STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED FOOD & COMMERCIAL WORKERS UNION LOCAL 1401, Chartered by the UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO Complainant, vs. METCALFE, INC., d/b/a SENTRY FOODS Respondent.	Case XLI No. 25766 Ce-1853 Decision No. 17660-A

Appearances:

Kelly and Haus, Attorneys at Law, by Mr. William Haus, 302 East Washington Avenue, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Quarles & Brady, Attorneys at Law, by Mr. James C. Mallien, 780 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter; and the Commission having appointed Dennis P. McGilligan to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wisconsin Statutes; and hearing having been held at Madison, Wisconsin, on May 1, 1980 before said Examiner; and the Examiner having considered the evidence, arguments and briefs of counsel; and the Examiner being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That United Food & Commercial Workers Union Local 1401, Chartered by the United Food & Commercial Workers International Union, AFL-CIO, formerly known as Retail Clerks Union Local No. 1401, and hereinafter referred to as the Complainant or Union, is a labor organization having its offices at 3010 East Washington Avenue, Madison, Wisconsin.

2. That Metcalfe, Inc., d/b/a Sentry Foods, hereinafter referred to as the Respondent or Employer, operates a retail food business at 726 North Midvale Blvd. in Madison, Wisconsin, and that the Respondent is engaged in a business affecting interstate commerce within the meaning of the National Labor Relations Act as amended and Section 301 of the Labor Management Relations Act and is included within the self-imposed jurisdictional standards of the National Labor Relations Board.

3. That for a number of years the Respondent operated a Sentry Food Store in Monona, Wisconsin; that in August of 1969 the Complainant and Respondent executed their first collective bargaining agreement and have maintained a continuous collective bargaining relationship since then; that more recently the parties entered into a collective bargaining agreement covering the period from June 26, 1977 through June 28, 1980; and that said agreement contains a recognition clause in which the Employer recognizes the Union as the sole and exclusive bargaining agent for the following collective bargaining unit:

> All employees of all present and future stores located in Dane County in the State of Wisconsin, including all employees in said stores who are actually engaged in the handling or selling of merchandise, EXCLUDING employees working in the meat department, and one (1) store manager per store, one co-manager per store, stock auditors, specialty men, demonstrators employed by vendors, and supervisors, as defined in the Act.

4. That sometime prior to August of 1979, the Respondent commenced actions to move its operations to a new store located at 726 North Midvale Blvd. in Madison, Wisconsin; that in August of 1979, the Respondent closed its old Sentry Food Store in Monona, Wisconsin; that in October of 1979, the Respondent opened its new store in Madison; that employes from the old store in Monona started working at the new store in Madison prior to October of 1979 in order to prepare for the opening; that the Respondent offered employment in the new store to its employes at the old store; that fourteen out of approximately twenty bargaining unit members from the old store accepted employment at the new store; that subsequently three of these employes were determined by the National Labor Relations Board to be supervisors in the new store and were excluded from the bargaining unit and one of said employes resigned; that although the nature and operation of the new store is basically similar to the old store, it is substantially larger and has a complement of approximately seventy employes and that both the old store and new store were located in Dane County, Wisconsin.

5. That on October 29, 1979, after the new store opened the Complainant, by its President, William A. Moreth, made a request of Thomas Metcalfe, the store owner, for recognition as bargaining representative; that Metcalfe on behalf of the Respondent declined to recognize the Union as the majority collective bargaining representative; that on November 6, 1979, the Complainant filed a Petition with the National Labor Relations Board seeking an election and new certification at the new store; that on November 30, 1979, following a hearing on the matter, the National Labor Relations Board issued its decision and Direction of Election at Respondent's new store.

6. That during the middle of December, 1979, prior to the scheduled election, the Respondent requested a meeting with the Complainant; that the meeting was attended by Moreth, David Crossen and Attorney Robert Kelly on behalf of the Union and by Thomas Metcalfe and Attorney James Mallien on behalf of the Employer; that at said meeting the Respondent proposed terms for a collective bargaining agreement that would alter the previous agreement by not providing for fringe benefits to part time employes, by giving the Employer greater flexibility with respect to the use of part time employes and that would remove the Union Security provision and that the Complainant did not agree to the Respondent's proposals as expressed in said meeting.

7. That an election was held, as scheduled, and the Union prevailed in the representation election and was certified as the col-

lective bargaining representative by the National Labor Relations Board in January, 1980, for the following:

> All full time and regular part time employees employed at the employer's Madison, Wisconsin location, but excluding meat department employees, confidential employees, guards and supervisors as defined in the Act.

