STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

IBEW, LOCAL UNION NO. 2150, Complainant, vs. CITY OF OCONOMOWOC, Respondent.	Case 44 No. 41348 MP-2164 Decision No. 25818-A

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Milwaukee, Wisconsin 53202, by Mr. William S. Kowalski, on behalf of the Complainant.

Lindner and Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, 10th Floor, Milwaukee, Wisconsin 53202, by Mr. Roger E. Walsh, on behalf of the Respondent.

ORDER GRANTING MOTION TO HOLD RECORD OPEN

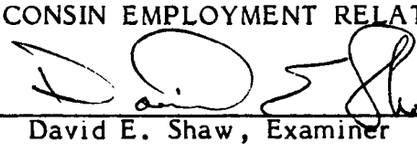
IBEW, Local Union No. 2150, hereinafter the Complainant, having, on December 2, 1988, filed with the Wisconsin Employment Relations Commission a complaint of prohibited practices wherein it alleged that the City of Oconomowoc, hereinafter the Respondent, has committed prohibited practices within the meaning of the Municipal Employment Relations Act (MERA) by refusing to bargain with Complainant and by conditioning further bargaining upon Complainant relinquishing the right to represent three employes in the bargaining unit represented by Complainant; and the Respondent having, on December 30, 1988, filed an answer to the complaint wherein it denied it has committed any prohibited practices and stated certain affirmative defenses; and Respondent having also, on December 30, 1988, filed with the Commission a Motion to Hold the Proceedings in this Matter in Abeyance Pending Resolution of a Petition for Unit Clarification, wherein it alleged that a determination in the unit clarification proceeding is a necessary condition precedent to a determination as to whether Respondent has a duty to bargain with Complainant; and the Commission having, on January 6, 1989, notified the parties telephonically that Respondent's motion was denied; and the Commission having appointed David E. Shaw of the Commission's staff to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats.; and hearing on said complaint having been held at Oconomowoc, Wisconsin on January 9, 1989; and Respondent having, at the conclusion of the hearing on January 9, 1989, orally moved to hold the record open in this case so as to include the record and decision in the unit clarification proceeding before the Commission in the record of this case; and the Examiner having reserved ruling on Respondent's motion pending receipt of the parties' written arguments on the motion; and the parties having filed briefs and reply briefs regarding Respondent's motion by February 2, 1989; and the Examiner having considered the motion and the arguments of the parties; and being satisfied that said motion should be granted makes and issues the following

ORDER

That the record in this matter is to remain open for the purpose of receiving the record and decision in the unit clarification proceeding, Case 1 No. 41440 ME/uc-0302, currently pending before the Wisconsin Employment Relations Commisison.

Dated at Madison, Wisconsin this 10th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 

David E. Shaw, Examiner

CITY OF OCONOMOWOC

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO HOLD RECORD OPEN

BACKGROUND

As noted in the introductory paragraph, the Complainant filed a complaint of prohibited practices alleging that the Respondent violated MERA by refusing to bargain with Complainant and by conditioning bargaining upon Complainant waiving its right to bargain for certain employes in the unit it represents. The Respondent filed an answer denying it has committed any prohibited practices and alleging that the former employer of the employes in the unit, the City of Oconomowoc Utility Commission, had been abolished and that Respondent was the new employer, that the Utility employes share a community of interest with certain of Respondent's employes in a unit represented by AFSCME and ought to be included in that unit; that Respondent has filed a petition with the Commission for a unit clarification wherein it requests that the Commission determine whether the Utility employes should be included in the AFSCME unit, and that the determination by the Commission is a necessary condition precedent to a decision by Respondent as to whether it has any obligation to bargain with Complainant with regard to any Utility employes. Accompanying Respondent's answer was a motion to hold this complaint case in abeyance pending the Commission's determination in the unit clarification proceeding based on Respondent's position that a determination by the Commission in the unit clarification proceeding is necessary to determining whether Respondnt has any obligation to bargain with Complainant. The Commission denied the Respondent's motion to hold the complaint case in abeyance and a hearing was held on the complaint on January 9, 1989. After the parties had presented their respective cases, but prior to the close of the hearing, Respondnt moved to have the hearing in this case kept open for the purpose of including the record and determination in the pending unit clarification proceeding in the record of this case.

