STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 139, Complainant, vs. C. BUNDY, JR., INC. Respondent.	Case I No. 31249 Ce-1970 Decision No. 20466-B

Appearances:

Goldberg, Previant, Uelman, Gratz, Miller and Brueggeman, S.C., by Mr. Matthew R. Robbins, 788 North Jefferson Street, Milwaukee, Wisconsin, appearing on behalf of the Complainant.

Melli, Shiels, Walker and Pease, S.C., by Mr. Thomas R. Crone, Suite 600, 119 Monona Avenue, P.O. Box 1664, Madison, Wisconsin, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

International Union of Operating Engineers, Local 139, having on March 1, 1983, filed a petition with the Wisconsin Employment Relations alleging that C. Bundy, Jr., Inc., had refused to bargain with the Complainant, restrained and coerced employes in the exercise of their rights, and discriminated against employes to discourage membership in the union in violation of Section 111.06(1)(a), (c) and (d) of the Wisconsin Employment Peace Act; and the Commission having on May 11, 1983 appointed Edmond J. Bielarczyk, Jr., as Examiner in the instant matter to make and issue Findings of Fact, Conclusions of Law and Order; and hearing in the matter having been conducted on May 26, 1983, at Milwaukee, Wisconsin; and a stenographic transcript of the proceedings having been prepared; and the parties having filed post-hearing arguments by July 26, 1983; and the Examiner, having considered all of the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That International Union of Operating Engineers, Local Union No. 139, hereinafter referred to as the Complainant, is a labor organization and maintains its offices at 7283 West Appleton Avenue, Milwaukee, WI 53216.

2. That C. Bundy, Jr., Inc., hereinafter referred to as the Respondent, is a masonry contractor operating in the Milwaukee area and maintains its offices at 1810 South Calhoun Road, New Berlin, WI 53151.

3. That Building Laborers Local 113 and 392, hereinafter referred to as the Laborers, is a labor organization and maintains its offices in Milwaukee, Wisconsin.

4. That the Respondent meets the jurisdictional standards of the National Labor Relations Board by virtue of its purchases during the prior fiscal year of materials in excess of $50,000 from points located outside the state of Wisconsin.

5. That since 1965 the Respondent, as a member of a multi-employer bargaining unit represented by Allied Construction Equipment Association, hereinafter referred to as ACEA, has voluntarily recognized the Complainant as the exclusive bargaining representative of all operating engineers in the employe of the Respondent; that for the past number of years Complainant has represented Robert Henke as the only operating engineer in the employ of the Respondent; that as a member of the ACEA, the Respondent has been bound by collective bargaining agreements with the Laborers, Bricklayers Union, Cement Finishers Union,

Carpenters Union, and the Ironworkers Union, that in December of 1981 the Respondent terminated its membership in the ACEA; and, that on June 1, 1982 the collective bargaining agreement between the Complainant and the ACEA expired.

6. That in calendar year 1982 Henke was paid wage rates in accordance with the collective bargaining agreement between the Complainant and ACEA; that until June of 1982 the Respondent submitted fringe benefit payments in accordance with the collective bargaining agreement between the Complainant and ACEA; that on August 4, 1982, Complainant's President-Business Manager Donald W. Shaw sent the following letter to the Respondent:

> C. Bundy Jr., Inc.
> 1810 South Calhoun Road
> N. Berlin, WI 53151
>
> RE: AREA I BUILDING AGREEMENT
>
> Gentlemen:
>
> We have been advised by the Allied Construction Employers' Association that your Company has terminated its bargaining rights with that Association for representation with Local 139.
>
> We have also been advised by our Fund Office that your Company has submitted June fringe benefit contributions on behalf of Operating Engineers employed by you. To enable us to continue to accept fringe benefit contributions on behalf of Operating Engineers, it is necessary we have a signed Labor Agreement. Accordingly, please find two (2) copies of the Memorandum of Agreement to the Area I Building Agreement for your signature. Please execute both copies and return them to us. One executed copy will be returned to you for your files.
>
> Copies of the newly negotiated Labor Agreement are not available at this time however, we are enclosing a copy of the new wage and fringe benefit contribution rates which are retroactive to June 1, 1982.
>
> If you have questions in this matter, please contact us.
>
> Very truly yours,
>
> INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139
>
> Donald W. Shaw, Sr. /s/
> Donald W. Shaw, Sr.
> President-Business Manager

