. That at all times material herein the Union and the State of Wisconsin were parties to a collective bargaining agreement covering the wages, hours and working conditions of the employes in said collective bargaining unit described in Finding of Fact No. 2; and that said agreement contains, among its provisions, terms and conditions for negotiation at the local level on issues relating to hours of work.

4. That pursuant to the terms of the collective bargaining agreement, representatives of the State of Wisconsin and the Union met and negotiated a tentative agreement involving the assignment of State Patrol Troopers to semi-perminent shifts rather than the standard rotating shifts previously in existence; said negotiated tentative agreement further provided for implementation upon the outcome of a referendum vote by the Union.

5. That between October 16 and October 18 of 1978 the Union conducted a referendum vote at Tomah, Wisconsin and at Lake Mills, Wisconsin, to determine whether State Patrol Troopers would work semi-permanent shifts or rotating shifts on the interstate highways; that only Union members were permitted to vote in the referendum; and that the majority of Union members voting chose a semi-permanent shift system, which was subsequently instituted by the State of Wisconsin.

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

CONCLUSIONS OF LAW

1. That the Respondent Union's refusal to permit non-union members to vote did not coerce employes in the exercise of their rights guaranteed under Section 111.82 SELRA, and therefore does not constitute an unfair labor practice in violation of Sections 111.84(2)(a) and 111.84(3), Wis. Stats.

2. That the actions of the State of Wisconsin in filing the original complaint herein did not constitute an unlawful interference with the administration of the internal affairs of the Respondent Union, and therefore does not constitute a violation of Section 111.84(1)(a) and 111.84(1)(b), Wis. Stats.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That the complaints in the instant matter be, and the same hereby are, dismissed.

Dated at Madison, Wisconsin this 1st day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Michael F. Rothstein
Michael F. Rothstein, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS (SECURITY AND PUBLIC SAFETY)
CXXIII, CXXXVI, Nos. 16902-B and 17148-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Background and Positions of the Parties

The basic facts in this case are not in dispute. For that reason the parties waived an evidentiary hearing onthe facts and stipulated to the utilization of briefs for resolution of the matter. Since the collective bargaining agreement between the parties provided for local level negotiations on issues relating to hours of work, representatives of the Employer and affiliated Local No. 55 met and reached tentative agreement on a proposal which would have permitted State Troopers to work semi-permanent shift assignments on the highways rather than the rotating shifts which were in existence prior to the tentative agreement. 1/ On October 16, 1978 and again on October 18,

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1/ Reprint of tentative agreement:

MANAGEMENT'S MODIFICATION OF PROPOSAL

Presented to Local 55
9/19/78

Para. 1 This proposal for semi-permanent shifts for troopers with Interstate Highway System patrol assignments, including any modifications thereto, are subject to the final approval of Management and ratification by the Local Union.

Para. 2 The semi-permanent shift proposal consists of five permanent shifts (2 day, 2 evening, 1 midnight) and is applicable to troops with seven or more members who are assigned to the Interstate Highways. Additional troopers shall select the swing or fill-in shifts.

Para. 3 This proposal entails a progressive days off concept which repeats itself every 28 days which may include a four day week end. Split days off will be avoided whenever possible.

Para. 4 Those troopers assigned to Interstate Highways shall select shifts by seniority. Seniority is determined by the current contract.

Para. 5 Shift selection will be conducted annually at the time of vacation selection or earlier in the event of District reorganization of troop structure. Troopers with less than 2 years of experience are not eligible to select permanent "W" shifts.

Para. 6 Interstate Highway Shift assignment starting times will normally be 7A, 3P and 11P.

(Continued on page 5)

1978, the Union conducted a referendum vote on the tentative agreement. The right to vote was granted only to those bargaining unit members who were members of the Union. The tentative agreement was adopted by the majority of those voting, and the semi-permanent shift system was instituted pursuant to the proposal outlined in footnote No. 1. Subsequent thereto, the Department of Employment Relations (DER) and

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1/ (Continued)

Para. 7 Short term mutually agreed upon shift changes, within shift rotation, may be made with supervisory approval.

