

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL NO. 116, INTERNATIONAL :
TYPOGRAPHICAL UNION, :
 :
Complainant, : Case I
 : No. 28939 Ce-1939
vs. : Decision No. 19218-A
 :
TYPOGRAPHY UNLIMITED and :
KENOSHA TYPOGRAPHERS, INC., :
 :
Respondents. :
 :

Appearances:

Cornfield and Feldman, Attorneys at Law, by Mr. Gilbert A. Cornfield, 10 South LaSalle Street, Chicago, Illinois 60603, appearing on behalf of the Complainant.

Mr. James Dobrzynski, 1701 Douglas Avenue, Racine, Wisconsin 53402, appearing on behalf of the Respondent.

Frank & Kenny, Attorneys at Law, by Mr. Kurk A. Frank, 606 West Wisconsin Avenue, Milwaukee, Wisconsin 53203 on Respondent's brief.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Local No. 116, International Typographical Union filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission in the above-entitled matter, alleging that Typography Unlimited and Kenosha Typographers, Inc. committed unfair labor practices; the Commission appointed Sherwood Malamud, a member of the Commission's staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; hearing on said complaint was held on February 25, 1982, before the Examiner; at the commencement of said hearing Complainant amended said Complaint to allege that Respondents committed unfair labor practices within the meaning of Section 111.06(1)(c), (d), (e) and (f) of the Wisconsin Employment Peace Act (WEPA); and the Examiner considered the evidence, arguments, and briefs of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local 116, International Typographical Union, hereinafter referred to as the Union, is a labor organization; it maintains its offices at 2109 - 33rd Street, Kenosha, Wisconsin 53140.

2. James Dobrzynski and Donald Kummers were partners in a partnership 1/ doing business as Kenosha Typographers, hereinafter referred to as Respondent Kenosha Typographers, which operated as a typesetting business at 1347 - 52nd Street, Kenosha, Wisconsin. Mr. Kummers and Mr. Dobrzynski bought Kenosha Typographers from Kenneth Paul in August, 1973, and Paul remained employed by Respondent Kenosha Typographers through April, 1981.

1/ Complainant alleged in its complaint that Kenosha Typographers was incorporated. During the course of the hearing, Respondent credibly testified that Kenosha Typographers was unincorporated.

3. James Dobrzynski and Donald Kummers own all of the stock in Typography Unlimited, hereinafter Respondent Typography Unlimited, a Wisconsin corporation which operates a typesetting business at 1701 Douglas Avenue, Racine, Wisconsin. Respondent Typography Unlimited commenced operations in October, 1980. A cold type process is used exclusively in the composing room at Respondent Typography Unlimited, and no collective bargaining agreement has ever been executed between the Union and Respondent Typography Unlimited.

4. The Union initially filed a charge with Region 30 of the National Labor Relations Board; the NLRB refused to assert jurisdiction in the matter because the unit at Kenosha Typographers contains only one employee.

5. Complainant Union and Respondent Kenosha Typographers executed their first collective bargaining agreement on September 17, 1973, and maintained a continuous collective bargaining relationship; the sole employee in the collective bargaining unit covered by said agreement is Kenneth Paul. The most recent agreement contains the following duration provision:

. . . from and after March 1, 1979 and for a term of two years, ending February 28, 1981 and for a reasonable time thereafter, (not to exceed 30 days) as may be required for the negotiation of a new agreement . . .

and the following provisions pertinent hereto:

SECTION 2 (b). In the event the Employer decides to introduce any new equipment, machinery or process which is a substitute for, or evolution of, present composing equipment, machinery or process, employees covered by this agreement will perform all work within the jurisdiction of the Union regardless of the equipment or material used or where the work is to be performed. The Employer agrees to provide journeymen and apprentices with adequate equipment and full opportunity to become proficient on all such equipment and processes. The Union agrees to supply journeymen and apprentices to carry out the purposes of this section.

. . .

SECTION 11. In the event of suspension of business or when an employee is discharged or laid off for any reason other than a deliberate attempt to provoke discharge in order to obtain severance pay, he shall be paid in addition to the wages due him, one week's pay for each six months or fraction thereof, of continuous service with the employer, the maximum of severance pay not to exceed an amount equivalent to five (5) weeks' straight pay, such severance compensation to be computed at the average weekly rate of salary received by the employee during the previous six months.

