

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOURNEYMEN PLUMBERS AND	:	
GAS-FITTERS UNION LOCAL NO. 75,	:	
	:	
Complainant,	:	Case I
	:	No. 30722 Ce-1961
vs.	:	Decision No. 20214-A
	:	
OCONOMOWOC PLUMBING, INC. AND	:	
OCONOMOWOC PLUMBING SYSTEMS,	:	
INC., 1/	:	
	:	
Respondents.	:	
	:	

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law,
788 North Jefferson Street, P. O. Box 92099, Milwaukee, Wisconsin 53202,
by Mr. Matthew R. Robbins, on behalf of the Union.
Eilman & Sakar, Attorneys at Law, 6416 West Capitol Drive, Milwaukee, Wisconsin
53216, by Mr. James R. Eilman, on behalf of the Company.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

AMEDEO GRECO, Hearing Examiner: Journeymen Plumbers and Gas-Fitters Union Local No. 75, herein the Union, filed a complaint and an amended complaint with the Wisconsin Employment Relations Commission alleging that Oconomowoc Plumbing, Inc. and Oconomowoc Plumbing Systems, Inc. had committed unfair labor practices within the meaning of Section 111.06 of the Wisconsin Employment Peace Act, herein WEPA. The Commission thereafter appointed the undersigned to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Section 111.07(5), Wis. Stats. Hearing was held on January 20, 1983, at Waukesha, Wisconsin. The parties there presented oral arguments in lieu of briefs.

Having considered the arguments and the evidence, the Examiner makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Union is a labor organization which has its principal place of business at 9601 West Silver Spring Drive, Milwaukee, Wisconsin 53225. At all times material herein, Richard Lansing, Gary Hamilton, and Gordon King have served as Business Managers for the Union and they have acted as its agents.

2. Respondents Oconomowoc Plumbing, Inc., (OPI) and Oconomowoc Plumbing Systems, Inc., (Systems) are two heating and plumbing companies which have had their principal place of business at W39990, Highway 16, Oconomowoc, Wisconsin. That address is also the address of Erwin Keepman, the sole owner and President of both companies, who, at all times material herein, has acted on their behalf and as their agent. The record does not reveal the amount of business that these two entities have done in interstate commerce.

3. The Union for about the last four or five years has represented employees employed by OPI. In 1981 and 1982, OPI and Systems employed only one employee, William Blunck, who has worked for both companies for about the last eight years. The Union and OPI on June 1, 1980 entered into an "Agreement Memorandum of Understanding" (underline in original) under which the parties agreed to be bound

1/ Respondent's name was amended at the hearing.

by the terms of a master contract entered into by the Union and the Plumbing and Mechanical Contractors Association of Greater Milwaukee and Southeastern Wisconsin, and the Associated Mechanical Contractors, Inc., herein the Contractors' Association. Article XXII of the latter agreement, entitled "Duration of Agreement" (underline in original), stated:

Section 22.1. This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until May 31, 1982, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than sixty (60) days prior to said expiration date, or any anniversary thereof. Since it is the intention of the parties to settle and determine, for the term of this Agreement, all matters constituting the proper subjects of collective bargaining between them, it is expressly agreed there shall be no reopening of this Agreement for any matter pertaining to rates of pay, wages, hours of work, or other terms and conditions of employment, or otherwise, during the term of this Agreement.

4. Pursuant to the above quoted provision, Business Manager Gordon King by letter dated March 15, 1982, 2/ advised OPI that:

Oconomowoc Plumbing, Inc.
W39990 Highway 16
Oconomowoc, WI 53066

SUBJECT: TERMINATION OF LABOR CONTRACTS

Dear Sir:

In accordance with the provisions of the current labor contracts, notice is hereby given of the intent of the Plumbers and GasFitters Union, Local No. 75, to terminate all labor contracts upon their expiration date of May 31, 1982.

A proposal will be submitted to you for new contracts at any early and mutually acceptable date.

After Keepman received that letter, the Union made no attempt to subsequently contact him before the May 31 contractual termination date and there were no negotiations or impasse between the parties before that date. The Union did not contact OPI because it wanted to first negotiate a multi-employer master contract with the Contractors' Association. Neither OPI nor Systems was a member of that or any other multi-employer bargaining group.

