STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PLUMBERS AND PIPEFITTERS LOCAL 557, Complainant, vs. JEROME FILBRANDT PLUMBING AND HEATING, INC., Respondent.	Case 2 No. 46219 Ce-2121 Decision No. 27045-C

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Ms. Marianne Goldstein Robbins, 1555 N. Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Plumbers & Pipefitters Local 557.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Ronald J. Rutlin, with Mr. Jeffrey T. Jones, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Jerome Filbrandt Plumbing & Heating, Inc.

ORDER AFFIRMING AND MODIFYING EXAMINER'S PROPOSED FINDINGS OF FACT, AND AFFIRMING EXAMINER'S PROPOSED CONCLUSIONS OF LAW AND ORDER

On March 20, 1992 Examiner Richard B. McLaughlin issued his Proposed Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-entitled matter wherein he concluded that the Respondent Jerome Filbrandt Plumbing and Heating, Inc. had committed unfair labor practices within the meaning of Sec. 111.06(1)(a) and (d), Stats.

On April 9, 1992, the Respondent timely filed objections to the Examiner's proposed decision. Complainant Plumbers and Pipefitters Local 557 filed a written response to the Respondent's objections on May 1, 1992.

Being fully advised in the premises, the Commission is satisfied that the Examiner's Proposed Findings of Fact should be affirmed and modified and that his Proposed Conclusions of Law and Order should be affirmed in their entirety.

NOW, THEREFORE, it is

ORDERED 1/

1/ Pursuant to Sec. 227.48(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. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 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.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

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A. The Examiner's Proposed Findings of Fact 1 - 20 are affirmed.

B. The Examiner's Proposed Finding of Fact 21 is modified through the addition of the underlined language.

> 21. The delays between negotiations meetings <u>following December 6, 1990</u>, were due primarily to the unavailability of Company negotiators.

C. The Examiner's Proposed Conclusions of Law and Proposed Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 29th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian /s/
Herman Torosian, Commissioner

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

I Dissent.

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

1/ Continued

> (a) Proceedings for review shall be instituted by serving a petition therefore 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. 227.49, 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. 227.48. If a rehearing is requested under s. 227.49, 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. 77.59(6)(b), 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.
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> (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. 227.57 upon which petitioner contends that the decision should be reversed or modified.
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> . . .
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> (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.

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

The instant complaint alleges that the Company violated Secs. 111.06(1)(a) and (d), Stats. by refusing to bargain in good faith with the Union. The complaint seeks an order compelling the Company to bargain in good faith with the Union and dismissing the election petition filed by the Company.

The Examiner issued a decision which concluded that the Company had failed to bargain in good faith with the Union because of the delays between bargaining sessions caused by the unavailability of Company representatives. To remedy this unfair labor practice, the Examiner ordered the dismissal of the election petition filed by the Company and directed the Company to bargain in good faith with the Union. The Examiner's Order further specified that the Company would be barred from filing another election petition for a period of six months.

The Company filed objections to the Examiner's proposed decision. The Company summarized the basis for its objections as follows:

> In this matter, the Union bears the burden of establishing by a "clear and satisfactory preponderance of the evidence" that the Employer has engaged in bad faith bargaining. A "totality of the conduct" standard is applied in determining such matters.
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> The Hearing Examiner found that the Employer had engaged in bad faith bargaining based on the fact that its representatives failed to meet at reasonable intervals with Union representatives for purposes of negotiations. The "totality of the conduct" as applied to the facts of this matter clearly establishes that the Employer's representatives did not refuse to meet with the Union representatives at reasonable intervals for the purpose of negotiations. Scheduling negotiation sessions in close proximity to one another was extremely difficult for a variety of reasons including the parties' (including Mr. Guenther's) previous commit-ments, Mr. Guenther's vacation, the parties' consider-ation of the holiday season, Mr. Guenther's canceling of a number of previously scheduled sessions for various reasons, and Mr. Sederstrom's canceling of a session due to illness. In such circumstances, it would be patently unfair to place the blame for failing to meet at reason-able intervals at the Employer's feet.
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> For the foregoing reasons, the Employer respect-fully requests the Commission to reject the Hearing Examiner's Finding of Fact No. 21 and his conclusion that the Employer engaged in bad faith bargaining by failing to meet at reasonable intervals with Union.

The Union filed a written response to the Company objections arguing that the Examiner's Proposed Findings of Fact, Conclusions of Law and Order are fully supported by the evidence and law. Thus, the Union urges the Commission to affirm the Examiner's decision in its entirety.

DISCUSSION

The Examiner premised his bad faith bargaining determination upon the Company's unavailability for bargaining sessions on a sufficiently regular basis. He held:

. . .

> It is doubtful whether any of the above cited factors warrant a finding that the Company engaged in anything other than hard bargaining. On balance, the record does indicate some reason to believe the Company had no willingness to agree with the Union on any point of substance. This point has not, however, been seriously tested by the Union, for the record indicates the Union took the position that the Company should take the Union's proposed agreement on an all or nothing basis. The duty to bargain does not require the making of a specific concession. It is apparent the Union itself chose a hard bargaining stance, with unit members striking to advance their demands. In the absence of evidence beyond that cited above, it would be difficult to characterize the Company's actions as anything other than its own hard bargaining stance.
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> There is, however, evidence beyond that cited above. The evidence which supports the bad faith bargaining allegation in this case turns on the Company's unwillingness to meet at reasonable intervals. The Company's request to postpone the initial bargaining session is, standing alone, unremarkable. It did, however, serve to cut roughly one month from the certification year. More significantly, that postponement does not stand alone but prefaces an extended period during which the Company negotiators were unable to meet at anything approaching regular intervals. By the time of the anniversary of the Union's certification, the parties had met six times. While the Company accurately notes that the Union acquiesced in the setting of the meeting dates, the point remains that the Company never made itself available at less than four to six week intervals. Guenther was less than emphatic in seeking more regular meetings, and did not seek to challenge the frequency of the meetings until the December 6, 1990, meeting. The point remains, however, that there can be no collective bargaining without mutual meetings. To overlook the Company's limited availability to meet in this case in effect turns the certification year into certification months.
>
> It can be noted that the Company is a small employer, and the unit is also small. This point does not, however, impact on the statutory duty to bargain.

As the United States Supreme Court noted in Brooks v. NLRB, 348 US 96, 35 LRRM 2158 (1954):

> (I)t is not within the power of this Court to require the Board . . . to relieve a small employer, like the one involved in this case, of the duty that may be exacted from an enterprise with many employees. 10/

The Court, in Brooks and in Fall River, specifically discussed the policies supporting the presumption which is applied to the Union's majority status during the year following certification. To ignore the Company's demonstrated unavailability for bargaining in this case would effectively gut that presumption.

The remedy set forth in the ORDER proposed above does not require extensive discussion. The election petition would be dismissed. No refiling would be permitted for six months. 11/ This six month period is to remedy the delays attributable to the Company discussed above. A longer extension is not appropriate on this record. As noted above, in the absence of the Company's pattern of unavailability, it would be difficult to characterize the parties' bargaining as anything beyond hard bargaining. The ORDER also requires the Company to bargain in good faith during this period. To discharge that duty, Company represent-atives must make themselves available at reasonable intervals to negotiate.

10/ 348 US at 104, 35 LRRM at 2161.

11/ See Colfor Inc. v. NLRB, 838 F.2d 164; 127 LRRM 2447 (CA 6, 1988).

We concur with the Examiner's conclusion that the Company's unavailability for bargaining constitutes a refusal to bargain in good faith. However, our focus in making such a determination is limited to the period following the parties' December 6, 1990 meeting. Prior to that meeting, the Union had not advised the Company that the frequency of meetings was unacceptable. Indeed, prior to December 6, 1990 the Union had itself been responsible for substantial delays in the bargaining process. Nonetheless, commencing with the December 6, 1990 meeting, 2/ the record satisfies us that

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2/ At said meeting Guenther advised Filbrandt that he was concerned with the amount of time which passed between meetings and that he would be available to meet more often including the holiday season. Tr. 35. Filbrandt testified that Guenther said "that he'd be available most any time." Tr. 137. Filbrandt's response was that the "first meeting that could be held would be on the 10th of January." Tr. 35. Again at the January 10 meeting Guenther complained that meetings were getting strung out too long and that they should try to meet earlier (Tr. 86) and that the Union could be available at any time to meet. Tr. 107. Guenther testified that he agreed to February 28 because "that was the only date they could come up with." Tr. 86. Filbrandt testified that Guenther objected and said "that he would like to have more frequent meetings" but

the Union placed the Company on notice that it wished to meet more frequently than every four to six weeks and would make itself available to meet at anytime.