that thereafter the Respondent returned said letter and underlined the words " . . . To enable us to continue to accept fringe benefit contributions on behalf of Operating Engineers, it is necessary we have a signed Labor Agreement," indicated on said Memorandum that only the classification of Material Hoists was used by the Respondent and returned copies of said Memorandum unsigned; and, that thereafter the Respondent discontinued sending contributions to said fringe benefit funds.

7. That on October 21, 1982, Complainant's Business Representative Larry Rieckhoff sent the following letter to the Respondent:

> Dear Sir:
>
> It has been brought to our attention by our Fringe Benefit Office that they are holding June fringe benefit contributions payments made on behalf of Operating Engineers which were or are presently employed by you and cannot be credited to the individuals accounts for lack of a current labor agreement.

Accordingly, we are enclosing two (2) copies of the Area I Building Memorandums of Agreement for your signature. Please sign both copies and return them to us. One signed copy will be returned to you for your files.

In the event you are not presently employing Operating Engineers and reporting forms are sent to you, please indicate on the form that you are presently inactive and in the future, when you again employ operating engineers you may resume making fringe benefit payments.

Your cooperation in this matter is very much appreciated. If you have any questions, please do not hesitate to contact me.

Very truly yours,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139

Larry A. Rieckhoff /s/
Larry A. Rieckhoff
Business Representative

8. Thereafter, on November 16, 1982, Shaw sent the following letter to Columbia Hospital:

Columbia Hospital
Administrative Offices
2025 E. Newport Avenue
Milwaukee, WI 53211

NOTICE OF POSSIBLE WORK STOPPAGE

Pursuant to certain interpretations of Section 8(g) of the National Labor Relations Act, notification is hereby given to your health facility that your construction project could be affected by a work stoppage on behalf of Operating Engineers of the I.U.O.E. Local 139.

The Labor Agreement between C. Bundy, Jr., Inc., prime contractor on the project, and Local 139 terminated on May 31, 1982 and at this time the contractor is not signatory to a Labor Agreement with this Union and it appears that a work stoppage is inevitable.

Be advised that no action will be taken until ten (10) days after receipt of this notification.

Very truly yours,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139

Donald W. Shaw, Sr. /s/
Donald W. Shaw, Sr.
President-Business Manager

9. That on November 19, 1982, James, D'Amico, Project Superintendent of the Columbia Hospital project, sent the following letter to Shaw:

Re: Notice of Possible Work Stoppage
Columbia Hospital Project
C. Bundy Jr. Inc.

Dear Mr. Shaw:

Today I met with Clarence Bundy to discuss the above referenced subject. He informed me his firm is currently bargaining in good faith with Laborers Local #113. His legal

representative is Mr. Thomas R. Crone from the law offices of Melli, Shiels, Walker & Pease, S.C. of Madison, Wisconsin.

As I understand the situation, it appears the conflict centers on operation of a forklift to tend masons. Both operating engineers and laborers have a claim on this piece of equipment as to who is authorized to operate it.

I spoke yesterday to Mr. Bill Johnson of Laborers Local #113. His statement to me was that laborers are authorized to operate any equipment necessary to tend masons. He also informed me there have been several disputes settled over this matter with judgement favoring the Laborers.

It is also my understanding of the local area agreements that should a contractor be bargaining in good faith, it is not within the scope of these agreements to initiate a possible work stoppage until such a time as this bargaining should cease.

If this is the case, we would expect a notice rescinding the letter of November 16, 1982. Also, if your local agreements have been misinterpreted, we would expect to be notified immediately.

