STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS "GENERAL" LOCAL NO. 200, Complainant, vs. MALCO, INC., Respondent.	Case I No. 26771 Ce-1880 Decision No. 18103-A

Appearances:

Mr. Herbert L. Usow, Herbert L. Usow, S.C., Attorney at Law, 606 West Wisconsin Avenue, Milwaukee, Wisconsin, appearing for the Respondent.

Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, S.C., Room 600, 788 North Jefferson, P.O. Box 92099, Milwaukee, Wisconsin, Attorneys at Law, by Mr. Matthew R. Robbins, appearing for the Complainant.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Teamsters "General" Local No. 200 having, on September 12, 1980, filed a complaint with the Wisconsin Employment Relations Commission alleging that Malco, Inc., had committed an unfair labor practice within the meaning of Sections 111.06(1)(a), (c) and (d), Wis. Stats.; and the Commission having appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusion of Law and Order, as provided in Section 111.07(5), Wis. Stats.; and hearing on said complaint having been held at New Berlin, Wisconsin on December 15, 1980 before the Examiner; and briefs having been filed with the Examiner by both parties, and the record being closed on February 10, 1981; the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Teamsters "General" Local No. 200, herein the Complainant or the Union, is a labor organization within the meaning of Section 111.04, Wis. Stats.; and that Jerry Sprague is a Business Representative of Complainant and its agent.

2. That Complainant is the exclusive representative of all warehousemen and truck drivers employed by Respondent at its New Berlin, Wisconsin facility, excluding all office, clerical, confidential, security, maintenance, professional and supervisory employes.

3. That Malco, Inc., herein Respondent, is a Delaware corporation engaged at its 16115 West Ryerson Avenue, New Berlin, Wisconsin facility in storage and sale of building and construction products; and that Ken Molkup is Sales Manager of Respondent and its agent.

4. That Complainant and Respondent are parties to a collective bargaining agreement commencing in 1976 and terminating on July 31, 1979, to which an Addendum existed, which stated as follows:

> Article XIII. Basic work week - add the following: fifty per cent (50%) of the work

> force shall be guaranteed a minimum of forty hours of pay per week, so long as the Company maintains its operation in West Allis, Wisconsin.

5. That said Addendum was negotiated in 1976 and signed by Union Business Representative Sprague and by Roger Miller, at that time President of Respondent; that at the time said Addendum was negotiated Respondent maintained a facility in West Allis, Wisconsin; that about April 1, 1979, Respondent moved from its West Allis facility to its present facility at New Berlin, Wisconsin; and that said move did not materially alter Respondent's products, services, management or employe complement.

6. That on July 24, 1979 Sprague and Respondent's Sales Manager, Ken Molkup, met for the purpose of negotiating a new collective bargaining agreement to replace the expiring 1976-79 agreement; that the Addendum referred to above was not discussed either at, or in written proposals exchanged by the parties prior to, said meeting; and that agreement was reached at the July 24, 1979 meeting as to all matters which either party had proposed for negotiations.

7. That on August 8, 1979 Sprague mailed to Molkup, at the latter's Rock Island, Illinois office, typed copies of the new proposed collective bargaining agreement, in which Sprague had inserted in the wording of Article XIII the phrases which had appeared as the Addendum to the 1976-79 agreement; that thereafter Molkup telephoned Sprague, informed him that he had never seen or heard of the Addendum and requested a copy of it; and that Sprague sent Molkup, on August 21, 1979, a copy of the Addendum.

8. That Molkup wrote a letter to Sprague on September 10, 1979, which stated as follows:

> I have received a copy of the addendum to the labor agreement covering the period 8/1/76 through 7/31/79.
>
> At the time of our negotiations I had no knowledge of this addendum so I cannot allow it to become part of the new contract.
>
> I would like to delete this addendum totally as it is not applicable since we have moved our branch from West Allis to New Berlin. Also, I don't like the wording of the guarantee regardless of the mistake in the location of the branch.
>
> If it is acceptable to you I will delete this addendum from the contracts, then sign and return them to you.

9. That on November 6, 1979 Sprague, by letter to Molkup, advised Respondent that it was Complainant's position that the language of the former addendum should remain intact in the new agreement.