The record further satisfies us that the Examiner correctly concluded it was the unavailability of the two person Company bargaining team which was the primary cause for the delays between meetings. We acknowledge that the schedule of the Union representative(s) and the federal mediator also played a role in the gaps between post-December 1990 meetings. Nonetheless, it remains clear that the personal commitments of the two person Company team were the prime cause for delay. These commitments removed three or four days each week as potential meeting dates. The duty to bargain requires greater availability than the Company representatives were willing to provide. 3/

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that Guenther never strongly objected. Tr. 143.

3/ Interstate Paper Supply Company, Inc., 251 NLRB 1423, 1425 (1980)

> . . . it is well established that '(t)he Act does not permit a party to hide behind the crowded calendar of his negotiator, whether he be a busy labor attorney or an over-worked company officer.' Radiator Specialty Company, 143 NLRB 350, 369 (1963). See also Milgo Industrial, Inc., 229 NLRB 25, 31 (1977) . . . ;

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3/ Continued

Southside Electric Cooperative, 243 NLRB 390, 396 (1979)

> . . . The Board has held there to be no legal acceptance in the explanation that a party's representative is a busy consultant with many clients and demands on his time, as it is a party's obligation to furnish a representative who can be available to negotiate at reasonable times without inordinate delays, as the statute requires. 8/ . . . ;

8/Inter-Polymer Industries, Inc., 196 NLRB 729, 760 (1972).

Coronet Casuals, Inc., 207 NLRB 304, 316 (1973)

> . . . Collective bargaining, particularly for a first contract, is a difficult procedure in most cases. It can be especially impeded by the fail-ure or the refusal of the parties to cooperate in setting prompt and timely negotiation sessions. The obligation to bargain in good faith required by the Act is not met by appointing negotiators who are too busy, or are otherwise prevented from meeting promptly and at timely intervals. . . . ;

Quality Motels of Colorado, Inc., 189 NLRB 332, 337 (1971)

> . . . It is well settled that an employer is required to attend to his bargaining obligation with the same degree of diligence as he would to important business matters. B. F. Diamond Construction Co., 163 NLRB 161, 174; Bartlett-Collins Co., 140 NLRB 202; M. Systems Inc., 129 NLRB 527, 549. In J. H. Rutter Rex Manufacturing Company, Inc., 86 NLRB 470, the Board stated:
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> > The obligation to bargain collectively surely encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and confering (sic). Agreement is stifled at its

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> source if opportunity is not accorded for discussion or so delayed as to provoke or prolong unrest or suspi-cion. It is not unreasonable to expect of a party to collective bar-gaining that he display a degree of diligence and promptness in arranging for the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance. . . ;

Radiator Specialty Company, 143 NLRB 350, 368-369 (1963)

> . . . While neither the Board nor the courts have evolved, or indeed can evolve, any particular formula by which to test whether any given frequency of meetings or amount of time spent in negotiations, satisfies the statutory requirement "to meet at reasonable time," the Board has repeatedly admonished that parties to collective bargaining are obligated to display as great a degree of diligence and promptness in the dis-charge of their bargaining obligations as they display in other business affairs of import-ance. 37/ For, "Agreement is stifled at its source if opportunity is not accorded for dis-cussion or so delayed as to invite or prolong unrest or suspicion." J. H. Rutter Rex Manufac-turing Company, Inc., 86 NLRB 470, 506. More-over, "delay in collective bargaining entails more than mere postponement of an ordinary business transaction, for the passage of time itself, while employes grow . . . impatient at their designated bargaining agent's

Although, the Company also argues that the Union "agreed" to the meeting dates which were scheduled following December 6, 1990, we think it more apt to conclude that the Union "acquiesced" to the dates in question because it remained hopeful an agreement could be reached. 4/ Thus, such acquiescence does not militate against a bad faith bargaining determination.

Given the foregoing, we also affirm the Examiner's Order and have therefore dismissed the Company election petition. As appropriately tailored by the Examiner in acknowledgment of initial Union acceptance of the delay, the bar to refiling the election petition is limited to six months from the date of this Order assuming that good faith bargaining occurs during that interval.