Sincerely,

McBRO

James D'Amico /s/
James D'Amico
Project Superintendent

JD:da
cc: C. Bundy Jr. Inc.
Laborers Local #113
Don Donaldson
Columbia Hospital
Thomas R. Crone

10. That on November 24, 1982, Shaw sent the following letter to D'Amico:

Dear Mr. D'Amico:

Please be advised that C. BundyJr. (sic) Inc. has historically employed members of the I.U.O.E. Local 139 and through the years we have enjoyed a bargaining history with this Company. As of July 1982 this Company, did without notice, discontinue making contributions on behalf of bargaining unit employees to our fringe benefit funds, and, refused to enter into negotiations to cover the bargaining unit employees represented by this Union. It would appear this Employer is shopping for a union and totally disregarding the bargaining unit employee's current bargaining representative.

Failure on the part of C. undy (sic) Jr. Inc. to enter into negotiations in good faith bargaining w th (sic) this Union will result in immediate strike action against this employer.

Very truly yours,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139

Donald W. Shaw, Sr.
President-Business Manager

DWS/mg

cc: C. Bundy Jr., Inc.

11. That on December 9, 1982, Respondent's representative Thomas Crone sent the following letter to Shaw:

> Re: C. Bundy Jr., Inc.
>
> Dear Mr. Shaw:
>
> This firm represents C. Bundy Jr., Inc. We are responding to your letter of November 24, 1982 to Mr. James D'Amico, Project Superintendent of McBro on the Columbia Hospital Project.
>
> As you are aware, the Employer withdrew from the Allied Construction Employer Association in November 1981 and is not presently signatory to an agreement with your Union. See your letter of August 4, 1982, copy enclosed. As you are further aware, in such circumstances fringe benefit contributions will not be accepted by the funds.
>
> The Employer has not declined to bargain with your organization for a successor agreement. Within recent years the Employer has not, however, employed any individuals which perform work coming within the Operating Engineers' jurisdiction. Although the Operating Engineers have contended and apparently still do contend that the operation of a forklift is within its jurisdiction, recent decisions of the National Labor Relations Board have determined that such work is within the jurisdiction of the Laborers. See, e.g., International Union of Operating Engineers, Local 139 (McWad, Inc.), 262 NLRB No. 118 (1982).
>
> The Employer's preference is to have the Laborers continue to operate the forklift as they have traditionally done and currently do.
>
> The Employer is willing to negotiate a successor agreement, in an appropriate unit for bargaining, to the extent it employs persons performing work properly within the jurisdiction of the Operating Engineers. For the reasons earlier stated, however, it is the Employer's belief that it does not employ, within an appropriate unit for bargaining, employees performing work properly within the Operating Engineers jurisdiction.
>
> If you have any questions or would like to discuss any of the matters raised in this letter, please contact the undersigned.
>
> Very truly yours,
>
> Thomas R. Crone /s/
> Thomas R. Crone
>
> TRC/dlh
>
> cc: Mr. James D'Amico
> Mr. Clarence Bundy

12. That on January 7, 1983, Complainant's Business Representative Robert Morris sent the following letter to Crone:

> RE: C. Bundy, Jr., Inc.
>
> Dear Mr. Crone:
>
> This letter is written in response to your letter of December 9, 1982. Let us assure you that we are not seeking to force Mr. Bundy to assign any particular work to employees represented by our Union. Nor are we seeking to involve in anyway (sic) Mr. Bundy in any jurisdictional dispute with the Laborers' Union.

However, we do wish to maintain a collective bargaining relationship with C. J. Bundy, Inc. C. J. Bundy, Inc. has had labor agreement with this Union covering certain of its employees for many, many years. We wish to sit down at the earliest possible time to negotiate a successor labor agreement. We would be available to meet at our offices on the following dates to negotiate a successor agreement: January 17th, 19th, or 21st.

To repeat, we do not desire to require C. J. Bundy, Inc. to assign any particular work to employees represented by our Union. We merely seek to continue the amicable collective bargaining relationship we have had with C. Bundy, Jr., Inc. for many years.