10. That no further material communication or discussion took place between Complainant and Respondent till about late May, 1980, at which time Sprague telephoned Molkup and informed him that the Union then conceded the dispute over the inclusion of the former addendum language and would sign the agreement, as the Company had proposed on September 10, 1979, without said language; and that Molkup stated that he would call Sprague back.

11. That about July, 1980 Molkup informed Sprague, by telephone, that the Company would not sign the agreement, and that this was because business conditions had allegedly changed and because the sole employe remaining in the unit had allegedly disclaimed the Union as his representative.

12. That by refusing to sign the agreement in the form in which the Company had proposed it in September, 1979 Respondent, by its agent Molkup, refused to bargain with Complainant.

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

CONCLUSION OF LAW

That Respondent, by refusing to sign the collective bargaining agreement as proposed by Respondent and later agreed to by Complainant, has committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(a) and (d), Wis. Stats.

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

ORDER

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

1. Cease and desist from refusing to bargain with Teamsters "General" Local No. 200.

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

   a) Execute the 1979-82 collective bargaining agreement between Respondent and Complainant, and supply Complainant with at least one executed copy of said agreement;

   b) Notify all employes employed at any time since September 10, 1979 at its New Berlin, Wisconsin facility by mailing to each at his/her last known address, and by posting in conspicuous places where employes work, copies of the notice attached hereto and marked Appendix "A", which notices shall be signed by a responsible representative of the Respondent, shall be mailed and posted immediately upon receipt of a copy of this Order and which in the case of posted copies shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by Respondent to ensure that said posted notices are not altered, defaced or covered by other material.

   c) Notify the Wisconsin Employment Relations Commission in writing, within twenty

(20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 18th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The Complaint in this matter concerns the Company's refusal to sign a collective bargaining agreement in the form in which the Company had, a number of months earlier, proposed it. There is no dispute that the Company had proposed such an agreement or that it later refused to sign it; the eight-month hiatus was caused initially by the fact that the Union had included within the body of the typed new contract language relating to a guaranteed workweek to which the Company, upon seeing the typed document, objected. This language, according to credible evidence, had previously been in effect as an addendum to the 1976-79 contract, and there is no reason for the undersigned to conclude that the Union's inclusion of this language, notwithstanding the fact that it was not discussed in the brief July, 1979 negotiation meeting, was an attempt to "slip something by" the Company. 1/ At the same time, Company Sales Manager Molkup's testimony that this language came as a surprise to him in the August, 1979 submission of the typed proposed contract is also credible, given that the addendum's signator, the prior Company President, was no longer, according to Molkup's uncontradicted testimony, available to be questioned about the matter. It is therefore apparent that as of July 24, 1979, the date agreement was reached on those items in which modifications to the 1976-79 contract had been proposed, both sides had reason to believe that agreement had been reached as to all outstanding issues, but each also had, in good faith, a different view of what the agreement entailed. The difference, of course, came to light when the Union submitted its understanding of the complete agreement, in writing, to the Company for signature. Thereafter, discussions took place between Molkup and Sprague by telephone and letter, the upshot of which was that on September 10 Molkup offered to sign the contract without the workweek guarantee language, and on November 6, 1979 Sprague reiterated the Union's position that the workweek guarantee should remain a part of the contract.

Matters stood at this pass for eight months, a fact on which the Company partially relies for its subsequent refusal to sign the agreement; for there is no dispute that the Union did, eventually, concede the workweek guarantee and agree to sign the contract as proposed by Molkup on September 10, 1979. Both Molkup and Sprague were vague, in testimony, concerning the dates of their conversations in 1980; for the most part the differences are inconsequential, but the Examiner adopts Sprague's version of the dates and sequence of relevant actions in 1980, as it is the more detailed and coherent of the two. Though Molkup's testimony gives the impression that his refusal to sign the agreement, and his reasons, were given in his first 1980 conversation with Sprague in about June, the Examiner therefore credits Sprague's testimony to the effect that the Union agreed to sign the contract without the workweek guarantee in May, that Molkup was non-committal at that time, and that about July, Molkup told Sprague that the Company would not sign the agreement and that alleged dissatisfaction with the Union by employes, and business conditions, were the reasons.

