

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOTION PICTURE MACHINE
OPERATORS, LOCAL 361,

Complainant,

vs.

FRANK CARMICHAEL, d/b/a
OLD MARKET SQUARE THEATRE,

Respondent.

Case 1
No. 33849 Ce-2006
Decision No. 22243-B

INTERNATIONAL ALLIANCE OF
THEATRICAL STAGE EMPLOYEES
AND MOTION PICTURE MACHINE
OPERATORS, LOCAL 361,

Complainant,

vs.

FRANK CARMICHAEL, d/b/a
OLD MARKET SQUARE THEATRE,

Respondent.

Case 2
No. 34232 Ce-2015
Decision No. 22244-B

Appearances:

Schwartz, Weber, Tofte, and Nielsen, by Mr. Robert K. Weber, 704 Park Avenue, Racine, WI 53403, on behalf of Complainant.

Plous, Boyle, Plous and Mason, by Mr. Robert P. Ochowicz, Attorney at Law, 1020 - 56th Street, P.O. Box 1226, Kenosha, WI 53141, on behalf of Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators, Local 361, herein Complainant, filed two separate complaints with the Wisconsin Employment Relations Commission on September 19, 1984, and on December 5, 1984, and a subsequent amended complaint on January 8, 1985, alleging that Frank Carmichael, d/b/a Old Market Square Theatre, herein Respondent, had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act, herein WEPA, by unlawfully refusing to bargain with Complainant and by engaging in an unlawful lockout of its employees. The Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sec. 111.07(5), Stats. and a hearing was subsequently held in Kenosha, Wisconsin on February 7, 1985. The parties thereafter filed briefs which were received by March 20, 1985. Thereafter, by letter dated May 8, 1985, and with a copy to the Examiner, Union Attorney Robert K. Weber asked Company Attorney Robert P. Ochowicz for certain information regarding the Company's post-hearing action in opening up two new movie screens, indicating therein that he was considering filing a "motion for a supplementary disposition" with the Commission. In response to the Examiner's subsequent inquiry as to whether Complainant wanted him to hold off issuing the instant decision until such time that a deposition could be filed, Weber, by letter dated June 5, 1985, advised the Examiner that he was satisfied with the information Respondent provided him on the matter and that "You may issue a decision on the instant record."

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

FINDINGS OF FACT

1. Complainant is a labor organization which represents certain projectionists employed by the Respondent. It maintains its principal offices and place of business at 6641 - 60th Avenue, Kenosha, Wisconsin. At all times material herein, James Kuntzelman has served as Complainant's business agent.

2. Respondent operates a movie theatre in Kenosha, Wisconsin called Old Market Square Theatre, and its principal place of business is 8600 Sheridan Road, Kenosha, Wisconsin. At all times material herein Frank Carmichael has owned said theatre.

3. Complainant and Respondent bargained over a series of collective bargaining agreements ever since the opening of Respondent's theatre in 1979, the last of which expired on September 10, 1984. The parties therefore bargained over the terms of a successor contract in 1984 during which time they met on September 18, October 15, and November 15, 1984. Throughout those negotiations, Respondent made an inability to pay argument to the effect that its precarious financial situation necessitated relief from the prior contract, and Respondent in fact was experiencing severe financial difficulties. Thus, by letter dated August 24, 1984, Respondent's Attorney Jon G. Mason advised Union Attorney Weber:

I have been authorized to communicate to you an offer of \$4.50 per hour for the union members. The basis of this offer is that we believe it to be in conformity with the contract previously afforded the operators at the Lake Theater and further takes into consideration the financial problems my client is currently suffering. Please let us hear from you prior to the expiration date of the contract.

In response, Union President Leon McPherson, himself a member of the bargaining unit, telephoned Mason on or about August 30, 1984, to discuss Respondent's offer, at which time Mason told him that his hands were tied and that he had absolutely no flexibility in moving from Respondent's \$4.50 an hour wage offer: said offer represented a \$2.75 an hour cut from the existing \$7.25 an hour provided for in the expiring contract.

4. In order to ascertain Respondent's true financial condition, the Union on several occasions asked Respondent for the financial data supporting its claim. Respondent initially refused to supply such data and it ultimately agreed to do so only after the Union filed an unfair labor practice complaint with the Commission over said refusal. The Union earlier in the year had filed another complaint which charged that Respondent was the alter ego of another theater operated by Frank Carmichael's brother, Kurt Carmichael. Said complaint was settled between the parties on July 25, 1984, when Respondent agreed to pay back pay and to also immediately commence negotiations with the Union for the theater herein.

5. During their September 18, 1984 bargaining negotiations, Respondent raised its prior \$4.50 an hour offer to \$6.75 an hour and stated that it wanted to limit the number of hours of work given to unit personnel.

6. By letter dated September 19, 1984, Mason advised Kuntzelman:

Gentlemen:

I would like to take this opportunity to summarize the meeting we had on September 18, 1984. You had originally submitted a proposed contract to Mr. Carmichael, which contract bore a date of July 28, 1984, but I am actually uncertain as to when that was delivered to him. The employment contract submitted contained various items, the principal concerns of which was an increase in the wages, concern for guaranteed hours, a provision for successor owners and a mandatory arbitration

clause. After receipt of that document in a letter dated August 7, 1984 addressed to your attorney, Robert K. Weber, I informed your attorney that I had been authorized to commence negotiations of the contract with your local and questioned who should be contacted and informing Mr. Weber that your proposal, so far as wages was concerned, was substantially higher than we were going to be able to afford.

I did receive a reply from Mr. Weber dated August 8, 1984, informing me that I was to approach Mr. Kuntzelman directly but was not provided with a business phone or address for Mr. Kuntzelman in Mr. Weber's letter.

Prior to the expiration of the contract and in a letter to your attorney dated August 24, 1984, we communicated an offer of settlement in the amount of \$4.50 per hour; and until our meeting of yesterday, had received no reply to that offer.

Subsequently I did receive a letter from Mr. Kuntzelman which did have a return address requesting various items, the most significant of which was a request for financial information. Quoting from your letter, you request or state as follows: "If, indeed Mr. Carmichael is going to plead financial hardship, please make arrangements for the necessary financial information to be made available for our study prior to asking for specific reductions in salaries."

After receiving that request, I did contact Mr. Carmichael (sic) who then contacted his accountant, Mr. Stephen Barasch, and at approximately this time it was discovered that there had been a faulty financial statement prepared for Carmichael & Associates, the company under which Market Square Theater operates.

Since the error was discovered, it required Mr. Barasch to redo his accounting work and requested that all unaudited financial statements be returned, which request was honored by Mr. Carmichael and myself. In a letter dated August 31, 1984, Mr. Barasch provided me information which indicated that the net loss for the company was \$156,254.00 and that the correct stockholder deficit was \$615,551.00.

You should be aware that the financial statements prepared were prepared for Carmichael & Associates and not specifically for Old Market Square Theaters and you have been so informed. Mr. Carmichael, when contacted concerning the furnishing of a financial statement of Old Market Square, was informed by his accountant that he would prepare one but would be charging him a fee. It would be my feeling that our obligation to provide you with information only extends to that information in our possession and available to us and not something we must create.

Because of my schedule in my business and also due to the fact that I had to be at the Mayo Clinic the week of September 11th, we were unable to arrange a mutually convenient time to meet until September 18th at 4:00 P.M. in my office. At the meeting in my office, Mr. Carmichael and I appeared and Jim and Leon from the Union appeared. It was at the meeting yesterday afternoon that you first communicated a counter-proposal to our \$4.50 offer and your initial concession was to indicate that you would be agreeable with a two year contract a \$7.25 per hour with the guaranteed hours contained in the paranthesis under the paragraph entitled "Hours" being reduced to 29 hours, 4 hours and 5 hours. Further, you agreed to, at page 4 under "Film Set Up", to reduce the minimum charge for set up from 2 hours to 1 hour.

After considering that proposal, we presented a counter-proposal to yours which indicated we would pay the operators at the rate of \$6.75 per hour with a one year contract and that the projectionist would be guaranteed a minimum of 11 hours per week with 8 hours guaranteed on Sunday and the customary 3 hours on Thursday for set up and tear down. We also indicated that we were opposed to the successor clause in view of the intended marketing of the theater but were receptive to your proposal of the one hour set up time mentioned previously.

To our proposal, you indicated that you wanted to consider the proposal if provided with sufficient financial information which would satisfy you concerning the losses at the theater and that if accepted, you would want the following language inserted: "A union operator shall be furnished by the union for every shift not taken by the owner himself. A minimum 48 hours advance notice will be given for such relief if less than 48 hours; if the notice is less than 48 hours, double time will be paid."

At the meeting we did furnish you with a copy of the letter of Mr. Barasch indicating the losses to Carmichael & Associates and you requested a specific break out of the financial affairs of Old Market Square Theater, and we indicated to you we had not made a decision whether or not the same would be provided in view of the cost factor. It was mutually agreed that in either event, that is to say, if we agree to provide the information concerning the financial affairs of the theater or in the event we felt we could not or would not provide the information, another meeting would be scheduled.

I also informed you that I would attempt to notify you by Friday and hopefully no later than next Tuesday whether or not that information would be forthcoming so that another meeting could be scheduled.

7. By letter dated September 26, 1984, Mason advised Kuntzelman:

Please find enclosed, pursuant to our agreement, a copy of the profit and loss sheet from Old Market Square. If I am interpreting the document correctly, it would appear that there was a loss, not even considering depreciation, in the amount of \$10,431.48.

8. By letter dated October 4, 1984, Kuntzelman advised Frank Carmichael:

I am in receipt of the financial data which you sent. I beleve (sic) that it is not complete, and Leon has requested the remainder from Mr. Mason. There are some significant questions which we will raise at the next negotiations meeting, but we do thank you for your effort.

I am sorry that the process has slowed down, but the need to check with a lawyer who is not often available makes it difficult to achieve a quick turn-around of information.

In response to several inquires made by you at the last session, I thought it might be helpful to respond in detail.

Regarding the concept of a manager-operator contract, although we did enter such an agreement one time, it has not proven to be beneficial to either side. We, as a Union, are not really equipped to train and or monitor the business end of the contract. Therefore, we are in essence (sic) promising something which we cannot provide. Also, should there need to be a change of managers, under such a system, there must also be a change of operators -- an event which might not be

necessary under a two-contract system. Our position, then, is that we have no objection to your hiring anyone (operator or not) as a manager under a separate contract not tied to the contract we agree to for the Union to provide operators. We will be willing to discuss this more fully at the next negotiations meeting.

Regarding the owner-operation of the theatre with Union operators coming in only for limited relief, first of all, it would be impossible for us to continue advertising the Market Square Theatres as Union operated booths under such a system. Also, we could not in good conscience advise other local unions that they will be guaranteed union-quality projection if they choose Market Square Theatres for their individual, family, or group entertainment needs. Finally, since this would no longer be a significant source of income for a trained individual, a substantial increase in wages for these reduced hours would be expected.

Regarding the owner-operation of the theatre with Union operators setting up and tearing down film, we have serious reservations about the liability involved in such a schedule. We question what would happen if, during the first run of the film on Friday, a portion of or complete film is damaged. Your immediate response would be to charge the Union with improper set-up, while the cause would more likely be incorrect operation of the equipment. Also, since the quality of operation affects future business, I question whether a self-trained owner-operator would be able to cope with some of the problems encountered during the first run of a film. Even with a careful operation, there have been occasions where a film reel is spliced on backwards or upside down. Our operators are trained to minimize the inconvenience to the patron in such a situation.

As I have said for months, I hope that we can reach an equitable settlement either ourselves or through mediation or arbitration to avoid additional legal fees and/or a situation which will prove to be mutually destructive (sic). I really feel that we provide an excellent service at a reasonable cost. Remember, members are trained, when necessary, at no expense to you. We make every effort to provide uninterrupted service no matter what the emergency. I can furthermore assure you that we will not repeat the mistake of the Lake Theatre in future negotiations in Kenosha County.

Please let me know as soon as possible if you will be available to meet at 4:15 on Wednesday, October 10th or any Tuesday, Wednesday, or Thursday thereafter. If not, perhaps we can meet early on Saturday or Sunday afternoon to attempt to resolve our differences.

9. By letter dated October 15, 1984, Kuntzelman and McPherson advised
Mason:

Following you will find responses to inaccuracies contained in your letter sent to Wisconsin Local #361 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada in care of James Kuntzelman (Business Agent) who resides at 6641-60th Avenue, Kenosha, Wisconsin 53142.

In paragraph three (page 1) you (Mason) stated that you had received no reply to Frank Carmichael's offer of \$4.50 per hour from the Union until 18 September 1984.

