STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MADISON THEATRICAL STAGE EMPLOYEES AND MOVING PICTURE MACHINE OPERATORS, LOCAL 251, IATSE, MPMO, AFL-CIO Complainant, vs. DANE COUNTY, Respondent.	Case LXXV No. 26328 MP-1117 Decision No. 17893-B

Appearances:

Mulcahy & Wherry, S.C., Attorneys at Law, 131 W. Wilson St., #202 Madison, Wisconsin, by Mr. John T. Coughlin, appearing for the Respondent.

Lawton & Cates, Attorneys at Law, 110 East Main Street, Madison, Wisconsin, by Mr. Bruce M. Davey, appearing for the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Madison Theatrical Stage Employees and Moving Picture Machine Operators, Local 251, IATSE, MPMO, AFL-CIO having, on June 4, 1980, filed a complaint with the Wisconsin Employment Relations Commission alleging that Dane County had committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (4), Wis. Stats., and the Commission having appointed Ellen J. Henningsen, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5) of the Wisconsin Statutes; and hearing on said complaint having been held before Examiner Henningsen on July 10 and 11, 1980 at Madison, Wisconsin, at which hearing the complaint was amended to add certain allegations; and briefs having been filed by both parties until September 23, 1980; and Examiner Henningsen, prior to any further action in this matter, having resigned her employment with the Commission; and the Commission having on October 5, 1980, appointed Christopher Honeyman, a member of its staff, to succeed Examiner Henningsen and to make and issue Findings of Fact, Conclusions of Law and Order in this matter; and Examiner Honeyman having, on December 19, 1980, repeated Examiner Henningsen's personal examination of the work sites involved herein, and having, on December 29, 1980, consulted with Examiner Henningsen concerning questions of credibility of various witnesses; the present Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Madison Theatrical Stage Employees and Moving Picture Machine Operators, Local 251, IATSE, MPMO, AFL-CIO, herein referred to as the Complainant or the Union, is a labor organization; and that Steve Schroeder is Business Agent of the Complainant.

2. That Dane County, herein referred to as the Respondent or the County, is a municipal employer which among other functions operates an exhibition center and arena complex known as the Exposition Center - Memorial Coliseum.

3. That the Complainant is and has been since May 11, 1979 the certified exclusive bargaining representative of all maintenance-stagehands and all persons performing work as stage carpenters, stage electricians, property persons, spotlight operators, fly-persons, riggers and wardrobe workers employed by Respondent at the Dane County Exposition Center - Memorial Coliseum, but excluding all other employes of Dane County.

4. That the bargaining unit referred to above contained, at the time it was certified, one full-time employe, John Sparks, in addition to sundry employes called for from time to time by Respondent and referred through Complainant's hiring hall.

5. That in or about June, 1979 Complainant, by its Business Agent Steve Schroeder, requested to Respondent that it meet to bargain an initial collective bargaining agreement covering the employes described above in Finding of Fact No. 3; that no meeting was held about that time; and that Complainant and Respondent agreed on interim terms of employment for employe Sparks pending the outcome of a petition for judicial review filed by the County, in Dane County Circuit Court, requesting review of the Commission's Certification of Representative.

6. That on January 31, 1980 Reserve Circuit Judge George R. Currie issued a Judgment affirming the Commission's Certification of Representative.

7. That following the issuance of Judge Currie's decision referred to above, Complainant and Respondent agreed to meet for the purpose of negotiating a collective bargaining agreement.

8. That the first negotiation meeting took place on April 9, 1980; that at this meeting the Union reiterated proposals it had made in about June, 1979; that the County stated its proposal with regard to wages for Sparks; that said County proposal was that Sparks be paid what the County contended was the standard area wage rate for his craft, minus twenty per cent, plus standard benefits received by other County employes; that the County paid certain employes practicing other crafts according to this formula; and that the application of the County's proposed formula to Sparks would have reduced his wage rate from $7.32 per hour to $6.00 per hour.

9. That on or about May 1, 1980 a resolution (number 19 of 1980) was introduced at a regular meeting of the County Board, which resolution called for reclassification of Sparks' position from Maintenance-Stagehand to Custodian II; that on or about May 1, said resolution was referred to the County Personnel Committee and Exposition Commission; that on or about May 12, 1980 the County Personnel Committee and Exposition Commission recommended that said resolution be adopted; that the County Board adopted said resolution at its June 15, 1980 meeting; that the County thereupon reclassified Sparks to Custodian II and transferred him into an existing bargaining unit represented by Local 65, American Federation of State, County and Municipal Employees, AFL-CIO; and that at no time during its consideration of the proposed change of Sparks' position's classification did the County notify the Union of said proposal and/or offer to bargain concerning same.

