STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

## REVISED FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW, AND REVISED ORDER

Examiner Dennis P. McGilligan having, on December 12, 1980, issued Findings of Fact, Conclusions of Law, and Order, as well as a Memorandum accompanying same, in the above-entitled matter, wherein he concluded that the above named Employer had committed certain unfair labor practices within the meaning of the Wisconsin Employment Peace Act, and wherein said Examiner ordered the Employer to cease and desist from such activity, and to take certain affirmative action to remedy the unfair labor practices found to have been committed; and said Employer having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and the Employer having filed a brief in support of its petition, and the Union having filed a brief in opposition thereto; and the Commission, having reviewed the entire record, the Examiner's decision, the petition for review, and the briefs filed in support and in opposition thereto, being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be revised, all as follows:

## REVISED 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 Union, is a labor organization, and has its offices at 3010 East Washington Avenue, Madison, Wisconsin.

2. That Metcalfe, Inc., d/b/a Sentry Foods, hereinafter referred to as the Employer, operates a retail food store at 726 North Midvale Blvd., Madison, Dane County, Wisconsin.

3. That for the past number of years, and to approximately August, 1979, the Employer operated a Sentry Food Store in Monona, Wisconsin, a suburb of Madison, Wisconsin; that in August, 1969, following an election conducted by the National Labor Relations Board (NLRB) and the issuance of a certification by said

agency to the effect that the Union was the certified collective bargaining representative of certain of the employes of the Employer, the Union and Employer executed their first collective bargaining agreement covering wages, hours and working conditions of said employes; that the parties have maintained a continuous collective bargaining relationship; and that in said regard, more recently, the parties entered into a collective bargaining agreement, for the period from June 26, 1977 through June 29, 1980, which agreement contained, among its provisions, the following:

ARTICLE II - RECOGNITION

The employer agrees to recognize and hereby does recognize the Union as the sole and exclusive collective bargaining unit herein established and described as follows:

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.

. . .

It is understood that the first paragraph shall not apply in new stores during the first week after the store is opened.

. . .

ARTICLE IV - MANAGEMENT RIGHTS

The management of the business and the direction of the working forces, including the right to plan, direct and control retail store operations, hire, suspend, or discharge for proper cause, transfer, or relieve employees from duty because of lack of work or for other legitimate reasons, the right to study or introduce new or improved production methods or facilities, the right to sub-contract and the right to use supervisors (as defined in the Act) for any of the work (provided these rights are not used to destroy the bargaining unit), and the right to establish and maintain rules and regulations covering the operation of the stores, a violation of which shall be among the causes for discharge, are vested in the Employer, provided, however, that this right shall be exercised with due regard for the rights of the employees and provided that it will not be used for the purpose of discrimination against any employee.

. . .

ARTICLE VIII - HOURS AND HOLIDAYS

Section 17.

The Employer shall furnish time clocks in all stores covered by this Agreement. Each employee shall punch his own time card and shall follow all reasonable practices established by the Employer with respect to time cards and time clocks. The Union shall be notified in writing of the above practices, and if the Union feels these practices to be unreasonable, the grievance procedure may be utilized.

. . .

Section 20.

In stores where the average weekly sales (Grocery, Produce, Meat) for the previous fifty-two (52) weeks is $15,000.00 or

more there shall be one (1) Produce Manager, one (1) Head Stock Clerk (Assistant Manager), and one (1) Head Cashier.

. . .

In stores where the average weekly sales (Grocery, Produce, Meat) for the previous fifty-two (52) weeks is less than $15,000.00 at least two (2) Department Heads shall be assigned.

. . .

In any store, regardless of volume where the Employer appoints a Co-Manager all three (3) Department Heads must be assigned.

. . .

ARTICLE IX - SENIORITY

Section 1.

In layoffs and rehiring, the principle of seniority shall apply. Seniority shall be determined on the length of service of the employee with regard to his experience and ability to perform the work. All circumstances being reasonably equal, length of service shall be the controlling factor. In promotions and transfers from one type of work to another or from one store to another, the Employer shall have the right to exercise his final judgment after giving due regard to seniority.

. . .

Section 8.

Should a regular employee be temporarily transferred from his regularly assigned store to another store outside the cities of Madison, Middleton and Monona area, and such transfer results in additional transportation expense, the employee will be reimbursed by the Employer for such additional transportation expense.

. . .

ARTICLE X - BULLETIN BOARD

The Employer agrees to furnish the Union with bulletin board space in each store.

. . .