If you recall -- your (Mason's) office was called three times (by Leon McPherson) to talk about Franks (sic) Carmichael's offer. These dates are as follows:

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1. 8/28/83--you (Jon Mason) were in the Law Library in your office and would not talk to me (Leon McPherson).
2. 8/30/84--called, and again you (Jon Mason) would not talk to me (Leon McPherson). Stated through your secretary that I was to call back 8/31/84.
3. 8/31/84--called, and was able at this time to talk to you (Jon Mason). I (Leon McPherson) asked if you had the power to negotiate. You (Mason) said NO -- then changed it to yes by stating that you (Mason) could negotiate in only a limited way. We (Local #361) could not give a counter offer since you (Mason) could not negotiate in matters other than our (Local #361) acceptance of Frank Carmichael's financial offer.

In regards to paragraphs 2,3, and 4 on page one it should be noted that Mr. Masons' chronology is out of sequence.

In opposition to the request of both the Union and Union Attorney (Rob Weber) on 8 August 84 that proposals be made directly to the Union Representative -- Mr. Kuntzelman -- Mr. Mason waited three weeks to reply. This reply was routed through our Attorney, Rob Weber, thus delaying our (Local #361) receiving it even longer.

It is also noted that the reply that Mr. Mason (in paragraph three, page 1) received from Mr. Knutzelman was dated 8 August 1984 and was sent to both Mason and Carmichael prior to 24 August 84.

One could almost surmise that a delaying tactic was instituted by the rearranging of dated correspondence to indicate that the Union is dragging its feet in maintaining proper negotiation protocol.

In paragraph two (page 2) you (Mason) state that Frank Carmichaels' accountant "had prepared a faulty financial statement." It should be noted at this time that at the 18 September 84 meeting Frank Carmichael admitted that the faulty financial statement had been prepared from improper records and/or figures submitted to the accountant from his office by his secretary.

In paragraph three -- re: stockholder deficit. Would it not be more correct to state this as creditor deficit. Stockholders cannot have a deficit, for they invest or turnover dividends so as to keep a company/corporation going.

In paragraph three (page 2) you state that your "obligation to provide you with information only extends to that information in our possession and available to us and not something we must create."

My response to this is that if you (Mason) and your client (Carmichael) are going to state/claim that he (Carmichael) has a financial hardship and is asking for specific reductions in salaries that he (Carmichael) has the obligation to show just cause. Just saying that one is in financial straits is not good enough. For all we (Local #361) know -- without proof -- Frank Carmichael has made one million dollars profit in the last year. As you (Mason) are well aware, primary support of statements is paramount.

In paragraph two (page 3) you (Mason) did submit a "blanket" letter from Carmichael's accountant stating that Carmichael had incurred losses. This is well and good, but since Carmichael heads a corporation that has at least three

functioning branches, we (Local #361) can only concern ourselves with those profit/losses incurred from the THEATER operation of this (Carmichael) business. For all we (Local #361) know, the losses were incurred in one of the other branches and the theater branch is making a profit sustaining the other branches.

It should also be stated that on 26 September 84 Local #361 received a letter from Jon Mason, Attorney at Law, stating:

"Dear Mr. Kuntzelman:

Please find enclosed, pursuant to our agreement, a copy of the profit and loss sheet from Old Market Square. If I am interpreting the document correctly, it would appear that there was a loss, not even considering depreciation, in the amount of \$10,431.48.

Very truly yours,

/s/ JON G. MASON, S.C.
Attorney at Law"

On 4 October 84 I (Leon McPherson) called your (Mason's) office to set up an appointment/negotiating meeting with Frank Carmichael. You (Mason) were in court and the receptionist stated that your (Mason's) secretary would call my (Leon McPherson's) house early on the morning of 5 October 84 to confirm a date. My wife (Nancy McPherson)n (sic) talked to the secretary, who established a meeting date of 15 October 84. At this time the following list was given to your (Mason's) secretary for forwarding to Frank Carmichael:

1. Have received incomplete information from Frank Carmichael -- our (Local #361) original letter from Rob Weber asked for income and expenditures from January 1983 to August 1984. Please comply with the request.
2. We (Local #361) would like a "weekly House Expense" accounting from January 1983 to October 1984.
3. We (Local #361) want a copy of the monthly payroll sheets for all employee members of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local #361 from January 1983 to October 1984.
4. Local #361 Negotiating Representatives need an affidavit from Frank Carmichael that all figures submitted by him to Local #361 negotiators are accurate and true.

As of the above date (15 October 84), prior to the Negotiations Meeting, Local #361 has received no confirmation of the above requested materials.

10. At their October 15, 1984 bargaining session, the Union offered to freeze wage rates at their current level and to allow Frank Carmichael to work in the projectionist's booth, the latter being a change from the expired contract which provided that only unit members could do unit work. After the Union made that concession, Carmichael for the first time then also insisted that he be given the additional right to appoint a management designee to man the projection booth. Carmichael then also offered to freeze wages at their current level.

11. By letter dated November 2, 1984, Mason advised Kuntzelman:

Enclosed please find two copies of Frank Carmichael's contract counter proposal. This is our final proposal. Kindly advise after reviewing the same. Thank you.

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This marked the first time that Respondent ever stated that it was making a "final offer." Said proposal froze wages at their current \$7.25 an hour level; guaranteed unit employees twenty-five hours of work per week; and provided that Carmichael or his designee could operate the projectionist's booth during certain designated periods.

12. The Union by the November 15, 1984, bargaining session had dropped all of its own proposals to improve the contract and it either agreed to or was on the verge of agreeing to all of Respondent's concessionary proposals save one: Respondent's demand that owner Frank Carmichael and the manager on duty be allowed to operate the projectionist's booth at any time and Respondent's accompanying refusal to provide for the minimum hours of work guarantee found in the expired contract.

Throughout these negotiations, the Union never gave any indication that it would strike if an agreement were not reached. After meeting face to face during the November 15, 1984 bargaining session, and without any impasse having been reached, and without even responding to the proposals advanced by the Union, Frank Carmichael and Attorney Mason caucused for a few minutes. Thereafter, Frank Carmichael told the Union representatives that he would not be needing unit employees any longer and that "You're being locked out." Up until that moment, the Union had no idea that Respondent was planning a lockout. Later that night Respondent locked out its unit employees and it has refused to meet with the Union in spite of the latter's request that it do so.

13. On November 14, 1984, employee Kenneth Bordeau was approached by Ronald Carmichael, Frank Carmichael's brother, by the back door of the movie theatre. There, Ron Carmichael, acting on behalf of his brother Frank, asked Bordeau whether he and fellow employee Tim Becker would continue to work if his brother threw the Union out. Bordeau replied that he could not do that because it would hurt him and Becker if they ever tried to get employment in other cities.

14. Respondent refused to bargain in good faith over negotiations for a successor contract and its decision to lock out its employees was based upon anti-union considerations aimed at avoiding its collective bargaining obligations with the Union.

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

CONCLUSIONS OF LAW

1. Respondent did not violate Sections 111.06(1)4(d) or 111.06(1)(c) of the Wisconsin Employment Peace Act when it refused to provide certain financial data to the Union and when it turned over operation of the Roosevelt Theatre to Kurt Carmichael.

2. Respondent violated Section 111.06(1)(d) of the Wisconsin Employment Peace Act when it refused to bargain in good faith and it violated Secs. 111.06(1)(c)1 and (d) of the Wisconsin Employment Peace Act when it locked out its employees on November 15, 1984, in order to get rid of the Union's supporters and to evade its bargaining obligations.

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

ORDER 1/

IT IS ORDERED that those parts of the complaints herein relating to Respondent's refusal to supply the Union with certain financial data and its dealings with the Roosevelt Theatre be, and hereby are, dismissed in their entirety.

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.
(Continued on Page 9)

IT IS FURTHER ORDERED that Respondent, its officers, agents, successors, and assigns shall immediately:

1. Resume collective bargaining negotiations with the Union over the terms of a successor contract upon the latter's request.

2. Reinstate all employees who it has locked out since November 15, 1984 to their former or substantially similar positions and make them whole by paying to them a sum of money, including all benefits, that they otherwise would have earned from the time of their lockout until their reinstatement, minus any earnings that they otherwise would not have received.

3. Pay interest at the rate of 12% per year on any such back pay from the time said employees were locked out until the time of their reinstatement.

4. Cease and desist from:

a. Refusing to bargain in good faith with the Union over the terms of a successor contract; and

b. Engaging in its unlawful lockout.