1/ The Examiner does not view the moving of the workweek guarantee language from an addendum to the body of the contract as being a material change in the agreement as a whole.

For separate reasons, discussed below, the Examiner concludes that the Company, which did not withdraw its offer of a contract till after the Union had agreed to it, was bound by that offer throughout the intervening period despite the eight-month hiatus. The Company's argument with respect to employe disavowal of the Union may be treated, however, by noting here certain facts. The sole evidence presented at the hearing of such an alleged good-faith doubt of continuing majority status was Molkup's testimony that he told Sprague that "the members of the bargaining unit had given the Company written notice that they no longer wanted to be part of the bargaining agreement (sic) and that he ought to talk to his members and we should begin negotiations anew". Molkup did not name the employes involved, who were not called as witnesses; the alleged written notice was not offered in evidence; there is no evidence that employes or the Company petitioned any agency for an election to resolve doubts as to the Union's status; the offer to "begin negotiations anew" is inconsistent with Molkup's professed belief that the Union no longer represented the employes; and no evidence was presented concerning when, under what circumstances, or to whom the employes' alleged "written notice" was given. The Examiner concludes, for these reasons, that insufficient evidence exists to show that the Company could at any material time have entertained a good-faith doubt as to the Union's continued majority status. As to the fact that all bargaining unit employes were laid off by the summer of 1980 (the exact date of the last layoff is not in the record), there is no showing herein that this condition is permanent, the Company is in a business well-known to be cyclical in nature, and the collective bargaining agreement which had been reached may well provide for certain benefits and guarantees for laid-off employes. Neither the bargaining unit nor the Union's interest in representing that unit can be said, therefore, to be defunct - a conclusion attested to by Molkup's own offer, noted above, to reopen negotiations with the Union.

The central issue, however, is whether the Company's September 10, 1979 offer to sign the contract without the disputed workweek guarantee remained open throughout the ensuing ten months. Sprague's November 6, 1979 reply to that letter states as follows:

> It is my position that at the time of negotiations we discussed any and all pertinent Contract changes. The guarantee referred in the Addendum should remain as part of this Contract, and any further discussions regarding this matter should be taken up during our next Contract talks.
>
> Please contact me at your earliest convenience if you have any questions regarding this matter.

This statement of position was something less than a clear, exact rejection of the offer plainly stated in Molkup's September 10 letter (see Finding of Fact #8). Furthermore, even in a case where a union had clearly rejected a management offer the employer involved was found to have committed an unfair labor practice when, the union subsequently having reconsidered, the employer refused to sign the offer it had originated. 2/ Though the time period here, as the Company points out, vastly exceeds the five days' hiatus in the Penasquitos case, as in that case the Company never withdrew its offer and no time limit was stated by the Company for the Union to accept or reject it. Furthermore, this case is in some respects stronger for the Union than Penasquitos or Pepsi-Cola, not only in that both parties were initially

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2/ Penasquitos Gardens, Inc., 236 NLRB 994; also see Pepsi-Cola Bottling Co., 251 NLRB #28, 105 LRRM 1119.

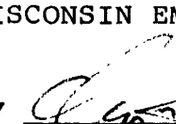
convinced that an agreement had been reached, but also in that the Union could at any time have made an arguable case that the Company was obligated to sign the agreement with the workweek guarantee intact: The Company has failed to make a persuasive argument that that guarantee did not previously exist and was not, like all other subjects not discussed in the July, 1979 negotiations, carried over into the 1979-82 contract.

For these reasons, the Examiner concludes that even though an extended period elapsed between the Company's September 10, 1979 offer to sign an agreement in a particular form and the Union's May, 1980 assent to that form, the offer remained viable and the Company remained bound by it throughout the time period material herein.

The requirement in the Order that the Respondent mail copies of the Notice to employes is unusual, but is deemed appropriate by the Examiner because of testimony that the two employes covered by the collective bargaining agreement have been laid off for a considerable time.

Dated at Madison, Wisconsin this 18th day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner