STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petition of PORTAGE ASSOCIATE STAFF ORGANIZATION WEA/NEA Involving Certain Employes of PORTAGE COMMUNITY SCHOOL DISTRICT	Case 18 No. 54766 ME-3571 Decision No. 20470-A

Appearances:

Ms. Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, 33 Nob Hill Drive, P.O. Box 8003, Madison, Wisconsin, 53708-8003, for the Portage Associate Staff Organization, WEA/NEA.

Lathrop & Clark, Attorneys at Law, by Mr. Michael J. Julka, 122 West Washington Avenue, Suite 1000, P.O. Box 1507, Madison, Wisconsin, 53701-1507, for the Portage Community School District.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, Attorneys at Law, by Mr. Frederick C. Miner, 1555 North RiverCenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin, 53212, for Teamsters Local 695.

ORDER DISMISSING PETITION FOR ELECTION

On January 3, 1997, the Portage Associate Staff Organization WEA/NEA filed a petition with the Wisconsin Employment Relations Commission seeking an election to determine whether certain custodial and maintenance employes of the Portage Community School District wished to continue to be represented for the purposes of collective bargaining by Teamsters Local 695, wished to be represented by the Portage Associate Staff Organization, or desired no representation.

On February 4, 1997, Teamsters Local 695 filed a Motion to Dismiss the election petition as being untimely filed.

Hearing on the petition and Motion was held in Portage, Wisconsin, on February 20, 1997, by Commission Examiner Peter G. Davis.

Post-hearing argument was filed, the last of which was received March 18, 1997.

Having considered the matter and being fully advised in the premises, the Commission makes and issues the following

FINDINGS OF FACT

1. The Portage Community School District, herein the District, is a municipal employer having its principal offices at 904 Dewitt Street, Portage, Wisconsin.

2. Teamsters Local 695, herein Teamsters, is a labor organization having its principal offices at 1314 North Stoughton Road, Madison, Wisconsin. For the purposes of collective bargaining, Teamsters currently represent employes of the District in custodial and maintenance positions.

3. Portage Associate Staff Organization, WEA/NEA, herein WEA, is a labor organization having its principal offices at P.O. Box 79, Portage, Wisconsin.

4. Teamsters and the District were parties to a collective bargaining agreement covering the employes identified in Finding of Fact 2 which had an expiration date of December 31, 1996. The agreement also provided:

> Either party shall notify the other party within 180 days of the ending date of this agreement of its desire to alter or amend this agreement.
>
> If no notification is given, the contract shall remain in full force and effect on a year to year basis.

By letter dated June 19, 1996, and received by the District June 20, 1996, Teamsters advised the District in pertinent part as follows:

> In accordance with 111.70(4)(c)4(cm) *(sic)*, we're hereby serving notice of our desire to modify our existing Contract to become effective following the expiration of said Contract.
>
> We're prepared to meet and negotiate upon requested changes with your designated representatives at the earliest possible date convenient to both parties.

In August 1996, a majority of the employes in the custodial and maintenance bargaining unit met with Teamster representatives and advised Teamsters of the employes' interest in becoming represented by the Wisconsin Education Association. Teamsters encouraged the employes to continue Teamster representation, but advised the employes that Teamsters would not "stand in the way" if the employes sought representation by another labor organization.

Thereafter, the employes met with a representative of the South Central United Educators,

WEA/NEA and began to establish the Portage Associate Staff Organization.

5. On or about November 2, 1996, all employes in the custodial and maintenance unit received the following letter dated November 1, 1996, from Teamster representative Gowey:

> The representation of your collective interests has been turned over to the undersigned. I have reviewed the matter based upon the information presented and, as I understand, the members of this bargaining unit are refusing to submit a proposal for successor bargaining.
>
> Here are the options as I perceive them to be:
>
> 1. A meeting will be called, which I would be happy to chair, for the purpose of taking your proposal in preparation for contract negotiations; or
>
> 2. in the absence of #1 above, the undersigned will submit a proposal on your behalf which is reflective of the trends in bargaining and will negotiate same without your direct involvement; or
>
> 3. the undersigned will exercise his authority as bargaining representative to lawfully extend your current contract without change for a two-year period.
>
> These are the options at your disposal. Personally, I would hope and encourage you to select the first. But I am not hesitant in moving forward with respect to option 2 or option 3.
>
> Concurrent with the mailing of this correspondence, under separate cover letter, the District is being advised and notified that this Union has filed a petition for mediation/arbitration.
>
> You are herewith requested to correspond in writing as to your individual desire with regard to options 1, 2, or 3. Absent any response from you, the undersigned will therefore conclude you have no interest and no objection to the manner in which this Union shall proceed on your behalf.
>
> Looking to hear from you soon.

On November 4, 1996, the Wisconsin Employment Relations Commission received a petition for interest arbitration pursuant to Sec. 111.70(4)(cm)6, Stats., from Teamsters for the custodial and maintenance unit. A copy of the petition is attached to this decision as Appendix A.