5. Take the following affirmative action to rectify Respondent's unfair labor practice:

a. Immediately resume bargaining with the Union over the terms of a successor contract and reinstate all employees who it has previously locked out;

b. Make said employees whole by paying to them back pay and interest in the above-described manner;

c. Notify all employees by posting in conspicuous places in its offices where employees are employed copies of the notice attached hereto and marked "Appendix A." That notice shall be signed by the District and shall be posted immediately upon receipt of a copy of the Order and shall

1/ (Continued)

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.

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remain posted for thirty days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by other material; and

d. Notify the Wisconsin Employment Relations Commission, in writing, within twenty days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 21st day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

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APPENDIX A

NOTICE TO ALL EMPLOYEES

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

1. WE WILL NOT lock out employees in order to avoid our collective bargaining obligations with the Union.
2. WE WILL NOT refuse to bargain with the Union over the terms of a successor contract.
3. WE WILL NOT in any like or related matter violate the statutorily protected rights of our employees as provided for in the Wisconsin Employment Peace Act.
4. WE WILL immediately cease our lockout and reinstate all employees to their former or substantially equivalent positions and pay them any back pay at the rate of 12 percent per annum for any loss of money and benefits that they otherwise would have received by for our lockout.
5. WE WILL immediately bargain in good faith with the Union over the terms of a successor contract.

Frank Carmichael, d/b/a Old Market Square Theatre

By _____

Dated this _____ day of _____, 1985.

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

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MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Union primarily contends that Respondent engaged in surface bargaining during negotiations for a successor contract and that it subsequently locked out its employees at a time when no impasse had been reached in order to avoid dealing with the Union. 2/

Respondent contends that its lockout was lawful because the parties had reached an impasse over their negotiations and that there was no point in continuing those negotiations once the Union refused to accept its November 2, 1984 final offer. In this connection, Respondent's brief asserts, "the parties had come very close to reaching an agreement in November of 1984" and that of the nine issues discussed in negotiations, "Only the owner's prerogative to run the booth and the allocation of the minimum hours guaranteed were the sources of discontent."

This claim proves too much: for Respondent fails to mention that the Union in those negotiations dropped all of its original proposals; that the parties ended up bargaining only over the concessionary items demanded by Respondent; that the Union finally agreed to almost all of Respondent's demands save one; and that the Union never even indicated that it might strike if an agreement were not reached. Far from showing that the parties were at impasse on November 15, 1984, the record shows that the Union at least was actively attempting to reach agreement and that it was making an honest attempt to deal with Respondent's poor financial condition.

Respondent, on the other hand, did not agree to any of the Union's initial proposals throughout these negotiations. Respondent also initially refused to supply the Union with requested information regarding its inability to pay claim, as it was legally required to do, and it likewise initially refused to give Mason, its delegated bargaining agent, any authority whatsoever to move from its initial \$4.50 per hour wage offer. Since that offer represented a \$2.75 an hour pay cut from the existing contractual rate, Respondent knew that the Union would not accept it and that its refusal to budge from that figure would temporarily stall negotiations. In addition, Respondent at the October 15, 1984 bargaining session escalated its demands by then insisting--for the first time--that its manager be allowed to operate the projectionist's booth, a demand which it had never previously made.

Respondent's hardball tactics were also evidenced when it finally gave its so-called "final offer." During the October 15, 1984 bargaining session--only the second between the parties--Respondent never told Union negotiators that bargaining was close to impasse and that it no longer had any flexibility in its bargaining stance. Respondent instead waited until after the meeting to make that important announcement via its November 2 letter to Kuntzelman. As a result, the subsequent November 15, 1984 bargaining session--only the third between the parties--marked the first time that Union negotiations could respond face-to-face to Respondent's final offer. Respondent, though, would have nothing more to do with bargaining; it refused to even respond to the Union, thereby insuring that no agreement could be reached.

2/ The Union at the hearing dropped its complaint allegations regarding Respondent's involvement with the Roosevelt Theatre and the Union makes no claim that Respondent breached its settlement agreement with the Union whereby it promised to supply the Union with certain financial information. These complaint allegations therefore are dismissed.

The record further shows that Frank Carmichael bore hostility against the Union. Ronald Carmichael, Frank Carmichael's brother, stated during a post-hearing deposition which has been made part of this record and which has never been rebutted, that "He (Frank) felt he was screwed by the negotiations that happened at the Lake Theatre (which he formerly owned) a couple or about a year previously" and that "Frank has been hostile ever since the Lake Theatre subcontract was signed. In my opinion, that's when we started talking about union things every time it would be a holiday or something." During those discussions, Ronald Carmichael testified he asked his brother "If you got something against the Union, why do you still have them?"

In this connection I also find, as noted in Finding of Fact No. 13, that Ron Carmichael, Frank Carmichael's brother, approached employee Kenneth Bordeau on November 14, 1984 and asked whether he and another employee would continue working if his brother threw the Union out. While Ron Carmichael denied ever having made that statement, and while Frank Carmichael professed that he never asked his brother to question Bordeau, I find otherwise since it is clear that Frank Carmichael wanted the Union out of his hair and this questioning was entirely in line with his overall scheme. In addition, in resolving the head-on credibility conflict posed by Bordeau's claim and Ron Carmichael's denial, I find it most significant that theatre manager James Searson (phonetic spelling) did not testify on this issue, even though Ron Carmichael asserted that he, Searson, was with him when he met with Bordeau (Bordeau claimed that only he and Ron Carmichael were present during their conversation). Searson's failure to testify on such a key issue creates an adverse inference that he would not have supported Ron Carmichael's story had he been called to testify. Moreover, since it is inherently implausible to believe that Ron Carmichael acted on his own on such a sensitive subject, it can be inferred, and I so find, that he broached this subject with Bordeau because his brother asked him to.

Given all of the foregoing, it is clear that Frank Carmichael finally took up his brother's suggestion by engaging in surface bargaining during negotiations in order to trigger his subsequent November 15 lockout and the total cessation of bargaining which went along with it. In that way, Frank Carmichael finally achieved what he wanted all along: the Union on the outside looking in.

Unfortunately for him, such a refusal to engage in good faith bargaining and his effective firing of the Union's supporters are unlawful. Accordingly, it follows that the November 15 lockout also violated Sec. 111.06(1)(d) since it is well established that an employer cannot engage in a lockout where, as here, it is being used to further unlawful objectives. 3/

To remedy this unlawful conduct, Respondent must immediately resume good faith negotiations with the Union over the terms of a successor contract and reinstate its locked out employees to their former or substantially equivalent positions. Furthermore, and in order to make them whole for its unlawful

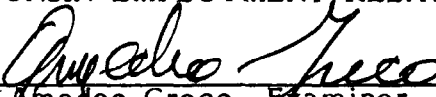
3/ See, for example, Edward W. Alexander 235 NLRB 1500, 98 LRRM 1225 (1978), enforced sub nom; Serv-U Stores, Inc. 225 NLRB 37, 93 LRRM 1033 (1976); Square Binding and Ruling Co., 146 NLRB 206, 55 LRRM 1274 (1964); Joseph Weinstein Electric Corp. 152 NLRB 25, 59 LRRM 1015 (1965); Bagel Bakers Council, 174 NLRB 662, 70 LRRM 1301 (1969), modified 434 F.2d. 884, 75 LRRM 2718 (CA 2, 1970); Donelson Packing Co. 220 NLRB 1043, 90 LRRM 1549. (1975) enforced, 569 F.2d. 430, 99 LRRM 2742 (CA 6, 1978); Dust-tex Serv., Inc. 214 NLRB 398, 88 LRRM, 1292 (1974), enforced 521 F.2d. 1404, 90 LRRM 3074 (CA 8, 1975); Ralph's Wonder Inc. 127 NLRB 1280, 46 LRRM 1188 (1960); Eva-Ray Dress Mfg. Co. 88 NLRB 361, 25 LRRM 1328 (1950) enforced 191 F.2d 850, 28 LRRM 2658 (CA 5, 1951).

conduct, Respondent shall pay said employees the back pay and benefits, less any interim earnings they otherwise would have earned but for Respondent's illegal lockout; Respondent also is required to pay 12 percent interest on any such back pay owed. 4/

Dated at Madison, Wisconsin this 21st day of June, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Amedeo Greco, Examiner

4/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the instant complaints were filed, i.e., 12 percent a year. See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83) citing, Anderson v. LIRC 111 Wis.2d 245 (1983) and Madison Teachers Inc. v. WERC, 115 Wis.2d 623 (CtApp IV, No. 82-579, 10/83).