Para. 8 Hours of work will be projected until the expiration of the present contract.

Para. 9 Short term vacancies resulting from sick leave, trials, etc., will be filled by "floating" troopers or left open at the supervisor's discretion.

Para. 10 Adjustments to days off and shifts may be required to meet commitments of work unit meetings, training, emergencies, off-highway assignments, special details, vacations and union activities.

Para. 11 Vacancies occurring as a result of transfer, resignation and extended leave of absence will be filled by the transfer clause of the contract.

Para. 12 Troopers assigned the afternoon shifts would be scheduled to start prior to court if notice is received before the schedule is published. Any court time earlier than the schedule time after the schedule is posted will result in overtime, with the option of working out the balance of a shift given to the trooper with notification to the supervisor.

Para. 13 In-service will be assigned.

Para. 14 Single vacation unit selections must be selected in conjunction with the regular weekend off or receive only one weekend off with vacation week.

Para. 15 The Hours of Work Committee representing Management and Union will hold meetings as mutually agreed upon to monitor and review the initial 6-month implementation of this semi-permanent shift concept. Further definitive language may result from these meetings.

the State of Wisconsin as an employer filed an unfair labor practice complaint claiming that, by refusing to allow non-union members the right to vote on the tentative agreement, the Union had committed unfair labor practices in violation of 111.84(2)(a) and 111.84(3) of SELRA. 2/

The Union filed an answer denying that such a restriction on the right to vote was an unfair labor practice and, in addition, counter-complained that the State of Wisconsin, by attempting to determine voter eligibility, had committed an unfair practice of interfering with the administration of the internal affairs of the Union. 3/

It is apparently the position of the Employer that the refusal of the Union to permit non-members to vote on the tentative agreement affecting hours of work is discriminatory as to non-union members; and that, therefore, the Union has violated its duty to fairly represent all members in the collective bargaining unit for which the

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2/ 111.84 Unfair Labor Practices

. . .

(2) It is unfair practice for an employe individually or in concert with others:

(a) To coerce or intimidate an employe in the enjoyment of his legal rights, including those guaranteed under s. 111.82.

. . .

(3) It is an unfair labor practice for any person to do or cause to be done on behalf of or in the interest of employers or employes, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by subs. (1) and (2).

3/ While the Union's counter-complaint does not specify the exact section of SELRA allegedly violated by the Employer's filing of the complaint, the language of the counter-complaint is quite clear: the Union intended for the counter-complaint to be read as a violation of Section 111.84(1)(b), which provides, in part, as follows:

111.84 Unfair Labor Practices

(1) It is an unfair labor practice for an employer individually or in concert with others:

. . .

(b) To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization. . . .

Union is the exclusive bargaining representative. The Union contends that it has neither a statutory nor a legal obligation to permit non-union members to vote for ratification on a tentative agreement which has been negotiated by the Union's bargaining team and the Employer.

Discussion:

Wisconsin Statutes, Section 111.83(1) provides, in part, as follows:

> (1) A representative chosen for the purpose of collective bargaining by a majority of the State employes voting in a collective bargaining unit shall be the exclusive bargaining representative of all of the employes in such unit for the purposes of collective bargaining.

Case law has developed over the years which holds that concommittant with this right of exclusivity, a union has a duty to fairly represent individual employes throughout the bargaining unit, since such employes do not have individual negotiating rights and must look to the union to represent their interests. Thus, a union is obligated to fairly represent the interests of all employes in the bargaining unit, in good faith, and in a non-arbitrary and nor-capricious manner. 4/ Does the exclusion of non-union members voting on ratification of a locally negotiated agreement violate this duty of fair representation?

It should be noted at the outset that Wisconsin Statutes recognize the right of a union to limit voting on ratification of agreements to its members:

> Tentative agreement reached between the Department of Employment Relations acting for the Executive Branch and any certified labor organization shall, after official ratification by the Union, be submitted to the Joint Committee on Employment Relations. . . . (Section 111.92(1), Wis. Stats.); (Emphasis added).