6. On November 13, 1996, Gowey received the following letter signed by 16 of the

approximately 20 employes in the custodial and maintenance unit:

> We were very surprised to receive your letter, stating that you had taken over representation of our "collective interests." As we are sure you are aware, we met with David Shipley and David Bruegger in August of this year, at which time we advised them that we had unanimously decided that we no longer wished to be represented by the Teamsters. They indicated at that time that the Teamsters would not object to our decision to have them no longer represent us.
>
> Since that time, we have heard nothing from the Teamsters organization. It was our intention to file a petition for an election with the Wisconsin Employment Relations Commission upon the expiration of the current collective bargaining agreement.
>
> Your recent letter indicates that you intend to make proposals on our behalf, regardless of whether or not we authorize you to do so. You further indicate that, without any authorization whatsoever, you have already filed a petition for a mediation-arbitration.
>
> **It is our desire that the Teamsters cease to represent us effective immediately.**
>
> Since there has been no bargaining and, therefore, no basis for filing the mediation-arbitration petition, it appears that you filed the petition solely to prevent us from having an election. We ask that you immediately withdraw the petition. We believe that to refuse to do so, and to continue to make proposals and take actions inconsistent with our expressly-stated interests, violates the law, as well as the Teamsters constitution and bylaws.
>
> We sincerely hope that you will abide by the wishes of the employees, and that you will honor the statements you made to us in August that you would not challenge our disaffiliation.
>
> We are providing a copy of this letter to the Wisconsin Employment Relations and to the employer. By this letter, we are advising the employer that we no longer wish to have the Teamsters represent us.

7. On or about November 14, 1996, all employes in the custodial and maintenance unit received the following letter dated November 13, 1996, from Gowey:

> For whatever reason, you have chosen to ignore my initial correspondence to you dated November 1, 1996. Therefore, enclosed please find a copy of your proposal which will be submitted into collective bargaining. If you have any additional proposal(s) you would like submitted, kindly notify the undersigned immediately, or as soon as possible, so that your proposal(s) can be made ready for bargaining.

Thank you.

No proposals were submitted to Gowey.

8. On December 2, 1996, Teamsters and the District met for the first time to bargain a successor to the existing contract for the custodial and maintenance unit. No agreement on a successor contract had been reached when the existing contract expired by its terms on December 31, 1996.

9. On January 2, 1997, WEA filed an election petition with the Wisconsin Employment Relations Commission for the custodial and maintenance unit.

Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

The interest of enhancing labor peace through stability in the collective bargaining relationship between the District and Teamsters is stronger than the interest in giving employes a present opportunity to determine whether they wish to continue to be represented by Teamsters. Therefore, the presence of the Teamster petition for interest arbitration renders the subsequently filed WEA election petition untimely.

Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission makes and issues the following

ORDER 1/

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may

(Footnote 1 continues on page 6)

(Footnote 1 continued from page 5)

order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified. . . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and

The petition for election is dismissed.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I dissent.

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

MEMORANDUM ACCOMPANYING ORDER DISMISSING
PETITION FOR ELECTION

As reflected in our Findings of Fact and the prefatory paragraphs which precede them, Teamsters urge us to dismiss WEA's election petition as untimely.

More specifically, Teamsters argue the Commission has a long standing practice of dismissing election petitions filed during the pendency of a petition for interest arbitration. Teamsters assert this practice correctly balances the competing interests of stability in collective bargaining and employe choice of bargaining representative, particularly because dismissal of the petition merely delays exercise of the employes' right to decide whether they want to change bargaining representatives.

Teamsters urge the Commission to reject WEA's suggestion that the motivation for filing an interest arbitration is relevant when determining whether an election petition is timely. Teamsters contend the Commission should maintain its practice of refusing to examine the underlying justification for an interest arbitration petition and continue to hold that the parties' pre-arbitration petition bargaining history does not determine the validity of the petition itself.

Should the Commission conclude it is appropriate to determine a union's "true" motivation for filing an interest arbitration petition, Teamsters contend the record does not establish any improper motivation. Teamsters argue the facts presented at hearing establish that it acted to meet its ongoing obligation to represent the unit.

Teamsters contend the record demonstrates the need to protect the collective bargaining process from interference. Teamsters argue that once the election petition was filed, the District refused to continue to bargain and the Commission's investigator would not investigate the Teamsters' arbitration petition. Teamsters contend the recognized policy of protecting the collective bargaining process warrants dismissal of the election petition.

WEA acknowledges the general existence and validity of the Commission's interest arbitration bar policy, but contends that under the facts of this case, no public policy would be served by denying the employes an election.

WEA argues that none of the prior Commission cases cited by Teamsters involved interest arbitration petitions filed for the sole purpose of preventing an election. WEA asserts the record establishes the only purpose served by filing the petition was thwarting the aspirations of the employes for a different labor organization. In this regard, WEA cites the absence of any pre-petition bargaining or even bargaining proposals; the absence of consultation with or notice to the employes prior to the filing of the petition; the employes' request that the petition be withdrawn; the defective nature of the interest arbitration petition itself (i.e., a preliminary final offer did not accompany the petition and the petition did not and could not identify when proposals had been

exchanged or negotiations held); and potential violations of Teamster by-laws as to how bargaining demands are to be authorized.

Given the foregoing, WEA argues that Teamsters were not driven by a desire to move along a bargain or to represent employes, but rather filed the petition to block an election petition.

WEA acknowledges that bargaining did ultimately take place between Teamsters and the District. However, WEA asserts that because the employes had no input into any bargaining proposal and have not been present for any bargaining sessions, the bargaining which has taken place can hardly be viewed as meaningful or worthy of protection. WEA contends there is no labor stability to be protected in this case.

Therefore, WEA asks that the employe interest in selecting a bargaining representative be found to be the strongly predominant interest in this case and that the Commission therefore should deny the Motion to Dismiss and direct an election.

The District takes no position on the Motion to Dismiss.

DISCUSSION

In Mukwonago School District, Dec. No. 24600, (WERC, 6/87), we stated:

> Determinations as to the timeliness of election petitions seeking to change or eliminate the existing bargaining representative require that we balance competing interests and rights. 1/ On the one hand, we have the interest of encouraging stability in collective bargaining relationships which enhances the potential for labor peace. 2/ On the other hand, we have the statutory right of employes to bargain collectively through representatives of their own choosing, which right necessarily includes the right to change or eliminate a chosen representative. 3/ Historically, we have balanced these competing interests and rights by concluding that there should be a guaranteed but limited time prior to commencement of bargaining for a successor agreement when an election petition can be timely filed. Thus, our contract bar policy provides that during the 60-day period prior to the reopening date for commencement of negotiations on a successor agreement, an election petition can be timely filed. 4/ The interests of stability have caused us to conclude that a petition filed during the term of a contract and prior to or after this 60-day period is untimely.
>
> Where no election petition has been timely filed during the 60-day period prior to the reopener date, and the union and/or employer have invoked the statutory interest arbitration procedures in an effort to reach a successor agreement, we have held that the interests of stability warrant finding an election petition filed during the pendency of an interest arbitration petition to be untimely. 5/ However, mindful of

> the statutory rights of municipal employes and municipal employers to raise questions as to representation, we have also concluded that this interest arbitration bar is extinguished once the term of the contract being arbitrated (under either party's offer) has expired. 6/ Our holdings provided municipal employes and employers with the guaranteed time prior to the commencement of bargaining on a successor (to the contract being arbitrated) agreement when questions concerning representation could be timely raised.
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> 1/ Durand Unified Schools, Dec. No. 13552, (WERC, 4/75).
>
> 2/ Secs. 111.70(4)(c) and 111.70(1)(a), Stats.
>
> 3/ Secs. 111.70(2) and 111.70(4)(d)5, Stats. Municipal employers are also able to raise questions concerning the continuing majority status of an incumbent union under Sec. 111.70(4)(d)5, Stats.
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> 4/ Wauwatosa Board of Education, Dec. No. 8300-A, (WERC, 2/68) aff'd (CorCt Dame. 8/68).
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> 5/ Dunn County, Dec. No. 17861, (WERC, 6/80); City of Prescott, supra.
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> 6/ Oconto, supra; Marinette, supra.

Under the timeliness rules recited in Mukwonago and the contract language in Finding of Fact 4, the employes in the custodial and maintenance unit had a guaranteed opportunity to file a timely petition during the 60 day period prior to July 5, 1996. They did not do so.

WEA acknowledges that as a general matter, Commission precedent would warrant dismissal of the election petition as untimely due to the previously filed petition for interest arbitration. However, WEA argues that an exception to the general rule is warranted by: the Teamsters' motivation for filing the petition; the insufficiency of the petition itself; and Teamsters' failure to follow Teamster by-laws when bargaining with the District.

WEA is correct in noting that there is language in prior Commission decisions which suggests that a union's decisionmaking process when filing a petition for interest arbitration is a relevant consideration. Thus, in City of Prescott, Dec. No. 18741 (WERC, 6/81), the Commission stated:

> Petitioner claims that, since the Union did not conduct a referendum among the members of the bargaining unit on its. decision to petition for interest arbitration, the filing of the interest arbitration petition should not bar the subsequently filed election petition Petitioner bases his argument on the fact that the Union previously held a ratification vote among the members of the bargaining unit on the City's offer

for a 1980 agreement, but did not submit the City's offer on the proposed changes for 1981 to such a vote before petitioning for interest arbitration.

Petitioner's argument relates to the Union's internal rules and procedures and there is nothing in the record to indicate that the latter violated its internal procedures by not submitting the City's offer, which its Business agent, Stein, considered unacceptable, to a formal vote of the bargaining unit's membership. There is, however, evidence in the record which shows that Stein did discuss the City's offer with the members of the bargaining unit at a meeting with them on December 11, 1980, subsequent to Stein's meeting with the City's negotiator on the same day. At that meeting the members indicated informally to Stein that they rejected the City's offer as unsatisfactory, and no member objected when Stein recommended interest arbitration as the course of action to take.

In other words, there is no evidence in the record upon which we can conclude that, due to the means by which the Union arrived at its decision to petition for interest arbitration, the arbitration petition is invalid. Therefore we conclude that the pending interest arbitration proceeding also bars the conduct of a present election.

Allowing litigation over the decisionmaking process which prompted the filing of the interest arbitration petition has negative consequences for all parties to a proceeding. The delay, uncertainty of result, and expense caused by litigation of such issues (particularly in the context of parties' efforts to reach agreement on a contract) strongly suggest that such issues should be found to be irrelevant to the timeliness issue. Indeed, we herein hold that in all future such proceedings, this issue is irrelevant and should not be litigated. However, given the existence of the language in Prescott, it is appropriate in this case to examine and resolve the issue raised by WEA as to the circumstances surrounding the filing of the interest arbitration petition.

From the record before us, we find Teamsters' conduct to be consistent with its by-laws and consistent with its obligation as the existing bargaining representative to bargain a successor agreement. Teamsters invited employes to attend a meeting for the purpose of developing proposals. The invitation is consistent with the WEA cited provision of Teamsters' by-laws requiring that a meeting be called "to determine and authorize the bargaining demands to be made." 2/ The employes rejected the opportunity for the meeting. Teamsters then proceeded to formulate

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2/ The cited provision states:

ARTICLE XXVII
NEGOTIATIONS, RATIFICATION OF
AGREEMENT, STRIKES AND LOCKOUTS
Section 1. Whenever a collective bargaining agreement is about to be negotiated,

(Footnote 2 continues on page 12)

bargaining proposals. We see nothing in the by-laws that prohibited Teamsters from proceeding once the employes rejected the invitation for a meeting.

Nor is there anything in the by-laws or the Municipal Employment Relations Act which mandates that employes represented by a labor organization authorize the filing of a petition for interest arbitration. The decision to file the petition is one which the law gives to the representative of the employes to make as it sees fit, presumably in a manner consistent with any existing by-laws and constitution. Teamster by-laws are silent on this matter. Given the foregoing, we reject WEA's argument that the petition is somehow flawed by the absence of specific employe authorization.