8. That since the time the Respondent opened a new store in Madison, Wisconsin, the Employer has failed and refused to recognize the validity of and to comply with the terms and conditions of the pre-existing collective bargaining agreement referred to in Finding of Fact Number 3 above; that the Respondent has in fact unilaterally implemented new terms and conditions of employment such as a new health insurance program in November, 1979; that the Complainant has filed a series of grievances claiming violation of the terms and conditions of the aforementioned pre-existing collective bargaining agreement and that the Respondent has responded to said grievances through its counsel, James Mallien, by asserting that there was no valid collective bargaining agreement in effect.

9. That on November 20, 1979, the Complainant filed unfair labor practice charges with the National Labor Relations Board; that in said charge the Complainant alleged that it was the exclusive bargaining representative of certain employes of the Respondent and that it had entered into a collective bargaining agreement with the Respondent effective from September 30, 1977 to June 28, 1980 and that the Complainant further alleged in the charge that following the Respondent's move to a new store the Respondent failed to recognize the Complainant as the bargaining representative of its employes and failed to apply the terms and conditions of the aforesaid collective bargaining agreement at the new store.

10. That on January 11, 1980, the National Labor Relations Board, Region 30, refused to issue a complaint on the grounds that:

> . . . it appears that since the Union won the election conducted on January 3, 1980, quite apart from whatever bargaining obligation there might have been before the election, there now exists a bargaining obligation which presumably will be met. To the extent that there are contract rights under the collective bargaining agreement, they may be enforced in a Section 301 lawsuit. In any event, it will not effectuate the Act to proceed. I am, therefore, refusing to issue a complaint in this matter.

that said decision by the National Labor Relations Board was appealed by the Complainant and thereafter the instant action for enforcement of the collective bargaining agreement was also initiated before the Wisconsin Employment Relations Commission pursuant to the Wisconsin Employment Peace Act.

11. That since the aforesaid decision by the Board, the Complainant has requested that the parties meet to negotiate terms for a successor collective bargaining agreement; that the Employer has responded while it was willing to commence negotiations same would be for an initial collective bargaining agreement and that said negotiations were pending as of the date of the hearing herein.

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

CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission does not have jurisdiction over Metcalfe, Inc., for the purpose of determining whether or not Metcalfe, Inc., has committed any unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Statutes.

2. That the Wisconsin Employment Relations Commission has jurisdiction over Metcalfe, Inc., for the purpose of determining whether or not Metcalfe, Inc., has committed any unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

3. That Metcalfe, Inc., by its refusal to honor and enforce any provisions of the collective bargaining agreement existing between it and the Complainant, United Food & Commercial Workers Union Local 1401, Chartered by the United Food & Commercial Workers International Union, AFL-CIO, has violated and is violating the terms of a collective bargaining agreement, and has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes.

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

ORDER

IT IS ORDERED that Metcalfe, Inc., its partners, officers and agents shall immediately:

1. Cease and desist from refusing to comply with the terms and conditions of the collective bargaining agreement in effect from June 26, 1977 through June 28, 1980 between it and United Food & Commercial Workers Union Local 1401, Chartered by the United Food & Commercial Workers International Union, AFL-CIO.

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

   a. Immediately make all bargaining unit employes whole for all wages and benefits lost as a result of the Respondent's failure to comply with the provisions of the aforementioned collective bargaining agreement.

   b. Immediately make payment by certified check payable to United Food & Commercial Workers Union Local 1401, Chartered by the United Food & Commercial Workers International Union, AFL-CIO, and mail same to 3010 East Washington Avenue, Madison, Wisconsin 53704 for all loss of dues as a result of the Respondent's abrogation of said collective bargaining agreement.

c. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin this 12th day of December, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The instant complaint was filed on February 25, 1980. The Examiner scheduled a hearing for March 31, 1980 which was subsequently postponed to May 1, 1980. The Respondent filed an Answer on March 25, 1980. The transcript was issued on May 13, 1980. The Complainant filed a brief on May 29, 1980. The Respondent filed its brief on June 17, 1980.

POSITION OF THE COMPLAINANT

The Complainant alleges in its complaint that the Respondent has renounced the collective bargaining agreement in effect between the parties and violated the terms and conditions of same. The Complainant further alleges that the Respondent has failed to process grievances over said violations. By said conduct the Complainant claims that the Respondent has committed unfair labor practices in violation of Section 111.06(1) (a) and (f) of the Wisconsin Statutes. For relief the Complainant requests that the Commission order the Respondent to comply with the provisions of the aforesaid agreement and make its employes whole for all wages and benefits lost as a result of its actions.

