STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE MACHINE OPERATORS, LOCAL 361,		
Complainant,	:	Case 1 No. 33849 Ce-2006
vs.	:	Decision No. 22243-C
FRANK CARMICHAEL, d/b/a OLD MARKET SQUARE THEATRE,		
Respondent.		
INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES AND MOTION PICTURE MACHINE OPERATORS, LOCAL 361,		
Complainant,	:	Case 2 No. 34232 Ce-2015
vs.	:	Decision No. 22244-C
FRANK CARMICHAEL, d/b/a OLD MARKET SQUARE THEATRE,		
Respondent.		

Appearances:

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

Plous, Boyle and Mason, by Mr. Robert P. Ochowicz, Attorneys at Law, 1020 - 56th Street, P.O. Box 1226, Kenosha, Wi 53141, appearing on behalf of the Respondent, at all time prior to July 25, 1985, and Krukowski, Chaet, Beck & Loomis, Attorneys at Law, by Mr. Timothy G. Costello, 7111 West Edgerton Avenue, Milwaukee, WI 53220, appearing on behalf of the Respondent on and after July 25, 1985.

ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

Examiner Amedeo Greco having, on June 21, 1985, issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled proceeding wherein he concluded that Respondent had, by unlawfully refusing to bargain with Complainant and by engaging in an unlawful lockout of its employes, committed unfair labor practices within the meaning of Secs. 111.06(1)(c) and 111.06(1)(d) Stats.; and the Respondents having, on July 8, 1985, timely filed a petition for Commission review of the Examiner's decision; and the parties having filed briefs in the matter, the last of which was received on November 13, 1985; and Respondent having submitted a July 14, 1986, written argument based on a recent caselaw development; and Complainant having responded in writing thereto on July 21, 1986; and the Commission having conferred with the Examiner regarding his impressions of the witnesses and the Commission having reviewed the record, the Examiner's decision, the petition for review and the parties' written arguments, and being satisfied that the Examiner's Findings of Fact, Conclusions of Law and Order should be modified;

NOW, THEREFORE, it is

ORDERED 1/

That the Examiner's Findings of Fact, Conclusions of Law and Order are hereby modified to read as set forth below, and as so modified are hereby adopted by the Commission.

(See Footnote 1 on Page 2)

1/ Pursuant to Sec. 227.11(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. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 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 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.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor 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. 227.12, 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. 227.11. If a rehearing is requested under s. 227.12, 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. 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. 227.20 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 placement in the mail to the Commission.

MODIFIED FINDINGS OF FACT

1. That International Alliance of Theatrical Stage Employees and Motion Picture Machine Operators, hereinafter referred to as Complainant, is the collective bagaining representative of certain employe-projectionists of the Respondent; that Complainant maintains its offices at 6641 60th Avenue, Kenosha, WI 53142; and that at all times material James Kuntzelman is its business agent and Leon McPherson is its president and they have acted on its behalf.

2. That Frank Carmichael, hereinafter referred to as Respondent, at all times material herein, owned and operated a movie theatre, known as Old Market Square Theatre, located at 8600 Sheridan Road, Kenosha, Wisconsin.

3. That Complainant and Respondent have been parties to a series of collective bargaining agreements since the theatre opened in 1979; that the latest agreement was effective for the period September 10, 1983, to September 10, 1984; that on or about May 6, 1984, Kuntzelman sent a letter to Respondent requesting that the parties meet to negotiate the terms of a successor agreement to that expiring on September 10, 1984; that on or about July 24, 1984, Complainant sent Respondent a contract proposal for a successor agreement; that on July 25, 1984, the parties settled a complaint involving the Roosevelt Theatre, operated by Respondent's brother, Kurt Carmichael, wherein Respondent agreed to pay back pay and to commence negotiations with Respondent within 20 days for the theatre herein.

4. That by a letter dated August 7, 1984, Respondent's Attorney, Jon G. Mason, advised the Complainant's Attorney, Robert K. Weber, that he was authorized to commence negotiations and asked to whom he should communicate Respondent's proposal; that Mason additionally indicated the wage sought by the Complainant was higher than Respondent could afford to pay; that by a letter dated August 8, 1984, Weber informed Mason to deal directly with Kuntzelman; that by a letter dated August 8, 1984, addressed to Mason, Kuntzelman pointed out past concessions to Respondent and the concessions to the Lake Theatre and requested financial information if Respondent was going to plead financial hardship.

