STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| FRANK MALKE,<br><br>Complainant,<br><br>vs.<br><br>ANSUL FIRE PROTECTION,<br><br>Respondent. | Case 1<br>No. 45402 Ce-2114<br>Decision No. 26848-A |

Appearances:

Morrison & Coggins, S.C., Attorneys at Law, by Mr. Steven E. Wolfe, 2042 Maple Avenue, P.O. Box 406, Marinette, Wisconsin 54143, appearing on behalf of the Complainant.

Lindner & Marsack, S.C., Attorneys at Law, by Mr. James R. Scott, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

## FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Frank Malke having, on March 1, 1991, filed a complaint with the Wisconsin Employment Relations Commission alleging that Ansul Fire Protection had committed unfair labor practices within the meaning of Secs. 111.01, 111.04, 111.05 and 111.06 of the Wisconsin Employment Peace Act, herein WEPA; and Ansul Fire Protection, by Counsel, having, on March 8, 1991 filed a Motion to Dismiss for Lack of Jurisdiction; and the Commission having, on March 25, 1991 appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5) Stats.; and Complainant having, on April 30, 1991, filed a response to Respondent's motion; and the Examiner having considered the Motion and arguments of counsel and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

## FINDINGS OF FACT

1. That Frank Malke, hereinafter referred to as the Complainant, is an individual whose address is W1512 County Trunk B, Marinette, Wisconsin 54143.

2. That Ansul Fire Protection, hereinafter referred to as the Respondent, is a wholly owned subsidiary of Grinnell Corporation and is an employer within the meaning of Sec. 111.02(7), Stats. and its principal offices are located at One Stanton Street, Marinette, Wisconsin 54143.

3. That Complainant had been employed by Respondent for about 16 years until his termination on May 30, 1990; that during the summer of 1989, the Complainant was involved in an effort on behalf of the United Paperworkers International Union, AFL-CIO, CLC, hereinafter referred to as the Union, to organize certain of the Respondent's workers; that Complainant was active on behalf of the Union between the summer of 1989 and May 10, 1990; that an election was held by the National Labor Relations Board, hereinafter NLRB, on May 9 and 10, 1990 and employes voted against representation by the Union; and that no objections were filed and the results were certified by the NLRB on May 18, 1990.

4. That on or about May 24, 1990, Complainant was informed by Respondent that he had an excess amount of down time and that it was believed that Complainant was willfully hindering production; that by a letter dated May 25, 1990, the Complainant was suspended without pay pending further investigation for willfully hindering production; and that Complainant was discharged on May 30, 1990 for willfully hindering production.

5. That on June 11, 1990, the Union on behalf of the Complainant filed a charge of an unfair labor practice with the NLRB alleging that Complainant was discharged because of his activities on behalf of the Union or because of his other protected concerted activities; that the NLRB by a letter dated July 26, 1990 informed the Union that the charge noted above had been carefully investigated and considered and it was concluded that the evidence was not sufficient to controvert the Respondent's contention that Complainant was discharged for willfully hindering production, and therefore, it was declining to issue a complaint; that the matter was appealed to the NLRB's General Counsel; and that by a letter dated August 15, 1990, the appeal was denied by the NLRB's General Counsel.

6. That on March 1, 1991, the Complainant filed the instant complaint with the Commission alleging that Respondent had committed unfair labor practices contrary to enumerated statutes including provisions of Chapter 111; that in his complaint, the Complainant alleged that the reason for his discharge was pretextual and the real reason was based on his protected concerted activities; and that the complaint alleged that the Complainant did not willfully hinder production and Complainant sought reinstatement and back pay.

7. That on March 8, 1991, Respondent, by Counsel, moved to dismiss the complaint on the basis that the Commission's jurisdiction was preempted by the NLRB who has exclusive primary jurisdiction over the matter; that on April 30, 1991, Complainant, by Counsel, filed a brief in opposition to Respondent's Motion to Dismiss wherein primary jurisdiction was conceded to lie with the NLRB but it was argued that the Commission has jurisdiction because the decision by the NLRB not to issue a complaint may have been made on the basis of a fraud committed against it by Respondent; and that exceptions to the exclusive jurisdiction in the NLRB apply and the Commission should deny the Motion.

8. That Complainant has not denied and Respondent admits that Respondent is engaged in a business affecting commerce within the meaning of the NLRA and is covered by the jurisdictional standards of the National Labor Relations Board.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

## CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission does not have jurisdiction to determine any violations of Secs. 103.14(2), 103.18, 103.51, 134.01, 134.02, 134.03 or the constitutional guarantees of Free Speech and Association.

2. That Respondent Ansul Fire Protection is an employer engaged in interstate commerce within the meaning of the National Labor Relations Act, as amended, and meets the jurisdictional standards of the National Labor Relations Board.

3. That Complainant's claim that Respondent committed unfair labor practices in violation of Chapter 111 of the Wisconsin Statutes by retaliating against Complainant for engaging in union activity involves conduct which is protected by Section 7 or prohibited by Section 8 the National Labor Relations Act.

4. That it has not been demonstrated that the National Labor Relations Board has declined to assert jurisdiction over the conduct which gives rise to the complaint of unfair labor practices.

5. That the Wisconsin Employment Relations Commission is preempted from asserting its jurisdiction to regulate the Respondent's conduct which gives rise to the complaint of unfair labor practices.

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

ORDER 1/

That Complainant's complaint of unfair labor practices be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 30th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

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

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> (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.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

In his complaint initiating these proceedings, the Complainant alleged that he was terminated because of his concerted protected activity and the Respondent's reasons for the termination were pretextual. The Complainant alleged violations of Chapters 103, 111 and 134 of the Wisconsin Stats. as well as both the State and Federal Constitutions. The Respondent filed a Motion to Dismiss on the basis that the WERC has no jurisdiction in this matter as exclusive jurisdiction was vested in the NLRB. The Complainant responded to said Motion by asserting that certain exceptions apply to the general rule that the NLRB has exclusive jurisdiction and contends that the instant complaint comes within these exceptions and insists the WERC should exercise its jurisdiction to hear this matter.

DISCUSSION

The Complainant acknowledges that the law cited by the Respondent and articulated in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L. Ed. 2d 775 (1959); Guss v. Utah Labor Relations Board, 353 U.S. 1 77 S. Ct. 598, 1 L. Ed. 2d 601 (1957); Muenchow v. the Parker Pen Co., 615 F. Supp 1405 (W.D. Wis., 1985); Arena v. Lincoln Lutheran of Racine, 149 Wis. 2d 35, 437, N.W. 2d 538 (1989) is the controlling law in this matter.

In San Diego Building Trades Council v. Garmon, supra, the U.S. Supreme Court articulated the general rule of preemption as follows:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.
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> When an activity is arguably subject to Sec. 7 or Sec. 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

In Local 248 v. WERB, 11 Wis.2d 277 (1960), cert. denied 365 U.S. 878 (1961), our Supreme Court held that the Commission is preempted from exercising its jurisdiction under the Wisconsin Employment Peace Act where the conduct at issue arguably falls within the scope of the Labor Management Relations Act administered by the National Labor Relations Board. See also Moreland Corp. v. Retail Store Employees Union, 16 Wis.2d 499 (1962); Markham v. American Motors Corp., 22 Wis.2d 680 (1964); Hanna Mining Co. v. District 2, etc., Asso., 23 Wis.2d 433 (1964); Klotz v. Wathen, 31 Wis.2d 19 (1966); and Arena v. Lincoln Lutheran of Racine, 149 Wis.2d 35 (1989). Given the Court's holding, the Commission has consistently concluded that it has no jurisdiction over unfair labor practice complaints involving conduct and parties as to which the National Labor Relations Board would exercise its jurisdiction. 2/

The U.S. Supreme Court in Garmon has recognized two exceptions to the preemption rule, namely:

1) Activities that are merely a peripheral concern of the federal law; and

2) Conduct that touches interests so deeply rooted in local feeling and responsibility.

The Court has held that state jurisdiction to enforce its laws prohibiting violence, 3/ defamation, 4/ the intentional infliction of emotional

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2/ Local 244, Bakery Workers', Dec. No. 5743 (WERC, 5/61); Nopak, Inc., Dec. No. 5708-B (WERC, 7/61); Local 200, Teamsters, Dec. No. 6375 (WERC, 6/63); Local 444, Meat Cutters, Dec. No. 6791 (WERC, 7/64); Portage Stop N. Shop, Inc., Dec. No. 7037 (WERC, 2/65); Napiwocki Construction, Inc., Dec. No. 11941-B (WERC, 3/76); Trucker's and Traveler's Restaurant, Dec. No. 20882-C (WERC, 10/84); and Pember Excavating, Inc., Dec. No. 26672-A (WERC, 2/91).

3/ Youngdahl v. Rainfair, 355 U.S. 131 (1957) and United Construction Workers v. Laburnum, 347 U.S. 656 (1954).

distress, 5/ or obstruction of access to property 6/ is not preempted by the NLRA. Thus, the U.S. Supreme Court does not apply the Garmon rule in a literal mechanical fashion, but is flexible and has stated that the critical inquiry is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to or different from that which could have been, but was not, presented to the Labor Board. 7/ Where the conduct at issue is arguably within the compass of Sec. 7 or Sec. 8 of the NLRA, the state must defer to the exclusive competence of the NLRB. 8/ The Commission has recognized that the preemption doctrine set forth in Garmon, supra, is effective to preempt jurisdiction in cases where the NLRB has asserted jurisdiction over matters involving substantially identical allegations. 9/ The Commission has not expressly stated that assertion of jurisdiction by the NLRB is a necessary precondition to preemption, rather the Garmon doctrine precludes the assertion of jurisdiction unless and until the NLRB declines to assert jurisdiction. 10/

It is necessary to review the complaint and apply the above principles to determine whether the Garmon doctrine precludes jurisdiction by the Commission. The complaint alleges that Complainant was terminated because of his engaging in concerted protected activity on behalf of the Union and that the Respondent's stated reason for discharging him was pretextual and not substantiated. Essentially, this is the same case presented to the NLRB. It seems quite clear that the gravamen of the complaint involves conduct which is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act and thus, under Garmon, the NLRB has exclusive jurisdiction and the Commission is totally preempted from all jurisdiction. There are no allegations in the complaint that either of the two exceptions to Garmon apply. There was no allegation made that Respondent was an employer who did not meet the jurisdictional standards of the NLRB. In fact, a charge was filed and investigated and the General Counsel affirmed the decision not to issue a complaint based on the merits of the case. As the NLRB has not declined jurisdiction, the Commission is preempted from taking jurisdiction. In its response to the Respondent's Motion to Dismiss, Complainant asserts that the NLRB dismissed the complaint because of fraud. Inasmuch as the Commission's jurisdiction has been preempted by the NLRB, it follows that it has absolutely no jurisdiction to review the procedures utilized by the NLRB in the exercise of its jurisdiction. In other words, where the Commission has been totally preempted from jurisdiction in the matter, it has no jurisdiction of the merits or procedure. Therefore, the complaint has been dismissed because the Commission lacks jurisdiction over the complaint.

The complaint alleged violations of statutory provisions other than Chapter 111 as well as constitutional violations. The Commission has authority only with respect to Chapter 111 and the complaint has been dismissed with respect to the other alleged statutes for lack of jurisdiction without reference to the Garmon doctrine.

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4/ Linn v. Plant Guard Workers, 383 U.S. 53. (1966).

5/ Farmer v. Carpenters Union, 430 U.S. 290 (1977).

6/ United Automobile Workers v. Russell, 350 U.S. 634 (1958).

7/ Sears, Roebuck & Company v. Carpenters, 43 U.S. 180 (1978).

8/ Arena v. Lincoln Lutheran of Racine, supra.

9/ Pember Excavating, Co., Dec. No. 26672-A (WERC, 2/91); Trucker's & Traveler's Restaurant, Dec. No. 20880-B, 20882-B (McCormick, 3/84) and Strauss Printing Company, Inc., Dec. No. 20115-A (Schoenfeld, 12/82).

10/ Pember Excavating Co., supra, n. 11.

The Respondent has requested that it be awarded attorneys fees as the complaint is frivolous and contrary to clearly settled legal principles. The Commission has held that attorneys fees are warranted only in exceptional cases where the allegations or defenses are frivolous as opposed to debatable. 11/ The complaint has not been shown to be so frivolous, in bad faith or devoid of merit so as to warrant the imposition of attorneys fees and Respondent's request for same is denied.

Dated at Madison, Wisconsin this 30th day of May, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

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11/ Wisconsin Dells School District, Dec. No. 25997-C, (WERC, 8/90) citing Madison Metropolitan School District, Dec. No. 16471-B (WERC, 5/81).