ARTICLE XIX - UNION STORE CARD

The Employer shall display such Union store card and decals in conspicuous areas accessible to the public in each establishment covered by this Agreement.

4. That said agreement also contained provisions relating to (a) "union security", namely a "maintenance of membership" provision, which required all present employes who were members of the Union and all new employes, following completion of their probationary period, to maintain their membership in the Union as a condition of employment; (b) final and binding arbitration of "differences, disputes or complaints" arising over the interpretation or application of the contents of said agreement; (c) hourly rates of pay, premium pay, holiday and vacation pay, and pay for certain leaves of absence; (d) Employer contributions to a health and welfare trust fund and a Union pension fund; and (e) a check-off provision requiring the Employer to honor dues check-off authorization executed by employes.

5. That sometime prior to August, 1979 the Employer made plans to close the Monona store and to move to a Madison location at 726 North Midvale Blvd., a building previously occupied by an "A & P" store; that prior to the closing of the Monona store, Thomas Metcalfe, the Employer's principal stockholder, in a conversation with the Union's President, William Moreth, inquired as to the Employer's obligations with respect to employes at the Monona store, who because of the change of location might not desire employment at the Madison store; that Moreth responded that "as far as the contract is concerned" Metcalfe's obligation would be to offer said employes employment at the new store; that, following the close of the Monona store in August, 1979, the Employer opened its store at the above Madison location in October, 1979, operating under the name of "Sentry"; that all twenty bargaining unit employes previously working at the Monona store were offered employment at the Madison store; that ten of such employes accepted such employment; that the Madison store is substantially larger than the store previously operated by the Employer in Monona; and that at the time of the hearing in the instant matter approximately seventy employes, other than confidential, supervisory and managerial employes, were employed at the Madison store.

6. That on October 29, 1979, following the opening of the Madison store, and after the Union had conducted an organizational campaign among the employes at the Madison store, Moreth, on behalf of the Union, requested Metcalfe to voluntarily recognize the Union as the collective bargaining representative of the Madison store employes; that Metcalfe declined to do so; that as a result the Union, on November 6, 1979, filed a petition with the 30th Region of the National Labor Relations Board (NLRB), Milwaukee, Wisconsin, requesting the latter agency to conduct an election among the employes of the Madison store to determine whether they desired to be represented by the Union for purposes of collective bargaining, and in said petition the Union set forth that there existed no recognized nor certified collective bargaining representative for the employes involved, that there was no past collective bargaining history between the Union and Employer with respect to the employes covered by the petition, and that there existed no collective bargaining agreement which constituted a bar to a present election to determine bargaining representative.

7. That on November 23, 1979, the Union, by its Counsel, filed a charge with the 30th Region of the NLRB, wherein it alleged that the Employer had committed certain unfair labor practices within the meaning of Sec. 8(a)(1) and (5) of the National Labor Relations Act by the following:

> 1. Employer heretofore recognized Union as exclusive bargaining representative for "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." and on 9/30/77 entered into a written collective bargaining agreement covering the wages, hours and conditions of such bargaining unit employees for the term ending 6/28/80.
>
> 2. Employer moved its retail grocery business from a facility located on Monona Drive to a facility located on Midvale Boulevard in Madison, Wisconsin, continuing to employ among its employees, fourteen (14) out of twenty (20) such bargaining unit employees.
>
> 3. Employer now refuses to recognize the union as the bargaining representative of its employees at its Madison, Wisconsin facility.
>
> 4. Employer has failed and refused to apply terms and conditions of its collective bargaining agreement to its employees at its Madison, Wisconsin facility.

8. That following a hearing on the election petition the NLRB, on November 30, 1979, issued its Direction of Election in said matter, wherein it directed that an election be conducted among "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"; and that the Decision accompanying said Direction contained the following determinations by the then Acting Regional Director, deemed material herein:

> The Employer is a Wisconsin corporation with a facility in Madison, Wisconsin. Until August of 1979, the Employer operated a similar facility in Monona, Wisconsin, where all of the persons in question performed duties which are the same or similar to what they now perform. There are approximately 65 employees in the petitioned-for bargaining unit. There is no history of collective bargaining for any employees in the petitioned-for unit.
>
> The parties have stipulated, and I so find, that there is no contract bar to an election in this case . . .