5. That by a letter dated August 24, 1984, Mason informed 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.;

that by a letter dated August 30, 1984, Weber informed Mason:

> I am authorized, on behalf of the IATSE, Local 361, to make a formal demand for copies of the monthly and yearly profit and loss statements of the Old Market Square Theater for 1983 and 1984 year to date.
>
> I would also demand a copy of the monthly payroll sheets to all employee-members of the IATSE for that period of time.
>
> This financial information is relevant and necessary in order to enable Union representatives to bargain effectively and therefore, time is of the essence in view of our September, 1984 contract expiration date.;

that on or about August 30, 1984, McPherson telephoned Mason and they set up a bargaining meeting and McPherson asked about Mason's authority to negotiate to which Mason responded that the only thing he could negotiate for was $4.50.

6. That on September 18, 1984, the parties first met in negotiations for a successor agreement for the contract that expired on September 10, 1984.

7. That by a letter dated September 19, 1984, Mason informed Kuntzelman as follows:

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

counterproposal 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 parenthesis 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.

8. That by a letter dated September 26, 1984, Mason advised Kuntzelman as follows:

> 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.

9. That by a letter dated October 4, 1984, Kuntzelman advised Frank Carmichael as follows:

> 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 essense (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 operator -- 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 distructive (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.

10. That by a 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 Motion 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 September 18, 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:

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. Kuntzelman 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 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 Motion 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.

11. That on October 15, 1984, the parties met in negotiations and the Complainant proposed a wage rate at $7.25 per hour, which was the current rate, with employes to work the booth five days a week and Respondent to work the other two days with language dealing with cases of last minute employe substitutions; that Respondent indicated that he wanted the right to subtitute a designee for his days in the booth; and that the Complainant reiterated its objection to a manager/operator outlined in its October 4, 1984 letter to Respondent.

12. That after this meeting, the Complainant typed and submitted by mail its latest offer to Respondent.

13. That by a letter dated November 2, 1984, Mason advised Kuntzelman as follows:

> 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;

that the proposal contained among others the following provisions:

> IT IS FURTHER MUTUALLY AGREED:
>
> The following schedule of wages shall cover the Projectionist labor cost for installing, operating and servicing of all motion picture and sound projection equipment at the Market Square Theatres located at 8600 Sheridan Road, Kenosha, Wisconsin, from September 10, 1984, to September 9, 1985. Except that Frank Carmichael, or another employee designated by Carmichael, may, at his option, exercise his owner's prerogative and operate the booth on Monday, Tuesday and Wednesday nights, as delineated hereinafter in this contract.
>
> HOURS. The minimum Employee's hours for the term of this contract shall be no less than twenty-five (25) hours per week to be allocated as follows: as minimum of four (4) continuous hours per day Thursday through Saturday and a minimum of five (5) continuous hours on Sunday. All allocated shifts shall include one-half (1/2) hour preparatory time in the projection booth prior to the first scheduled film showing. The owner may exercise his prerogative and operate the booth himself on Monday, Tuesday and Wednesday nights; should he not desire to do so, he agrees to notify the Union a minimum of twenty-four (24) hours in advance and to pay a Union operator at the regular rate. Should the notice be less than twenty-four (24) hours, the owner agrees to pay one and one-half times (1 1/2x) the regular rate for shifts or parts of shifts thus worked.
>
> WAGES. The regular hourly rate of pay from September 10, 1984, to September 9, 1985, will be seven dollars and twenty-five cents ($7.25) per hour. The minimum booth cost will be one hundred eighty-one dollars and twenty-five cents (181.25) per week. Wages are figured in quarter hour increments.

14. That on November 15, 1984, the parties met in a bargaining session; that Kuntzelman indicated that the parties were very close and that some items needed to be discussed; that the Complainant then went through nine items contained in the Respondent's proposal of November 2, 1984 on which there was disagreement; that these nine items were as follows:

1. Stage Employes were deleted from Respondent's Proposal - Complainant wanted inclusion continued.

2. Term of contract - Complainant 2 years - Respondent 1 year.

3. Overtime hours - Respondent: 12:30 A.M. to 6:00 A.M. - Complainant: 12:30 A.M. to 1:00 P.M. with a possible compromise.