POSITIONS OF THE PARTIES

Respondent

Respondent takes the position that if the unit clarification is decided in its favor, it would have no obligation to bargain with Complainant and the instant complaint would have to be dismissed, rendering futile a hearing at this time on the complaint. Respondent makes a number of arguments in support of its motion. First, Respondent notes it is charged with violation of Sec. 111.70(3)(a)4, Stats., which provides it is a prohibited practie for a municipal employer:

> To refuse to bargain collectively with a representative of a majority of its employes in an appropriate collective bargaining unit. (Emphasis added).

Respondent claims that in this case it has taken over the management and control of the Utility from the Utility Commission and has questioned the continued appropriateness of the Utility bargaining unit. If the unit is not appropriate, the Respondent has no duty to bargain with Complainant. Hence, whether the unit is appropriate must be determined before the complaint can be addressed and Respondent has petitioned for a unit clarification to that end. If Respondent's position is found to be correct, the employes in the Utility unit will be merged into the unit presently represented by AFSCME and consisting of employes in the Department of Public Works, Parks and Forestry Department and the Waste Water Treatment Plant. In that case, Respondent would not be obligated to bargain with Complainant. It would be inappropriate to decide the complaint at this point as the Respondent's duty to bargain has not yet been established.

Second, Respondent contends that Complainant cannot rely upon Milwaukee County (Sheriff's Department) 1/ and National Press, Inc. 2/ for its claim that the law is clear that the filing of a unit clarification petition does not suspend

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1/ Decision No. 24027-A (Schiavoni, 1/87), affirmed Dec. No. 24027-B (WERC, 6/87).

2/ 241 NLRB 1000, 101 LRRM 1013 (1979).

the duty to bargain. Those cases are distinguishable from this case in two respects. Both cases involved the same employers and same unions that had been party to prior labor agreements; here Respondent is a different employer from the one who negotiated the previous agreement with Complainant. Also, in both cases the outcome of the unit clarifications would not have affected the union's majority status; here the appropriateness of the existing unit is in question and if the unit is deemed inappropriate, Complainant loses its majority status. In Milwaukee County the Commission noted that the National Labor Relations Board (NLRB) case law is consistent that a pending unit clarification will not stand as a defense to a refusal to bargain charge "where the majority status of the exclusive bargaining representative is not in doubt." Decision No. 24027-B at 5. The Commission further noted that in that case and in National Press the majority status of the union was not in question. In National Press the NLRB noted the appropriateness of the unit was not in question. 241 NLRB at 1001, 101 LRRM at 1014.

While the NLRB and the federal courts have held as a general rule that a successor employer has a duty to bargain with the pre-existing certified representative, 3/ there are exceptions where the appropriateness of the unit is questioned. Citing, Border Steel Rolling Mills, 204 NLRB 814, 83 LRRM 1606 (1973). Respondent cites federal circuit court decisions as holding that before the successor employer's duty to bargain with the pre-existing unit can be determined, the continued appropriateness of the unit must be determined. Citing, NLRB v. Security-Columbian Banknote Co., 541 F.2d 135 (3rd Cir. 1976). In Computer Sciences Corp. v. NLRB, 677 F.2d 804, 110 LRRM 2642 (11th Cir. 1982), it was held that the NLRB was the agency to determine successorship issues, including the continued appropriateness of the unit under the new employer and that this could be done in the unfair labor practice proceeding against the new employer.