In support of the above, the Complainant basically argues that the collective bargaining agreement in effect at the old store is still in effect at the new store. The Complainant maintains the fact it filed a representation petition in the instant matter or the fact the aforesaid agreement did not act as a bar to the election which followed should not abrogate or void the parties' agreement.

The Complainant further argues that the totality of the Employer's conduct reveals a disregard for basic labor law principles. In this regard the Complainant cites the Employer's commitment in the recognition clause to recognize the Union as the sole and exclusive collective bargaining representative for "all present and future stores located in Dane County in the State of Wisconsin." The Complainant claims that the Respondent abrogated the terms and provisions of the aforesaid labor agreement and withdrew its recognition of the Union in violation of said provision.

POSITION OF THE RESPONDENT

The Respondent initially argues that the National Labor Relations Board has jurisdiction to determine the issues in the present case or, in the alternative, that the Wisconsin Employment Relations Commission defer its jurisdiction to the Board, as a matter of comity.

The Respondent next argues that by relocating its store it does not have to abide by the terms of the labor agreement in effect at the old Monona, Wisconsin store. In this regard the Respondent relies on the fact that considerably less than a majority of employes at the relocated facility transferred from the prior facility.

The Respondent also argues that the "new store" clause in the contract is invalid.

Finally, the Respondent concedes that the contract bar doctrine is not determinative of the issues in the instant case.

Based on all of the above, the Respondent would have the Examiner dismiss the complaint.

JURISDICTION OF THE COMMISSION

The Respondent raises a threshold issue whether the Commission may properly assert its jurisdiction in this matter. The Complainant alleges that the Respondent violated Sections 111.06(1)(a) and (f) of the Wisconsin Statutes by its actions noted above.

The Examiner is satisfied that the Commission is preempted from asserting its jurisdiction to determine whether the Respondent violated Section 111.06(1)(a) because said section is substantially similar to provisions of the National Labor Relations Act, as amended, and the National Labor Relations Board has jurisdiction to determine whether or not the Respondent has committed said violation. 1/

However, the Examiner finds that it would be proper to assert the Commission's jurisdiction to determine whether the Respondent violated Section 111.06(1)(f) which makes it an unfair labor practice for an employer to breach the terms of a collective bargaining agreement. In this regard the Examiner notes that pursuant to Section 301 of the Labor Management Relations Act, as amended, both federal courts and state tribunals have concurrent jurisdiction to enforce the terms of collective bargaining agreements. 2/ The Commission is an appropriate state tribunal empowered under the Wisconsin Employment Peace Act to determine whether an employer has violated the terms of the collective bargaining agreement and it may assert its jurisdiction over employers "in commerce" to enforce the terms of a collective bargaining agreement between an employer and an appropriate collective bargaining representative. 3/ However, when the Commission asserts its jurisdiction over commerce employers it must apply federal substantive law, in those instances. 4/

In the instant case the record indicates that while the Union filed unfair labor practices with the National Labor Relations Board, the Board, Region 30, refused to issue a complaint on the grounds that "...to the extent that there are contract rights under the collective bargaining agreement, they may be enforced in a Section 301 law suit." The record also indicates that although the Union filed an appeal in the matter said appeal has not been acted upon at any time material herein. Therefore based on all of the above the Examiner will assert the Commission's jurisdiction as noted above.

SUBSTANTIVE ISSUES

At issue is whether the Respondent has any contractual responsibilities in the instant matter.

1/ Dorance J. Benzschawel & Terrence D. Swingen, d/b/a Parkwood IGA (10761-A) 2/72.

2/ Textile Workers Union vs. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957); Charles Dowd Box Co., vs. Courtney, 368, U.S. 502, 49 LRRM 2619 (1962).

3/ Seaman-Andwall Corp., (5910) 1/62; Tecumseh Products Co., (5963) 4/62, aff'd subnom. Tecumseh Products Co. vs. WERB 23 Wis. 2d 118 (1964); American Motors Corp. vs. WERB 32 Wis. 2d 237 (1966).

4/ Local 164, Teamsters vs. Lucas Flour, 369 U.S. 95, 49 LRRM 2917 (1962).

In making such a determination the Examiner must look at the facts present in the instant case in light of federal substantive law.

Both parties cite representation and duty to bargain cases to support their positions. However, the Examiner is satisfied that questions presented herein with regard to the Respondent's contractual obligations are of a different genre than those questions presented in representation or duty to bargain cases. 5/ Therefore, the Examiner concludes that although representation and duty to bargain cases may provide guidance to the Examiner he may look beyond said cases in making a determination in the instant matter.

The Complainant relies on the recognition clause to support its position. That clause specifically extends employer recognition of the Union as the bargaining representative of its employes to all new stores located in Dane County, Wisconsin. Such recognition continues pursuant to the contract's terms for a period from June 26, 1977 through June 28, 1980. Employes covered by said clause clearly would be entitled to the wages and benefits afforded by the contract for the length of the contract period.

The Respondent argues that a new store clause is invalid. However, the case relied upon by the Respondent to support this contention, NLRB v. Retail Clerks Local 588, Retail Clerks International Association, AFL-CIO, 587 F.2d 984 (9th Cir., 1978), was not a Section 301 action for a violation of a contract between an employer and the labor organization as is the instant case. Nor is there any indication that the United States Court of Appeals for the Seventh Circuit has adopted such a rule for this jurisdiction.

To the contrary the Wisconsin Supreme Court held in a Section 301 action for enforcement of a collective bargaining agreement that absent an express contractual provision, there is no prohibition against an employer moving its manufacturing operations out of the state. 6/ In reaching its decision the Court examined the contract's language, including the recognition clause, to determine the parties' responsibilities.

Applying the Court's approach noted above in looking at the contract language to determine the parties' rights and responsibilities, the Examiner concludes that the pertinent contractual provisions in the instant matter support the Union's position. The record also indicates that following the closing of its old store in Monona the Respondent opened a new store in Madison, Dane County, during the life of the contract. Therefore, based on all of the above, the Examiner finds that the contract applies to the Respondent's employes at the new store.

A question remains concerning the impact of the change in the Respondent's work force. The Respondent argues that since a small

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5/ S & O, Inc. d/b/a Paul's IGA Foodliner, (10762-A) 2/72.

6/ UAW Local 577 v. Hamilton Beach Mfg. Co. 40 Wis. 2d 270, 162 N.W. 2d 16 (1968)

percentage of its new work force consisted of employes from the old store it has no contractual obligations. However, the applicable yardstick in a Section 301 action seems to be the percentage of the previous work force hired by the new employer. 7/ Indeed, the Commission has approved such a standard in Section 301 contract enforcement actions. 8/ Applying that standard to the facts of the instant case, the Examiner finds that a majority of the bargaining unit employes at the old store accepted employment from the Respondent at the new store.

In view of all of the foregoing, and absent any persuasive evidence or arguments by the Respondent to the contrary, the Examiner finds it reasonable to conclude that the Respondent has violated the collective bargaining agreement in effect between the parties by refusing to comply with its terms and conditions and by, in effect, repudiating same.

The Examiner has granted the make whole remedies requested by the Complainant for relief. However, the Examiner has denied imposing costs and legal fees on the Respondent based on the lack of support for same in the record and the Complainanant's failure to satisfy the Commission's test for the awarding of such monetary damages. 9/ In addition the Examiner can find no basis in the record for awarding any other relief requested by the Complainant.

For the foregoing reasons the undersigned has found that the Wisconsin Employment Relations Commission lacks jurisdiction over the Respondent for the purpose of determining whether or not the Respondent has committed unfair labor practices within the meaning of Section 111.06(1)(a) of the Wisconsin Statutes but that the Wisconsin Employment Relations Commission does have jurisdiction over the Respondent for the purpose of determining whether the Respondent has violated Section 111.06(1)(f) of the Wisconsin Statutes and has found that the Respondent has committed an unfair labor practice within the meaning of that section and has ordered the Respondent to cease and desist from said violation and to take appropriate remedial action.

Dated at Madison, Wisconsin this 12th day of December, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Dennis P. McGilligan
Dennis P. McGilligan, Examiner

7/ Boeing Co. v. Machinists, 504 F. 2d 207, 87 LRRM 2865 (CA5, 1974).

8/ Dorance J. Benschawel & Terrence P. Swingen, d/b/a/ Parkwood IGA, (10761-B, C) 2/73.

9/ Madison Metropolitan School District (14038-B) 4/77 Aff'd Dane County Cir. Ct. 12/77; Fox Point - Bayside School Dist. #8 (16000-B) 11/79.