4. Special Shows - Respondent proposed 2 1/2 hours minimum at 1 1/2 time if less than 7 days notice - Complainant

proposed 3 hours minimum at double time if less than 7 days notice.

5. Complainant sought an abrogation clause and a successor clause which were not included in Respondent's offer.

6. Arrest/Indictment - Respondent proposal present language- Complainant sought pay for all wages lost.

7. Hours - Respondent offered a minimum of 4 hours Thursday through Saturday and 5 hours on Sunday with a total of 25 hours minimum for $181.25 per week. Complainant sought a minimum 4 hours Tuesday through Saturday, 5 hours on Sunday, with a total 25 hours minimum at $181.25 per week.

8. Last minute replacement - Respondent proposed time and 1/2 with less than 24 hours notice - Complainant sought time and 1/2 if notice less than 72 hours but more than 48 hours; double time if less than 48 hours notice.

9. Designee - Respondent sought to use a designee - Complainant proposed deleting "or his designee";

that Respondent listened to the nine issues and then requested a few minutes to meet; that shortly thereafter Respondent informed Complainant's representatives that they wouldn't be needed anymore and that "you're being locked out."; that Kuntzelman indicated a willingness to continue bargaining; that subsequent to this meeting Respondent locked out its employes; and that there is no evidence of any bargaining activity or requests for bargaining by either side occurring during the period after November 15, 1986, and through the time of the instant hearing.

15. That Complainant has not established by a clear and satisfactory preponderance of the evidence that Ronald Carmichael, a brother of Respondent, acted on behalf of Respondent and asked employe Kenneth Bordeau on November 14, 1984, whether Bordeau and another employe would continue to work after his brother threw the Union out.

16. That the Respondent's conduct in negotiations with the Complainant did not constitute bad faith surface bargaining or a refusal to bargain in good faith.

17. That the lockout of employes was economically motivated in support of the Respondent's bargaining position and was not motivated by a desire to evade its duty to bargain or to discriminate against Complainant.

MODIFIED CONCLUSIONS OF LAW

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

2. That the Respondent did not refuse or fail to bargain in good faith with Complainant with respect to the terms and conditions of a successor collective bargaining agreement to that expiring on September 10, 1984, and therefore, Respondent did not violate Section 111.06(1)(d) of the Wisconsin Employment Peace Act.

3. That Complainant has failed to establish by a clear and satisfactory preponderance of the evdidence that the Respondent's lockout of his employes was motivated by a desire to discriminate against employes for the exercise of rights guaranteed under Sec. 111.04, Stats., or to evade its bargaining obligations, and therefore, Respondent has not violated Section 111.06(1)(c) or (d) of the Wisconsin Employment Peace Act.

MODIFIED ORDER

That the Examiner's Order is set aside and that the Complaints filed herein be, and the same hereby are, dismissed in their entirety.

Given under our hands and seal at the City of Madison, Wisconsin this 22nd day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

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

MEMORANDUM ACCOMPANYING ORDER MODIFYING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER

BACKGROUND

In its complaints initiating these proceedings, the Complainant alleged that Respondent committed unfair labor practices within the meaning of Sections 111.06(1)(a), (c) and (d) of the Wisconsin Employment Peace Act by refusing to provide relevant and necessary financial business information requested by Complainant, by engaging in surface bargaining as evidenced by its bargaining proposals and the limited character of its negotiator's authority, by its refusal to turn on the heat at the Roosevelt Theater, by its lockout of employes and by Ron Carmichael's contacting employe Ken Bordeau and asking him if he and another Union employe would be interested in working for Respondent after Respondent got rid of the Union. Respondent answered said complaints and denied that it violated its duty to bargain, that it had implemented its final offer, that it acted in bad faith in locking out employes, that it turned off the heat to interfere with the rights of employes, that Ron Carmichael asked Ken Bordeau to work after Respondent got rid of the Union and that Frank Carmichael had knowledge of Ron Carmichael's allege conversation with Bordeau or that he had asked his brother to contact Bordeau. At the hearing, the Complainant withdrew its allegations regarding the turning off of the heat at the Roosevelt Theater and the refusal to supply financial information and these allegations were dismissed by the Examiner.