10. That on June 3, 1980 the County and Union met for the purpose of collective bargaining; and that at said meeting the County refused to negotiate Sparks' wages, hours and working conditions with the Union, on the grounds that he was allegedly not a craft employe and was being reclassified.

11. That by processing, adopting and executing Resolution No. 19 of 1980 without notifying or offering to bargain with the Union concerning the reclassification of Sparks' position, the County unilaterally and in bad faith altered the wages, hours and working conditions of said position; and that by these acts, and by its outright refusal to bargain concerning Sparks' conditions of employment on June 3, 1980, the County refused to bargain collectively with the Union.

12. That by proposing, on April 9, 1980, lower wages for Sparks then he already was receiving, the County did not refuse to bargain collectively with the Union.

Upon the basis of the foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That Respondent, by proposing that the Complainant agree to lower wages than were already in existence prior to any collective bargaining, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)(1) or (4), Wis. Stats.

2. That Respondent, by refusing to negotiate terms of employment for the Maintenance-Stagehand position with Complainant and by reclassifying the sole regularly employed incumbent in said position without notice to or bargaining with Complainant, committed prohibited practices within the meaning of Section 111.70(3)(a)(1) and (4), Wis. Stats.

Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER

IT IS ORDERED that Dane County, its officers and agents shall immediately:

1. Cease and desist from refusing to acknowledge John Sparks as a member of the bargaining unit represented by Complainant, and from refusing to negotiate Sparks' wages, hours and working conditions with Complainant.

2. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Municipal Employment Relations Act:

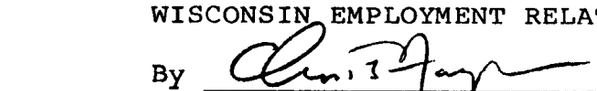
a. Make John Sparks whole for any losses he suffered by reason of Respondent's reclassification of him.

b. Notify all employes by posting in conspicuous places where notices applicable to employes working at the Dane County Exposition Center - Memorial Coliseum are normally posted, copies of the notice attached hereto and marked Appendix A, which notices shall be signed by a responsible representative of the Respondent, shall be posted immediately upon receipt of a copy of this Order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the Respondent to insure that the said notices are not altered, defaced or covered by other material.

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

Dated at Madison, Wisconsin this 26th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

Christopher Honeyman, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

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

WE violated John Sparks' rights under the Municipal Employment Relations Act, and employes' rights under that law, by reclassifying John Sparks from Maintenance-Stagehand to Custodian II and by refusing to negotiate his wages, hours and working conditions with Madison Theatrical Stage Employees and Moving Picture Machine Operators, Local 251, IATSE, MPMO, AFL-CIO, and if he incurred losses by reason of those actions we will make him whole for such losses.

By _____
Dane County

Dated this _____ day of _____, 1981.

THIS NOTICE MUST REMAIN POSTED FOR A PERIOD OF SIXTY (60) DAYS AND MUST NOT BE ALTERED, DEFACED OR COVERED BY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint, as filed, alleges that the County refused to bargain at negotiation meetings on April 9 and June 3, 1980; at the hearing, the Union amended its complaint to add an allegation that the County engaged in bad-faith bargaining by unilaterally reclassifying the lone full-time employe in the unit involved here so as to remove him from the unit.

Background:

On October 3, 1978 the Union filed a petition with the Commission, seeking a representation election among maintenance-stagehands at the County's Exposition Center - Memorial Coliseum. The County principally contended, at a hearing on the petition, that the maintenance-stagehands were not appropriately represented as a separate unit, in the event that they should choose collective representation; the Union contended that John Sparks, the sole full-time employe in the classification, and the various employes used on an on-call basis from the Union's hiring hall are craft employes and thus entitled to be represented in a unit separate from other employes of the County. The Commission decided 1/ that the employes petitioned for were in fact craft employes, and on May 2, 1979 an election was conducted among the employes in the classification of maintenance-stagehand, in which the Union won the right to represent these employes; on May 11, 1979 the Commission issued a Certification of Representative which stated as much.