Very truly yours,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 139

Robert W. Morris /s/
Robert W. Morris
Business Representative

RWM/mg

cc: Clarence Bundy

13. That on January 11, 1983, Crone sent the following letter to Morris:

Re: C. Bundy Jr., Inc.

Dear Mr. Morris:

This letter is in response to your letter of January 7, 1983.

Your letter states that it is not your intent to require C. Bundy Jr., Inc. to assign any particular work to employees represented by Operating Engineers Local Union No. 139, but that you wish to negotiate an agreement with the Employer.

The Employer has not and does not employ any person performing work within the Operating Engineers' jurisdiction. Although the Employer has employed one employee, Robert Henke, who belongs to both the Laborers and the Operating Engineers, Mr. Henke has been employed exclusively as a laborer and forklift operator.

As I advised Mr. Shaw in my letter of December 9, 1982, it is the Employer's understanding that the operation of a forklift is with in (sic) the jurisdiction of the Laborers, and it is further the Employer's preference that the Laborers continue to perform that work.

As the Employer does not employ any person performing work within your jurisdiction, the Employer declines your request to bargain. To the extent that your request is based upon Mr. Henke's previous or current employment, your request to bargain is also declined for the reasons set forth above and for the further reason that a single employee unit is not an appropriate unit for bargaining. Finally, to the extent you are proposing a pre-hire agreement, that request is also declined.

Should you wish to discuss any of the above matters or should you believe that any of the above statements are factually incorrect, please contact the undersigned.

Very truly yours,

Thomas R. Crone

TRC/dlh

cc: C. Bundy Jr. Inc.

14. That since 1965 and 1963 Henke has been a member of the Complainant and Laborers respectively; that Henke performs the same duties as Respondent's employes who are represented by the Laborers; that all of Respondent's employers represented by the Laborers operate a forklift; that Henke operates a forklift and has not operated any other equipment claimed by the Complainant to be within its work jurisdiction for at least five (5) years; that the Complainant does not claim to represent all forklift operators employed by the Respondent; that in calendar year 1982 the Respondent's workforce consisted of Henke, between two (2) to fifteen (15) Laborers and between three (3) to twenty (20) bricklayers; that at no time material herein as the Respondent acquiesced that a bargaining unit consisting of only Henke is an inappropriate unit of bargaining.

15. That in December of 1982 the Respondent reached agreement with the Laborers on a collective bargaining agreement and signed said agreement into effect on January 7, 1983; and, that thereafter the Respondent began paying Henke wage rates and contributing funds for fringe benefits for Henke in accordance with said agreement.

16. That both the Complainant and the Laborers claim the operation of a forklift to be within their work jurisdiction.

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

CONCLUSION OF LAW

1. That since a bargaining unit consisting of Henke does not constitute an appropriate bargaining unit within the meaning of Section 111.02(6) of the Wisconsin Employment Peace Act the Commission will not assert jurisdiction in the instant matter because Respondent is subject to the jurisdiction of the National Labor Relations Board.

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

ORDER 1/

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

Dated at Madison, Wisconsin this 6th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Edmond J. Bielarczyk, Jr., Examiner

1/ 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

(Continued on Page Eight)

1/ (Continued)

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 complaint herein alleges, in substance, that the Respondent has refused to bargain in good faith with the Complainant since the expiration of the collective bargaining agreement covering the period 1980-1982. Said complaint further alleges that the Respondent has restrained and coerced employes in the exercise of rights guaranteed by Section 111.04 of the Wisconsin Employment Peace Act and that the Respondent discriminated to discourage membership in the labor organization. Complaint alleges the Respondent's acts are in violation of 111.06(1)(a), (c) and (d).

The Complainant argues that since at least 1965 it has represented Henke and points out that during calendar year 1982 Henke has been the only person employed by the Respondent paid at the wage rates provided for in the expired collective bargaining agreement between the Complainant and the ACEA. The Complainant further argues that it is well settled that the Commission has jurisdiction over a one person bargaining unit because the National Labor Relations Board (NLRB) declines such jurisdiction. The Complainant asserts that Henke has the skills of the Operating Engineers' craft and performs the same work performed by others in the Operating Engineers' craft. The Complainant therefore contends Henke is in a one person unit performing an identifiable craft and thus the Commission has jurisdiction.

The Respondent argues that the allegations raised by the Complainant are clearly encompassed by Sections 8(a)(1)(3) and (5) of the National Labor Relations Act (NLRA), points out that the parties stipulated that the Respondent satisfies the NLRB's jurisdictional standards, and argues that in such circumstances the Commission has consistently held that its jurisdiction is preempted. Respondent contends that while the Commission has asserted jurisdiction in cases involving only one employe, the unit must be an appropriate unit for bargaining. The Respondent asserts that the Complainant has failed to establish the existence of a viable one employe unit which meets the definitional requirements of Section 111.02(6) of WEPA and therefore contends the instant complaint should be dismissed in its entirety.

The Commission has clearly established in Sinclair Refining Co., 8526-A (1969) that it can assert jurisdiction in one man bargaining unit cases even though the Employer's business falls within the jurisdictional standards of the NLRB and the allegations raised are encompassed by the National Labor Relations Act (NLRA). 1/ However, in Sinclair the unit had previously been certified by the NLRA and the Commission found the one man unit therein was an appropriate unit for bargaining. As a result, since Respondent here does fall within the jurisdictional standard of the NLRB, the Commission can exercise its jurisdiction only if the instant matter involves a one-man bargaining unit which is appropriate under the Wisconsin Employment Peace Act (WEPA). 2/

As to that, Sec. 111.02(6) of WEPA defines the term "collective bargaining unit" as follows:

> The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05(2) to constitute such group a separate bargaining unit they shall be

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1/ Affirmed WERC v. Atlantic Richfield Co. (successor to Sinclair Refining Co.), 52 Wis 2d, 126 (1971).

2/ Straus Printing and Publishing Company, 17736 (4/80). Although dealing with a question of representation the Commission concluded that if a one man unit is found to be appropriate, the Commission rather than the NLRB may properly exercise its jurisdiction.

so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the commission may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the commission shall be subject to all rights by termination or modification given by this subchapter I of chapter 111 in reference to collective bargaining units otherwise established under said subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05(2) so to do.

Herein, the Complainant does not contend it represents all the employes of the Respondent, nor is there any evidence that a majority of employes engaged in a single craft, division, department or plant have voted in secret ballot conducted by the Commission or the NLRB to constitute a separate bargaining unit. Complainant, however, points to its long bargaining history with the Respondent, points out that Henke has skills to operate equipment Complainant contends is within its work jurisdiction, and contends that Henke performs duties similar to the duties performed by employes of other employers it represents to support its position that Henke constitutes an appropriate one man unit. Although the record demonstrates that for at least five (5) years prior to June, 1982, the Respondent has recognized Henke as a one-man bargaining unit, nonetheless, it appears to be an unappropriate unit. The Complainant did not dispute that Henke performs the same duties as Respondent's other employes who are represented by the Laborers. Further, during calendar year 1982 the Respondent employed a minimum of at least two (2) other employes represented by the Laborers who performed those identical duties. In addition, although Henke has the skills necessary to operate equipment claimed by Complainant, Henke has not operated any such equipment for at least five years except for the operation of a forklift. In such circumstances it must therefore be concluded that Henke does not constitute an appropriate one man bargaining unit, as any bargaining unit established must also include Henke's fellow forklift drivers. As there is not an appropriate one man bargaining unit and as the Respondent meets the jurisdictional standards of the NLRB, the Commission can not assert jurisdiction in the instant matter.

For the reasons set out above, the complaint is dismissed.

Dated at Madison, Wisconsin this 6th day of October, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Edmond J. Bielarczyk, Jr., Examiner