

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petition of	:	Case 1
	:	No. 44420 E-3068
UAW REGION 10/TEAMSTERS LOCAL 744/	:	Decision No. 26850-D
UFCW LOCAL 1444/UNITY TEAM	:	
	:	Case 2
Involving Certain Employees of	:	No. 44421 E-3069
	:	Decision No. 26851-D
DAIRYLAND GREYHOUND PARK, INC. :	:	
	:	

Appearances:

Mr. Gary M. Williams, Attorney at Law, 12065 West Janesville Road, Hales Corners, Wisconsin 53130, on behalf of UAW Region 10, Teamsters Local 744, UFCW Local 1444/Unity Team.

Michael, Best & Friedrich, Attorneys at Law, by Mr. Thomas W. Scrivner and Mr. Jonathan O. Levine, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, on behalf of Dairyland Greyhound Park, Inc.

Mr. Frank J. Schiro, Attorney at Law, 135 West Wells Street, Suite 530, Milwaukee, Wisconsin 53203, on behalf of HERE Local 122.

Mr. Michael Fitzgerald and Mr. Frank Vitacco, Business Representatives, 600 West Washington Boulevard, Chicago, Illinois 60606, on behalf of IBEW, Local Union 134.

ORDER DISMISSING AMENDED ELECTION PETITION

On September 9, 1991, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Region 10/Teamsters Local Union No. 74/ and United Food and Commercial Workers Union Local 1444 filed an amended election petition with the Wisconsin Employment Relations Commission seeking joint certification as "UAW Region 10/Teamsters Local 744/UFCW Local 1444 'Unity Team'" in three potential bargaining units of Dairyland Greyhound Park, Inc. employes.

Dairyland, International Brotherhood of Electrical Workers, Local 134 and Hotel Employees and Restaurant Employees Local 122 oppose the petition.

Hearing was held on October 2 and 3, 1991, in Kenosha, Wisconsin, before Examiner Peter G. Davis. Written argument was filed, the last of which was received on April 7, 1992.

No. 26850-D
No. 26851-D

Having considered the matter, the Commission is persuaded the amended election petition is untimely.

NOW, THEREFORE, it is

ORDERED

1. The amended election petition is dismissed.
2. Within thirty days of the date of this Order, hearing shall commence as to all issues which must be resolved prior to issuance of a Certification of the August 2, 1991 election results and any Direction of additional elections.

Given under our hands and seal at the City of Madison, Wisconsin this 11th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

DAIRYLAND GREYHOUND PARK, INC.

MEMORANDUM ACCOMPANYING
ORDER DISMISSING AMENDED ELECTION PETITION

Background

On March 29, 1991, the Wisconsin Employment Relations Commission issued Findings of Fact, Conclusions of Law and Direction of Elections which determined that there were at least three potential appropriate collective bargaining units of Dairyland employes: (1) Food/Beverage Department; (2) Mutuels Department; and (3) all other employes. The Commission therein directed that any labor organization who wished to represent the employes in any of the potential bargaining units should so advise the Commission within ten days of the date of the Direction. The Commission also gave all parties the opportunity to request the establishment of additional departmental units.

The Commission issued Amended Findings of Fact, Conclusions of Law and Direction of Elections on May 3, 1991, which granted a UAW request that a Maintenance Department unit also be determined as appropriate and further ordered that any labor organization wishing to represent employes in the Maintenance Department unit should so advise the Commission within ten days of the date of the Amended Direction.

On May 24, 1991, the Commission conducted an election to determine whether the employes in the three departmental units which were found to be potentially appropriate wished to be included in separate departmental bargaining units or whether said employes wished to be combined with other employes for the purposes of collective bargaining. On July 19, 1991, the Commission certified to the parties that a majority of the Food/Beverage Department employes did not vote to establish themselves as a separate bargaining unit; that a majority of the Mutuels Department employes did vote to establish themselves as a separate department; and that a majority of the Maintenance Department did vote to establish themselves as a separate bargaining unit. Therefore, the Commission directed that elections be held in a Mutuels Department unit, a Maintenance Department unit and a unit of all other Dairyland employes for the purpose of determining whether the employes in these potential bargaining units wished to be represented by any of the labor organizations seeking to represent them for the purposes of collective bargaining or whether they desired no such representation.