Examiner's Decision

The Examiner found that the Respondent engaged in surface bargaining on the basis that Complainant had dropped all of its initial proposals and had agreed to all but one of Respondent's demands and was honestly attempting to reach agreement with Respondent. He found that Respondent initially refused to supply financial information, severly limited the authority of its negotiator, proposed a $2.75 per hour pay cut, escalated its bargaining demands by insisting on a designee to operate the projectors, submitted a final offer after only two meetings and refused to respond to the Union at its third bargaining meeting. The Examiner determined that the Respondent was hostile to the Union because of the agreement the Union made at the Lake Theater. The Examiner held that Ron Carmichael acted on behalf of Respondent and asked employe Bordeau if he and another employe would continue to work after Frank Carmichael threw the Union out and that Respondent locked out the Complainant as part of an overall scheme to rid himself of the Complainant. The Examiner concluded that the lockout was used to further unlawful objectives and that Respondent had refused to engage in good faith bargaining thereby violating Sections 111.06(1)(c) and (d), Stats.

Petition for Review

The Respondent contends that the Examiner erred in finding that it had refused to bargain in good faith for a successor agreement and erred in finding Respondent's lockout was based on anti-union considerations and a desire to avoid its bargaining obligations. It submits that the Examiner's Findings of Fact and Conclusions of Law that it failed to bargain in good faith are not supported by the record. It argues that it is necessary to examine the overall conduct of the Respondent to determine whether bargaining has been conducted in good faith. It claims that the Respondent's conduct throughout the negotiations was reasonable and cannot be construed as lacking in good faith. It assets that contrary to the Examiner's Finding of Fact 11, it was not obligated to forewarn Complainant that it was planning to present a final offer and that the mere request for concessions does not support a finding of bad faith. It maintains that it was willing to enter into an agreement incorporating its final offer and that it bargained in good faith with Complainant.

The Respondent submits that it lawfully locked out employes in order to obtain the Complainant's agreement to its final bargaining proposal. It insists that the lockout is a protected economic weapon and is legal where it is not motivated by anti-union animus or a desire to avoid the obligation to bargain. It

argues that the Examiner's findings of animus and a desire to avoid bargaining are without any basis. It submits that Respondent had engaged in good faith negotiations and presented a reasonable final offer in light of its financial condition and it had sufficient business reasons to lockout the employes until Complainant was willing to provide some concessions.

The Respondent maintains that the Examiner's Finding of Fact 13 on the alleged conversation between Ron Carmichael and Ken Bordeau, which is the basis for the existence of anti-union animus, is clearly erroneous. It asserts two bases for error: 1) That the statement was made was seriously disputed; and 2) No evidence was presented that Ron Carmichael was acting as agent of Frank Carmichael. Respondent submits that Ron Carmichael testified that the conversation never took place and both Ron and Frank testified that Frank never directed Ron to speak to Bordeau. It submits that the disputed conversation is not a sufficient basis on which to conclude that Respondent acted unlawfully in light of the total record on Respondent's effort to reach agreement with the Complainant and the lockout was based on achieving concessions needed due to Respondent's financial condition. It requests the Commission reverse the Examiner's Findings, Conclusions and Order.

The Complainant contends that the Examiner's Findings regarding anti-union animus and a failure to bargain in good faith are amply supported in the record and compel Commission affirmation. The Complainant submits that the standard for Commission review of an Examiner's decision is essentially the same as circuit court review of the Commission's findings, i.e., it is supported by "substantial evidence". It argues that there is an adequate basis to affirm the Examiner in all respects. It claims that there was direct evidence of anti-union animus in the Bordeau - Ron Carmichael conversation and Bordeau's version was properly credited. It also notes that Ron Carmichael's testimony of hostility by Frank Carmichael supports a finding of anti-union animus. Complainant points out that Respondent's arguments on agency are misplaced because Ron Carmichael, by his actions and words as well as being a relative-employe, had sufficient apparent authority to act as agent for his brother and liability must be imputed to Frank Carmichael.