9. That prior to the conduct of the NLRB election, and on December 7, 1979, the Union, over the signature of Moreth, sent the following letter to the Employer:

> Please be advised that our Union is aggrieved by the Company's unliateral discontinuation of payment to the Union health and welfare fund and the Union and employer pension fund on behalf of the bargaining unit covered by our collective bargaining Agreement.
>
> We request that we meet for a conference pursuant to the terms of the collective bargaining Agreement (Article V) for purposes of Step 1 of the grievance procedure. In fact, we ask that the Company agree to consolidate Steps 1, 2 and 3 of the grievance procedure in order to expedite this matter.
>
> We seek as a remedy full compliance with the terms of the collective bargaining Agreement, including making and and (sic) all past due payments to the funds as called for by our collective bargaining Agreement.
>
> We would be available to meet with the Company as soon as possible.
>
> Please advise.

10. That the Employer, rather than responding to the above letter, requested a meeting with the Union; that sometime in the middle of December, 1979, Union representatives, together with Counsel, met with the Employer, and its Counsel, at the Employer's Madison store, for approximately one and one-half hours, during which the Employer offered to negotiate a collective bargaining agreement with the Union, which would, among other things, not provide certain fringe benefits for part-time employes, and which also would not provide any "union security" provisions; that the collective bargaining agreement, which had been executed when the Employer operated the Monona store, contained fringe benefits for part-time employes, and also contained a "union security" provision; and that at said meeting Union representatives did not agree to those matters proposed by the Employer.

11. That on January 3, 1980 the NLRB conducted the election among the employes of the Employer at its Madison store, in the collective bargaining unit described in the Direction issued by the NLRB on November 30, 1979, wherein a majority of those employes voting selected the Union as their collective bargaining representative.

12. That the results of said election were certified by the NLRB on January 11, 1980; that also on the same date the Regional Director of the 30th Region of the NLRB directed a letter to the Union, with a copy thereof to the Employer, which contained, in material part, the following:

> As a result of the investigation, it does not appear that further proceedings are warranted on the charge that the Employer violated Section 8(a)(1) and (5) of the Act by refusing to recognize the Union as bargaining representative of its employees at its Madison, Wisconsin facility and to apply the terms of its collective-bargaining agreement with the Union to these employees. Rather, 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.

13. That on January 22, 1980 Counsel for the Union filed a Notice of Appeal, wherein said Counsel set forth that the Union was thereby appealing the Regional Director's action, in refusing to issue a complaint with respect to the charges filed by the Union, to the General Counsel of the NLRB, Washington, D.C.; that subsequently, upon the filing of a new charge by the Union, said Regional Director issued a complaint, and scheduled a hearing thereon; and that, however, following the issuance of the Examiner's decision herein, and prior to the hearing on the NLRB complaint, the Regional Director, at the request of the Union dismissed said NLRB complaint proceeding on January 6, 1981.

14. That on February 7, 1980 the Union, over the signature of its Business Representative, sent four separate letters to the Employer, wherein the Union indicated that it was "aggrieved" over claimed violations of certain provisions of their 1977-1980 collective bargaining agreement, relating to (a) rate adjustments which should have been made, (b) failure to pay premium pay to employes assisting the head cashier, (c) failure to pay other premium pay to employes, including "key carrier pay", and (d) the Employer's refusal to pay double the straight time rate for Sunday work; and that in said regard the Union requested the Employer to comply with the terms of the collective bargaining agreement.

15. That on February 11, 1980 Counsel for the Employer sent the following letter to the Union, in response to its letters of December 7, 1979 and February 7, 1980:

> At the present time the employer does not have any contract(s) with your union. However, we have been waiting for your union to contact us with regard to negotiations. The NLRB certified the results of the election that was held on January 3, 1980. We have not received any request for negotiations and we have not received any contract proposals. We will await further word from you with regard to negotiations.

16. That on April 15, 1980, over the signature of Moreth, the Union sent a letter to the Employer, constituting "official notice" that the Union desired to amend their existing contract; that said letter contained a request for the names of all employes in the bargaining unit, their starting dates, their current rates of pay, and their average number of hours worked per week; and that attached to said letter was a copy of the "Notice to Mediation Agencies" which was being sent on the same date to the Federal Mediation and Conciliation Service, as well as to the Wisconsin Employment Relations Commission.

17. That on April 21, 1980, Counsel for the Employer, in response to the Union's letter of April 15, 1980, sent a letter to the Union, which contained, among other things, the following statement material herein:

> With respect to your reference to a current labor agreement, as you know, the Company insists that there is no current labor agreement at this store. However, in the recent NLRB election, your union was certified as the collective bargaining agent for all full time and regular part time employees, guards and supervisors as defined in the Act. We

are, therefore, prepared to meet with your union and to negotiate a collective bargaining agreement, in accordance with the law.