Similarly, Section 111.83(1) provides, in part:

> . . . Any individual employe, or any minority group of employes in any collective bargaining unit, may present grievances to the State employer in person, or through representatives of their own choosing, and the State employer shall confer with said employe in relation thereto if the majority representative has been afforded the opportunity to be present at the conference. Any adjustment resulting from such a conference may not be inconsistent with conditions of employment established by the majority representative and the State. (Emphasis added).

4/ Heinz vs. Ancor Motor Freighting, Inc., 424 US 554, 91 LRRM 2481 (1978); Vaca vs. Sipes, 386 US 171, 64 LRRM 2639 (1967); Ford Motor Company vs. Huffman, 345 US 330, 31 LRRM 2548 (1953).

Thus, inherent in the Statute is the concept that the exclusive bargaining representative (the union), in its negotiations with the employer, may enter into a collective bargaining agreement which impacts both union and non-union members; and if individual employes in that bargaining unit are dissatisfied with the results of the collective bargaining agreement, adjustments of their "grievances" cannot be inconsistent with the conditions of employment established by that collective bargaining agreement.

In addition to the statutory authorization recognizing the right of union members to engage in the ratification of collective bargaining agreements, there is also a body of case law that has clearly recognized the right of union members to determine the method chosen for ratification of a negotiated agreement. 5/ Recognizing the right of the exclusive bargaining representative in contract negotiations and ratification procedures, the Commission has also established a body of law which clearly enfranchises the union (and thus the union's membership) as the sole decision maker on issues involving negotiations and ratification procedures to be followed in any collective bargaining context. 6/ Even on issues which clearly impact solely upon non-members of the union (for example, fair share issues) the Commission has concluded:

> . . . [T]he development of bargaining priorities and strategies or the delegation of such decision making to agents is a matter for the members of the organization certified or recognized as the majority representative, here the Union, unless a broader voting enfranchisement is effected in the documents (e.g., constitution and by-laws) governing the Union's operations. 7/

Here, the Union's constitution clearly provides that decision making is a right conferred upon members of the Union, and not upon all individuals represented by the Union in the collective bargaining unit. 8/ Thus, only Union members would be permitted to cast votes

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5/ NLRB vs. Western Division of Borg Warner, 356 US 342; 78 S. Ct. 718 (1958); Leer Siegler, Inc. vs. International Union, United Auto, Aerospace & Agriculture Implement Workers of America, 419 F. 2d 534 (1969); NLRB vs. International Union of Elevator Constructors, 465 F. 2d 974 (9th Cir. 1972); NLRB vs. Corscicana Cottonmills, 178 F. 2d 344; 24 LRRM 2494 (5th Cir. 1949).

6/ See Whitehall School District (10268-A) 8/71; Waukesha County (16515) 8/78.

7/ Waukesha County, Id.

8/ 1978 International Constitution of the American Federation of State, County and Municipal Employees:

> 7. Members shall have the right to full participation, through discussion and vote, in the decision-making processes of the union, and to pertinent information needed for the exercise of this right. This right shall specifically include decisions concerning the acceptance or rejection of collective bargaining contracts, memoranda of understanding, or any other agreements affecting their wages, hours, or other terms and conditions of employment. . . . (pps. 2-3).

for ratification of an agreement affecting shift preferences. This process was clearly followed by the members of Local 55.