The Parties' Negotiations:

About May 17, 1979 Steve Schroeder, the Union's Business Agent, sent proposals for a collective bargaining agreement to the County, and (according to Schroeder's uncontradicted testimony) in June, 1979 he contacted both the County's Personnel Director, Edward Garvoille, and its attorney, John Coughlin, with a view to arranging a negotiation meeting. Coughlin told Schroeder that the County intended to appeal the Commission's decision to Dane County Circuit Court, that it felt the decision would be overturned, and that it was unwilling to negotiate in the interim. The Union and County reached an agreement by which formal bargaining was postponed, with Sparks being granted the same monetary improvements that another County bargaining unit had received in January, 1979. In June, 1979 the County filed a petition for judicial review asking the Dane County Circuit Court to overturn the Commission's Decision No. 16946, but on January 31, 1980 Judge George R. Currie issued a judgment affirming that decision.

The parties thereafter commenced negotiations, which focused, for purposes of this proceeding, on Sparks' wages, hours and working conditions. On April 9, the parties met, at which time the County proposed that terms of employment for Sparks be set according to a formula which, according to Garvoille's uncontradicted testimony, is applied to certain other craft employes of the County, and which consisted of wages at the prevailing area wage rate, minus twenty per cent, plus various fringe benefits accorded other County employes. Garvoille proposed that the rate paid "stewards" by the Madison Ticket Agency be used as the prevailing rate; Schroeder testified, without contradiction, that this formula would result in Sparks' wages being cut from $7.32 per hour to about $6.00, with no increase in fringe benefits because he was already receiving them. Schroeder argued, at

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1/ Decision No. 16946.

the April 9 meeting, that the straight-time hourly area rate for a "houseman" was $12.00 and that a houseman's duties more closely approximated Sparks' functions than did a steward's. The record shows that the County did not, at the April 9 meeting, give any indication that it was considering reclassifying Sparks' position.

Another negotiating session was held on June 3. 2/ Prior to this meeting, however, Schroeder learned, not by any notification from the County, that a resolution had been introduced to the County Board which was intended to reclassify Sparks' position as a Custodian II position, and which would have the effect of removing that position from the IATSE bargaining unit and inserting it in a long-established unit represented by Local 65, American Federation of State, County and Municipal Employees. The origin and passage of this resolution is the subject of a separate count of the amended complaint, and is discussed below.

Schroeder's account of the June 3 meeting differs from Garvoille's and may be summarized as follows: Schroeder asked Garvoille if the County intended to reclassify Sparks, and Garvoille stated that it was the County's contention that Sparks did primarily custodial rather than craft work. Schroeder asked what analysis of the position was being referred to in the text of the resolution, and Garvoille replied that this was the analysis that had been given to the Wisconsin Employment Relations Commission during the hearing prior to the election. Schroeder testified also, in effect, that the County refused to bargain further about Sparks' wages, hours and working conditions, and that Garvoille stated that this was because of the expected passage of the resolution. 3/

Garvoille, in testimony, denied saying anything to Schroeder concerning an analysis of Sparks' position, and denied telling Schroeder at this meeting that the County would not bargain concerning Sparks. Garvoille noted in his testimony that Sparks, as of June 3, was not yet reclassified. Garvoille also testified that he told Schroeder at the June 3 meeting that the resolution would not have the effect of freezing Sparks' pay till other Custodian II's caught up with him and that Schroeder had apparently misinterpreted statements made to him at a County Board meeting. 4/

Although several other persons were present at the June 3 meeting (including two who testified at the hearing) no other witness testified concerning that meeting.

2/ Complainant does not contend that any delays in holding meetings constituted refusals to bargain in good faith.

3/ It is not altogether clear from Schroeder's testimony whether this alleged refusal occurred on June 3: Schroeder testified that Garvoille made such a statement at a County Board meeting on May 15, in a conversation between them, and Schroeder's testimony can be interpreted both as saying that Garvoille repeated this on June 3 and as saying that he did not. The Examiner concludes that despite this vagueness Schroeder must be credited as to the allegation that the County refused to bargain Sparks' working conditions with the Union, and that it makes little difference whether the statement of that refusal occurred on May 15 or June 3.

4/ This was presumably the May 15th conversation which Schroeder, in his testimony, referred to. Garvoille did not deny Schroeder's allegation that he had, on May 15, refused to bargain further concerning Sparks' terms of employment.

The Reclassification of Sparks' Position:

The County contends that changes in Sparks' workload justified its reclassification of him to Custodian II even though it had failed to establish that his job was custodial in nature in the prior Wisconsin Employment Relations Commission and court proceedings. Though much of the record herein is devoted to evidence concerning Sparks' actual functions, the arguments and evidence largely repeat those in the election proceeding; to this extent the issue is, however, stare decisis. It is unnecessary to repeat the discussion in the Commission's decision 5/ and the Examiner here focuses on the alleged changes, since that decision, in the job in question.