The representation election was conducted on August 2, 1991. The tally of the votes on August 2, 1991, reflected the following results:

Mutuels Unit

1.	CLAIMED ELIGIBLE TO VOTE		<u>275</u>
2.	BALLOTS CAST (Includes all ballots)		<u>215</u>
3.	BALLOTS CHALLENGED	<u>9</u>	
4.	BALLOTS VOID		<u>0</u>
5.	BALLOTS BLANK		<u>0</u>
6.	VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots void ballots, and blank ballots)		<u>206</u>
7.	BALLOTS CAST FOR IBEW LOCAL 134	<u>72</u>	
8.	BALLOTS CAST FOR TEAMSTERS LOCAL 744	<u>4</u>	
9.	BALLOTS CAST FOR UFCW LOCAL NO. 1444	<u>35</u>	
10.	BALLOTS CAST FOR NO REPRESENTATION	<u>95</u>	

Maintenance Unit

1.	CLAIMED ELIGIBLE TO VOTE		<u>67</u>
2.	BALLOTS CAST (Includes all ballots)		<u>57</u>
3.	BALLOTS CHALLENGED	<u>21</u>	
4.	BALLOTS VOID		<u>0</u>
5.	BALLOTS BLANK		<u>0</u>
6.	VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots void ballots, and blank ballots)		<u>36</u>
7.	BALLOTS CAST FOR H.E.R.E. LOCAL 122		<u>0</u>
8.	BALLOTS CAST FOR INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 139		<u>0</u>
9.	BALLOTS CAST FOR TEAMSTERS LOCAL 744	<u>11</u>	
10.	BALLOTS CAST FOR UAW REGION 10	<u>15</u>	
11.	BALLOTS CAST FOR UFCW LOCAL 1114		<u>7</u>
12.	BALLOTS CAST FOR NO REPRESENTATION	<u>3</u>	

Residual Unit

1.	CLAIMED ELIGIBLE TO VOTE		<u>436</u>
2.	BALLOTS CAST (Includes all ballots)		<u>310</u>
3.	BALLOTS CHALLENGED	<u>43</u>	
4.	BALLOTS VOID		<u>2</u>
5.	BALLOTS BLANK		<u>1</u>

6.	VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots void ballots, and blank ballots)		<u>266</u>
7.	BALLOTS CAST FOR H.E.R.E. LOCAL 122		<u>0</u>
8.	BALLOTS CAST FOR TEAMSTERS LOCAL 744	<u>55</u>	
9.	BALLOTS CAST FOR UAW REGION 10	<u>38</u>	
10.	BALLOTS CAST FOR UFCW LOCAL 1444		<u>68</u>
11.	BALLOTS CAST FOR NO REPRESENTATION	<u>105</u>	

On August 8, 1991, representatives of the Commission met with the parties to discuss resolution of the various challenges to ballots which were filed during the August 2 election. Sufficient challenges were resolved in the Residual Unit to allow for a revised tally sheet which reflected the following:

1.	CLAIMED ELIGIBLE TO VOTE		<u>436</u>
2.	BALLOTS CAST (Includes all ballots)		<u>312</u>
3.	BALLOTS CHALLENGED	<u>18</u>	
4.	BALLOTS VOID		<u>2</u>
5.	BALLOTS BLANK		<u>1</u>
6.	VALID BALLOTS COUNTED (Total ballots cast minus challenged ballots void ballots, and blank ballots)		<u>291</u>
7.	BALLOTS CAST FOR H.E.R.E. LOCAL 122		<u>0</u>
8.	BALLOTS CAST FOR TEAMSTERS LOCAL 744	<u>59</u>	
9.	BALLOTS CAST FOR UAW REGION 10	<u>45</u>	
10.	BALLOTS CAST FOR UFCW LOCAL 1444		<u>71</u>
11.	BALLOTS CAST FOR NO REPRESENTATION	<u>116</u>	

Subsequent to the August 8, 1991 meeting, UFCW Local 1444, Dairyland, and H.E.R.E. Local 122 all filed objections to the conduct of the August 2, 1991 election. H.E.R.E. subsequently withdrew its objections.

On September 9, 1991, the Unity Team petition was filed with the Commission seeking placement of UAW/Teamsters/UFCW on the ballot as a single choice in all three potential bargaining units in the next round of elections.

Positions of the Parties

UAW/Teamsters/UFCW

The Unity Team argues that it should be allowed to appear as a single choice on the next election ballot to offer Dairyland employees the opportunity to cast a meaningful ballot in the reasonably near future on the fundamental underlying question of whether they desire to be represented for the purposes of collective bargaining by a labor organization. Unity Team argues that the preliminary results of the first round of representation elections indicate that while a majority of the valid ballots cast in each bargaining unit favored representation by a labor organization, no single labor organization was able to garner a majority of the valid ballots cast in any bargaining unit. Unless the Unity Team is allowed to appear on the next ballot, the Unity Team argues that many more elections with the resultant delay will be required before a definitive result is reached. If the Unity Team request is granted, Unity Team asserts that the next round of elections will almost certainly provide a determinative answer in the three potential bargaining units.

Unity Team further asserts that, in light of the preliminary results of the first round of representation elections, UAW/Teamsters/UFCW should be afforded the opportunity to reassess whether the interests of Dairyland employees and their own individual interests as labor organizations are now better served by seeking individual or joint certification as the exclusive collective bargaining representative.

Unity Team asserts that the Commission has the power and authority to grant the Unity Team request. In this regard, Unity Team argues that the Commission has powers "incidental and reasonably necessary to the proper and efficient administration" of the Wisconsin Employment Peace Act, citing *Layton School v. WERC*, 82 Wis.2d 324, at 350 (1978). Unity Team further contends that Sec. 111.05(4), Stats., allows the Commission to conduct another election within a bargaining unit "provided that it appears to the Commission that sufficient reason therefor exists." Unity Team argues that such sufficient reason exists herein for the granting of the Unity Team request.

Dairyland

Dairyland asserts that the Unity Team petition should be dismissed as untimely. Dairyland contends that if the Unity Team is a labor organization, it is a new labor organization and a new petitioner for the purposes of Dairyland elections. Dairyland alleges that Sec. 111.05(3)(m), Stats., does not contemplate or permit the addition of a new ballot choice at the run-off election stages of the process. In this regard, Dairyland asserts that while the Commission can drop an existing choice from the ballot during a run-off election, the Commission cannot add a new choice. Dairyland argues that it is axiomatic that a choice which did not appear on the first ballot could not have received votes sufficient to appear on a run-off ballot.

Dairyland further asserts that the petition is untimely in the context of the deadlines established in Commission decisions within which labor organizations were to have made their intentions known as to interest in appearing on representation ballots. Obviously, the Unity Team did not express such an intention within the timeframe established by Commission decisions.

Dairyland further alleges that the Commission should refuse to permit the Unity Team to appear on the ballot because granting the request would interfere with the orderly process of election proceedings. In this regard, Dairyland asserts that under Wisconsin law, a new or amended election petition must be considered untimely not later than some point prior to the first election in an election process.

Dairyland further contends that the Unity Team is not a proper joint representative. In this regard, Dairyland asserts that allowing the Unity Team to participate in any election would be contrary to the policies the Peace Act was intended to promote; that the unions which comprise the Unity Team are not entitled to any presumptions of interest as to joint representation; that a prima facie showing of an intention to jointly represent employees is rebuttable; and that the record evidence shows that the unions in question do not intend to represent Dairyland employees on a joint basis.

Lastly, Dairyland argues that to grant the Unity Team motion would be to interfere with employee free choice and render the results of the past elections null and void. In this regard, Dairyland contends that to add the Unity Team to any ballot would create irreconcilable difficulties because choices employees had previously expressed interest in would be removed from the ballot, while a choice no employee had previously expressed interest in would be added to a ballot. Dairyland asserts that if the Unity Team had been on the ballot for the unit determination election or for the first representation election, the results of those elections may well have been very different.

Given all of the foregoing, Dairyland asks that the Unity Team petition be dismissed.

IBEW

IBEW asserts that the Unity Team petition should be dismissed as untimely. It argues that the petition attempts to circumvent the previous procedures and election outcomes. In this regard, IBEW contends that through the new petition UAW would be provided untimely access to the Mutuels unit ballot, and Teamsters would be protected from being dropped from the Mutuels ballot based upon the results of the last election. Therefore, IBEW asks that the petition be dismissed.

H.E.R.E.

H.E.R.E. asserts that the Unity Team petition is untimely, flies in the face of employees' rights to self determination, and is without any basis under Wisconsin law. H.E.R.E. contends that there is no statutory provision or administrative rule which even remotely suggests that the Commission has the authority to allow a new labor organization onto the ballot in a run-off election. Moreover, H.E.R.E. argues that placing the Unity Team on a run-off ballot at this stage in the process would allow other labor organizations other than those on the original ballots to also seek placement on the ballot. Thus, H.E.R.E. argues the election process could continue forever, contrary to the intent of the Wisconsin Employment Peace Act. H.E.R.E. further contends that to allow the Unity Team to seek joint certification would be to disregard the wishes expressed by the employees within the bargaining units. Given all of the foregoing, H.E.R.E. asks that the petition be dismissed.

Discussion

Section 111.05(3m), Stats., provides in pertinent part that in a run-off election:

". . . the commission may drop from the ballot the name of the representative that received the least number of votes at the original election, or the privilege of voting against any representative when the least number of ballots cast at the first election was against representation by any named representative."

Reviewing this statutory provision, we think it clear that the only change in the ballot which we are empowered to make in a run-off election is the deletion of choices from the ballot. Thus, we conclude that we do not have the statutory authority to alter the choice confronting the voters in any other manner. 1/ Therefore, we do not find it appropriate to allow the three labor organizations in question to appear as a single choice on the ballot in any of the three bargaining units. Given the foregoing, we have dismissed the petition.

Dated at Madison, Wisconsin this 11th day of May, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By A. Henry Hempe /s/
A. Henry Hempe, Chairperson

Herman Torosian /s/
Herman Torosian, Commissioner

William K. Strycker /s/
William K. Strycker, Commissioner

1/ Because the statute explicitly resolves the issue before us, we reject the Unity Team argument which asserts that under the Layton School holding, we have "incidental" discretion to grant the Unity Team request.

Further, contrary to the Unity Team argument, Sec. 111.05(4), Statsl, applies only to the question of whether another election should be conducted and not to the question of changing ballot choices.