We also reject WEA's contention that the petition for interest arbitration was fatally flawed by the absence of a preliminary final offer or by the absence of prior bargaining (or exchange of proposals) by the parties. Teamsters correctly read Milwaukee Schools, Dec. No. 23689 (WERC, 5/86) as holding that such issues are relevant to the Commission investigator's determination as to how he or she should proceed, but not to the validity of the petition itself. 3/

(Footnote 2 continued from page 11)

> modified or extended at the request of the Employer or by this Local Union, the Secretary-Treasurer shall call a meeting to determine and authorize the bargaining demands to be made. The Executive Board shall determine whether such meeting shall be limited to the members in a particular division, craft, or place of employment. Where this Local Union is a participant in an area-wide, conference-wide, national agreement, it is understood that the bargaining demands of this Local Union may be accepted, modified or rejected by the over-all negotiating committee in accordance with such rules and procedures as may be adopted by the area-wide or conference-wide bargaining group.

3/ Commissioner Meier concludes that Milwaukee Schools would lead reasonable party to believe that the arbitration petition bar to an election is available even where the petition shows that the parties have not yet met and for that reason would not apply a different rule in this case. By this note, however, Chairperson Meier informs parties that in the future he would limit application of Milwaukee Schools to cases where the petition shows on its face that the parties have met and negotiated, and would dismiss a petition which shows on its face that the parties have not negotiated even where the parties have subsequently negotiated. Chairperson Meier would consider such a petition invalid and incapable of being cured by subsequent negotiation; that a refusal to bargain complaint -not a petition for interest arbitration - is the proper means by which to force an unwilling

(Footnote 3 continues on page 13)

(Footnote 3 continued from page 12)

Lastly, WEA asserts that there is no real interest in "stability" to be protected here because there has allegedly been no real bargaining. To the extent the WEA argument is premised on the absence of employe participation at the bargaining table, we again note that Teamsters invited participation, but got none. To the extent the WEA argument is premised on an assertion that the bargaining which has taken place has not been substantive, our record gives us no basis for reaching such a conclusion.

In summary, the interests of stability/labor peace are served by allowing Teamsters to proceed to bargain a contract or achieve one through the interest arbitration process. The exercise of the interest of employe free choice is delayed, but not eliminated by allowing the bargaining/interest arbitration process to produce a contract. Under such circumstances, we believe the interest of stability/labor peace predominates. Thus, we have dismissed the election petition.

Given under our hands and seal at the City of Madison, Wisconsin, this 23rd day of July 1997.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By James R. Meier /s/
James R. Meier, Chairperson

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

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party to the bargaining table, and that a decision otherwise violates legislative intent, discourages bargaining and encourages gamesmanship and an overreliance on Commission resources.

Commissioner Hahn shares Chairperson Meier's concern regarding the absence of any negotiations but believes that the bargaining which ultimately occurred between the parties "cured" any defect prior to the filing of the election petition. He views the presence or absence of a "reasonable period of negotiation" to be a factor for the Commission investigator to consider when determining whether to require that the parties engage in additional bargaining before he or she meets with the parties.

I dissent.

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

DISSENTING OPINION OF COMMISSIONER A. HENRY HEMPE

The immediate issue of this case is whether or not to block a petition for a representation election with the interest arbitration bar rule.[4] Yet the case is as much about the petition for interest arbitration, itself - at best a dissembling, deficient document in furtherance of a shabby scheme. The majority refuses even to censure it. As a result the interest arbitration bar rule is reduced to an instrument for the preservation of endangered incumbent bargaining agents and is barely recognizable as a Commission product.

For never before has this Commission condoned the submission of a counterfeit pleading filed in blatant furtherance of a selfish interest. Never before has this Commission obfuscated the *unanimous* desire of bargaining unit members to change their bargaining representative. In fairness, I have no doubt that the majority neither intends nor embraces these results. In candor, I have no doubt that the majority's decision has nonetheless enabled them to occur.

Analysis of Petition for Interest Arbitration

It seems to me that before we insist on injecting the equitable doctrine chosen by the majority as the basis for denying the representation election unanimously sought by bargaining unit members we should first make sure the basis for our blockage is itself in reasonable compliance with the law. In view of the strong statutory policy favoring employe self-determination in the selection of their bargaining representative,[5] this seems not only prudent, but imperative.

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[4] This rule generally holds that election petitions cannot be filed during the pendency of an interest arbitration petition. *City of Prescott*, Dec. No. 18741 (WERC, 6/81) citing *Dunn County*, Dec. No. 17861 (WERC, 6/80)

[5] Sec. 111.70(6) Stats., seems plain enough:

> DECLARATION OF POLICY. The public policy of the state as to labor disputes arising in municipal employment is to encourage voluntary settlement through the procedures of collective bargaining. Accordingly, it is in the public interest that municipal employes so desiring be given an opportunity to bargain collectively with the municipal employer through a labor organization or other representative *of the employes' own choice.* If such procedures fail, the parties shall have available to them a fair, speedy, effective, and above all, peaceful procedure for settlement as provided in this subchapter. (Emphasis supplied.)

Two other statutes bear the imprint of this strong legislative policy pronouncement: Sec. 111.70(2). RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right . . .to bargain collectively through representatives *of their own choosing* . . ." (Emphasis supplied.)

> Sec. 111.70(4)(d)5. Questions as to representation may be raised by petition of the municipal employer or any municipal employe or any representative thereof. Where it appears by the petition that a situation exists requiring prompt action so as to prevent or terminate an emergency, the commission

My examination of that basis, i.e., the petition for interest arbitration on file herein, reveals multiple defects: 1) the petition fails to recite the date the union and employer had the open meeting mandated by sec. 111.70(4)(d)5.[6]; 2) a copy of the preliminary-final offer required by sec. 111.70(4)(cm)6. is not attached to the petition; 3) the petition falsely asserts that the parties had passed the statutory[7] threshold of "a reasonable period of negotiations."[8]

The facts adduced at hearing fully expose that petition as a sham:

1. no open meeting had taken place between the parties because other thana notice dated June 19, 1996 to open negotiations,[9] the parties had had no contact between them;

2. there had not been "a reasonable period of negotiations" because there had been *no* negotiations;

3. no copy of a preliminary-final offer had been attached to the petition because none existed;

4. there was no "deadlock" because the incumbent bargaining agent had not even submitted an initial proposal to the employer.

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shall act upon the petition forthwith. The fact that an election has been held shall not prevent the holding of another election among the same group of employes, if it appears to the commission that sufficient reason for another election exists.

Thus, sec. 111.70(6) expresses legislative policy as to freely chosen representation of municipal employes; sec. 111.70(2) declares freely chosen municipal employe representation to be a substantive right; sec. 111.70(4)(d)5., an obligation on this commission to enforce municipal employe representation rights. From these statutory sources it seems fair to infer that the Legislature has demonstrated a strong, continuing concern that municipal employes be granted the right of self-determination with which we may tamper only for good cause, and even then at our peril.

[6] Petitioner had attempted to fill in the blanks of a form petition provided by the Commission. "N/A" was inserted in the blank to be filled in response to the open meeting question.
[7] Sec. 111.70(4)(cm)6.
[8] The petition also claimed mediation by the Commission had taken place. Obviously, none had. Further down the document, the petitioner answered inquiries as to the number of occasions on which the parties had met and the number of mediation meetings that had taken place by again inserting the notation "N/A."
[9] Arguably, even this notice was not provided during the period specified by the existing labor agreement. See Note 21, *infra*, for a fuller discussion.

At least equally disturbing is the fact that the petition was filed in direct breach of the incumbent bargaining representative's pledge to bargaining unit employes that it would not stand in their way to replace it with another union. At a meeting between the incumbent bargaining representative and the bargaining unit employes, on at least four occasions, the bargaining representative promised the employes not to block their efforts to change unions. Obviously, the incumbent bargaining representative reneged on this pledge. The inference is unavoidable that this pleading and procedural duplicity originated with the determination of the incumbent bargaining agent to hold captive a bargaining unit which it knew would otherwise flee to representation by a rival union.

But unless the majority intends to hold no future parties to the statutory standards so badly missed by the incumbent bargaining agent in this matter,[10] it appears the majority dismissed the wrong petition. It is not the petition for election which deserved dismissal; it is the defective petition for interest arbitration. Should that occur there would be no further impediment to conducting the election the bargaining unit employes so desperately want.

Let there be no misunderstanding: I find *no* Commission precedent which allows a petition for interest arbitration to be filed when there have been *no* negotiations between the parties. Nor do I find any Commission precedent which holds a petition for interest arbitration that *falsely* alleges that negotiations have taken place stands in any better position.

The majority takes a different view and cites *Milwaukee Public Schools*[11] as holding that issues such as the absence of a preliminary-final offer or prior bargaining are not relevant to the validity of the petition. I find this interpretation exaggerated, at best. For *Milwaukee Public Schools* makes no contentions with respect to the presence or absence of a preliminary-final offer

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[10] As to this question, based on Note 3 appearing in the majority's opinion, it appears that Chairman Meier is willing to agree, prospectively, that ". . .a petition for interest arbitration is invalid on its face and should be dismissed where, as here, the petition itself reflects that there has been **no** negotiations and there is no claim that the absence of negotiations is due to the unwillingness of the other party to meet." In other words, the Chairman views dismissal as the proper remedy in future cases where the initiating document contains a confession of procedural transgression by the initiating party. This is a view with which it is difficult to quarrel. It doesn't deal with the issue raised herein, however. For in the instant matter the total absence of negotiations was not revealed *on the face* of the petition for interest arbitration; it was initially revealed in the letter of the bargaining unit employes to their bargaining agent (a copy of which was also provided to the Commission) after the employes had been advised by their bargaining agent that he had filed an interest arbitration petition purportedly on their behalf; it was subsequently confirmed at a hearing scheduled to consider the petition for election filed thereafter.

[11] *Dec. No. 23689 (WERC, 5/86).*

or, for that matter, an open meeting; those issues were never raised. Neither was the validity of the petition for interest arbitration attacked on the grounds that either the petition didn't conform to statutory standards or that it contained a false, material allegation.

The sole issue in *Milwaukee Public Schools* was not whether there had been *any* bargaining, but whether there had been *enough* bargaining, i.e., whether three bargaining meetings were sufficient to constitute "a period of reasonable negotiation." But settling a good faith argument as to whether three meetings constitute a *reasonable* period of negotiation by referring it to a normal investigative (mediation) channel is quite different than determining whether a petition for interest arbitration is invalid because it falsely alleges negotiations to have taken place when *none* did. The former resolves a good faith difference of opinion as to a statutory interpretation; the latter is a matter that cuts to the integrity of the whole statutory system for the resolution of municipal labor dispute.

If the incumbent bargaining agent relied on *Milwaukee Public Schools*, its reliance was misplaced; *Milwaukee Public Schools* does not condone deceptive pleadings in any fashion. Our rules against that are inherent and have never changed.

Nor should they.

Stability of Collective Bargaining Relationship

The majority next cites "the interests of stability/labor peace" as a policy justification for the interest arbitration bar rule it imposes. Certainly, that is a rationale that has done past, competent service for the Commission. In this case, however, its use by the majority suggests more reflex than reflection.

For in the past, when applying this standard the Commission has examined the ". . . factors which affect the stability of the relationship between *the employes, their bargaining agent, and the employer*."[12] (Emphasis supplied.) In the instant matter, the majority appears to look only to the relationship between the incumbent bargaining agent and the employer. The embittered relationship between the bargaining unit members and their bargaining agent is ignored. Arguably, that is the one that merits the greatest attention.[13]

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[12] *City of Milwaukee,* Dec. No. 9172 (WERC, 7/69) citing *City of Green Bay*, Dec. No. 6558 (WERC, 11/63).

[13] Indeed, under the circumstances herein where the incumbent bargaining agent has taken independent action without the authorization of the bargaining unit, there may be some question whether it continues to qualify as a "labor organization" insofar as this bargaining unit is concerned. Sec. 111.70(1)(h) defines "labor organization" as " . . .any employe organization *in which the employes participate* and which exists for the purpose, in whole or in part, of engaging in collective bargaining . . ." (Emphasis supplied) The record is quite clear that the employes in this

Yet even from the employer/bargaining agent perspective to which the majority seems to limit its "stability" analysis, the majority's conclusion is neither logical nor persuasive. The majority's order coerces the employer to bargain collectively with a bargaining representative unwanted by *every* member of the bargaining unit. As reflected in this record, the relationship between bargaining unit members and the incumbent bargaining representative is already dysfunctional: knowing that, how can the employer be confident that any proposal made by the *unanimously repudiated* bargaining representative actually represents the sentiments of even one member of the bargaining unit, much less a majority. Under these circumstances the majority's result seems more likely to promote a total *destabilization* of the bargaining relationship between the employer and bargaining representative instead of the stability the majority professes to seek.

Moreover, as the majority reconfirms the exclusive representational status of the incumbent bargaining agent, even without benefit of a new election, that agent's duty of fair representation owed to bargaining unit members continues. Given the chasm of tensions and hostilities currently dividing the incumbent agent from the workers to whom it owes this duty, increased misunderstandings, discord, and even litigation as to the proper discharge of the duty seem inevitable.

Past decisions of this Commission have not usually been issued without a thoughtful analysis of possible consequences such as these. Indeed, the avoidance of consequences deemed pernicious accounts for not only the growth and development of the interest arbitration bar rule the majority now cites, but the growth and development of its parent doctrine as well, the so-called *Wauwatosa* or "contract bar" rule.[14]

The *Wauwatosa* rule has the same underlying purpose as the interest arbitration bar rule: *promoting the stability of a collective bargaining relationship.* Like the interest arbitration bar rule, the *Wauwatosa* rule governs the timing of election petitions by restricting the periods during which they may be filed.

Historically, however, the Commission has recognized that *preserving an existing bargaining relationship* was not always compatible with the goal of *promoting a stable bargaining relationship*. "There are a number of situations where the underlying purpose of the contract bar

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matter did not participate in the decision to file the petition for interest arbitration, nor were they invited to.

[14] The rule received its name from the case in which it was announced [*Wauwatosa School District,* Dec. No 8300-A (WERC, 2/68)]. The *Wauwatosa* Rule limits the timing of petitions for representation elections in municipal bargaining units filed by rival unions to the 60-day period prior to the date on which negotiations for a successor agreement may commence (with certain exceptions developed in subsequent cases). Although it is a variant of the so-called "contract bar" rule that governs representation election petitions in the private sector, it is sometimes referred to by the same term in municipal labor relations parlance.

policy would not be served by its application," the Commission observed. One ". . . recognized exception to the contract bar policy is the situation where the relationship has already become unstable as a result of a schism," [citing *Artistic Cleaners and Lauderers*, Dec. No. 4918-A (WERC, 11/58); Hershey Chocolate Corp., 121 NLRB 901, 42 LRRM 1460], *and an election could contribute more to stability than the application of a contract bar policy."*[15] (Emphasis supplied)

Commission pragmatism and common sense allowed continued growth in this area: "(h)owever, the above 'contract bar' policy is not etched in stone. The Commission, *where circumstances warrant, has made exceptions thereto where the underlying purpose of maintaining reasonable stability in the collective bargaining process would not be served by its application*."[16] (Emphasis supplied)

So policy modifications or adjustments as to timing of election petitions continued to occur. For instance, originally the Commission not only blocked election petitions filed during the pendency of fact-finding proceedings, but for an additional reasonable period of time thereafter, to encourage collective bargaining between the same parties as to implementation of the fact-finder's recommendations.[17] But once interest arbitration became available to most municipal units the Commission concluded that since an interest arbitration award requires no further bargaining, when each final offer before an interest arbitrator covers a contractual period of time which has already expired " . . . the strength of the interest in collective bargaining stability is sufficiently lessened so as to allow for the processing of the election petition."[18]

The Commission also ordered an election where police officers had abandoned membership in their local police officers association even though "(a)bsent the defunctness of the Association the Commission would have deemed the petition to have been untimely.[19]

In another case, an election was directed by the Commission where the petition for the election was filed after the labor contract had expired, despite the fact that the incumbent bargaining representative and the municipal employer were engaged in bargaining at the time (although a petition for interest arbitration had not yet been filed).[20]

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[15] *Durand Unified Schools*, Dec. No. 13552 (WERC, 4/75). A "schism" in the bargaining unit as to the selection of a bargaining agent was also cited by the Commission as a relevant factor to consider in determining whether to process a petition for a representation election in another case several years later. *Chippewa Falls Federation of Teachers*, Dec. NO. 8767 (WERC, 11/68)

[16] *Brown County*, Dec. No. 19891 (WERC, 9/82)

[17] See *City of Appleton,*, Dec. No. 7423 (WERC, 1/66); *City of Milwaukee,* Dec. Nos. 9172 & 9477 (WERC, 1/70)

[18] *Shawano County*, Dec. No. 34856 (WERC, 5/85), citing *Oconto County*, Dec. No. 21847 (WERC, 7/84) and *Marinette County*, Dec. No. 22102 (WERC, 5/85).

[19] *City of Milton (Police Department)*, Dec. No. 13442 (WERC, 3/75)

[20] *City of Franklin*, Dec. No. 19538 (WERC, 4/82).

Finally, in a case where the petition for election and petition for interest arbitration arrived at the Commission on the *same* day, even though the incumbent union had an extensive bargaining history with the employer (and imposition of the interest arbitration bar was supported by the employer), " . . . in recognition of the rights of employes to change or eliminate an existing bargaining representative. . ." the Commission ordered the requested election.[21]

Thus, past Commission policy as to election petition timeliness has been shaped, sculpted, and honed in response to immediate urgencies arising in cases brought to the Commission for decision. It has not been a hide-bound doctrine, but a pragmatic, dynamic policy designed to balance and blend the statutory mandate of bargaining unit self-determination with the goal of stability in the collective bargaining relationship. Reasonable solutions were developed in response to new fact situations. Adjustments were made as required by the constraints of the law and a sense of justice.

Regrettably, in the instant case the only adjustment the majority chooses to make in response to what is in my view a compelling exigency is a relatively modest one on a peripheral consideration. [22]

Equitable Doctrines in Response

Barring an election is an *equitable*, not statutory, remedy. It cannot be imposed in a vacuum without regard to other applicable equities. In the instant matter, there are two that should have been considered: 1) *estoppel;* 2) *clean hands doctrine.*

1) Estoppel *in Pais*.

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[21] *Dunn County, supra,,* at note 1. In *Dunn County*, the incumbent bargaining representative contended that to direct an election during the pendency of a mediation-arbitration petition would "destroy" the mechanism which the Legislature created for peaceful dispute resolution. The County echoed that position and also argued that an election would have a disruptive effect on its ability to provide services to the public.

[22] The majority prospectively repudiates Commission consideration of compliance by a party with its own by-laws in the filing of a petition for interest arbitration, a practice it originally allowed in *City of Prescott,* Dec. No.18741 (WERC, 6/81) . I concur with that result. In my view, two reasons favor the new policy: 1) if statutory compliance is observed in the filing of a petition for interest arbitration, filing compliance with the internal by-laws of the party filing the petition may be *relevant* as to the legality of the petition, but is *immaterial* from the Commission's standpoint; 2) most labor organizations can probably provide a superior forum than we on matters involving inquiries as to compliance with their own by-laws. However, I do not necessarily agree with the majority's approval of Teamster by-law compliance in this matter, because I do not perceive sufficient information on which to base an informed judgment.

In pais simply means without legal proceedings. Thus, the term "estoppel *in pais*" means that a party is estopped or prevented from taking action without any legal proceedings having taken place such as a contract or court judgment.

An "estoppel *in pais*" consists of action or nonaction on the part of one against whom estoppel is asserted which induces reliance thereon by another, either in the form of action or nonaction, to his detriment. *Fritsch v. St. Croix Central School District*, 183 Wis. 2d 336, 344, 515 N.W. 2d 328, Wis. App. (1994); *Heideman v. American Family Insurance Group*, 163 Wis. 2d 847, 860-1, 473 N.W. 2d 14, Wis. App. (1991); *Hanz Trucking, Inc. v. Harris Bros. Co., Crestline Division*, 29 Wis. 2d 254, 266, 138 N.W. 2d 238 (1965) citing *City of Milwaukee v. Milwaukee County*, 27 Wis. 2d 53, 66, 133 N.W. 2d 393 (1965).

Estoppel arises when a party's conduct misleads another into believing that a right will not be enforced and causes the other party to act to his detriment in reliance upon this belief. *Hystro Products Inc. v. MNP Corp.,* 18 F.3rd 1384, 1393, (7th Cir. 1994) citing *J. H. Cohn & Co. v. American Appraisal Assocs., Inc.,* 628 F.2d 994, 1000 (7th Cir. 1980).

In the instant case bargaining unit members relied on repeated assurances by an officer of the incumbent bargaining agent with apparent authority who spoke in the presence of another officer of the incumbent agent that said agent would not stand in the way of the workers' efforts to change unions. The response to the incumbent agent's subsequent petition for interest arbitration signed by sixteen bargaining unit members makes this very clear.[23]

Had bargaining unit workers not received those assurances the passion and momentum of their unanimity suggests they would have considered and adopted a far less passive strategy to achieve their desired goal. Under the circumstances, an alternate strategy may well have been successful.[24]

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[23] Received into evidence as Exhibit 1: " . . .As we are sure you are aware, we met with David Shipley and David Bruegger in August of this year, at which time we advised them that we had unanimously decided that we no longer wished to be represented by the Teamsters. *They indicated at that time that the Teamsters would not object to our decision to have them no longer represent us*. Since that time we have heard nothing from the Teamster organization. *It was our intention to file a petition for an election with the Wisconsin Employment Relations Commission upon the expiration of the current collective bargaining agreement*. . ." (Emphasis supplied)

[24] The majority asserts that"(u)nder the timeliness rules recited in *Mukwonago* (citation omitted*),* the employes in the custodial and maintenance unit had a guaranteed opportunity to file a timely petition during the 60 day period prior to July (5), 1996." This is not necessarily accurate. Contract reopener language provides in relevant part: "(e)ither party shall notify the other party *within* 180 days of the ending date of this agreement" The agreement terminated on December 31, 1996. 180 days of the ending date of December 31, 1996 is July 4, 1996. Based on apparently clear and unambiguous contract language, a strong argument can be made that the reopener notice should have been sent *between* July 4, 1996 and December 31, 1996, not *prior* to July 4, 1996.

Understandably, officers of the incumbent bargaining agent declined to tell bargaining unit workers how to achieve that end. They had had no obligation to do so. But they *did* have an obligation to speak truthfully to the workers; they *did* have an responsibility not to mislead the workers; they *did* have a duty not to lull the workers into a false sense of security. Having done so, they are now (or should be) estopped from taking advantage of the reliance they effected.

The cause-and-effect relationship of the uncontested version of events herein seems obvious. In another forum a similarly compelling sequence of events would likely result in a "slam-dunk;" here the result should be estoppel.

2) Clean Hands Doctrine.

The "clean hands doctrine" offers further support for the denial of the equitable relief sought by the incumbent bargaining agent. Well-known and of long pedigree in Anglo-American jurisprudence,[25] " . . .this fundamental principle is expressed in the maxim, 'he who comes into equity must come with clean hands.'"[26]

> "While a court of equity endeavors to promote and enforce justice, good faith, uprightness, fairness, and conscientiousness on the part of parties who occupy a defensive position in judicial controversies, it no less stringently demands the same from the litigant

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The incumbent bargaining representative's letter advising the District of its desire to "alter or amend" was dated June 19, 1996, and received by the District on June 20, 1996. Thus, since the reopener notice was *not* provided within the contractually specified time-frame, arguably it is void. While the District may choose to waive this defect by beginning to bargain with the representative (as the District did for one meeting in December), the District and union cannot waive the defect as to third parties, including bargaining unit members. Thus, under *Mukwonago* (as well as *Wauwatosa School District, supra,* note 7, and *Dunn County,* supra, Note 1) bargaining unit members, the District or a rival union could argue that filing an election petition on *any* day between July 4, 1996 and December 31, 1996, would be appropriate, as long as the election petition was filed prior to (or on the same day as) the filing of a petition for interest arbitration. But in reliance on the non-interference assurances of incumbent bargaining agent officers it does not appear that bargaining unit workers ever considered this approach.

For that matter, even assuming, *arguendo*, that the majority's view as to window period is accurate, bargaining unit workers could have followed an alternate strategy of direct participation in and control of their collective bargaining to insure no petition for interest arbitration would be filed. When the contract expired at year's end, there would be no barrier to a representation election. Again, in reliance on incumbent bargaining agent representations of non-interference, apparently bargaining unit workers did not consider this avenue.

[25] See *Railroad Co. v. Soutter et al.*, 80 U.S. 517, 523-4, 13 Wall 517, 20 L.Ed. 543 (1871) which quotes with approval an English maxim: "He that hath committed iniquity shall not have equity."

[26] *David Adler & Sons Co. v. Maglio*, 200 Wis. 153, 159-60, 228 NW 123, 66 A.L.R. 1085 (1929).

parties who come before it as plaintiffs or actors in such controversies."[27]

Under this doctrine, " . . . if a party seeks relief in equity, he must be able to show that on his part there has been honest and fair dealing."[28]

In the instant matter, hands necessarily soiled by their manipulative inducement of misplaced worker trust and reliance appear too begrimed to grasp - or merit - the equitable relief for which they stretch.

Conclusion

The bargaining unit workers herein are not apt to be reassured by the narrowness of the majority's view. The putative frustration of these workers is understandable: the apparent unwillingness of the majority to confront and condemn the deceptive, defective petition for interest arbitration filed in this matter suggests not only an indifference to the entrapment plight in which unit members have been placed through the machinations of their incumbent bargaining agent, but an erosion of statutory guarantees of bargaining unit self-determination.

Moreover, the majority fails to face realistically the unique stability issue this case raises. For the question remains: *if an unstable relationship due to a schism within a bargaining unit is a "recognized exception" to the contract bar rule that requires an election to heal, does not the unanimous hostility of the bargaining unit employes towards their current bargaining agent offer an even more compelling reason for an election?* The majority has no answer, and thus bargaining unit workers have no relief.

Finally, in a case that fairly shrieks for a balancing of doctrinal equities, the majority is able to focus on only one: the interest arbitration bar rule. Stronger applicable equities are overlooked, and again bargaining unit workers obtain no relief.

In summary, the majority's decision as to this case protects and preserves the status of an incumbent bargaining representative at the expense of both the statutory rights of the bargaining unit members and restoring stability to the collective bargaining relationship. Its failure to fashion appropriate relief in *this* matter not only condones and rewards the questionable conduct and petition of the incumbent bargaining representative, but in the end may be far more debilitating to the legitimate Commission goal of promoting collective bargaining stability. System is favored over substance, pettifoggery rewarded over principle, and factitiousness over fair play. The real losers are twenty-one bargaining unit members who want only to exercise their statutory right to change unions.

Almost forty years ago, Wisconsin Employment Relations Board Chairman L. E. Gooding, joined by Commissioners J. E. Fitzgibbon and Morris Slavney, granted a petition for election based on a schism in the bargaining unit. Their words provide a legacy we would do well to remember in the instant controversy:

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[27] *David Adler & Sons Co. V. Maglio, supra*, at 159.

[28] *Wheeler v. Sage*, 68 U.S. 518, 529, 1 Wall 518, 17 L.Ed. 646 (1863).

"We are, however, deeply concerned that in this struggle for power by these two unions that we do not by our order, entered to protect the employes, too often the forgotten men in struggles of this kind, deprive them of rights the statute confers, not on unions as such but on employes as such." [29]

A. Henry Hempe /s/

A. Henry Hempe, Commissioner

[29] fay *Artistic Cleaners and Launderers*, Dec. No. 4918-A (WERC, 11/58). The Wisconsin Employment Relations Board, of course, was the predecessor agency to the Wisconsin Employment Relations Commission.