5. By letter dated June 11, Business Manager Richard Lansing sent OPI a proposed "Agreement Memorandum of Understanding" (emphasis in original) which provided that the parties thereto would be bound by a recently negotiated master contract. Said letter provided:

Oconomowoc Plumbing, Inc.

Dear Sir:

A labor contract has been negotiated and approved by the Plumbing and Mechanical Contractors Association of Milwaukee & Southeastern Wisconsin.

The duration of the contract is two years, beginning June 1, 1982, and ending May 31, 1982. The following schedule of wage and fringe increases will apply retroactively to June 1, 1982, for journeymen plumbers and apprentices: (Emphasis in original)

2/ Unless otherwise noted, all dates hereinafter refer to 1982.

	<u>June 1, 1982</u>	<u>June 1, 1983</u>
Wages	15.49	16.06
Vacation Fund	1.02	1.02
Pension Fund	1.55	1.55
Welfare Fund	1.40	1.40
Education Fund	.12	.12
Industry Fund	.05	.05
Total:	<u>19.63</u>	<u>20.20</u>
Foreman's Wage	16.44	17.01
General Foreman's Wage	16.74	17.31

A Memorandum of Understanding (in duplicate) is enclosed. Please sign both copies and return one signed copy to our office.

Because you are a stockholder, we have also enclosed two (2) copies of the Stockholder's Agreement. Please sign both copies and return one signed copy to our office.

Keepman never signed the enclosed Memorandum of Understanding and he never indicated that he would do so.

6. By letter dated July 7, Lansing sent another letter to OPI which provided:

Oconomowoc Plumbing, Inc.

Dear Sir:

A Memorandum of Understanding and a Stockholder's Agreement recently mailed to you have not been returned to this office.

This can create a multitude of administrative problems for both of us if they are not in our files by the end of next week.

Further, a new building trades directory is being assembled, listing all building trades contractors who are signed to a union labor contract. These directories are distributed to all architects, general contractors, developers, institutions and utilities, and we have a printer's deadline to meet.

If it is your intention to continue as a party to our labor contract, please sign the Memorandum and Stockholder's Agreement and return one copy to our office.

The record does not indicate whether that letter was received. Keepman thereafter never indicated that he would sign said Memorandum.

7. Lansing on several occasions spoke directly with Keepman about the latter's refusal to sign the proffered contract. Lansing and Hamilton also telephonically spoke with Keepman, at which time Keepman repeated his refusal to sign a contract, claiming that the contract had terminated and that he had decided to operate as a non-union firm. Keepman had decided upon that course of action because he believed that he no longer could compete with his local competition if he remained a signatory to a Union agreement.

8. Some time in April or May, Keepman spoke to employee Blunck about his plans to cease doing business as a union firm and he then admittedly told Blunck that, "he would have to make a decision whether he wanted to go into the Union and stay with the Union or stick with me as a non-union shop . . ." Keepman also told Blunck that if he wished to remain with OPI, he would have to sign an affidavit which explained that he had decided to forego Union membership. Blunck ultimately decided to stay with OPI and to forego his Union membership and he subsequently advised the Union of that fact. However, neither Keepman nor anyone else on the OPI or System's behalf ever gave Blunck an affidavit to sign. Blunck thereafter worked for OPI for the remainder of 1982.

9. From June 1 to the time of the instant hearing, neither Systems nor OPI paid Blunck the major contractual and fringe benefits provided for under either

the terminated 1980-1982 agreement between the Union and OPI or the newly negotiated master contract entered into between the Union and the Contractors' Association. Similarly, neither entity collected or forwarded any Union dues to the Union and neither entity after May 31 made any fringe benefit contributions to the fringe benefit funds provided for in both contracts. In addition, Keepman after May 31 entered into unilateral individual negotiations with Blunck, under which they negotiated the wages, hours, and working conditions governing Blunck's employment and Keepman similarly unilaterally altered the wages and other mandatory terms and conditions of employment which Blunck had received under the expired contract. All of that was done without the consent of the Union and before any impasse in negotiations had been reached.

10. On October 31, OPI ceased doing business as a corporate entity. On November 1, Systems began its operations as OPI's alter ego. Thus, Systems was in the same heating and plumbing business as OPI; Systems and OPI had the same address and offices; both were totally owned by Keepman, who served as the President of both entities; both used the same equipment and telephone number; and both used the same lawyer and accountant.