6. Respondent Kenosha Typographers primarily used a hot metal method of typesetting in its composing room; under the hot metal method a linotype machine is used to produce slugs in the typesetting process; in the latter part of 1973 or the early part of 1974, a cold type method of typesetting was introduced at Kenosha Typographers. In the cold type process a positive film is produced and the film is used in the typesetting process; in the hot metal process a typing keyboard with approximately 90 keys is employed while in the cold type process a typing keyboard similar to that of a regular office typewriter with approximately 60 keys is employed.

7. In recent years many typesetting business operations have converted from the hot metal to the cold type process. Employees need to be retrained when there is such a conversion. In either 1974 or 1975, Paul had taken a class in cold type processes at Gateway Technical Institute, which he paid for himself. Paul used cold type skills at Respondent Typographers for a short period of time immediately after taking the cold type class. In the middle of 1980, Dobrzynski asked Paul to again work with the cold type process. Paul attempted to do such work, but found that because of lack of experience and the need to work on both the hot and cold type keyboards he could not adequately perform on the cold type keyboard.

8. Employee Sandy Capp began working at Respondent Kenosha Typographers sometime during 1980, and she performed the typing for the cold type process there. Capp was transferred to the Respondent Typography Unlimited and continued to type in the cold type process used at Typography Unlimited; Capp was not included in the bargaining unit when she was working at either Respondent Kenosha Typographers or Respondent Typography Unlimited. In May, 1980 a salesman was hired to increase business at Respondent Kenosha Typographers and Respondent Typography Unlimited when it opened in October, 1980. Dobrzynski also served as a salesperson for both operations, as well.

9. On January 6, 1981, Paul, acting in his capacity as bargaining representative on his own behalf, hand delivered a letter to Kummings, addressed to Kenosha Typographers, that stated in pertinent part:

You are hereby notified that as of February 28, 1981, our current collective bargaining agreement will expire. Pursuant to the terms of that agreement we hereby will present our proposal for a new agreement to replace the current agreement on the above noted expiration date.

We hereby offer to meet with you for the purpose of negotiating an agreement with respect to wages, hours and other terms and conditions of employment.

When Paul handed Kummings the letter, he indicated to Kummings that his proposals would be forthcoming. Kummings responded that they would get together on the matter. Approximately two weeks later, Paul handed Kummings a list of proposals. Kummings, at that time, again responded that they would get together on the matter.

10. Kummings granted Paul an interim wage increase which was implemented on February 23, 1981. When Kummings granted that interim wage increase, Paul asked Kummings to negotiate the new labor agreement, but he received no response from Kummings. In negotiations for prior agreements, the parties developed a bargaining practice in which an interim increase would be granted to preclude the payment of a retroactive wage increase when agreement was reached on a new contract. During bargaining for a successor to the 1979-1981 agreement, the provision pertaining to retraining was not put in issue by either Complainant or Respondent. Paul submitted a proposal to increase the severance payout. Neither Kummings nor Dobrzynski presented any proposals or counterproposals on behalf of Respondents in the bargaining for a successor agreement. In February, 1981, Kummings told Paul that Respondent Kenosha Typographers was incurring financial problems.

11. In the first week of April, 1981, Kummings and Dobrzynski told Paul that for financial reasons Respondent Kenosha Typographers would close. On April 17, Respondent prepared the following letter which it mailed to its customers. The letter in material part states as follows:

Due to current economic conditions, Kenosha Typographers was forced to make a tough decision. As of April 24th, we will be closing the doors on our Kenosha operation. However, we will not be going out of business, only consolidating our business under one roof and under a new name possibly not familiar to you.

Since September of 1980, we have also operated in Racine under the name of Typography Unlimited. This operation was opened because of the large volume of work that we were receiving from the Racine area.

Typography Unlimited will continue to serve the Kenosha area with the same quality work and possibly even better service. We will now be offering our Kenosha customers a pick-up and delivery service. Our phone number will remain the same 552-9452, but our address will be changed to 1701 Douglas Avenue, Racine, Wisconsin.

Our only regret is that we will no longer be able to offer hot metal typesetting. The demand has declined and the costs are too high to continue this operation. We will continue a complete Photocomposition Department to serve you the best we possibly can.

