

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

: CARPENTERS' DISTRICT COUNCIL :
: OF MILWAUKEE COUNTY :
: AND VICINITY, :
: :
: Complainant, :
: :
: vs. : Case II
: No. 30887 Ce-1964
: Decision No. 20286-A
: MORGAN-WIGHTMAN SUPPLY :
: COMPANY, :
: :
: Respondent. :
: :

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, Milwaukee, WI 53202, by Mr. Timothy G. Costello, appearing on behalf of the Complainant.
Krukowski & Associates, S.C., Attorneys at Law, 811 East Wisconsin Avenue, Milwaukee, WI 53202, by Mr. Kevin J. Kinney, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Carpenters' District Council of Milwaukee County and Vicinity having on December 14, 1982 filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, alleging that Morgan-Wightman Supply Company had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act, herein WEPA; and the Commission having on January 26, 1983 appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusion of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held in Milwaukee, Wisconsin on February 4, 1983 1/; and the parties having filed briefs with the Examiner by April 13, 1983; and the Examiner having considered the evidence and arguments of Counsel, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Complainant, Carpenters' District Council of Milwaukee County & Vicinity, hereinafter referred to as the Union, is a labor organization and has its offices at 3020 West Vliet Street, Milwaukee, Wisconsin 53708.

2. That Respondent, Morgan-Whightman Supply Company, hereinafter referred to as the Employer, is an employer within the meaning of WEPA; and that it is engaged in the buying and selling of stock millwork with its offices located at 16260 West Rogers Drive, New Berlin, Wisconsin 53151.

3. That since 1970, certain employers in the Milwaukee area that operated millwork shops formed a multi-employer group, hereinafter referred to as the Association, which negotiated with the Union as the representative of their employees; that the Association and the Union have negotiated a series of collective bargaining agreements, each covering a two year period commencing 1970-1972; that additional employers who were not members of the Association also signed this same agreement which became known as the Millwork Agreement; that the Employer was at times a member of the Association that negotiated the Millwork Agreement, and at other times was not a member, but later signed the same agreement negotiated by the Association; that the Association for the 1980-82 agreement consisted of 12 employers and the same agreement was signed by a total

1/ On this same date, a companion hearing was held on an election petition which will be handled in a separate decision to be issued at a subsequent date.

of 33 employers with the exception that two of those had a retail clause added to the Millwork Agreement; and that the Employer was a member of the Association and a signatory to the 1980-82 Millwork Agreement.

4. That the Association for the negotiations of the 1982-84 agreement consisted of 12 employers; that the Employer was not one of these; that by a letter dated February 19, 1982, the Union gave notice to all employers of its intent to negotiate modifications to the 1980-82 agreement; that the Employer by a letter dated March 26, 1982, gave the Union notice of its intent to negotiate changes in the 1980-82 agreement; that thereafter the Union and the Association met on several occasions for negotiations for a successor agreement; that on July 12, 1982, the Union's membership had a ratification meeting on the Association's proposal, and the proposal was rejected; that on July 12, 1982, the Union's business representative, John Scioli, called employers, who were not members of the Association, and read the Union's proposal that it had offered to the Association; that on July 12, 1982 Scioli called the Employer and read that proposal to Thomas Schmidt, the Employer's Vice-President and Manager; that Scioli indicated to Schmidt that if the Employer would go along with the proposal, the Union would not picket his place; that Schmidt indicated that he didn't think the proposal was too bad, but he would like a copy of it; and that Scioli did not send Schmidt a copy of the proposal that he had read to him.

5. That on July 13, 1983, Schmidt telephoned Scioli and Schmidt indicated that the Employer would go along with the settlement to be reached by the Association, but it would make no payments to the welfare fund until final settlement was reached; that Schmidt shortly thereafter that same day, gave his bargaining unit employe two handwritten notes which stated as follows:

7/13/82

I will accept the Carpenters District Council proposal in principal (sic) for the period of 7/13/82 thru 7/16/82, but will not commence welfare payments until final contract is signed.

/s/
Thomas E. Schmidt
Michael J. Maniscalco

7/13/82

I will accept the carp. proposal in principal (sic) for the period 7/16/82 thru 7/23/82, but will not commence Welfare payments until final contract is signed.

/s/
Thomas E. Schmidt;

and that on July 13, 1982, the Union struck certain employers not including the Employer.