18. That at all times material herein, and at least up to the date of the hearing in the instant matter, the Employer did not consider, and has not considered, the collective bargaining agreement involved herein as binding upon it in the operation of its retail store in Madison.

Upon the basis of the above and foregoing Revised Findings of Fact, the Commission makes and issues the following

## REVISED CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission has jurisdiction to determine whether, at any time between October 29, 1979 and June 29, 1980, Metcalfe, Inc., d/b/a Sentry Foods, was a party to a collective bargaining agreement with United Food & Commercial Workers Union Local 1401, chartered by the United Food & Commercial Workers International Union, AFL-CIO covering wages, hours and working conditions of certain employes employed at said Employer's store at 726 North Midvale Blvd., Madison, Wisconsin, for the purpose of determining whether said Employer committed any unfair labor practices within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That the terms and conditions of the collective bargaining agreement between Metcalfe, Inc., d/b/a Sentry Foods, and United Food & Commercial Workers Union Local 1401, chartered by the United Food & Commercial Workers International Union, AFL-CIO, effective June 26, 1977 through June 28, 1980 became applicable to all employes of said Employer's store at 726 Midvale Blvd., Madison, Wisconsin, who were actually engaged in the handling and selling of merchandise, excluding employes working in the meat department, one store manager, one co-manager, stock auditors, specialty men, demonstrators employed by vendors, and supervisors, as of January 11, 1980, and continued in full force and effect through June 28, 1980, all within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That Metcalfe, Inc., d/b/a Sentry Foods, by failing and refusing to apply and extend the terms of the aforesaid agreement to the aforesaid employes from January 11, 1980 through June 29, 1980, has committed, and is committing unfair labor practices within the meaning of Sections 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Revised Findings of Fact and Revised Conclusions of Law, the Commission makes and issues the following

## REVISED ORDER

IT IS ORDERED that Metcalfe, Inc., d/b/a Sentry Foods, its officers and agents, immediately

1. Cease and desist from:

   a. Failing and refusing to generally apply the terms of the collective bargaining agreement existing between it and United Food & Commercial Workers Union Local 1401, chartered by United Food & Commercial Workers International Union, AFL-CIO, effective June 26, 1977 through June 29, 1980, covering all employes employed at its store at 726 North Midvale Blvd., Madison, Wisconsin, who were actually engaged in the handling and selling of merchandise, excluding employes working in the meat department, one store manager, one co-manager, stock auditors, specialty men, demonstrators employed by vendors, and supervisors, for the period from January 11, 1980 through June 28, 1980.

   b. Failing and refusing to specifically comply with Article V of said collective bargaining agreement with respect to grievances filed, or to be filed as provided hereinafter

in this Revised Order, alleging violations of various provisions of said collective bargaining agreement, between January 11, 1980 through June 29, 1980, with respect to any of the employes covered thereby.

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

a. Notify United Food & Commercial Workers Union Local 1401, chartered by United Food & Commercial Workers International Union, AFL-CIO, that it will comply generally with the terms of the aforesaid collective bargaining agreement for the period from January 11, 1980 through June 29, 1980, and more specifically, notify said Labor Organization that it will comply with Article V of said collective bargaining agreement with respect to all grievances previously filed alleging violations of said agreement occurring on and after January 11, 1980, and through June 28, 1980, as well as grievances filed by said Labor Organization within thirty (30) days from the date of such notification, alleging with specificity, claimed violations of said collective bargaining agreement occurring during the period from January 11, 1980 through June 29, 1980.

b. Upon request of United Food & Commercial Workers Union Local 1401 chartered by United Food & Commercial Workers International Union, AFL-CIO, comply with the terms of said collective bargaining agreement, especially Article V thereof, with respect to grievances filed by said Labor Organization alleging violations of said agreement occurring on and after January 11, 1980, and through June 28, 1980, and also with respect to all grievances filed by said Labor Organization within thirty (30) days from the date of the notification set forth in subpara. a., supra, alleging, with specificity, claimed violations of the provisions of said collective bargaining agreement, occurring during the period from January 11, 1980 through June 28, 1980.

c. Post on its premises at 726 North Midvale Blvd., Madison, Wisconsin, where notices to employes are usually posted, copies of the attached notice marked "Appendix", and signed by its duly authorized representative. Said notice shall remain posted for a period of sixty (60) days following its initial posting.

d. Notify the Wisconsin Employment Relations Commission, within thirty (30) days from the date hereof, as to what steps it has taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin this 16th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner

APPENDIX

Notice to Employes
Posted by Order of the
WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WE WILL NOT fail and refuse to generally apply the terms of the collective bargaining agreement existing between us and United Food & Commercial Workers Union Local 1401, chartered by United Food & Commercial Workers International Union, AFL-CIO, effective June 26, 1977 through June 29, 1980, covering all employes employed at our store at 726 North Midvale Blvd., Madison, Wisconsin, who were actually engaged in the handling and selling of merchandise, excluding employes working in the meat department, one store manager, one co-manager, stock auditors, specialty men, demonstrators employed by vendors, and supervisors, for the period from January 11, 1980 through June 28, 1980.

WE WILL NOT fail and refuse to specifically comply with Article V of said collective bargaining agreement with respect to grievances filed, or to be filed, alleging violations of various provisions of said collecitve bargaining agreement, between January 11, 1980 through June 28, 1980, with respect to any of the employes covered thereby.

WE WILL notify United Food & Commercial Workers Union Local 1401, chartered by the United Food & Commercial Workers International Union, AFL-CIO, that we will comply generally with the terms of the aforesaid collective bargaining agreement for the period from January 11, 1980 through June 28, 1980, and more specifically that we will comply with Article V of said collective bargaining agreement with respect to all grievances previously filed alleging violations of said agreement occurring on and after January 11, 1980, and through June 28, 1980, as well as grievances filed by said Labor Organization within thirty (30) days from the date of such notification, alleging with specificity, claimed violations of said collective bargaining agreement occurring during the period from January 11, 1980 through June 28, 1980.

WE WILL upon request of United Food & Commercial Workers Union Local 1401, chartered by United Food & Commercial Workers International Union, AFL-CIO, comply with the terms of said collective bargaining agreement, especially Article V thereof, with respect to grievances filed by said Labor Organization, alleging violations of said agreement occurring on and after January 11, 1980, and through June 28, 1980, and also with respect to all grievances filed by said Labor Organization within thirty (30) days from the date of the notification set forth in subpara. a., supra, alleging, with specificity, claimed violations of the provisions of said collective bargaining agreement, occurring during the period from January 11, 1980 through June 28, 1980.

Dated at Madison, Wisconsin this ____ day of February, 1982.

METCALFE, INC., d/b/a SENTRY FOODS

By _____

Title _____

THIS NOTICE SHALL REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS FROM THE DATE HEREOF. THIS NOTICE SHALL NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

## MEMORANDUM ACCOMPANYING REVISED FINDINGS OF FACT, REVISED CONCLUSIONS OF LAW AND REVISED ORDER

In its complaint initiating the instant proceeding the Union alleged that, after moving its store location from Monona to Madison, the Employer ceased to honor the collective bargaining agreement between the parties including the grievance procedure set forth therein. The Union contends that the Employer thereby committed unfair labor practices within the meaning of Secs. 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act (WEPA).

In its answer the Employer denied the existence of any collective bargaining agreement covering employes at the Madison store of the Employer, and therefore asserted that it had not committed any unfair labor practices.

### The Decision of the Examiner

Following the hearing, and after reviewing the briefs filed by Counsel, the Examiner rejected the Employer's contention that there was a threshold issue of whether the Union, in fact, continued as the bargaining representative of the employes of the Employer after the change in its store location, and that said issue should be determined by the National Labor Relations Board (NLRB), rather than by the Wisconsin Employment Relations Commission (WERC), since the Employer's volume of business fell within the jurisdictional standards of the NLRB. In that regard the Examiner concluded that, since the complaint alleged a violation of a collective bargaining agreement, the WERC has jurisdiction to determine issues relating thereto.

The Examiner also concluded that (a) the broad recognition clause in the agreement covering "all employes of all present and future stores located in Dane County" constituted a valid provision; (b) a majority of the employes at the Monona store transferred to the Madison store; (c) the collective bargaining agreement was therefore valid; and (d) the collective bargaining agreement remained in effect and covered the employes at the Madison store. The Examiner further concluded that inasmuch as the Employer had rejected the application of the terms of said agreement to wages, hours and conditions of employment involving the employes of the Madison store, the Employer violated Sec. 111.06(1)(f) of WEPA. The Examiner ordered the Employer to cease and desist from such activity and to make the employes whole for losses sustained as a result of the Employer's repudiation of the agreement, and to pay to the Union sums of money due it pursuant to the union security provisions in the agreement.