The County primarily argues that Sparks' position ceased to be a craft position on account of an industry-wide falloff of bookings for theatrical and other similar attractions. There is substantial evidence in the record that the Exposition Center's bookings fell off considerably, from late 1979 to the time of the hearing, from historical levels. There is no question that the more intricate parts of Sparks' job occur in connection with stage events and it is therefore reasonable to infer that when events are few in number there is correspondingly less need for his particular skills. From this, and from the Commission's reference in its decision to the "substantial" amount of time Sparks spends doing work that is exclusively of a craft nature, the County argues that it had good-faith reasons to reclassify Sparks as a custodian, or lay him off, once the percentage of his time that could be billed to event promoters, or that was otherwise clearly tied to events, dropped. The County also argues that the decision to reclassify an employe is a permissive subject of bargaining; the cases cited by the County are, however, inapposite in a situation where an employer is alleged to have reclassified an employe with the principal object of frustrating a union's bargaining attempts.

The Examiner, from the record as a whole, has little doubt that the percentage of Sparks' time spent doing the more complicated parts of a stagehand's work has dropped, due at least partly to factors beyond his or the County's control, since the date of the previous hearing in the election case. But the ups and downs of what may well prove to be a short-term business cycle do not automatically make it appropriate for the County to reclassify a craft employe into a non-craft position; especially where, as here, the County continues to use Sparks for work not normally performed by custodians. Though a position description of the maintenance-stagehand job, apparently prepared in September, 1979, differs in some respects from that introduced in the election proceeding, the differences are inconsequential, and the County does not contend that such work as has always been exclusively the stagehands' has become any less complex, or requires any less training or experience, than in 1978. The County's justification for the reclassification, rather, rests essentially on the ratio of such work now available to work which Sparks has been assigned but which is essentially of a custodial nature. But the downturn in Expo Center business has not been shown to be a permanent condition, and even if all doubts as to the (disputed) figures are resolved in favor of the County, some work clearly of a stagehand nature continues to be needed. Moreover, Sparks testified without contradiction that when he was reclassified, Expo Center Manager Roy Gumtow told him his duties would not change. Furthermore, some custodial work was always within the job description of a maintenance-stagehand; the fact of an overlap between the two positions' functions was considered and disposed of in the Commission's decision in the election proceeding. Even giving the County the benefit of any doubts as to the quantity of stagehand work available, therefore, the Examiner concludes that what remains is still substantial and that Sparks continues to use, on a regular basis, his craft skills.

5/ No. 16946.

The County argues that Sparks has lost nothing by the reclassification and that its action in maintaining him within the AFSCME unit, at his preceding pay rate plus the across-the-board increase which that unit had received in its 1980 contract, shows good faith on the County's part. The record shows, however, that the rate for Sparks' position would be maintained at its present level relative to other Custodian II positions only so long as Sparks is incumbent in that job; upon his leaving, the position would revert to the regular Custodian II wage rate. The County has therefore in fact unilaterally altered the wages of Sparks' position, in a long-term sense, even though the incumbent is arguably unaffected. And the Union does not argue that the County's primary motive was to save money, but rather that it took this action in an attempt to weaken the bargaining unit to the point where the Union would become defunct. In view of the County's expressed opposition (in the election and Court proceedings) to bargaining with a separate unit of maintenance-stagehands, and its present contention (see fn. 6) that the unit has become "inappropriate" upon the reclassification of Sparks, it is difficult to fault the Union's reasoning in this respect.

The County's motives are called into question by the fact that the County never notified the Union, prior to the introduction of the resolution, of its intentions. Gumtow testified that the reclassification was his idea, yet his explanation in testimony as to why he did not notify the Union was that "there was no union to notify" and that "there was no reason to notify the union". After such a history of litigation over the same fundamental issue, Gumtow's statement that "there was no union to notify" shows contempt for he Union's status as certified exclusive bargaining agent, and this and his blithe attitude toward stripping the unit of its sole full-time member without seeing "any reason" to notify the Union point to only one interpretation: that the resolution originated not in any real belief that the workload changes were sufficient to change the essence of Sparks' position from "craft" to "custodial", but in the County's reluctance to bargain with the Union. 6/

It is this failure to notify the Union that gives the lie to another County contention: that good faith in the reclassification is shown by the alleged fact that had the County not reclassified Sparks it would have had to lay him off. Schroeder denied Garvoille's allegation that the latter had told him this during the May 15 Board meeting, testifying that he first heard this contention at the hearing herein. The Examiner credits Schroeder over Garvoille with respect to the June 3 meeting's events (see below), but there is no substantive basis on which to make any conclusion as to credibility specifically as it affects this issue; that, however, hardly matters. An ex post facto rationale is such whether coined just prior to the hearing or as early as May 15, and the layoff threat is shown to be an ex post facto rationale by the mere fact that it was not raised to the Union prior to the introduction of the resolution to the County Board. The County had, in view of past experiences, every reason to expect that the reclassification would be vigorously challenged by the Union, so if in fact it had ironclad reasons to lay off Sparks in the absence of a reclassification, it could only have been to its advantage to make the Union aware of this as early and as convincingly as possible. Furthermore, the County has not shown in this proceeding that a layoff would necessarily have been the result had Sparks maintained his former classification, for when he was reclassified Gumtow told him that his duties would not change, and since no contract with the Union had been reached the County could

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6/ The Examiner notes that the County argues in its brief that with the reclassification of Sparks the unit became devoid of full-time employes, and that it avers that the unit is now an inappropriate one and that the County has no continuing duty to bargain with the Union at all.

not in good faith presume that there would be an economic reason to lay off Sparks rather than a custodian, if a layoff of any employe was essential: it is possible that with a credible threat of a layoff the Union might have proved amenable to cost savings in the negotiations.

There is further evidence that the County has not acted in good faith in arriving at the decision to reclassify Sparks: about June 17, 1980 Gumtow, in a memorandum, criticized Buildings and Grounds Manager Marvin Peterson for assigning Sparks to back-to-back shifts totalling 23 hours out of a consecutive 29. Gumtow, in testimony, claimed that this memo was because such scheduling was "in violation of the Union agreement", but it developed on cross-examination that he was referring to the AFSCME agreement and that the event involved took place after the original complaint in this matter was filed, but prior to the County's reclassification of Sparks into the AFSCME unit. Gumtow's further contention that the County makes a practice of applying the standards of the AFSCME contract to its unrepresented employes is curious, given that Sparks was represented by Complainant, and is also undercut by credible evidence that such long shifts, with "short turnaround" not only had been endemic in Sparks' work history (because of the peak-and-valley nature of event scheduling) but were used on the same dates to keep the Expo Center's soundman (also not in the AFSCME unit) at work, without any objection being raised to the practice in his case. Although Gumtow made an unrebutted contention that, unlike Sparks, no one was available to replace the soundman, his sudden concern about Sparks' event-related overtime hours after years of apparent satisfaction with them contributes to an overall impression that his actual motivation was to minimize the amount of time in which Sparks could be said to be performing exclusively craft work, in order to buttress the County's contention that he is not a craft employe. That such a motive demonstrates bad faith towards the Union is beyond question.

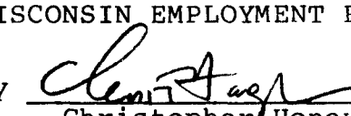
The whole course and conduct of the County's actions thus combine to convince the Examiner that the motivation for the reclassification was to avoid bargaining with the Union with respect to Sparks, and that the other reasons cited by the County are pretextual.

The Examiner credits Schroeder as opposed to Garvoille with respect to the events of the June 3 meeting, for these reasons: it is likely that Schroeder would aggressively question Garvoille with respect to the County's motivations and actions, having found out already that the reclassification was "in the works", and it is not improbable that Garvoille would have assumed that the resolution's passage was inevitable and thus refused to negotiate with the Union concerning Sparks even though Sparks was still at that date in the IATSE unit. But significantly, if Garvoille's version of the meeting is credited, the discussion makes no sense, for if Garvoille is to be believed, very little at all was said. This is so highly improbable, under the circumstances, as to compel the conclusion that Schroeder's version is the more credible. The Examiner therefore finds that the County refused to bargain with the Union concerning Sparks' terms of employment on June 3, 1980.

A similar finding with respect to the meeting of April 9, 1980 is, however, not warranted. This meeting took place prior to Gumtow's idea of reclassifying Sparks, and the Examiner is not persuaded that the mere fact that the County proposed lower wages than Sparks was already receiving demonstrated bad faith. If the County in fact believed that Sparks was already well treated by comparison with other employes, it was entitled to make its point in a forceful way; and even if it did not believe that, a certain amount of bombast is to be expected in negotiations, particularly in the early stages, and bad faith cannot necessarily be assessed as the cause.

Dated at Madison, Wisconsin this 26th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner