

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL #721 OF THE INTERNATIONAL
ALLIANCE OF THEATRICAL STAGE
EMPLOYEES AND MOVING PICTURE
MACHINE OPERATORS OF THE UNITED
STATES AND CANADA, AFL-CIO,

Complainant,

vs.

KOHLBERG THEATRES, INC.
(LAKES DRIVE IN THEATRE),

Respondent.

Case V
No. 31095 Ce-1967
Decision No. 20482-A

Appearances:

Mr. Joseph J. Shutkin, Attorney at Law, 135 West Wells Street, Suite 509,
Milwaukee, Wisconsin 53203, appearing on behalf of the Complainant.
Franks and Pikofsky, S.C., Attorneys at Law, by Mr. Seymour Pikofsky,
2040 West Wisconsin Avenue, Suite 201, Bockl Building, Milwaukee,
Wisconsin 53233, appearing on behalf of the Respondent. 1/

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

Daniel J. Nielsen, Examiner: Local No. 721 of the International Alliance of
Theatrical Stage Employees and Moving Picture Machine Operators of the United
States and Canada, AFL-CIO, having, on February 7, 1983, filed a complaint of

- 1/ The Respondent did not appear in person or otherwise at the hearing in this
matter. Mr. Pikofsky entered an appearance subsequent to the hearing by
means of the following letter:

May 13, 1983

Mr. Daniel J. Nielsen, Examiner
State of Wisconsin
Wisconsin Employment Relations Commission
P. O. Box 7870
Madison, Wisconsin 53707-7870

Dear Mr. Nielsen:

Re: Kohlberg Theatres, Inc.
(Lakes Drive In Theatre)
Case V No. 31095 Ce-1967

Please be advised that we are retained by and represent Kohlberg
Theatres, Inc. regarding the above captioned matter. I am com-
pletely at a loss as to what has occurred since I have none of the
papers. Please forward a copy of the complaint which was issued in
this matter so that I may make some determination of how to advise
our client.

Very truly yours,

FRANKS & PIKOFSKY, S.C.

By Seymour Pikofsky /s/
SEYMOUR PIKOFSKY

SP/cs
(Continued on page two)

No. 20482-A

unfair labor practices with the Wisconsin Employment Relations Commission, hereinafter referred to as the Commission, alleging that Kohlberg Theatres, Inc., (d/b/a Lakes Outdoor Theatre), a foreign corporation doing business in the State of Wisconsin, committed unfair labor practices within the meaning of Sec. 111.06 of

1/ (Continued)

The Examiner responded by letter on May 16, 1983, as follows:

May 16, 1983

Mr. Seymour Pifkosky (sic)
FRANKS & PIKOFISKY, S.C.
2040 West Wisconsin Avenue
Suite 201, Bockl Building
Milwaukee WI 53233

Re: Kohlberg Theaters, Inc.
(Lakes Drive In Theater)
Case V, No. 31095 Ce-1967

Dear Mr. Pikofsky:

I am in receipt of your letter dated May 13, 1983, a copy of which I am forwarding to the Union's counsel, Mr. Shutkin. Pursuant to your request for information, I have enclosed the following documents:

- 1) A copy of the complaint filed by Local #721:
- 2) A copy of the Order Appointing Examiner issued by the Commission on March 30, 1983;
- 3) A copy of the Notice of Hearing issued by the undersigned on March 30, 1983;
- 4) A copy of a letter that I sent to your client on April 28, 1983, summarizing the status of the case and offering your client the opportunity to order a copy of the transcript and file a brief.

Each of these documents was sent to your client by certified mail, and each was returned because your client refused delivery. An additional copy of the April 28, 1983 letter was sent by non-certified mail. I assume that you have a copy of that letter, since your letter bears the correct name and case numbers for this file.

The reporter has informed me today that she is mailing the transcript and it should be received tomorrow. If you wish to order a copy of the transcript, please notify me immediately. The deadline for submission of briefs will be two weeks after I receive the transcript. Reply briefs, if any, are due ten days after the initial briefs.

Very sincerely yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen, Examiner

cc: Mr. Joseph J. Shutkin, 135 W. Wells St., Suite 509, Milwaukee,
WI 53203

(Continued on page three)

the Wisconsin Employment Peace Act, hereinafter WEPA; and the Commission having, on March 30, 1983, appointed Daniel J. Nielsen, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), WEPA; and Notice of Hearing having been served on the

1/ (Continued)

The text of the April 28, 1983, letter referred to above is reproduced below:

April 28, 1983

President
Kohlberg Theatres, Inc.
25 West Madison Street
Chicago, IL 60602

Re: Kohlberg Theatres, Inc.
(Lakes Drive In Theatre)
Case V No. 31095 Ce-1967

Dear Sir:

I telephoned your firm in March in an attempt to schedule a hearing in the above-captioned matter. At that time, Mr. Kohlberg, who represented himself to be the President of Kohlberg Theatres, Inc., informed me that the corporation had no interest in participating in the hearing and would not be present at the time of the hearing. Subsequent correspondence with your firm by certified mail was refused and returned to our offices. Among the documents returned were the copy of the complaint, order appointing the examiner and notice of hearing. Service on your firm was accomplished in accordance with the provisions of Section 111.07(2)a, Wis. Stats., by serving the Office of the Secretary of State.

On April 22, 1983 a hearing was held in Racine, Wisconsin pursuant to the notice issued by the undersigned. The Union presented its case and no appearance was entered by your firm. On the morning of the 22nd, prior to the hearing, and again at the close of the Union's case, I attempted to notify you of the hearing and determine whether you wished to enter an appearance and present evidence. I was unable to speak to anyone with the authority to decide one way or the other, and concluded that your prior response was still your company's position.

If you would like to order a copy of the transcript in the case, please notify me immediately. The transcript will be available in approximately ten days and may be purchased at a cost of 60¢ per page. Any motions or written arguments should be addressed to the undersigned in Madison, with a copy to Mr. Shutkin, the Union's attorney. The briefing schedule established at the hearing calls for the submission of briefs to the Examiner two weeks after receipt of the transcript and reply briefs ten days after that.

Sincerely,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen
Examiner

DJN/sw
C4926D.30

cc - Mr. Joseph J. Shutkin, Attorney at Law, Suite 509, 135 W.
Wells Street, Milwaukee, WI 53203
President, Kohlberg Theatres, Inc., 25 West Madison Street,
Chicago, IL 60602 (Non-certified letter)

No further communications were received from the Respondent or the Respondent's Counsel.

parties pursuant to Sec. 111.07(2)(a), WEPA 2/, and hearing on said complaint having been held before the Examiner in Racine, Wisconsin, on April 22, 1983; and neither party having submitted written arguments to the Examiner prior to the closing of the record on June 6, 1983, 3/; and the Examiner having considered the relevant evidence and arguments, and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

- 2/ The Respondent refused receipt of all certified correspondence from the Commission, including the copy of the Complaint, Order Appointing Examiner, and Notice of Hearing. Copies of these documents were served on the Office of the Secretary of State in Madison, Wisconsin. Sec. 111.07(2)(a) provides, inter alia:

In case a party in interest is located without the state and has no known post-office address within this state, a copy of the complaint and copies of all notices shall be filed in the office of the secretary of state and shall also be sent by registered mail to the last known post-office address of such party. Such filing and mailing shall constitute sufficient service with the same force and effect as if served upon the party located within this state.

- 3/ At the hearing in this matter, a briefing schedule was established calling for the submission of briefs to the Examiner, said briefs to be postmarked no later than two weeks after the receipt of the transcript. Reply briefs, if any, were to be submitted ten days after the receipt of the initial briefs. The Examiner sent the following letter to the parties on June 6, 1983:

June 6, 1983

Mr. Seymour Pikofsky
FRANKS & PIKOFKY, S.C.
2040 West Wisconsin Avenue
Suite 201, Bockl Building
Milwaukee, WI 53233

Mr. Joseph J. Shutkin
Attorney at Law
135 West Wells Street, Suite 509
Milwaukee, WI 53203

Re: KOHLBERG THEATRES, INC.
Case V, No. 31095 Ce-1967

Gentlemen:

The briefing schedule established in the above captioned matter called for the submission of briefs two weeks after the receipt of the transcript. The transcript was received on May 17, 1983. As I have not received a brief from either party, and since there has been no request for an extension from either party, I am closing the record in this case as of this date. I will proceed to draft Findings of Fact, Conclusions of Law and an Order on the basis of the evidence submitted at the hearing and the allegations in the pleadings.

Very truly yours,

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen
Examiner

cc: President, Kohlberg Theatres, Inc., 25 West Madison Street,
Chicago IL 60602

Neither party made any response to this letter.

FINDINGS OF FACT

1. That Local No. 721 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, hereinafter referred to as the Union, is a labor organization with its offices located at P.O. Box 255, Lake Geneva, Wisconsin 53147.

2. That Kohlberg Theatres, Inc., hereinafter referred to as the Employer, is a foreign corporation having its principal offices at 25 West Madison Street, Chicago, Illinois 60602; and that at all times relevant herein, the Employer has been the owner and operator of the Lakes Outdoor Theatre in Delavan, Wisconsin.

3. That at all relevant times the Employer has recognized the Union as the exclusive bargaining representative of all stage employees and moving picture operators employed by the Employer at the Lakes Outdoor Theatre in Delavan, Wisconsin; that from May 9, 1982 through September 29, 1982, Daniel Robert Hansen was employed as the head projectionist at Lakes Outdoor Theatre; that the head projectionist's position is included in the bargaining unit; that the Union and the Employer were parties to a collective bargaining agreement in effect at all relevant times with respect to said employee; and that said collective bargaining agreement provided, in relevant part, as follows:

(6) The Employer agrees to pay not less than the following schedule of prices for the work performed:

. . .

(See paragraphs 13 + 14)

. . .

Day Work, such as preparing the theatre for opening, the rate per day shall be: (Paragraphs: 17-19 + 22)

. . .

9. For the purpose of this Agreement, the term "Grievance" means any dispute between the Employer and the Union, between the Employer and any Employee concerning the interpretation of this Agreement, or any other dispute which may arise between the parties which affect wages, hours and/or working conditions. Any such grievance shall be settled in accordance with the following grievance procedure:

First Step: Oral conference between the aggrieved Employee and the Employer together with the Business Agent of the Union.

Second Step: In the event that the grievance is not settled in the first step, it may be carried to arbitration between the Employer and the Union. An arbitrator shall be selected according to the following procedure: Parties desiring arbitration shall notify the other party of its intent to arbitrate and simultaneously request the Wisconsin Employment Relations Commission to act as Arbitrator hereunder of said dispute. The Wisconsin Employment Relations Commission shall act with due dispatch to arbitrate the dispute in question.

There shall be no stoppage of work on behalf of the Union, or lockout on behalf of the Employer for the duration of this Agreement, and all grievances shall be settled in accordance with the afore said (sic) procedure.

10. The Employer recognizes the Union as having jurisdiction over all projection of pictures, and the maintenance of all sound equipment connected with the projection of the pictures, including the installation and maintenance of outdoor speakers.

. . .

12. The LAKES OUTDOOR THEATRE, DELAVAN, WISCONSIN, opening at 6:00 p.m. or later, and running continuous (sic) seven nights per week, shall pay to the projectionist employed hereunder a weekly minimum as follows in 13 + 14.

13. Weekend operation to be not less than three days (15) hours. Scale for weekend operation to be as follows:

April 1, 1981 through March 31, 1982 ... \$6.15 per hour.
April 1, 1982 through March 31, 1983 ... \$6.40 per hour.

Time in excess of Eighteen (18) hours shall be at time and one half of aforesaid weekend rate.

14. When the theatre is open for 7 days per week, the work week shall consist of not less than 36 accumulative hours between the hours of 6:00 p.m. and 3:00 a.m. daily, which shall include one-half hour preparatory time and one-half hour minimum field preparatory time. The first forty hours is to be straight time as follows:

April 1, 1981 through March 31, 1982 ... \$5.90 per hour.
April 1, 1982 through March 31, 1983 ... \$6.15 per hour.

All hours worked in excess of forty hours per week shall be at a time and one-half rate.

. . .

17. Work between 8:00 a.m. and 6:00 p.m. shall be at straight time rate as shown in paragraph 13.

. . .

21. For actual sickness during the duration of this contract, the regular operator shall be entitled to eight (8) days of sick leave per year, and any portion not used shall revert to vacation pay at the end of the season each year.

22. It is understood that a minimum of ten (10) ramps of working speakers are to be installed prior to opening each season. The Union shall furnish at least one man for 36 hours at the prevailing rate (straight time) for getting the theatre ready to open. If the balance of the field is to be completed prior to Memorial Day, one additional day per ramp will be allowed for setting up. It is also understood that at the close of the season the operator shall be allowed 36 hours at his discretion, to dismantle the field and projection booth.

4. That in the period between May and September of 1982, Daniel Robert Hansen performed the following amounts of overtime work:

OVERTIME HOURS WORKED BY DANIEL R. HANSEN

WEEKEND OPERATION

<u>Week Ending</u>	<u>Total Hours Worked</u>	<u>Maintenance Hours</u>	<u>Projectionist Hours</u>	<u>Overtime Hours 4/</u>
Thurs., May 13	11 1/2	11 1/2	0	0
Thurs., May 20	15 1/4	2 1/2	12 3/4	0

4/ Overtime hours for weeks in which the theater was open only for weekend operation are computed on the basis of all projectionist hours in excess of 18 hours. See p. 17-18, Transcript, and paragraphs 13, 14 and 17, Exhibit #1, collective bargaining agreement. Overtime hours for weeks in which the theater was operated on a seven day basis are all hours in excess of 40 hours.

<u>Week Ending</u>	<u>Total Hours Worked</u>	<u>Maintenance Hours</u>	<u>Projectionist Hours</u>	<u>Overtime Hours</u>
Thurs., May 27	19	3 1/2	15 1/2	0
Thurs., June 3	26	0	26	8
Thurs., June 10	24 1/2	5	19 1/2	1 1/2
Thurs., June 17	28 3/4	8 1/2	20 1/4	2 1/4
Thurs., June 24	21 1/4	1	20 1/4	2 1/4
Thurs., July 1	24 1/2	5	19 1/2	1 1/2
Thurs., August 5	20 1/2	1	19 1/2	1 1/2
Thurs., August 12	17 3/4	1/2	17 1/4	0
Thurs., Sept. 2	19 3/4	1	18 3/4	3/4
Thurs., Sept. 9	28 3/4	2	26 3/4	8 3/4
Thurs., Sept. 16	42	16 1/2	25 1/2	7 1/2
Thurs., Sept. 23	26 1/2	4	22 1/2	4 1/2

FULL WEEK OPERATIONS

Thurs., July 8	44	NA	NA	4
Thurs., July 15	31	NA	NA	0
Thurs., July 22	43 1/2	NA	NA	3 1/2
Thurs., July 29	40 3/4	NA	NA	3/4
Thurs., August 19	40	NA	NA	0
Thurs., August 26	31 3/4	NA	NA	0

that, at two-week intervals, Hansen submitted time sheets reflecting his hours worked, including overtime hours; that Hansen did not receive pay for his overtime hours worked; that Hansen demanded payment for his overtime hours; that Hansen was informed by the Theater Manager that he would not be paid for any overtime hours; that at the end of the season, Hansen again demanded payment for his overtime hours; that Hansen was told at that time to turn in a request for all monies due him for the last pay period and for whatever uncompensated hours he had worked during the season; and that Hansen turned in a request for such payment but the Employer refused to make the requested payment for overtime.

5. That Daniel Robert Hansen did not claim any sick leave for the period between May and September of 1982 when he was employed at the Lakes Outdoor Theatre; that Hansen requested 8 days of vacation pay in lieu of sick leave at the end of the 1982 season; and that the Employer refused the requested payment.

6. That, at the end of the 1982 season, Daniel Robert Hansen contacted the Employer's District Manager and offered to tear down the speakers at the theater, a process whereby the speakers are dismantled and stored for the winter; that Hansen was directed not to perform the work; that Hansen contacted the Union Business Agent and the Union President about the situation; that these individuals told Hansen that they had spoken with the Executive Manager for the Employer, a Mr. John Bischoff, who had instructed them that Hansen was not to perform any work in tearing down the speakers; that Hansen did not tear down the speakers; that in addition to tearing down the speakers, another part of preparing the theatre for the winter was in tearing down and winterizing the projection booth; that James Anton, a member and former Business Manager for the Union, performed the work of

winterizing the booth; that Anton performed this work at the request of Hansen, whom he was to assist in tearing down the speakers; that winterizing the booth required five and one-half hours; that the Employer paid Anton in full for his work in winterizing the booth; and that Hansen would have required 20 hours to tear down the field.

7. That on January 10, 1983, Joseph J. Shutkin, the Union's attorney, sent a certified letter to John Bischoff demanding payment to Hansen in the amount of \$957.19; that Shutkin's letter, in the alternative, demanded arbitration of the dispute; that delivery of Shutkin's January 10, 1983 letter was refused and the letter returned to him; that Shutkin thereafter contacted Bischoff by phone and Bischoff directed him to send another letter of demand and to direct the letter to Stanford Kohlberg, President of Kohlberg Theatres, Inc., and Jeffery Kohlberg, Stanford Kohlberg's son and an officer of Kohlberg Theatres, Inc.; that on January 17, 1983, Shutkin sent a certified letter to Stanford Kohlberg and Jeffery Kohlberg in Chicago, Illinois; that the letter demanded payment to Hansen in the amount of \$957.19; that the January 17, 1983 letter further stated:

. . . If you refuse to admit service of this letter by certified mail we will have no alternative but to file charges with the Wisconsin Employment Relations Commission demanding arbitration as well as action by the WERC for your violation of Section 111.06(1)(f) of the Wisconsin Statutes. Moreover, we would then bring charges against you under the Wage and Hour Law for violations thereof. Under the Wage and Hour Law you would be liable for double backpay wages plus attorney's fees. In addition action will be commenced against you in Federal Court under Section 301 of the Labor Management Relations Act.

that delivery of the January 17, 1983 letter was refused and the letter was returned to Shutkin; that no request for arbitration in the matter of Hansen's wages was submitted to the Wisconsin Employment Relations Commission; and that the instant complaint was filed along with the statutory filing fee on February 7, 1983.

8. That the Respondent Employer did not file an answer to the instant complaint, did not enter an appearance at, nor participate in, the hearing held on the instant complaint, and filed no written arguments prior to the closing of the record on June 6, 1983; and that the Employer did not raise a timely objection to the assertion of the Commission's jurisdiction over the instant complaint on the basis of a contractual provision for final and binding arbitration of contractual disputes.

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

CONCLUSIONS OF LAW

1. That Kohlberg Theatres, Inc., is an employer within the meaning of Sec. 111.02(2), WEPA.

2. That Daniel Robert Hansen was, at all relevant times, an employee within the meaning of Sec. 111.02(3), WEPA.

3. That Local 721 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, AFL-CIO, is a party in interest, within the meaning of Sec. 111.07(2)(a), WEPA, to the dispute over Daniel Robert Hansen's wages as set forth in the Findings of Fact.

4. That the Employer, Kohlberg Theatres, Inc., violated Sec. 111.06(1)(f), WEPA, when it refused to accept delivery of certified letters regarding the grievance of Daniel Robert Hansen, including the Union's demand for arbitration, and thereby repudiated the contractually established grievance procedure.

5. That the Employer, Kohlberg Theatres, Inc., repudiated the grievance procedure as set forth in Findings of Fact No. 3 and No. 7, supra, and Conclusion of Law No. 1, supra; that the Employer's failure to raise a timely objection to

the assertion of the Commission's jurisdiction over the alleged contractual violation, as set forth in Finding of Fact No. 8, supra, waives such an objection; and that the Examiner may properly assert the Commission's jurisdiction to determine the merits of the Union's claim under Sec. 111.06(1)(f), WEPA.

6. That the Employer, Kohlberg Theatres, Inc., violated Sec. 111.06(1)(f), WEPA, when it refused to pay Hansen for thirty-eight and one-half overtime hours worked on weekends between May and September, inclusive, 1982, and for eight and one-quarter overtime hours worked by Hansen during full week operations during the same time period, which payments Hansen was entitled to by paragraphs 13 and 14 of the collective bargaining agreement.

7. That the Employer, Kohlberg Theatres, Inc., violated Sec. 111.06(1)(f), WEPA, when it refused to pay Hansen eight days of vacation pay, at the rate of five hours per day, for his accumulated, unused sick leave, which payment Hansen was entitled to by paragraph 21 of the collective bargaining agreement.

8. That the Employer, Kohlberg Theatres, Inc., violated Sec. 111.06(1)(f), WEPA, when it refused to grant Hansen the opportunity to dismantle the speaker field at the end of the 1982 season, which work was guaranteed to Hansen by paragraph 22 of the collective bargaining agreement.

9. That, by the contractual violations set forth above, the Employer, Kohlberg Theatres, Inc., interfered with the exercise of rights guaranteed by Sec. 111.04, WEPA, and therefore violated Sec. 111.06(1)(a), WEPA.

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

ORDER 5/

IT IS HEREBY ORDERED that the Respondent, Kohlberg Theatres, Inc., its officers and agents, shall immediately:

1. Cease and desist from refusing to process and arbitrate grievances in violation of the collective bargaining agreement between it and the Complainant Union;
2. Take the following affirmative action which the Examiner deems will effectuate the purposes of the Wisconsin Employment Peace Act:

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

Section 111.07(5), Stats.

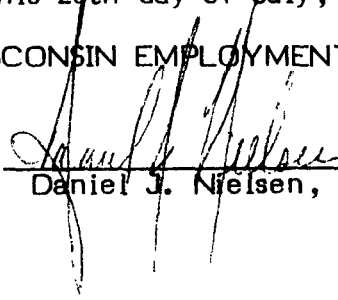
(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed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

- (a) Pay to Daniel Robert Hansen the amount of \$445.71 for overtime hours not paid as set forth in Conclusion of Law No. 3, supra.
 - (b) Pay to Hansen the amount of \$246.00 for the accumulated sick leave payout not paid as set forth in Conclusion of Law No. 4, supra.
 - (c) Pay to Hansen the amount of \$128.00 for wages lost due to the Employer's refusal to allow Hansen the opportunity to tear down the speaker field as set forth in Conclusion of Law No. 5, supra.
3. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order as to what steps shall be taken to comply herewith.

Dated at Madison, Wisconsin this 28th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Daniel J. Nielsen, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER

The Employer, Kohlberg Theatres, Inc., filed no responsive pleadings in this matter, refused to accept delivery of any Commission notices, did not appear at the hearing and submitted no written arguments. The issues before the Examiner, therefore, are limited to:

- (a) Is the Commission's jurisdiction over the alleged violations of Sec. 111.06(1)(f), WEPA, appropriately invoked; and, if so,
- (b) Has the Complainant established a violation of the collective bargaining agreement by a clear and satisfactory preponderance of the evidence; and, if so,
- (c) What is the appropriate measure of damages?

A. The Jurisdiction of the Commission

Sec. 111.06(1)(f), WEPA, makes violation of a collective bargaining agreement an unfair labor practice. As a necessary derivative of the public policy favoring adherence to labor agreements, and in order to conserve limited resources, the Commission will generally decline to assert jurisdiction over the alleged breach where the parties have agreed to submit such matters to final and binding arbitration. 6/ The policy of deferring to arbitration as the first resort for an aggrieved party does not apply, however, where the other party has effectively repudiated the contractual grievance procedure. 7/ Neither the public policy favoring private settlements nor the institutional concern with conservation of resources is served by forcing a party to engage in extensive litigation to obtain arbitration. If, as the Complainant alleges, the Respondent has resisted its efforts to arbitrate the underlying dispute, the Commission's jurisdiction may be properly asserted under Sec. 111.06(1)(f).

The Respondent's officers and agents were made aware of the dispute over Hansen's wages through conversations with Hansen, Union officials and Shutkin, the Union's attorney. Shutkin sent a certified letter to John Bischoff, the Respondent's Business Manager, detailing the dispute and demanding payment or arbitration. Bischoff refused delivery of the letter. Shutkin telephoned Bischoff and was told that another letter should be sent, and should be addressed to Stanford and Jeffery Kohlberg, as the primary officers of Kohlberg Theatres, Inc. Shutkin sent a certified letter to the Kohlbergs, again setting forth the claim and demanding payment or arbitration. Delivery of this letter was also refused. Shutkin thereafter filed the instant complaint.

The Examiner is satisfied that the Respondent's pattern of conduct constitutes a deliberate repudiation of the grievance procedure set forth in the labor contract. The Respondent was well aware of the dispute and urged the Union to submit the grievance in writing. The Respondent then refused to accept the documents that it had demanded, thereby preventing the processing of the grievance. There is nothing in the record to suggest that the Respondent's conduct was the result of inadvertence. On the contrary, the only reasonable inference to be

6/ American Motors Corp., No. 7488 (2/66); J.I. Case Co., No. 14513-A, B (11/76); F S B Wisco, Inc., No. 17217-B, C (4/80).

7/ Mews Ready Mix Corp., No. 6683 (3/64) (aff. 29 Wis. 2d 44, (11/65)); Bailey Construction Co., No. 18371-A, B (5/81).

drawn from the record is that the Respondent intended to prevent further processing of the grievance by refusing to recognize Hansen's claim or the Union's interest therein. 8/ Under these circumstances, and since the Employer failed to raise the arbitration clause as an affirmative defense 9/, the Examiner will assert the Commission's jurisdiction to determine the merits of the contractual dispute and award appropriate relief.

B. The Sufficiency of the Proof

There is absolutely no question but the Complainant has proven, by a clear and satisfactory preponderance of the evidence, 10/ that the Respondent has violated the labor agreement. The agreement clearly and unambiguously sets forth Hansen's right to overtime pay for hours worked in excess of eighteen for weekend operation and in excess of forty for full week operations. The agreement also specifies Hansen's right to receive a payout on unused sick leave, and the reservation of season-end dismantling work to the operator. Hansen testified that he had worked the overtime hours without compensation, and produced documents to confirm his claim. He further testified that he did not take any sick leave during the season and was not paid for his accumulated sick leave. The time sheets entered into evidence tend to confirm his claim that he took no sick leave. Finally, Hansen testified that he was denied the opportunity to dismantle the field of speakers at the end of the 1982 season. Hansen's testimony as to the contractual violations was credible and supports the Findings and Conclusions regarding his wage claims as set forth herein.

Similarly, the Union's claim that the Respondent refused to process the grievance to arbitration is supported by the testimony of Shutkin, Counsel for the Union. His testimony, summarized in Sec. A, supra, sets forth a pattern of conduct whereby the Employer refused to recognize or respond to Hansen's claim. Most telling in this respect is the Employer's refusal to accept the second certified letter which its agent, Bischoff, had himself requested. With considerable justification, the Union concluded that further efforts at voluntarily resolving the dispute would be futile. The evidence in this respect is more than enough to establish that the Union's analysis was correct.

C. The Proper Measure of Damages

At the hearing in this matter, the Complainant amended its prayer for relief to demand payment in the following amounts:

Dismantling the Speaker Field	\$134.40
Sick Leave Payout	\$295.20
Unpaid Weekend Overtime	\$443.60
Unpaid Full Week Overtime	\$142.99

As noted below, the evidence will not support award of the total amounts demanded.

8/ While the Examiner's determination that the Respondent repudiated the grievance procedure is based upon events occurring prior to the filing of the instant complaint, the Respondent's post-filing refusal to receive notices or appear at the hearing does suggest a consistent policy of refusing to recognize Hansen's grievance.

9/ The failure to exhaust contractual remedies must be raised as an affirmative defense, and failure to lodge a timely objection to the Commission's exercise of jurisdiction on that ground will waive the objection. See Bi-State Trucking Corp., No. 9924-A, B (8/71) and Equipment Installers, Inc., No. 18372-A, B (9/81).

10/ Sec. 111.07(3) provides, in part:

Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

1. Dismantling the Field

The Complainant claims that Hansen lost wages in the amount of twenty hours pay as a result of the Employer's refusal to allow him to dismantle the field at the end of the 1982 season. While it is plain from the collective bargaining agreement that Hansen was entitled to perform this work, and although the Examiner credits Hansen's testimonial estimate of twenty hours as the time necessary to perform this work, the record is insufficient to support the Complainant's claim for two hours of overtime calculated at the eighteen hour weekend standard. Paragraph 22 of the collective bargaining agreement provides that "the operator shall be allowed 36 hours at his discretion, to dismantle the field and projection booth." Although the dismantling work was to be paid at the weekend rate of \$6.40 per hour, it does not follow that the weekend overtime premium would be paid for dismantling work in excess of eighteen hours. Payment of the weekend rate is mandated by paragraph 17 of the agreement which provides that "work between 8:00 a.m. and 6:00 p.m. shall be at straight time rate as shown in paragraph 13." The provision that the operator be allowed thirty-six hours "at his discretion" belies any intention of paying overtime, inasmuch as overtime is generally designed as a means of spreading available work and compensating employees for hours worked in excess of their normal workweek. Neither of these goals is served by the payment of overtime under the circumstances presented by this facet of the instant case. Furthermore, there was no testimony whatsoever which would allow the Examiner to infer an intention by the parties that overtime be paid for dismantling work in excess of eighteen hours (industry practice, past practice, bargaining history, etc.). As neither the testimony nor the exhibits will support a claim for two hours of overtime pay in computing lost wages for dismantling work, the Complainant has not proven by a clear and satisfactory preponderance of the evidence that Hansen is due two hours of overtime pay. Therefore, the Examiner finds that the proper measure of damages for this portion of the claim is twenty hours wages at the straight time rate of \$6.40 per hour, for a total of \$128.00.

2. Vacation Hours

The Complainant demands forty-eight hours pay at the full week rate of \$6.15 per hour for sick leave payout. The specification of forty-eight hours assumes a six-hour work day. In providing for a vacation payout of up to eight days for unused sick leave, paragraph 21 of the collective bargaining agreement does not define the length of the workday referred to. The minimum guaranteed workday for weekend operations specified in paragraph 13 is five hours (15 hours divided by 3 days). The minimum workday guaranteed for full week operations under paragraph 14 is 5.14 hours (36 hours divided by 7 days). There being no testimony which would establish a longer work day for purposes of computing vacation time, the Examiner concludes that the five-hour minimum guaranteed workday established by paragraph 13 is the proper measure of damages owed to Hansen on this portion of his complaint. The Examiner will therefore award forty hours pay at \$6.15 per hour for the sick leave payout, for a total of \$246.00.

3. Unpaid Weekend Overtime

The Complainant demands payment for thirty-eight and one-half hours of unpaid overtime worked on weekends at the rate of \$9.60 per hour. The specification of thirty-eight and one-half hours is fully supported by the both the testimony of the grievant and the time sheets received into evidence. The rate of \$9.60 per hour is derived from paragraph 13 of the collective bargaining agreement, which specifies that the overtime rate for weekend hours shall be "at time and one-half of the aforesaid weekend rate" (\$6.40 per hour). The claim for \$369.60 for unpaid weekend overtime is therefore established by a clear and satisfactory preponderance of record evidence.

4. Unpaid Overtime for Full Week Operations

The Complainant claims fifteen and one-half hours unpaid full week overtime at the contractual rate of \$9.225 per hour. Hansen testified that he was entitled to overtime pay in the following amounts:

For the week ending July 8, 1982	- 4 hours
For the week ending July 15, 1982	- 4 1/2 hours
For the week ending July 22, 1982	- 1 1/2 hours
For the week ending August 19, 1982	- 5 1/2 hours

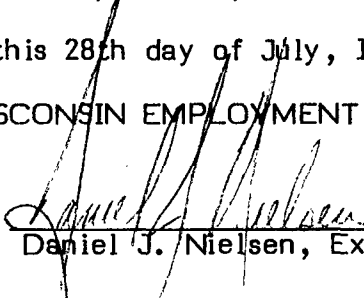
Hansen's testimony with respect to the weeks of July 15, July 22, July 29 and August 19 conflicts with the time sheets received into evidence as Exhibit 2. Hansen's time sheets reflect that in the week of July 15, Hansen worked thirty-one hours rather than the forty-four and one-half hours claimed in his testimony. Hansen's time sheets for the week of July 22 show a total of forty-three and one-half hours, rather than the forty-one and one-half claimed. Hansen claimed no overtime for the week of July 29, although his time sheets reflect a total of forty and three-quarter hours worked. Finally, Hansen claimed in his testimony that he had worked five and one-half hours overtime in the week of August 19, while the time sheets reflect a total of forty hours for that week.

Hansen's testimony regarding his hours worked took the form of affirmative answers to leading questions posed by Counsel. The Examiner finds the time sheets a more persuasive and reliable indicator of the actual hours worked. The Complainant's claim for overtime hours in excess of those reflected on the time sheets has not been established by a clear and satisfactory preponderance of the evidence. With regard to those weeks in which the time sheets reflect overtime hours worked but not claimed, the Examiner finds that the prayer for relief in the Complainant Union's initial complaint, requesting that Kohlberg Theatres, Inc., be ordered to comply with the provisions of the collective bargaining agreement, constitutes a sufficiently broad request for relief to allow the award of monetary damages for all overtime worked and not paid, without regard to whether Hansen specifically demanded it in his testimony at the hearing. The appropriate measure of damages for overtime worked but not paid during weeks in which the Lakes Drive In Theatre was operated on a seven-day basis is eight and one-quarter hours times the overtime rate of \$9.225 per hour, or a total of \$76.11.

Dated at Madison, Wisconsin this 28th day of July, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Daniel J. Nielsen, Examiner