### The Petition for Review

The Employer timely filed a petition with accompanying memorandum requesting the Commission to review and reverse the Examiner's decision. The Employer therein alleged that the Examiner failed to make certain Findings of Fact, which were material to the issue as to whether the collective bargaining agreement continued to exist following the change in store locations. In said regard the Employer contended that during the NLRB hearing on the Union's election petition, President Moreth of the Union, stated that there was no "recognized or certified bargaining agent" at the Madison store, and further that Union's Counsel "stipulated that there was no contract in existence" which would bar a present representation election. In addition, the Employer argues that prior to the closing of the Monona store, in response to an inquiry by Metcalfe as to the Employer's obligation to the Monona employes upon opening of the Madison store, Moreth replied that the "only obligation under the contract would be to offer the employes employment at the new store", and further, that in November, 1979 the Employer instituted a health insurance plan for full time employes at its Madison store.

The Employer contends that, on the basis of the above actions of the Union's representatives, the Union should be estopped from claiming that the agreement between the parties continued to exist after the Employer changed store locations.

It argues that had the Union considered that the agreement continued in effect, the Union would have no reason for seeking the representation election before the NLRB.

Further, the Employer argues that the "new stores" portion of the recognition provision of the collective bargaining agreement is invalid, that the Madison store is not a "successor" to the Monona store, and that to apply the terms of the agreement to approximately seventy employes, when only ten of the Monona employes transferred to the Madison store, would completely ignore the rights of the "new" employes to determine for themselves whether they desired to be represented by the Union for the purposes of collective bargaining.

The Union's Response to the Petition for Review

The Union argues that the statements made by its representatives at the election hearing before the NLRB have been misconstrued by the Employer. It contends that by such statements the Union did not admit the absence of a collective bargaining agreement between the parties covering the Madison store employes, but that said statements merely reflect that the Union was not claiming that such agreement should be considered as a bar to a present election. The Union indicates that it sought the NLRB election for the purpose of "proving majority status" a requirement of NLRB doctrine in "new stores" cases.

The Union contends that in the Employer's brief, the Employer did not include the entire conversation between Moreth and Metcalfe prior to the closing of the Monona store with regard to obligations of the Employer under the agreement. In that regard, the Union emphasizes that Moreth's reply must be considered in light of the context of Metcalfe's full inquiry relating to his obligation "for employes in the event they did not want to travel" to work at the Madison store.

The Union further argues that the Examiner correctly applied existing law in determining that the agreement covered "new stores". The Union concedes that the NLRB still requires some proof of the Union's majority status before it will enforce a "new stores" contractual provision in Section 8(a)(5) or accretion cases, but argues, however, that there are no contract enforcement (Section 301) cases requiring a similar proof of majority status. The Union contends that since it was selected as the bargaining representative by the majority of employes in the Madison store, the Union's majority status was preserved and that therefore it was entitled to have the collective bargaining agreement enforced.

Further, the Union calls the Commission's attention to the fact that the Examiner did not determine that the case involved a successorship. Since the agreement covered employes in a "new store", and since its majority status of employes in said new store was established in the NLRB election, the Examiner's decision was proper.

## DISCUSSION

The Revised Findings of Fact

We have revised the Examiner's Findings of Fact to more fully reflect all facts established in the record, which are material to the disposition of all the issues involved in this proceeding. In that regard we have enlarged the Findings to also include the following additional facts relating to:

1. Provisions in the collective bargaining agreement in effect at the Monona store, which provisions relate to "other stores" operated by the Employer, as well as a "union security" provision, and the provisions providing for final and binding arbitration of "differences, disputes or complaints" arising with respect to the "interpretation or application of the contents" of the agreement.

2. The contents of the conversation between President Moreth and Metcalfe, the Employer's primary stockholder, relative to the effect of the closing of the Monona store and the opening of the Madison store on Monona store employes.

3. The findings of the NLRB Acting Regional Director relating to "contract bar", "past bargaining history" and the "question of representation".

4. The contents of the charge filed by the Union with the NLRB alleging that the Employer committed unfair labor practices by not applying the terms of the Monona agreement to the Madison store employes.