We hope we can continue to serve you in the future as we have in the past.

Respondent Kenosha Typographers serviced between fifty and sixty customers per year; approximately eighty percent of those customers were located in Kenosha and approximately twenty percent were in Racine. Respondent Typography Unlimited now services both the Racine and Kenosha customers.

12. On April 24, 1981, Respondent Kenosha Typographers closed. At the time Kenosha Typographers closed, impasse had not been reached in their bargaining for a successor agreement. Paul requested of Kummers and Dobrzynski severance pay that was due him under the bargaining agreement. Kummers and Dobrzynski responded to Paul's demand for severance pay by telling him that they did not have the money to pay severance. Paul inquired about the severance pay on two or three subsequent occasions and received the same response. In a letter dated August 17, 1981, Paul Roders, the President of Complainant Union, informed Kummers and Dobrzynski that \$1,746.30 in severance pay was due Paul and \$71.50 was due to the Union pension fund. Neither Roders nor Paul received a response to the letter. Respondents continue to refuse to pay Paul severance or pay the Union pension fund the amount due. From the time Paul learned that Kenosha Typographers would be closed to the filing of the within complaint, Paul did not ask to be retrained, nor did either Paul or Roders demand to bargain over the impact of the closing of Kenosha Typographers except for the demand that severance be paid.

13. Typography Unlimited is an alter ego of Kenosha Typographers. Typography Unlimited and Kenosha Typographers are a single employer for purposes of labor relations.

14. During the hearing in the above captioned matter, neither Complainant nor Respondent raised any defense with regard to failure to exhaust the grievance and arbitration procedure contained in the expired agreement. In addition, Complainant stated its position that the grievance and arbitration provision was not in effect at the time the contractual disputes herein arose. No objection was raised to the Examiner's determination of the contractual issues between the parties.

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

CONCLUSIONS OF LAW

1. Since the National Labor Relations Board does not protect, prohibit or arguably protect or prohibit collective bargaining between the exclusive representative of the sole employee, Kenneth Paul, in the bargaining unit established by Complainant Union and Respondent Kenosha Typographers and since federal law does not privilege such activity against state regulation, the Wisconsin Employment Relations Commission may, and the Examiner does, exercise the jurisdiction of the Commission under the Wisconsin Employment Peace Act over Respondents Kenosha Typographers and Typography Unlimited.

2. Kenosha Typographers, a partnership, is a person within the meaning of Section 111.02(1) of the Wisconsin Employment Peace Act and is an employer within

maintain the status quo with regard to the wages, hours and conditions of employment in effect at the expiration of the 1979-1981 collective bargaining agreement between Complainant and Respondent Kenosha Typographers as provided in Section 111.02(5) and 111.06(1)(d) of the Wisconsin Employment Peace Act.

5. By its failure and refusal to pay severance to Paul prior to reaching of an impasse in negotiations between Complainant and Respondent and during the pendency of said negotiations, when on or about April 24, 1981 Paul requested that Respondents pay him severance pay and when Respondents failed and continue to refuse to pay Paul severance, Respondents Kenosha Typographers and Typography Unlimited have altered the status quo, and they have thereby violated Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

6. By failing to retrain Paul in the cold type process, in the absence of a request by Paul to be retrained, Respondents did not violate either Section 111.06(1)(d) or Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

7. Complainant and Respondent did not object to the assertion of jurisdiction by the Wisconsin Employment Relations Commission to determine allegations contained herein with regard to violations of contract, and the Commission does hereby assert its jurisdiction to determine these alleged contractual violations; by its failure to pay severance pay to Paul and its continuing refusal to pay severance pay to Paul, Respondents, Kenosha Typographers and Typography Unlimited, are violating Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

8. By its failure to pay the sum of \$71.50 to the pension plan of the International Typographical Union, Respondents Kenosha Typographers and Typography Unlimited violated and continue to violate Section 111.06(1)(d) and (f) of the Wisconsin Employment Peace Act.

9. By closing Kenosha Typographers on April 24, 1981, Respondents did not violate Section 111.06(1)(c) and (d) of the Wisconsin Employment Peace Act.

10. Kenosha Typographers, and Typography Unlimited did not violate Section 111.06(1)(e) of the Wisconsin Employment Peace Act.

