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-B

Appearances:

Mr. Herbert L. Usow, Herbert L. Usow, S.C., Attorney at Law, 606 West Wisconsin Avenue, Milwaukee, Wisconsin 53203, appearing for the Respondent.

Goldberg, Previant, Uelmen, Gratz, Miller, Levy & Brueggeman, S.C., Room 600, 788 North Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, Attorneys at Law, by Mr. Matthew R. Robbins, appearing for the Complainant.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

Examiner Christopher Honeyman having, on March 18, 1981, issued Findings of Fact, Conclusion of Law and Order, together with Memorandum accompanying same, in the above entitled matter, wherein said Examiner concluded that the above named Respondent had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act by refusing to execute a collective bargaining agreement previously negotiated and agreed upon by the parties, and wherein the Examiner ordered the Respondent to execute said agreement; and the Respondent having timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and Counsel for the parties having filed briefs in support of said petition for review and in opposition thereto; and the Commission, being fully advised in the premises, makes and issues the following

ORDER

1. That the Findings of Fact made and issued by the Examiner in the above entitled matter be, and the same hereby are, affirmed.

2. That the Conclusion of Law issued by the Examiner in the above entitled matter be, and the same hereby is, reversed to read as follows:

That the Respondent, Malco, Inc., by refusing to execute a collective bargaining agreement with Teamsters "General" Local No. 200, did not commit and is not committing any unfair labor practices within the meaning of Secs. 111.06(1)(d) and (a) of the Wisconsin Employment Peace Act.

3. That the Order issued by the Examiner in the above entitled matter be, and the same hereby is reversed to read as follows:

That the complaint filed in the instant matter be, and the same hereby is, dismissed.

Given under our hands and seal at the City of Madison, Wisconsin this 27th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

I dissent

_____
Herman Torosian, Commissioner

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, AND REVERSING EXAMINER'S CONCLUSION OF LAW AND ORDER

In its complaint initiating the instant proceeding the Union alleged that the Employer committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA) by refusing to execute a collective bargaining agreement previously negotiated by the parties. In its answer the Employer alleged that the Employer "has no employees in their employment, and further that the individuals involved in the negotiations did not arrive at a "meeting of the mind".

The Examiner's Decision

We have reviewed the record and we affirm the Findings of Fact as set forth by the Examiner in his decision. The material facts can be summarized as follows:

1. On July 24, 1979 the representatives of the parties reached an accord on the items being negotiated for inclusion in the 1979-1982 collective bargaining agreement.

2. On August 8, 1979 the Union representative forwarded to the Employer representrative a typed copy of the new agreement for signature. Said typed copy included an "addendum" which had been included in the previous agreement but was unknown to the Employer's representative.

3. On August 21, 1979, following a telephonic inquiry as to the origin of the "addendum", the Union representative forwarded a copy of the "addendum" to the Employer representative.

4. On September 10, 1979 the Employer representative sent a letter to the Union indicating that the "addendum" was unacceptable but that if said "addendum" were deleted, he would execute the agreement.

5. On November 6, 1979 the Union representative, by letter, advised the Employer that the "addendum" should remain intact in the new agreement.

6. No contact was had between said representatives until May, 1980 when the Union representative telephoned the Employer and indicated that the Union would delete the "addendum", and in reply the Employer representative indicated that he would call back his response.

7. In July, 1980 the Employer representative telephonically advised the Union that the Employer would not execute the agreement because of changed business conditions and because the one employe in the unit "disclaimed the Union as his representative".

Based on said facts, the Examiner concluded that the Employer's refusal to execute the agreement, without the "addendum", constituted a refusal to bargain in good faith and thus that the Employer had committed unfair labor practices within the meaning of Secs. 111.06(1)(a) and (d) of WEPA. The Examiner ordered the Employer to cease and desist therefrom, to execute the 1979-1982 agreement, to post notice with regard to its violation, and to notify the Commission as to the steps taken by it to comply with the Examiner's Order. In his memorandum the Examiner succintly stated his rationale in support of the foregoing conclusions in the following statement:

> ". . . 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 Petition For Review

The Employer timely filed a petition requesting the Commission to review the Examiner's decision and to overrule same. Briefs were filed by Counsel for the parties. The Union argues in support of the Examiner's decision contending that the Union accepted the Employer's condition for agreement prior to the withdrawal

of the offer by the Employer. On the other hand the Employer, in material part, argues that the Employer's offer should not have been considered to remain open for an indefinite period of time.