11. The Union filed an unfair labor practice charge with the National Labor Relations Board (NLRB) which alleged that OPI had unlawfully refused to bargain with the Union and that it had also committed other unlawful conduct. By letter dated November 16, NLRB Regional Director George Squillacote dismissed the charge and advised the Union's attorney:

The above-captioned case, charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. Concerning the refusal to bargain aspect of the charge, it appears that at all times material the bargaining unit involved herein consisted of one person. The National Labor Relations Board will not require an employer to bargain in a unit consisting of only one employee. See, Sac Construction Company, Inc., 235 NLRB 1211, at 1220 (1978). With respect to other aspects of the charge, it does not appear any discriminatory conduct has occurred, nor has the employment of any employee been adversely affected. Based upon all the foregoing, I am refusing to issue a complaint in this matter.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Based upon the foregoing Findings of Fact, the Examiner issues the following

CONCLUSIONS OF LAW

1. Oconomowoc Plumbing, Inc., violated Sections 111.06(1)(a) and (c) of WEPA when Keepman told Blunck that he could keep working for OPI only if he agreed to forego Union representation and that he would have to sign an affidavit to that effect.

2. Oconomowoc Plumbing, Inc., violated Section 111.06(1)(a) and (d) of WEPA when it engaged in individual bargaining with Blunck over the latter's terms and conditions of employment.

3. Oconomowoc Plumbing, Inc., and its alter ego Oconomowoc Plumbing Systems, Inc., violated Sections 111.06(1)(a) and (d) of WEPA when they refused to recognize and bargain with the Union after the termination of their 1980-1982 contract and when they unilaterally altered the mandatory terms and conditions of employment of their employee(s) which existed after the termination of the 1980-1982 contract.

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

ORDER 3/

IT IS HEREBY ORDERED that Respondents, Oconomowoc Plumbing, Inc., and Oconomowoc Plumbing Systems, Inc., its officers, agents, successors, and assigns shall immediately:

1. Cease and desist from:
 - (a) Telling their employee(s) that they can keep working for the Company only if they agree to drop their Union representation and requesting that their employee(s) sign an affidavit to that effect.
 - (b) Engaging in individual bargaining with their employee(s) over their terms and conditions of employment.
 - (c) Refusing to recognize and bargain with the Union as the representative of their employee(s).
 - (d) Refusing to adhere to the mandatory terms and conditions of employment which existed after the termination of the 1980-1982 collective bargaining agreement.
2. Take the following affirmative action which the Examiner finds will return the parties to the status quo ante which existed before the Respondents' unfair labor practices and which serve to effectuate the purposes of WEPA:
 - (a) Immediately offer to recognize and bargain with the Union as the collective bargaining representative of their employee(s).
 - (b) Immediately adhere to the mandatory terms and conditions of employment previously provided for in the 1980-1982 contract which, upon the contract's termination, thereafter became part of the terms and conditions of employment. Furthermore, and in order to restore the status quo ante, Respondents shall make whole their employee(s),

3/ 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.

by paying to them all of the monies and other benefits that they should have received after May 31, 1982, that they did not receive and which had become part of their terms and conditions of employment following termination of the 1980-1982 contract. Respondents shall also reimburse any fringe benefit funds provided for in that contract and which subsequently became part of the terms and conditions of employment following termination of said contract.

- (c) Notify all employees by posting in conspicuous places in its offices where employees are employed copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by Respondents and shall be posted immediately upon receipt of a copy of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced or covered by other material.
- (d) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps shall be taken to comply herewith.

Dated at Madison, Wisconsin this 3rd day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

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

1. WE WILL stop telling employees that they can remain with the Company only if they agree to forego Union representation and we will stop asking employees to sign an affidavit to that effect.
2. WE WILL stop engaging in individual bargaining with our employees over their terms and conditions of employment.
3. WE WILL stop refusing to recognize and bargain with Journeymen Plumbers and Gas-Fitters Union Local No. 75 and we will bargain with the Union upon its request.
4. WE WILL adhere to the mandatory terms and conditions previously provided for in the 1980-1982 contract which, upon the contract's termination, became part of the terms and conditions of employment, and we shall make whole our employee(s) and fringe benefit funds by paying to them whatever sums of money and other benefits they were entitled to receive thereunder.

By _____
Oconomowoc Plumbing, Inc., and
Oconomowoc Plumbing Systems, Inc.

Dated this _____ day of _____, 1983.

THIS NOTICE MUST BE POSTED FOR THIRTY DAYS FROM THE DATE HERETO AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

The Union contends that OPI unlawfully refused to adhere to the wage and fringe benefit provisions of their expired 1980-1982 contract before an impasse was reached between the parties; that OPI, through Keepman, engaged in unlawful individual bargaining with Blunck and coerced and threatened Blunck into dropping his Union membership; and that Systems is OPI's alter ego which, as such, assumed all of OPI's bargaining obligations, including its obligation to recognize and bargain with the Union.

Respondents, in turn, maintain that OPI was relieved of any bargaining obligations with the Union after the contract expired on May 31, 1982; that they were therefore free to disregard the terms of that contract and to unilaterally bargain with Blunck over the latter's terms and conditions of employment and that said discussions were not coercive. While the Respondents make no express claim that the Commission should defer to the NLRB in this matter, it nevertheless at the hearing pointed out that the NLRB had dismissed a similar unfair labor practice charge filed by the Union against them.

The first issue which must be addressed, then, is whether the Commission has jurisdiction over the instant dispute. As to that, the record is unclear as to the amount of Respondents' business in interstate commerce and whether that business meets the jurisdictional minimum established by the NLRB as a prerequisite to the exercise of its jurisdiction. But, the record does show, pursuant to its long standing policy, that the NLRB refused to exert its jurisdiction over the dispute herein because there is only one person in the bargaining unit. Since the Commission does have jurisdiction over such one man units, irrespective of whether the employer involved is engaged in either interstate or intrastate commerce, it follows that it has jurisdiction over the Respondents herein. 4/ In this connection, the NLRB also found that the charges filed by the Union were without merit. However, that determination cannot be given any weight since it was dicta in the NLRB's determination that it would not exert its jurisdiction over the instant controversy. For, once NLRB made that determination, the NLRB at that point relinquished its right to rule upon the merits of the remaining issues in dispute.

Turning to the substantive merits of that dispute, the record reveals that the termination clause herein provided that the contract would expire on May 31, 1982, if either party at least 60 days prior thereto served notice that it wished to terminate the contract. Since Union Business Manager King by letter dated March 15, 1982, advised OPI that the Union wished "to terminate all labor contracts upon their expiration date . . .", the contract therefore terminated on May 31, 1982.

The Union nevertheless argues that OPI was required to adhere to the provisions of that expired contract until the parties in their negotiations had reached an impasse over a successor contract. In this connection, the Union notes that, absent impasse, an employer at the expiration of a contract generally cannot alter the terms and conditions of employment of its employees.

This point is well taken. For, it is well recognized that upon the termination of a contract, the mandatory subjects of bargaining provided for therein continue to be part of the terms and conditions of employment governing the employer-employee relationship just as they were when the contract was in effect.

4/ Parkwood IGA, Decision No. 10761-B, C (2/73).

This bargaining obligation, then, does not rest upon the expired contract itself, but rather, upon the separate terms and conditions of employment which arose during the contract's existence. Thus, the Commission in Greenfield, 5/ has upheld "the general rule that an employer must, pending discharge of its duty to bargain, maintain the status quo of all terms of the expired agreement which concern mandatory subjects of bargaining. In so ruling, the Commission cited several cases where the NLRB and the courts have similarly adopted this important principle, including NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962) and NLRB v. Frontier Homes Corp., 371 F. 2d 974, 64 LRRM 2320, 2324, wherein the Eighth Circuit Court of Appeals in 1967 stated:

The expiration of the contract would permit the Company to negotiate for a new and different layoff arrangement, but would not allow it to institute a unilateral change on this mandatory bargaining issue without negotiating. The entire operation of the Company, including precedent, custom, tradition and contract, must be viewed in establishing the industrial pattern of its operation. Any changes affecting matters of mandatory bargaining . . . must be negotiated out, or at least until an impasse is reached. * * * Expired contract rights affecting mandatory bargaining issues, therefore, have no efficacy unless the rights have become a part of the established operational pattern and thus become a part of the status quo of the entire plant operation.