6. That sometime after July 13, 1982, the Union met with four of the twelve employer members of the Association and reached an agreement with these four for 1982-84, herein referred to as the Pietsch Agreement; that the other eight have not signed this agreement and certain of these have had individual bargaining meetings with the Union; that approximately 10 other employers who were not members of the Association have signed the Pietsch agreement; that by a letter dated August 3, 1982, the Union sent a copy of the Pietsch agreement to the Employer and asked it to sign it; that the Employer refused to sign the Pietsch Agreement and continues to refuse to sign it; that the Union has not demanded that the Employer individually bargain with it for the purposes of negotiating a successor agreement to the 1980-82 agreement; and that the Employer has not submitted any bargaining proposals to the Union and has not requested individual bargaining or bargaining dates from the Union.

7. That the Employer agreed to sign the agreement entered into by the Association and the Union; that the Pietsch Agreement is not the agreement of the Association and the Union, as there is no evidence that the other eight employers

comprising the Association agreed to be bound by the Pietsch agreement; and that the Employer did not agree to sign the Pietsch Agreement.

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

CONCLUSION OF LAW

1. That inasmuch as the Employer agreed to sign the collective bargaining agreement which was being negotiated between the original multi-employer group and the Union, and as the Pietsch Agreement is not the agreement that the Employer agreed to sign, the Employer's refusal to sign the Pietsch Agreement does not violate Section 111.06(1)d of WEPA.

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

ORDER 2/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 12th day of May, 1983.

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By Lionel L. Crowley
Lionel L. Crowley, Examiner

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

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(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,
CONCLUSION OF LAW AND ORDER

The issue presented by the complaint is whether the Employer refused to sign an agreement which it had orally agreed to, thereby violating Section 111.06(1)(d) of WEPA.

UNION'S POSITION

The Union contends that the Employer is violating its duty to bargain in good faith by its refusal to execute the agreement that was negotiated by the multi-employer group and the Union. In the support thereof the Union relies on the testimony of Scioli and the Employer's handwritten notes which states an acceptance of the Union's proposal in principle. It also refers to certain inconsistencies in Schmidt's testimony as contradicting his claim that he did not agree to be bound by the industry agreement. In the Union's view, Schmidt's handwritten notes indicate acceptance of the Union's proposal. It claims that the Employer's alleged desire to get its own contract is contradicted by its failure to submit any counterproposal or to respond to the Union's calls and letters.

The Union argues that the agreement signed by four of the twelve members of the multi-employer group is an industry agreement. It bolsters its opinion by pointing out that almost half the employers have signed it and it is the only agreement the Union has with any millwork employer. The Union contends that the Employer orally agreed to sign the industry agreement and as the Pietsch Agreement is the industry agreement, the Employer cannot renege on its agreement but should be ordered to sign it.

EMPLOYER'S POSITION

The Employer contends that it did not enter into any oral agreement with the Union. It relies on Schmidt's testimony that he did not, and has not, entered into any oral agreements with the Union, and certainly did not do so in this case. It maintains that the Union's proposal was never agreed to and the Union never asked Schmidt to sign or accept its proposal.

The Employer argues that even if Schmidt had agreed to accept the agreement then being negotiated by the multi-employer group, it was conditional on the Union arriving at an agreement with that group. It asserts that the multi-employer group has not reached agreement with the Union, so the conditional oral agreement has not been breached. The Employer contends that the Pietsch Agreement is not the industry agreement because the industry leaders are not a party to it. It also points out that the Pietsch Agreement was not within the Employer's or the Union's contemplation on July 13, 1982. The Employer maintains that the handwritten notes do not establish any oral agreement. It points out that these notes were given to the Employer's employee, at his request, with a delineated time frame which indicates no acceptance of any agreement beyond these time limits. The Employer concludes that it is not a party to any binding agreement.

DISCUSSION

Complainant Union must prove by a clear and satisfactory preponderance of the evidence that the parties entered into a collective bargaining agreement which the Respondent Employer refuses to sign and honor. The Union must show that there was a meeting of the minds on each and every term of the agreement. 3/ The Union relies on the testimony of Scioli as establishing that the Employer by Schmidt agreed, on July 13, 1982, to the millwork industry settlement in order to avoid a strike. Although Schmidt denied that he entered into any agreement, the Examiner credits the testimony of Scioli that Schmidt agreed to accept the millwork industry settlement. This conclusion is based on the following factors:

3/ Paul La Pointe (13140-A) 9/75.