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

ORDER

1. That all allegations with regard to charges that Respondents violated Sections 111.06(1)(c) and (e) of the Wisconsin Employment Peace Act are dismissed.

2. That all allegations with regard to charges that Respondents violated Sections 111.06(1)(d) and (f), by Respondents' failure to retrain Paul on the cold type process prior to or upon the closing of Kenosha Typographers, are dismissed.

3. With regard to the failure of and the continuing refusal of Kenosha Typographers and its alter ego Typography Unlimited to pay severance pay to Paul, the partners Dobrzynski and Kummers, the officers, successors and assigns of Kenosha Typographers and Typography Unlimited, a Wisconsin corporation, jointly and severally are hereby ordered and directed to:

a. Cease and desist from refusing to pay severance to Paul.

b. Take the following affirmative action which the Examiner finds will implement the policies of the Wisconsin Employment Peace Act by:

1. Paying Paul the severance pay due and owing to him in the amount of \$1,746.30.
2. Paying the International Typographical Union the sum of \$71.50 due and owing to its pension fund.

3. Notifying the Wisconsin Employment Relations Commission within twenty (20) days of this order of the action taken by Respondents to comply herewith.
2/

Dated at Madison, Wisconsin this 8th day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Sherwood Malamud, Examiner

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- 2/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

On December 8, 1981, Local 116 of the International Typographical Union filed a complaint of unfair labor practices against Respondents Typography Unlimited and Kenosha Typographers, Inc. Complainant seeks alternative relief for the unfair labor practices it alleges were committed by Respondents. Complainant asks that the Examiner order Respondents to retrain Kenneth Paul, the Respondents sole unit employe, in the cold type process or pay Paul severance in the amount of \$1,746.30 and pay the pension fund of Complainant Union \$71.50. Respondents did not file any motion to make the complaint more definite and certain nor did it file a written answer. At the hearing, Mr. Dobrzynski, one of the two partners in Kenosha Typographers and one of the two shareholders in the Wisconsin Corporation Typography Unlimited, appeared on behalf of Respondents. Pursuant to the Examiner's request, Complainant amended its complaint to specifically set forth the provisions of the Wisconsin Employment Peace Act allegedly violated by Respondents. Complainant alleged that by its conduct Respondents violated Section 111.06(1)(c), (d), (e) and (f) of the Wisconsin Employment Peace Act. To remedy these alleged violations, Complainant seeks Paul's re-employment and back pay until he is re-employed, and retraining for Paul once he is re-employed. After Complainant amended its complaint, Respondents orally answered on the record each allegation of the complaint. In his oral answer, Dobrzynski denied that Respondents had violated any provision of the Wisconsin Employment Peace Act.

Positions of the Parties

Complainant argues that Respondents violated its duty to bargain, when Respondents closed its Kenosha operation and when it refused to negotiate a successor agreement. Complainant asserts that Respondents consider their obligation to bargain to have expired with the expiration of the agreement and the Employer's move to Racine. However, Complainant also asserts that Respondent Typography Unlimited is the alter ego of Respondent Kenosha Typographers. Complainant cites NLRB decisions which conclude that the bargaining relationship and obligations attendant thereto survive a move by an alter ego employer within the same geographic area, Bell Company 93 LRRM 1180, 225 NLRB No. 63 (1976). In Bell the employer's ongoing bargaining duty survived even though the business structure changed when a move was made to a new plant; although the ownership of the business remained the same. Complainant cites Board decisions in Burgess Construction Corp. 95 LRRM 1135, 227 NLRB No. 119 (1977) and Victor Patino 100 LRRM 1616, 241 NLRB No. 76 (1979) as further support for its position. G & M Lathe & Plaster 105 LRRM 1557, 252 NLRB No. 137 (1980) where a successor employer was ordered to retrain a former employe is cited by Complainant in support of its principal prayer for relief, the reinstatement and retraining of Paul. Complainant cites NLRB v. Katz, 369 U.S. 736 (1962) in support of its position that Respondents could not impose new working conditions after the expiration of the agreement but prior to impasse, and that the bargaining relationship continues after the February 28, 1981 expiration of the agreement. It is against these legal principles that Complainant views the record evidence. Paul notified the Employer of the intent of the Union to negotiate a successor agreement. In February Respondents stalled the bargaining process, but pursuant to the practice of