Discussion

We disagree with the Examiner's conclusion that the Employer's offer remained viable until May, 1980, some nine months following the Employer's objection to same, and some six months following the insistence of the Union that the addendum be included in the agreement. In effect, the Union's letter of November 6th, 1979 constituted a rejection of the Employer's "offer" of September 10th, 1979 that it would execute the agreement absent the addendum.

Our dissenting colleague believes the Union's letter does not constitute a rejection of the Employer's offer to execute the agreement without the addendum. The portion of the Union's letter cited in support of our colleague's conclusion, in our opinion, indicates to the contrary, especially - "any further discussions regarding this matter should be taken up during our next contract talks." The complaint filed in this proceeding seeks to require the Employer to execute the agreement without the addendum. The Union's letter of November 6th claims that "The guarantee referred to in the Addendum should remain as part of the Contract. . ."

We conclude that the Employer's "offer" was not viable in May, 1980, when the Union indicated that it would accept same, and therefore, under such circumstances we cannot conclude that the Employer was obligated to execute the agreement. Its refusal to do so did not constitute any unfair labor practice within the meaning of any provision of the Wisconsin Employment Peace Act, and therefore we have reversed the Examiner's Conclusion of Law and Order.

Dated at Madison, Wisconsin this 27th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Gary L. Covelli, Chairman

_____
Morris Slavney, Commissioner

Dissenting Opinion

I disagree with the majority's opinion that the Union's letter of November 6, 1979 constitutes a rejection of the Company's September 10, 1979 offer and thus relieves the Company of signing an agreement, i.e., the August agreement without the disputed addendum, the terms of which were undeniably clear to both parties.

I am convinced, in reading the Union's November 6 letter, that the Union did not view the Company's letter of September 10 as constituting a counter proposal and the Union's letter of November 6th cannot be reasonably construed as a rejection of such an offer. Instead the letter merely sets forth the Union's position concerning the Company's claim that the August agreement did not include the disputed addendum. Thus the Union stated in its letter 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.

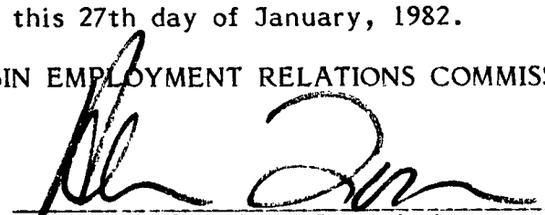
Clearly the Union was not bargaining but rather taking a position that the Company should execute that which was agreed to in August, which the Union perceived included the addendum, and discuss the deletion of the addendum during the next contract talks. The ensuing six month hiatus period was thus a period during which the parties were at a "standoff" as to whether the parties settlement included the disputed addendum. At no time was there a disagreement as to any other term of the agreement and at no time did the Company indicate, or claim, that it would not, or was not obligated to, sign an agreement containing such terms absent the disputed addendum.

The majority points out that the instant complaint seeks to require the Employer to execute the agreement without the addendum but that the Union's November 6 letter claims that "the guarantee referred to in the addendum should remain as part of the contract . . .". While this distinction is accurate, the majority fails to discuss, and I fail to see, its significance. The fact that the Union decided to forego its legal position in favor of the Company's position does not (1) indicate that the Union, on November 6, "rejected" the Company's position, or (2) establish that the August agreement did not include the addendum. It simply establishes that the Union decided to sign a collective bargaining agreement on the basis of the Company's position and upon the Company's refusal, enforce said position in this proceeding. Thus the question of whether the August agreement includes or excludes the addendum is not in issue and is not important herein.

Given the above facts, the Company in my opinion, was obligated to sign the August agreement once the Union, for whatever reason, decided that it would forego its position and, consistent with the Company's position, sign an agreement without the disputed addendum.

Dated at Madison, Wisconsin this 27th day of January, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION



Herman Torosian, Commissioner