1. The ten year bargaining history where the Employer had agreed to sign the millwork industry agreement without change, whether or not it was a member of the multi-employer group. The Employer has consistently gone along with whatever settlement has been negotiated by the Association and has not bargained individually.

2. Schmidt's lack of response to the Union's letters requesting him to execute the Pietsch agreement. The Union sent Schmidt letters dated August 3, September 7, October 6, November 1, and 16, 1982 asking him to execute the Pietsch agreement. Schmidt did not respond to them. It would seem logical that had Schmidt not made any agreement, he would have immediately denied and disavowed the statements made in the Union's letters to him. Inasmuch as he did nothing, his silence supports a finding that he agreed to accept the industry agreement.

3. The notes dated July 13, 1982 signed by Schmidt and given to the bargaining unit employee. On July 12, 1982, Scioli had read the Union's proposal to Schmidt and Schmidt indicated that it was "not too bad." The notes indicate that Schmidt would accept the proposal "in principal" (sic) pending a final contract. Knowing the terms of the proposal, Schmidt could go along with it, provided it was agreed to by the multi-employer group, i.e. his competitors. Schmidt's testimony that these notes were intended as extending the old contract terms is not supported by the plain language of the notes. These notes were given to the bargaining unit employee, apparently as his justification to the Union for not engaging in picketing, and the dates specified therein were for him on a weekly basis. Although the notes support a conclusion that the Employer did make an oral agreement, they are not, in themselves, a written memorandum of this agreement.

4. The Employer's bargaining stance after July 13, 1982. Schmidt testified that while he was satisfied with the basic concepts of the contract, he wished to negotiate an individual contract with the Union tailored to the special needs of the Employer. This testimony is contradicted by the Employer's conduct. No evidence was submitted that the Employer ever informed the Union that it desired to negotiate a separate agreement. The Employer never made any proposals, never asked for negotiation dates, and did not communicate any special provisions it needed in the 1982-84 agreement. In short, the evidence does not support Schmidt's contention.

5. No strike at the Employer's place of business. There is no plausible explanation for the lack of picketing at the Employer's business. It is likely that the Union would have struck the Employer if it had no agreement. Had Schmidt merely indicated to Scioli on July 13, 1982 that he would negotiate with him for an individual agreement, given the bargaining history of the parties, more likely than not, the Employer would have been picketed.

Based on the record, the Examiner finds that, on July 13, 1982, Schmidt agreed with Scioli that the Employer would accept the agreement negotiated between the Association and the Union.

The next issue for determination is whether such an agreement exists that the Employer is bound to honor. The parties have disputed whether a multi-employer bargaining group remained intact and whether employees could withdraw from this group. Here, it is not necessary to decide these issues. It is conceded that the Employer was not a member of the multi-employer group for the 1982-84 negotiations. While the Employer is not bound by its participation with the Association, it is bound by its separate agreement to accept the agreement of the Association. The Examiner finds that the "meeting of the minds" between the parties was that the Association of twelve employers would reach agreement which the Employer would then sign. This conclusion is based on the historical bargaining relationship that the Association had always negotiated an area-wide agreement which the other employers in the industry then signed. On July 13, 1982, neither Scioli or Schmidt intended or contemplated an agreement by a sub-group of fewer employers than the group of twelve employers. The Union argues that the Pietsch Agreement is the 1982-84 Millwork Industry agreement and the Employer must honor it. The Examiner finds that the evidence fails to establish that the Pietsch Agreement is the agreement contemplated by the parties. When

their agreement was reached on July 13, 1982, the parties were contemplating an area-wide agreement. The evidence fails to show that the other eight employers who were part of the Association are bound by the Pietsch Agreement. 4/ Inasmuch as there is no agreement agreed to by all twelve members of the Association, it follows that the Employer is not required to sign any agreement with the Union until such an agreement has been reached. As the agreement contemplated by the parties does not exist, the Employer has not failed or refused to execute an agreement previously orally agreed to, and thus has not violated the provisions of WEPA.

Dated at Madison, Wisconsin this 12th day of May, 1983.

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4/ While the Union relies on a decision by NLRB Regional Director Squillacote that the original employer group remained intact after four of those employers had entered into the Pietsch Agreement, that decision did not cover the issue of whether the remaining eight employers were required to sign the Pietsch Agreement.