Respondent claims that in this case there is serious doubt as to the appropriateness of the Utility unit following the abolishment of the Utility Commission and Respondent's assuming management and control of the Utility. The Utility employes share a community of interest with the fourteen regular full-time employes in the AFSCME unit. Respondent asserts there are a number of Commission decisions where it was held that a separate unit of utility employes was not appropriate bsaed on avoiding undue fragmentation and a shared community of interest. Citing City of Madison, Dec. No. 19584 (WERC, 5/82); City of Elkhorn (Light & Water Commission), Dec. No. 24790 (WERC, 8/87); City of Evansville, Dec. No. 16671 (WERC, 11/78); and City of Wisconsin Dells (Light & Water Department), Dec. No. 14041 (WERC, 10/75). Those decisions demonstrate that the appropriateness of the Utility unit must be reevaluated at this point, especially in light of the existence of the AFSCME unit and the community of interest the employes share.

The Respondent contends that the appropriateness of the unit is also in doubt in that it includes a group of electrical linemen which meet the definition of "craft employes" under MERA. The original petition for election filed in 1964 indicated there were no craft emloyes in the unit and the Commission's records indicate the linemen in the unit never had a "self-determination" election. Complainant's business representative testified he felt the linemen were craft employes. Under Sec. 111.70(4)(d)2a, Stats., craft employes are entitled to a self-determination election to vote whether they want to be in a separate unit by themselves or in the AFSCME unit or to not be represented. Citing, City of Cornell, Dec. No. 24028, 24029 (WERC, 10/86).

Respondent also asserts that the Complainant is not the certified bargaining representative for the Utility unit. The certification issued by the Commission in 1965 certified Local 464, IBEW as the exclusive bargaining representative. At most, the Utility Commission voluntarily recognized Complainant as the bargaining representative and while the appropriateness of the unit may not be questioned in such cases, given the change of employers and the existence of the AFSCME unit, Respondent has chose not to voluntarily recognize the Complainant and to seek a determination as to the appropriateness of the unit.

3/ NLRB v. Burns Int'l. Security Services, 406 U.S. 272, 80 LRRM 2225 (1972).

In its reply brief, Respondent denies Complainant's assertion that this motion is merely the reiteration of Respondent's initial motion which the Commission rejected. The first motion was to hold this case in abeyance pending the outcome of the unit clarification, while this motion is to hold the record in the complaint case open so as to include the record and determination in the unit clarification case. Neither party was prepared at the complaint hearing to present evidence as to the issues that will be raised in the unit clarification, and rather than postpone hearing in the complaint case the Respondent moved to hold the record open. Respondent asserts it did so "to avoid delay and wasted time in duplicating evidence and testimony in two hearings" and for the reason that the determination in the unit clarification proceeding is relevant to the outcome of the complaint proceeding. Respondent reiterated the arguments in its initial briefs as to relevance of the determination in the unit clarification proceeding to this case as it relates to the appropriateness of the Utility unit, as well as its arguments that Milwaukee County (Sheriff's Department) is inopposite to this case.

The Respondent requests that its motion to hold the record open be granted, or, in the alternative, requests that additional hearing be held so that Respondent may present evidence related to the unit clarification issues.

Complainant

Complainant takes the position that the motion Respondent made at the complaint hearing to hold the record in this matter open to receive the record and determination in the unit clarification proceeding is merely a reiteration of its initial motion to hold this matter in abeyance pending the outcome of the unit clarification. In both motions Respondent contended that "a determination in the unit clarification proceeding is a necessary condition precedent to a decision in this prohibited practice proceeding." In its response in opposition to the original motion Complainant asserted that Respondent had not demonstrated a sufficient reason why a determination in the unit clarification was necessary to a determination in this case. Respondent's original motion was denied, and since the Commission has already ruled on it, the instant motion should be denied on that basis alone.

Complainant contends that even if the merits of the Respondent's motion are considered, the merits of Respondent's unit clarification petition do not affect the outcome in this case. In Milwaukee County (Sheriff's Department) the Commission decided the same issue presented in this case without considering any evidence relating to the merits of the unit clarification petition and without waiting for a hearing on the petition. The holding of that case is that there is a duty to bargain before a unit clarification petition is resolved. Therefore, there is no merit to Respondent's motion and there is no reason to further delay this proceeding.