Applying that principle here, it must be concluded that Respondents were similarly required to maintain the wages, hours, and other mandatory terms and conditions of employment after the contract's termination and that their failure to do so, before any impasse in negotiations, was violative of Section 106(1)(a) and (d) of WEPA. 6/

Similarly, Keepman unlawfully engaged in unilateral negotiations with Blunck over his terms and conditions of employment. For, it is well recognized that an employer generally has a continuing duty to recognize and bargain with a union after a contract has terminated. An employer is relieved of that bargaining obligation only if it has a good faith doubt, based upon objective considerations, that employees no longer want the union to represent them for collective bargaining purposes. 7/

Here, Respondents claim that Blunck voluntarily decided to forego Union representation, thereby freeing them of any continuing duty to bargain with the Union. The problem with this claim is that Keepman told Blunck that he could continue working with OPI only if he agreed to no longer have the Union represent him and that he would have to sign an affidavit to that effect. 8/ If Blunck did not agree to that condition, he then would lose his job with OPI.

As correctly noted by the Union, such a proposition was clearly coercive because it deprived Blunck of his statutorily protected right under Section 111.04 of WEPA to decide for himself whether he wanted a union to represent him. That is so even though Blunck at the instant hearing claimed that Keepman's statements were not coercive. For, inasmuch as Blunck still works for Keepman and therefore may be reluctant to testify against him, and inasmuch as Keepman's remarks on their face were clearly coercive by any objective standard, and since alleged

5/ School Board, School District No. 6, City of Greenfield, Decision No. 14626-B (11/77).

6/ See also, Harold W. Hinson, d/b/a/ Hen House Market No. 3, and Amalgamated Meat Cutters and Butcher Workmen of North America, Local Union 576, 175 NLRB 596 (1969) and cases cited therein.

7/ See, for example, St. Mary's Hospital, Decision No. 9052 (5/69); Riverside Hospital Association, Decision No. 9545 (3/70); and Williams Cafeteria, Decision No. 11010 (5/72).

8/ Since Keepman did not dispute Blunck's testimony that he, Keepman, told Blunck that he would have to sign an affidavit, Blunck's uncontradicted testimony is credited.

coercive remarks must be judged upon their face and not the private, subjective views of the participants involved, Blunck's claims about his personal subjective views must be rejected. Accordingly, since Blunck's withdrawal from the Union was based upon Keepman's unlawful threat that Blunck would lose his job if he did not withdraw, it follows that that withdrawal cannot be given any legal effect and it therefore must be presumed that, but for that threat, Blunck would have had chosen Union representation, just as he had for the last several years that the Union represented him and his fellow employees.

That being so, OPI therefore was under a continuing obligation to recognize and bargain with the Union after the contract terminated. Inasmuch as that bargaining obligation prevents an employer from engaging in direct negotiations with its own employees, 9/ Keepman violated that duty when he negotiated Blunck's terms and conditions of employment directly with him, rather than through the Union. Similarly, Keepman unlawfully coerced and threatened Blunck that he would have to give up his affiliation with the Union if he wanted to keep his job and that he, Blunck, would have to sign an affidavit to that effect.

To rectify the foregoing unlawful conduct, and in order to restore the status quo ante which existed before that conduct, the remedial order above provides that Respondents are required to recognize and bargain with the Union as the representative of their employee(s). 10/ Respondents similarly have been ordered to stop engaging in individual bargaining with Blunck or any other employees as long as the Union is the representative of Respondents' employee(s) and to also stop coercing and threatening Blunck or any other employees with loss of employment if they do not forego Union representation. Additionally, Respondents have been ordered to make whole Blunck by paying to him the sum of money, including all benefits, that he should have received after the contract expired and, furthermore, Respondents shall also contribute to any fringe benefit funds the sum of money that has been due since the expiration of the expired contract. However, and contrary to the Union's request, Respondents are not required to reimburse the Union for past Union dues, as that part of the contract did not continue after the contract termination date. 11/

Dated at Madison, Wisconsin this 3rd day of June, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

9/ M & M Chevrolet Co., Inc., Decision No. 4083-A (4/56).

10/ The fact that Respondents must recognize and bargain with the Union does not necessarily mean that they have to agree to the 1982-1984 contract negotiated between the Contractors' Association and the Union, as that is a matter which is to be resolved in their negotiations.

11/ See, for example, Greenfield, supra.