5. The fact that the Union withdrew the appeal of the Regional Director's dismissal of its charge noted above.

The Jurisdiction of the Commission

In its complaint initiating the instant proceeding the Union alleged that the Employer, by failing and refusing to abide by the terms of the 1977-1980 collective bargaining agreement including the contractual grievance procedure, committed unfair labor practices within the meaning of Secs. 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act (WEPA). Sec. 111.06(1)(a) of WEPA prohibits unlawful interference, restraint, and coercion of employes because of their exercise of protected activity, and Sec. 111.06(1)(f) of WEPA provides that it is an unfair labor practice for an employer to violate the terms of an existing collective bargaining agreement. Violation of Sec. 111.06(1)(a) may occur as a result of a specific and direct act of the employer, e.g., threats of discharge because of participation in lawful concerted activity, or it may arise as a derivative violation from the violation of another type of unfair labor practice, specifically prohibited in the statute, e.g., as a result of a "discriminatory" discharge because of the exercise of lawful concerted activity. The act of "interference" alleged in the complaint filed herein appears to be a derivative violation arising as a result of the alleged violation of the collective bargaining agreement. Thus, if the Commission has jurisdiction to determine that the Employer violated the collective bargaining agreement, it would also have jurisdiction to determine whether said violation also constituted a derivative act of interference in violation of Sec. 111.06(1)(a) of WEPA.

As indicated by its action in conducting the representation election among the Employer's employes at the Madison store, the National Labor Relations Board has jurisdiction to apply the provisions of the National Labor Relations Act to the Union/Employer relationship herein. However, under the NLRA it is not an unfair labor practice for an Employer to violate the terms of a collective bargaining agreement. Sec. 111.06(1)(f) of WEPA contains such a provision and it has been well established that the Commission has concurrent jurisdiction with both state and federal courts to entertain complaints alleging such violations involving employers who are otherwise subject to the jurisdiction of the NLRB. Inasmuch as the charge that the employer violated the NLRA with respect to its non-observance of the terms of the Monona agreement is no longer pending before the NLRB, and since there is no court action pending involving a similar allegation, it is clear that the Commission has jurisdiction to determine whether, in fact, the Monona agreement is applicable to the Madison store employes.

Further, if the Commission should determine the latter issue in the affirmative, we are faced with the issue as to whether, in light of the fact that the Monona agreement contains a provision for the final and binding arbitration of grievances with respect to alleged violations of its provisions, the Commission should exercise its jurisdiction with respect to such alleged violations, or whether we should only require the Employer to proceed to arbitration with respect thereto. Generally, the Commission has refused to exercise its jurisdiction, but, rather, has held that such issues are for the arbitrator to determine. 1/

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1/ River Falls Co-op Creamery (2311) 1/50; J.I. Case Co. (14513-A) 11/76; Kohl's Food Stores (15903-A,B) 12/78.

The Merits

The facts are not in dispute and they are set forth in the Revised Findings of Fact in a manner which does not require that they be repeated in this memorandum. The pleadings and arguments of the parties raise the following issues as a result of said facts:

1. Can the 1977-1980 collective bargaining agreement between the parties be interpreted to apply to employes at a store other than in Monona?

2. If so, what is the impact of the NLRB certification and decision therein on the application of the Monona store agreement to the Madison store employes?

The Monona Store Agreement

It is readily apparent from the mere reading of various provisions of the collective bargaining agreement, set forth in Revised Finding of Fact 3, that the agreement was intended to cover employes other than those employed at the Monona store. The language in the "recognition" provision identifies the employes subject to the agreement, and such coverage is described in labor relations terms as "additional store clauses". This Commission, prior to the instant proceeding, has never been called upon to determine whether such a provision is legal. However, the NLRB has held such "additional store clauses" to be valid in situations where that agency is satisfied that the employes in the new store or stores have authorized the Union, which is a party to such a collective bargaining agreement, to represent them, either by a majority of such employes having executed authorization cards indicating such intent, or by a majority of them selecting the Union as their representative in an election conducted by the NLRB. 2/ Further, contrary to the Examiner's finding and the Union's contention, such a showing of majority status has been found to be imperative in contract enforcement proceedings as well as in NLRB accretion and unfair labor practice cases. 3/ The Union herein sought to establish such majority status with respect to the employes at the Madison store by seeking such an election resulting in the certification issued by the NLRB.

While it might be argued that, technically, the Madison store is not an "additional" store, since the Monona store ceased to exist prior to the opening of the Madison store, we conclude that the closing of the Monona store did not in itself terminate the collective bargaining agreement so as render it inapplicable to an "additional" store operated by the Employer at a new location in Dane County.

We are satisfied that the response of President Moreth to an inquiry by Metcalfe as to the effect of the agreement on Monona store employes who chose not to be employed at the Madison store does not establish that the Union considered the agreement as not applying to the Madison store operation. The transcript of the hearing discloses that in response to questions by Union Counsel with respect to a meeting with Metcalfe prior to the closing of the Monona store, and prior to the opening of the Madison store, Moreth testified as follows:

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2/ See Houston Division of the Kroger Co. 219 NLRB 388, 7/75; Mark-It Foods 219 NLRB 402, 7/75.