The Complainant agrees that the overall conduct of the Respondent must be reviewed to determine whether it bargained in good faith. It submits that the "hard bargaining" positions, delays, refusal to supply financial information, a lockout before impasse or reasonable belief that Complainant would not make further concessions all evidence an intent not to reach any agreement. It submits the economic justification offered by Respondent for the lockout was pretextual and the facts support the Examiner's Findings and Conclusions. The Complainant asks that the Order be upheld in all respects.

Discussion

The standard of review applied by the Commission to an Examiner's decision is the preponderance of the evidence and not the substantial evidence test. Sec. 111.07(5), Stats. sets forth the standard which is that it be based on the review of the evidence submitted. The Commission does not sit in an appellate capacity but is obligated to determine the weight and credibility of the evidence. The Commission must choose between reasonable inferences and reach an independent determination of the facts. 2/

The totality of the cirumstances surrounding bargaining must be examined to determine whether the Respondent has bargained in good faith. 3/ Upon careful consideration of the entire course of bargaining, we conclude that the Respondent did not engage in bad faith or "surface bargaining." The Respondent's initial wage offer was $4.50 per hour which represented a $2.75 decrease from the rate he was then paying under the agreement; however, the $4.50 rate was the same as that agreed to by the Complainant and the Lake Theater, Respondent's competitor. Complainant, in a letter dated August 8, 1984, explained why it had made this

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2/ Horicon Jt. School District No. 10, Dec. No. 13765-B (WERC, 1/78), aff'd Case No. 161-363 (Cir Ct, Dane, 11/78); Madison Metropolitan School District, Dec. No. 13794-B (WERC, 6/77).

3/ Accord, NLRB v. Insurance Agents' International Union, 361 U.S. 477, 45 LRRM 2704 (1960).

agreement with the Lake Theater and pointed out the past concessions it had made to Respondent. 4/ At the parties' first bargaining session on September 18, 1984, Respondent increased its proposed wage rate to $6.75 5/, and later, it proposed a rate of $7.25 per hour, the same as proposed by the Complainant. The Examiner found that the Respondent proposed and held the rate at $4.50 per hour to temporarily stall negotiations. If the Respondent was seeking concessions in a new agreement, delay would not have been to his advantage because he continued to pay the higher rate during any delay, and if an early agreement could have been reached on concessions, Respondent had everything to gain. For those reasons, we do not share the Examiner's inference that Respondent intended to stall negotiations by its initial wage proposal.

At the October 15, 1984, bargaining session, the Respondent sought to include the right to name a designee to operate the projector on nights reserved to the owner. The Examiner characterized this as an escalation of demands. A review of the bargaining history indicates that the Complainant had indicated it would agree to the owner's prerogative on two nights a week. 6/ The record indicates that the Complainant also had two proposals connected to the owner's prerogative, those being an abrogation clause and a clause on adequate warning guarantees should bargaining unit member's be asked to work on the owner's nights. 7/ It appears that the Respondent's designee demand was in response to the Complainant's abrogation clause proposal. We view this proposal as part of the give and take at the bargaining table rather than a new unrelated demand injected into the bargaining. We do not share the Examiner's characterization of this as an escalation of demands.

The Examiner relied on the Respondent's making a final offer after only two meetings as evidence that Respondent was not seeking an agreement. Kuntzelman testified that in the past, to speed up negotiations, a standard contract proposal was sent by the Complainant to Respondent and after it had been received, the parties would meet to discuss the specifics, usually only the money figure. 8/ It further appears that the Complainant had sent Respondent a contract proposal by mail after the October 15, 1984, negotiation session. 9/ The Respondent then sent Complainant its "final offer" on November 2, 1984. 10/ The sequence of events has not been shown to be markedly different from the parties' past negotiations.

The parties again met on November 15, 1984, at which meeting, the Complainant responded to the Respondent's "final offer". The parties were apart on nine issues. 11/ Of these nine, the Complainant was proposing certain changes to the prior agreement including a change in the overtime provision, a successor clause, a change to the Arrest/Indictment provision and a modification of the Special Shows provision. The parties were also in disagreement on term of the agreement, hours, designee, abrogation and notice for last minute replacement of owner/operator. 12/ In light of that evidence we do not share the Examiner's Finding that the Complainant had agreed to all of Respondent's proposals save one, or that Complainant had dropped all of its own proposals. Rather, as we read the record, each side had a number of proposals remaining when the lockout was announced.