In its reply brief, Complainant reasserts that Respondent is merely restating in this motion the argument rejected by the Commission in denying Respondent's initial motion. Complainant asserts that:

> The sole question presented in the prohibited practice proceeding is whether the City has an obligation to bargain while the UC petition is pending; in other words, what are the City's bargaining obligations before the petition is decided? Where the issue concerns respondent's bargaining obligations before the UC petition is resolved, it necessarily follows that any evidence pertaining to the merits of that petition, or a decision on the petition itself, is completely irrelevant in deciding the issue.

On the basis of the above, the Complainant requests that the motion be denied.

DISCUSSION

The Complainant essentially makes two arguments in opposition to Respondent's motion: (1) This motion is merely a reiteration of Respondent's motion to hold this complaint proceeding in abeyance and that motion was previously rejected by the Commission, hence, it follows this motion must similarly be denied; and (2) the Commission has held that the duty to bargain continues while a unit

clarification is pending and before it is resolved and, therefore, the resolution of the unit clarification is irrelevant.

The Complainant's first argument is rejected as the Examiner does not agree that the motion to hold the complaint in abeyance prior to any hearing on the complaint is the equivalent of the present motion to hold the record open in this matter. While the Examiner was not privy to the Commission's reasoning in denying the Respondent's initial motion, it is apparent that there is a difference between not proceeding at all on the complaint until a decision is rendered in the unit clarification, as opposed to proceeding as far as possible on the complaint at this point so as to avoid further delay after the unit clarification is decided. As discussed below, there are several matters of relevance to this proceeding that are also raised in the unit clarification before the Commission. While those matters could be litigated before the Examiner as well, it would be inefficient to do so, and as Respondent points out, neither party was prepared at the January 9, 1989 hearing to produce evidence as to those matters.

Complainant's second argument, that it is in effect a per se violation of Sec. 111.70(3)(a)4, Stats., to refuse to bargain while a unit clarification is pending, goes too far. Complainant relies on Milwaukee County (Sheriff's Department) to support it contention; however, the Examiner in that case, in relying on the NLRB's decision in National Press, noted that "In that case, as here, there was no claim that the disputed employes, department heads, could somehow affect the Union's majority status or that the overall unit was somehow inappropriate." Decision No. 24027-A at 7. In affirming the Examiner and approving her articulation of the law, the Commission expressly adopted the NLRB's approach to these types of cases:

> The basic approach adopted by the NLRB, as articulated by the Examiner, with regard to pending unit clarification petitions is sound to us. The NLRB case law has been consistent in rejecting claims that an unresolved unit clarification issue constitutes an adequate defense to a refusal to bargain charge where the majority status of the exclusive bargaining representative is not in doubt. As the NLRB stated in the National Press, Inc. decision:
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> > The Board has long held that where, as here, a union has demonstrated its majority and a question of unit placement of certain individuals is still unresolved, the final resolution of that question does not affect the basic appropriateness of the certified unit, the union's majority, or the obligation of the parties to bargain with respect to that unit.
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> Here, as in National Press, Inc., the Union's majority status is not in question. Decision No. 24027-B at 5-6.

Therefore, where the majority status of the union or the continued appropriateness of the unit is in question, a determination on those questions may be critical to a determination of the employer's continued duty to bargain with the union. The Respondent in this case alleges that it is a new, i.e., "successor" employer, that the Complainant is not the certified representative of the Utility unit, that the Utility unit is not an appropriate bargaining unit since Respondent has an existing unit that contains employes with whom the Utility employes have a community of interest and since the Utility unit contains craft and noncraft employes, without the former ever having been given the opportunity to vote whether to have a separate unit of their own.

Under the approach adopted by the Commission and the NLRB, the determinations on the above issues are relevant to making a determination in this case. Since those issues are pending in the unit clarification case, which is proceeding to hearing on February 20, 1989, the Examiner has deemed it appropriate to hold the record open in this case to receive the record and determination in the unit clarification proceeding before the Commission.

Dated at Madison, Wisconsin this 10th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
David E. Shaw, Examiner