3/ Ketchikan Pulp Co. 611 F2d 1295 (9th Cir. 1980) 103 LRRM 2494. The court held that employes cannot be accreted to a unit by an "additional store clause", in that a showing of majority status is necessary to guarantee employes of their Section 7 rights. The court further held that such a showing can be established by authorization cards, or other informal methods, but that the Company had waived its right to an election as a method of proving majority support by agreeing to an "additional store clause".

Q. What did he say at that meeting to the best of your recollection?

A. He stated that the new store was going to be some distance away and what obligation did he have for employes in the event they did not want to travel that far? What was his obligation?

Q. He asked you that?

A. That's my recollection, yes.

Q. What did you tell him at that time?

A. As far as the contract was concerned, his obligation would be to offer the employes employment at the new store.

Contrary to the view of the Employer, we do not interpret Moreth's response to Metcalfe's inquiry as relating to all employes at the Monona store, but only to those who did not chose to be employed at the Madison store because of the distance they would have to travel for such employment.

The fact that, in its petition filed with the NLRB and during the course of the hearing thereon, the Union set forth (1) that there existed no agreement which would bar a present election among the Madison store employes; (2) that there was no recognized or certified bargaining representative for such employes; and (3) that therefore, a question of representation existed among such employes to determine their bargaining representative, does not necessarily establish that the Monona agreement did not survive the closing of the Monona store, nor that the Union, by admitting the above in the NLRB proceeding, deemed the contract no longer binding on the parties. In fact, in order to continue the binding effect of the contract on the parties, it was absolutely necessary for the Union to establish that it represented a majority of the employes at the Madison store. 4/ One manner to do so was to utilize the NLRB election process. The NLRB certification established its representative status. Had the majority of Madison store employes rejected the Union as their bargaining representative the Union would not have had the status to seek to compel the Employer to comply with the collective bargaining agreement in issue. We therefore have concluded that the Employer was obligated to apply the terms of the 1977-1980 agreement between the parties to the wages, hours and working conditions of the employes at the Madison store from January 11, 1980, the date of the NLRB certification, to June 28, 1980, the date upon which the collective bargaining agreement expired.

While we agree with the Examiner that the collective bargaining agreement applied to the employes at the Madison store, we do not necessarily agree with his Conclusion of Law that the Employer violated "the terms" of said collective bargaining agreement, for as so worded by the Examiner it is implied, or at least it could be implied, that all of its provisions were violated, in light of para. 1 of the Examiner's Order. The agreement contains a grievance and arbitration provision, providing for final and binding arbitration with respect to alleged violations of the agreement. The Union on December 7, 1979 and February 7, 1980 filed grievances alleging violations of the agreement. The Employer, consistent with its position that no agreement applied, did not process same. We are satisfied, that at least from the date of the NLRB certification, the Employer was obligated to honor the collective bargaining agreement. Therefore any alleged violation going to the substantive terms of the agreement, other than the grievance and arbitration provision, must be determined through arbitration should the parties be unable to resolve any alleged violations of the agreement occurring between Janaury 11, 1980 and June 28, 1980.

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4/ Footnotes 2 and 3, supra.

The Revised Conclusions of Law

We have revised the Examiner's Conclusion of Law to include, in addition to those conclusions set forth by the Examiner, a modification as to the nature of the violation of the collective bargaining agreement involved. Since the agreement provides for final and binding arbitration of grievances with respect to alleged violations of said agreement, and since the parties did not litigate any substantive violations of the agreement in the hearing before the Examiner, we deem it proper that such determinations be made by an arbitrator, if the grievances involved cannot be resolved by the parties in the grievance procedure.

The Revised Order

We have revised the Examiner's Order so as to be consistent with our Revised Conclusions of Law. We have ordered the Employer to comply with the contractual grievance and arbitration provision of the agreement with respect to grievances relating to alleged violations of the agreement occurring between January 11, 1980 and June 28, 1980. Since the Employer consistently maintained that the Monona store agreement did not apply to its Madison store employes, it would have been futile for the Union to file grievances with respect to claimed violations of the agreement occurring during said period of time. Therefore our Order permits the Union, within the time limits specified, to file grievances with respect to any alleged contractual violations during said period, and the Employer is obligated to process same in efforts to reach an accord thereon. Failing same, and if the Union so requests, the Employer is required to proceed to arbitration on the unresolved grievances. In addition we have required the Employer to post a notice to employes with regard to the unfair labor practices committed by it.

Dated at Madison, Wisconsin this 16th day of February, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

_____
Herman Torosian, Commissioner