4/ Union Ex -8

5/ Tr - 18

6/ Tr - 21

7/ Tr - 19, 22

8/ Tr - 11

9/ Tr -25

10/ Company Ex. - 2

11/ Ex. #17(b).

12/ Id.

On all of the circumstances, then, we cannot conclude that the Respondent's bargaining conduct was so unreasonable as to evidence an intent to thwart an agreement.

The Examiner characterized Respondent's bargaining conduct as "hardball tactics" and his proposals as "concessionary" in reaching his finding of bad faith bargaining. Where an employer's proposals are such that they may be characterized as "unusually harsh, vindictive or otherwise unreasonable" so as to be predictably unacceptable, they may be found to be a factor in the totality of circumstances supporting a finding of bargaining in bad faith. 13/ The Respondent's proposals here cannot be construed to meet this description so as to warrant a conclusion of bad faith. Kuntzelman indicated that the parties were very close to an agreement at the November 15, 1984, session. Respondent's proposals, even if concessionary, were not so unreasonable that no agreement was predictable.

The Examiner based his decision in part on the Respondent's initial refusal to supply the Union financial information. It does appear from the record that the Respondent failed to promptly supply the Complainant with the financial information requested, but we note that Complainant has made no claim that Respondent breached the settlement agreement with respect to its request for financial information and the Examiner dismissed this allegation.

The Examiner also found that after locking out its employes, Respondent has refused to meet with Complainant in spite of the latter's request to do so. The record indicates that on the evening of November 15, 1984, the Respondent indicated he was locking out the employes and Kuntzelman indicated a willingness to continue bargaining; however, no other evidence in the record indicates a subsequent request by Complainant to resume bargaining or to meet with Respondent on negotiations. Thus, we conclude that the evidence is not sufficient to establish a refusal to negotiate by Respondent after the lockout began. The Examiner found that no impasse had occurred at the time of the lockout. We agree with this finding, but an impasse is not a prerequisite to the lawfulness of a lockout. 14/ It is only a factor to be considered in determining whether the Respondent's conduct was unlawful.

13/ See NLRB v. WRIGHT Motors, Inc., 102 LRRM 2021 (7th Cir, 1979), where the company's proposals supporting a finding of bad faith included (1) a guarantee of an "open shop," limiting the union's right to secure members and check off authorizations, (2) a management rights clause, not subject to the grievance procedure, which gave the company exclusive control over hours, work rules, and production, and allowed the company to shut down its business without regard to the effect on employees, (3) a no-strike, no-lockout clause which required the union to fine any employee who engaged in a prohibited work interruption, granted the company the right to seek an injunction and damages against the union without arbitrating the claim, made all union members liable individually and collectively for damages, and required the union to waive its legal right to remove a suit from state to federal court, (4) an article on arbitration providing only limited and permissive arbitration, and (5) a provision allowing the company to set hourly wage rates and to grant promotions at its sole discretion.

In Continental Insurance Co. v. NLRB, 495 F.2d 44, 86 LRRM 2003 (2d Cir. 1974), a finding of bad faith was predicated in part on (1) the company's refusal to recognize the union as the sole and exclusive bargaining representative unless the union agreed not to organize or represent other company employees, (2) the company's insistence that arbitrators of grievances be picked exclusively by the company and (3) wage, vacation and severance pay proposals substantially less generous than the benefits provided to employees before the union was certified.

In NLRB v. Johnson Manufacturing Co., 458 F.2d 453, 80 LRRM 2012 (5th Cir. 1972), a finding of surface bargaining was based on the Company's insistence that the Company retain complete and exclusive control of wages and working conditions, with the Union required to relinquish its right to bargain prior to any change.

14/ Darling & Co., 171 NLRB 801, 68 LRRM 1133 (1968), enforced sub nom. Lane v. NLRB, 418 F.2d 1208, 72 LRRM 2439 (CA DC, 1969).

While we are troubled by the fact that Respondent apparently did not offer to continue bargaining at the time it imposed the lockout, we also note that there is similarly no evidence that Complainant subsequently requested bargaining at any point after November 15, 1984. Based on the totality of the circumstances, we conclude that Complainant has failed to sustain its burden of proving by a clear and satisfactory prepondenrance of the evidence that Respondent engaged in bad faith bargaining.

A lockout is unlawful where it is motivated, in part, by anti-union animus or to avoid its obligation to bargain with the union. 15/ The Examiner found that there were two bases supporting a conclusion of anti-union animus: The first was that Respondent bore hostility against the Complainant for the agreement it made with the Lake Theatre wherein it agreed to a wage rate of $4.50 per hour. The second was a conversation between employe Ken Bordeau and Respondent's brother, Ron Carmichael. The Examiner credited Bordeau's testimony on the basis of an inference raised by the Respondent's not calling James Searson, Respondent's manager, who was alleged by Carmichael to be present when the disputed conversation took place. We do not find that the inference is warranted. A review of the testimony of Ronald Carmichael reveals the following:

Q Did you leave Old Market Square with Ken Bordeau on November 15, 1984?

A Yes, we all left together at the same time.

Q Who's all?

A James, Ken and myself.

Q And which exit did you leave from?

A On the side. It would be the south side.

Q Where does that lead to?

A The parking lot. There's a dumpster out there. That's where we park the cars.

Q Did you have a conversation with Ken Bordeau as you exited Old Market Square?

A Yes, I did.

Q What was the nature of that conversation?

A Good night, I'd see if I can get the parts at RCA the next day. And if I could, I'd get back as soon as I could to take care of the problems.

Q At this time and place, you did not ask Ken Bordeau if he an another union man would be interested in working for Frank Carmichael once Frank Carmichael got rid of the union?

A No.

This testimony merely indicates that the three left the theater together. No evidence was presented that James Searson took part in the conversation, overheard the conversation, or was still present when the disputed conversation took place. Bordeau testified that only he and Ron Carmichael were present during the alleged conversation. For those reasons, we conclude that while Searson left with Bordeau and Ron Carmichael, and may have been in the vicinity, the evidence fails to demonstrate that he was present and heard the alleged conversation. The failure to call Searson does not create an inference that he would support either version of the alleged conversation. Essentially we are left with the testimony of Bordeau asserting the conversation occurred and Ron Carmichael asserting that it did not occur. Inasmuch as we have found the Examiner's inference for crediting

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15/ American Shipbuilding Company v. NLRB, 380 U.S. 300, 58 LRRM 2672 (1965).

Bordeau was not warranted, we find no basis in the record to conclude that either Bordeau or Carmichael are more credible. We note that Ron Carmichael did not seek Bordeau out but was called in on the night of November 14, 1984 to fix the equipment, so their meeting was in the nature of a chance meeting. Furthermore, Carmichael was not reticent about testifying as to his brother's unhappiness with the Union over the Lake Theatre agreement. The Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the statement was made. 16/ Based on the record, we conclude that Complainant has failed in its burden and the alleged statement has not been proven. The only evidence of anti-union animus is the Respondent's hostility for the Lake Theatre agreement. We are of the opinion that this is insufficient to establish that the lockout was motivated by anti-union animus as opposed to being motivated by economic factors. On the contrary, the Respondent sought economic concessions and knew that Complainant had made concessions in the past to the Lake Theatre. Kuntzelman testified that the parties were very close to agreement on November 15, 1984, so it does not appear that Respondent was attempting to avoid an agreement with Complainant. It was only after the Complainant discussed the nine remaining issues that Respondent announced that it was locking out the employes.

While we are troubled by the abruptness with which Respondent announced and implemented the lockout and the apparent absence of an affirmative effort by Respondent to encourage the Union to consider accepting Respondent's last offer as a means of avoiding the lockout, based on the totality of circumstances, we are persuaded that the lock out was economically motivated in support of Respondent's bargaining position and therefore lawful.

Having concluded that the Respondent engaged in good faith bargaining and a lawful lockout, we find no violation of Secs. 111.06(1)(c) or (d) and we have therefore modified the Examiner's Findings of Fact, Conclusions of Law and have dismissed the complaint in its entirety.

Dated at Madison, Wisconsin this 22nd day of December, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Marshall L. Gratz, Commissioner

_____
Danae Davis Gordon, Commissioner

16/ Section 111.07(3), Stats.