Respondents identify three issues in this case. First, it argues that the Respondents met its duty to bargain in good faith. It kept an open mind and it made a sincere attempt to reach an agreement which is the standard under which Respondents' conduct must be judged, citing NLRB v. Insurance Agents Int'l Union, 361 U.S. 477 (1966) and B. F. Diamond Construction Co. 163 NLRB 25 (1967). Respondents argue that from the outset of negotiations Respondent Kenosha Typographers set forth its precarious economic position. Paul worked on a daily basis with Kummers, one of Respondents' partners. Bargaining meetings were not formally held, but took place in the course of the day to day work of the one employee and one partner of Respondent. There is no dispute concerning Respondents' economic position. Respondent was guilty of no more than maintaining a tough bargaining position, and it cites as precedent for its position NLRB v. Abbott Publishing Co., 331 F.2d 209, 52 LRRM 2994 (7th Cir. 1964) and Marathon Clark Co-op Dairy Assoc. v. NLRB, 315 F.2d 269, 52 LRRM 2723 (7th Cir. 1963). Respondents' second point is that it did not violate the agreement when it changed the location or the name of its business enterprise. At page 8 of its brief appears the following statement:

The Employer totally agrees with the Union's position that a company's relocation or a name change does not in this instance sever the bargaining relationship.

Respondents note that the existence of Typography Unlimited came as no surprise to Complainant. Respondents assert that it did not violate the agreement by changing its location, name or form of organization of its business. As to its third point, Respondents assert that the parties' agreement expired after good faith bargaining. If the contract is opened, they have 30 days from the expiration of the agreement in which to bargain. Respondents argue that it bargained in good faith and that a legitimate impasse developed over economic issues, and the contract expired on March 28, 1981. As for the training issue, Respondents argue that Paul had ample opportunity to learn the cold type keyboard. Furthermore, Respondents offered the hot type work when the closing of the Kenosha operation was discussed. Paul refused that work at the Racine facility because it would be part-time work. Respondents conclude that it did not violate any provision of the Wisconsin Employment Peace Act.

Discussion

Jurisdiction

Prior to filing the within complaint with the Wisconsin Employment Relations Commission, Complainant filed a charge with the National Labor Relations Board. In a letter to Mr. Paul, Regional Director Squillacote stated:

. . . it appears that you were the only employee of the Employer in a unit represented by the Union, and since the Board will not require an employer to bargain over a unit consisting of only one employee, it would not effectuate the policies of the Act to proceed further in this matter. I am, therefore, refusing to issue a complaint in this matter.

As a result of the Board's refusal to assert jurisdiction in this matter, the Commission is called upon by Complainant to enforce the provisions of the Wisconsin Employment Peace Act. Here, the Commission is not a Sec. 301 forum enforcing substantive federal labor policy, but it is acting solely as the administrative agency charged with the enforcement of the Wisconsin Employment Peace Act. The Commission asserts its jurisdiction over one person bargaining units, 3/ and its jurisdiction is appropriately asserted in this case.

Refusal to Bargain

Complainant's principle claim is that Respondent put off Complainant's bargaining representative and adopted a strategy of stalling until the agreement expired. Respondent asserts that due to the economic difficulties it was confronting, it adopted a tough bargaining position which it maintained to impasse.

3/ Sinclair Refining Co. (8526-A, B), aff'd sub. nom. WERC v. Sinclair Refining Co. 52 Wis 2d 126 (1971).

The record evidence reflects the following. On January 6, 1981 Paul gave notice to Kummers, a partner of Kenosha Typographers, of Complainant's intent to open the 1979-1981 agreement and enter into bargaining for a successor agreement. Two weeks later Paul, presented the Union's proposals to amend the agreement. Both Kummers and Paul worked together at the Kenosha location at the time the proposals were presented. In late January or February, Paul asked Kummers to bargain over the Union's proposals. Other than mentioning that Respondent Kenosha Typographers was having financial difficulty, Kummers put off bargaining with Paul over the Union's proposals. On February 23, 1981 Paul and Kummers agreed to the implementation of an interim wage increase. The implementation of an interim wage increase was customary during their bargaining for successor agreements. Neither Paul nor Kummers discussed the Union's proposals after the interim wage increase was implemented. The Employer made no counter-proposal to the Union. Then, in the beginning of April, Respondent informed Paul that Kenosha Typographers would close. They offered him any available hot typesetting work, at the Racine facility, Typography Unlimited. Paul believed this would be only part-time work, and he rejected it. At the time Respondent closed Kenosha Typographers on April 24, 1982, Paul requested that he be paid severance in accordance with Section 11 of the 1979-1981 agreement.

The facts related above do not reflect extensive bargaining and certainly do not establish that by the time the Kenosha facility was closed, the parties were at impasse. 4/ The only evidence that any bargaining took place is the Union's presentation of its proposals and the implementation of the interim wage increase. There is no evidence that the employer submitted counter-proposals, staked out a position on any issue raised by the Union or raised any issue of immediate concern to itself. 5/ Respondent through Kummers pointed to its difficult financial situation. There is no evidence that Respondent said anything else in bargaining. Respondent claims that given the small size of Respondent's operation and the fact that Kummers and Paul worked together, there were no formal meetings and all the other trappings of formal collective bargaining. Respondent is correct that the formalities are not required, but there must be evidence that the positions of the parties are known, firm, and after bargaining, irreconcilable, for there to be an impasse. 6/ Here there is evidence that very little negotiation actually took place. Therefore, the Examiner concludes no impasse was reached in the bargaining between the parties. 7/

In the absence of impasse, the status quo remained in effect. In Greenfield Schools (14026-B) 11/77, the Commission concluded that inherent in the duty to bargain is the principle that:

. . . most mandatory subjects of bargaining must remain intact per the terms of the expired contract, not because the Commission sua sponte extends contractual terms, but as a result of the employer's duty to maintain the status quo at least to the point of impasse in respect to such mandatory subjects as being an inseparable part of the employer's duty to bargain over changes in mandatory subjects of bargaining.

With the status quo in effect, Respondents were under an obligation to maintain intact most of the mandatory subjects of bargaining in accordance with the terms of the expired agreement. The Examiner applies these principles to the two claims made by Complainant for severance or retraining with the following results.

4/ The determination of an impasse is a factual determination. See Carpenter Sprinkler Corp. v. NLRB, 102 LRRM 2199 (C.A. 2, 1979).

5/ In Marathon Clark Coop, Dairy Assoc. v. NLRB, 315 F. 2d 269 (7th Cir. 1963), the case cited by Respondents, there is a record of extensive negotiations. The Employer staked out a position and made it known to the Union.

6/ Electric Machinery Co. v. NLRB, 653 F. 2d 958, 108 LRRM 2202 (1981), NLRB v. Big Three Industries, Inc., 497 F. 2d 43, 86 LRRM 3031 (5th Cir. 1974).

7/ Since the Examiner's decision is based upon the absence of impasse rather than bad faith bargaining, Respondents' citation of Abbot Publishing, supra, need not be discussed.

With regard to the severance pay issue, severance is a condition of employment, Nolde Bros. v. Bakery Workers 430 U.S. 243, 94 LRRM 2753 (1977), and a severance pay provision constitutes part of the status quo in effect during negotiations. Although Complainant Union requested an increase in the amount of the severance payout, the amount specified in Section 11 of the expired agreement constitutes the status quo as far as the level of severance pay in effect after the expiration of the agreement. Certainly, on April 24, 1981, at the time Respondent Kenosha Typographers closed, impasse had not been reached in the parties' bargaining. 8/ Therefore, under the status quo, and as a function of its duty to bargain, Respondent Kenosha Typographers was obligated to pay severance, if a demand for severance pay was made. At the time the Kenosha operation was closed, a demand for severance pay was made by Paul, and again in August the Union demanded that Respondent pay Paul severance and pay an appropriate sum into the Union's pension fund on Paul's behalf. At the hearing, Respondent by one of the partners of Kenosha Typographers, asserted that it did not have the money to pay Paul. Lack of funds is not a defense to the statutory obligation described herein. Accordingly, the Examiner concludes that Respondent breached the status quo and violated its duty to bargain when it refused to pay Paul severance. The Examiner's order directs Respondent to pay the severance and reimburse the Union's pension fund on Paul's behalf.

Complainant's claim for severance is an alternative position. Its principle claim is that Paul should be re-employed and trained in the cold type process under Section 2(b) of the parties' expired agreement. Section 2(b), the training provision, was not challenged by Respondent during bargaining or at the hearing as a permissive subject of bargaining. Therefore, it too is part of the status quo. However, the Examiner found that Respondent did not violate the status quo by its failure to train Paul. Neither Paul nor any other representative of the Union requested Respondent to train Paul during negotiations prior to the expiration of the collective bargaining agreement or after the contract expired. In April, when Respondent closed Kenosha Typographers, Paul demanded that he be paid severance. He did not ask to be trained and employed at Respondent's Racine operation. In fact, Respondent offered Paul part-time work at the Racine operation at the time Respondent told Paul of the shutdown of the Kenosha facility. Paul refused Respondents' offer, and he did not ask to be trained in the cold type process in April. In August, when Roders, the President of Complainant, wrote Respondent, he demanded that Respondent pay five weeks severance and \$71.50 to the Union pension fund. Respondent was not asked to train Paul. The demand for training was first made at the hearing. Respondent was not obliged to guess that Paul wanted to be trained. By his conduct, the Examiner finds that Complainant Union through its bargaining agent, Paul, waived its right to insist on the re-employment and training of Paul. The Examiner concludes therefore that Respondents did not breach the status quo when it failed to train Paul.

Breach of Collective Bargaining Agreement

Complainant asserts that Respondents' failure to pay severance and train Paul was a breach of the 1979-1981 agreement, and thereby Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act. Neither Complainant nor Respondent objected to the Examiner's assertion of the jurisdiction of the Commission to determine these contractual matters. 9/

On the matter of Respondents' contractual obligation to train Paul, in the absence of a timely request for training, the Examiner finds that Respondent was not obliged to train him.

Turning to the severance issue, the United States Supreme Court in Nolde Bros., supra, both the majority and dissenting opinions conclude that severance pay survives the expiration of the agreement. The majority in Nolde found that the issue was arbitrable; the dissent found that it was enforceable in a Sec. 301 forum. Since it is the nature of severance pay that it is likely to take effect at the termination of an agreement, the Court concluded that the contractual

8/ The basis for this conclusion is set forth extensively above.

9/ Transcript pp. 100-103.

provision survived the expiration of the agreement. See Nolde, supra at 94 LRRM 2756. Respondents' reliance on the agreement's duration clause 10/ is misplaced. Respondents argue that by its terms the agreement expired no later than 30 days after its termination date. Therefore, severance pay was not in effect at the time of the April closing. Nolde, however, stands for the proposition that severance survives the expiration of the agreement.

In this case, Respondent did not pay Paul severance because of a lack of funds. However, WEPA does not recognize a mere allegation of an inability to pay or an alleged lack of funds as a defense to a breach of a contractual obligation. 11/ Therefore, the Examiner concludes Respondent breached its contractual obligation to pay severance and violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act when it failed to pay severance to Paul.

Alter Ego

The Examiner concludes that Respondent Typography Unlimited, the Racine operation, is liable for the unfair labor practices found above and unfair labor practices committed by Respondent Kenosha Typographers, because Typography Unlimited is the alter ego of Kenosha Typographers. The National Labor Relations Board in its administration of legislation analogous to the Wisconsin Employment Peace Act, 12/ finds one enterprise to be the alter ego of the other:

. . . where two enterprises have 'substantially identical' management, business purpose, operation, equipment, customers and supervision, as well as ownership, . . . 13/

These factors appear in sufficient combination and degree in this case to support the conclusion that Respondent Typography Unlimited is an alter ego of Respondent Kenosha Typographers. Though Respondent Kenosha Typographers was in partnership form while Respondent Typography Unlimited is in corporate form, both businesses were wholly owned and managed by Mr. Dobrzynski and Mr. Kummers. No one, other than Mr. Dobrzynski and Mr. Kummers, acted in a supervisory capacity in either location. The business purpose was also the same at each, i.e., a typesetting service. The operation and equipment was similar, though not identical. The equipment at Respondent Kenosha Typographers was liquidated when it was closed. At Respondent Kenosha Typographers both a hot metal process as well as a cold type process were used in the composing room, while at Typography Unlimited a cold type process is used exclusively.

In addition, when Respondent Kenosha Typographers was closed on April 24, 1981, Respondent Typography Unlimited absorbed the customers previously serviced by Kenosha Typographers. When they were operating simultaneously, a salesman was hired "to build up sales in both accounts." 14/ The two business concerns were

10/ The 1979-1981 agreement provides: "WITNESSETH that from and after March 1, 1979 and for a term of two years ending February 28, 1981 and for a reasonable time thereafter, (not to exceed 30 days) as may be required for the negotiation of a new agreement . . . "

11/ See C. D. Rich Co. (3121) 4/72 and F. Taff Co., Inc. (12478) 2/76.

12/ See WEPA at 111.06(1)(f) of the Wisconsin Employment Peace Act.

geographically in close proximity. 15/ Central to the conclusion that Typography Unlimited is the alter ego of Kenosha Typographers, is the fact that Mr. Dobrzynski and Mr. Kummers viewed the two businesses as one. They attempted to impart that same feeling to their customers at Respondent Kenosha Typographers. Exhibit 12 clearly demonstrates this. That exhibit is a notice to customers of Respondent Kenosha Typographers. The notice informed customers that Respondent Kenosha Typographers was closing but stated that: "we will not be going out of business, only consolidating our business under one roof and under a new name . . . " (emphasis supplied) It continued: "Since September of 1980, we have also operated in Racine under the name of Typography Unlimited. 16/ This operation was opened because of the large volume of work that we were receiving from the Racine area." (emphasis added) It goes on to state that the Respondent Typography Unlimited will continue to service Kenosha area customers. It is apparent that Mr. Kummers and Mr. Dobrzynski intended that Respondent Kenosha Typographers and Respondent Typography Unlimited be different "plants" of the same business concern when they were simultaneously operating from October of 1980 through April 24, 1981, and thus considered the two operations to be one in the same. In light of the foregoing, the Examiner is satisfied that Respondent Typography Unlimited is an alter ego of Respondent Kenosha Typographers.

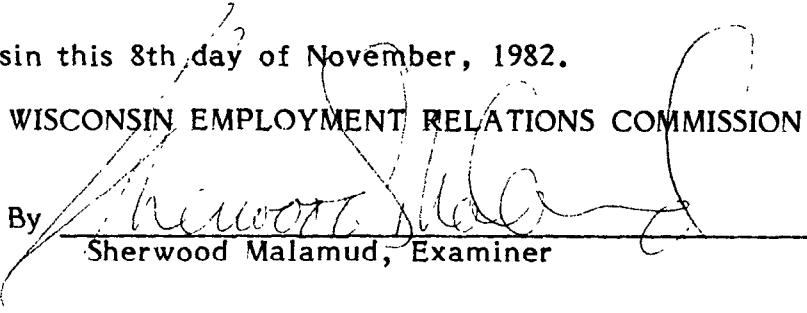
Since Typography Unlimited is the alter ego of Kenosha Typographers, the Examiner ordered that Respondent Typography Unlimited be jointly and severally liable for the payment of Paul's five weeks of severance pay which amounts to \$1746.30 and \$71.50 to the Union pension fund.

Complainant further claims that Respondent closed Kenosha Typographers with the intent of eliminating Complainant Union as the representative of its employees in violation of Section 111.06(1)(c) of WEPA. It is for economic reasons that Dobrzynski and Kummers closed Respondent Kenosha Typographers. 17/ There simply was not enough business to continue both Respondent Kenosha Typographers and Respondent Typography Unlimited. There is no evidence to the contrary. There is no evidence that Respondents were seeking to avoid or run away from the Union. In fact, they offered Paul part-time work at the Racine facility. As a result, the Examiner dismissed Complainant's charge of a violation of Section 111.06 (1)(c) of WEPA. Furthermore, there is no evidence in this record to support a finding that Respondent violated Section 111.06(1)(e) of WEPA. That charge is dismissed, as well.

Dated at Madison, Wisconsin this 8th day of November, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Sherwood Malamud, Examiner

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- 15/ Respondent Typography Unlimited is located in Racine, approximately ten miles from Respondent Kenosha Typographers.
- 16/ Respondent suggests in its brief that it breached no statute in changing its name. The Examiner agrees. The violations of statute occurred when it breached the status quo and the expired agreement by refusing to pay Paul severance.
- 17/ Transcript, p. 92, Mr. Dobrzynski's testimony.