While it is true that only union members may make determinations relative to terms and conditions for collective bargaining as well as for the ratification of same, such decisions cannot be made "arbitrarily, unfairly and capriciously." 9/ And while a wide range of reasonableness must be allowed a statutory bargaining representative, that representative must always act in complete good faith and honesty of purpose in the exercise of its discretion. 10/

It is the position of the Employer that the ratification of the tentative agreement by Union members resulted in a vote where the self-interests of the Union members were being expressed. If this were so, then the Union clearly would have violated its duty of fair representation. The Employer places its reliance on language found in Lettercarriers Branch 600 vs. NLRB, 595 F. 2d 808, 100 LRRM 2346 (D.C. Cir. 1979), wherein the Court stated:

> If a representative's negotiating decisions are motivated solely by self-interest, then there is a breach of the duty of fair representation. The same result obtains when the decisionmaking function is delegated to a group of employees with the understanding that their actions will be motivated solely by their own personal considerations. (p. 2348, footnotes omitted).

If, in fact, the ratification of the tentative agreement herein was motivated solely by the self-interests of Union members and did not take into account the views of non-members, then the Employer's charges could arguably be sustained. However, there is no evidence in the record to support the contention that the Union members voted solely on the basis of their own self-interests or in derogation of the interests of non-members. While it is true that the Court in Lettercarriers determined that the union membership in that particular case did not function in a representative capacity, the Court pointed out that "the general presumption is that the representative obligation has been performed in good faith." 11/ The Court further explained that "the bargaining representative is not required to carry out the wishes of non-union employes; it suffices that he is available to ascertain them and take them into account." 12/ Finally, the Court, in discussing the requirements for demonstrating the violation of the duty of fair representation, stated "that there was neither a procedure, nor the intent, to consider the views and interests of non-union employees" in the Lettercarriers case 13/; but the Court

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9/ Belanger vs. Local Division No. 1128, 254 Wis. 344, 36 N.W. 2d 414 (1949).

10/ Ford Motor Company vs. Huffman, supra.; O'Donnel vs. Pabst Brewing Company, 12 Wis. 2d 491 (1960); Truckdrivers and Helpers Local 568 vs. NLRB, 379 F. 2d 137, 65 LRRM 2309 (1958).

11/ Id., p. 2348.

12/ Id., p. 234.

13/ Id., at 2349.

then went on to discuss the obligations of the union in determining the views and interests of non-union employes:

> In most cases a general familiarity with the working environment may allow a representative of some experience to appreciate adequately the perspective of all employes. There must be communication access for employes with a divergent view, although there is no requirement of formal procedures. 14/

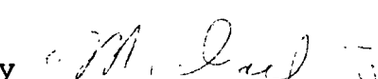
Nothing in the evidence submitted by the Employer suggests that the non-union employes' wishes, desires, or needs, were arbitrarily overlooked or capriciously disregarded. In fact, it is possible that the tentative agreement upon which Union members voted may have adversely impacted some less senior Union members, because shift preferences were allocated on the basis of seniority. The Employer has introduced no evidence to demonstrate that non-union unit employes were in any way adversely impacted by the ratification procedures employed in the instant matter. Thus, without establishing that those Union members voting at the ratification of the tentative agreement were not available to ascertain the interests of non-members or failed to consider those non-members' interests in ratifying such tentative agreement, no violation of the Union's duty to fairly represent all members of the bargaining unit can be found.

As to the Union's allegations that the filing of the complaint by the Employer constitutes an unlawful interference with the administration of the internal affairs of the Union, there is no evidence in the record to support this contention. Section 111.84(4) of the State Employment Labor Relations Act states that "any controversy concerning unfair labor practices may be submitted to the Commission as provided in Section 111.07 . . ." Section 111.07(2), Wis. Stats., states, in relevant part, "any other person claiming interest in the dispute or controversy as an employer, an employe, or the representative, shall be made a party upon application." In light of the statutory enfranchisement permitting an employer to intervene in an unfair labor practice proceeding, 15/ it does not appear that the filing of the instant complaint on the part of the State of Wisconsin can be viewed in terms of interference with the internal affairs of the Union.

Based upon the above rationale, the undersigned Examiner has dismissed both of the complaints in their entirety.

Dated at Madison, Wisconsin this 1st day of May, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Michael F. Rothstein, Examiner

14/ Id., at 2349.

15/ See AFSCME (Council 24, Local 55), AFL-CIO, (16837-A) 2/79.

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