We believe our colleague's dissent conveys his view that so long as the Company's conduct is not otherwise blameworthy, the personal commitments of the Company representatives, under the circumstances of this case, excuses the Company from meeting at intervals which would reflect a genuine effort to reach an agreement. We disagree. We agree with our colleague that additional unlawful conduct may make it easier to determine the employer's motivation or reasonableness in delaying negotiations, but such unlawful conduct is not necessary and the lack thereof, of course, does not relieve the employer of its duty to meet at reasonable times or intervals. In the final analysis the determination to be made is whether, under the particular circumstances of the case at hand, the delay in scheduling negotiations was reasonable. In this case we find not. The duty to bargain obligates the Company to meet its statutory obligation even if personal commitments must be subordinated upon occasion.

In closing, our colleague correctly notes that we do not specify an "acceptable meeting frequency." However, the issue before us is to determine whether the unavailability of the Company under the facts and circumstances of this case was inconsistent with the Company's duty to bargain under the Peace Act. Our holding clearly requires the Company to make itself more available for future meetings. Because we do not and cannot know how future bargaining will progress, we cannot provide a specific frequency of meetings.

Dated at Madison, Wisconsin this 29th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

> failure to report progress, weakens the unity and economic power of the group and impairs the Union's ability to secure a beneficial contract." Burgie Vinegar Company, 71 NLRB 829, 830. . . .

37/ J. H. Rutter-Rex Manufacturing Company, Inc., 86 NLRB 470, 506-508; "M" System, Inc., Mobile Home Division Mid-States Corporation, 129 NLRB 527, 549.

4/ Unfortunately, the alternative of litigating a refusal to bargain complaint often does not provide a timely remedy.

By Herman Torosian /s/
Herman Torosian, Commissioner

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

DISSENT

It is, of course, impossible for parties to bargain collectively unless they meet for that purpose. Thus, it is axiomatic that good faith bargaining includes a responsibility of the parties to meet at reasonable times.

"Determinations concerning the good faith aspects of the bargaining obligation are, of necessity, subjective in nature." 5/ "Subjective," however, is not defined, at least by this Commission. Yet, it seems obvious the term is not intended to connote a sense of "mechanistic" or "formalistic"; it seems equally clear that neither does it mean "whimsical."

Nor does the subjective nature of our product relieve us from the obligation of reviewing all relevant factors in reaching our conclusions. 6/ This approach is bolstered by good faith bargaining decisions of the NLRB which, in the words of one legal scholar, ". . .rely on 'all of the circumstances' because it is otherwise difficult to determine exactly what are the 'reasonable times' at which parties must meet." 7/

In the instant matter, the period under scrutiny consists of one year.

During the first six months of that period it is clear that the Union substantially contributed to bargaining delays by conduct which included both cancelling a previously established meeting date to accommodate the vacation schedule of the Union representative and allowing a period of six weeks to elapse before "getting back" to the Employer to propose a new meeting date. As to this, there is no factual dispute.

It is equally pellucid to me that the Employer does not bear the sole onus for bargaining delays during the last six months of the period in question. Based on the Employer's "totality of conduct" 8/ during that period, the history of its relationship with the Union during the months preceding it, along with other relevant factors, I conclude that the Employer complied with its duty of good faith bargaining.

5/ Adams County, Dec. No. 11307-A (WERC, 4/73).

6/ See Price County, Dec. No. 7755 (WERC, 10/66) in which approving reference is made to ". . . a total review of the facts."

7/ Gorman, Robert A., Basic Text on Labor Law Unionization and Collective Bargaining, "Duty to Bargain in Good Faith," Sec. 2, at 401, West Publishing Co., St. Paul, Minn., 1976.

8/ Adams County, supra; Price County, supra.

The majority primarily focuses on only what it chooses to interpret as deliberately dilatory aspects of Employer's conduct for that six month span.

Yet, during that time-span:

1) Although the Union suggested shorter intervals between meetings, it was, in the words of the examiner, "less than emphatic" in doing so; though it now claims to have expressed a willingness to meet ". . . at any time," the record does not indicate that it ever suggested a specific bargaining date, and further appears to reflect a ready enough agreement by the Union to bargaining dates suggested by the Employer; those meetings were scheduled approximately four weeks apart; each meeting lasted from 2 to three hours.

2) The Union cancelled a scheduled March meeting which, at the Employer's suggestion, took place nine days later;

3) For several months, the bargaining unit for whose benefit negotiations were proceeding had no members -- not a particularly compelling motivation for either side to meet more frequently; 9/

4) The Employer continued to be a small, family owned operation, attempting to meet its bargaining obligations as economically as possible. 10/

5) There was collective bargaining inexperience amply displayed by each side in approximately equal measure, 11/ coupled, however, with what the

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9/ Originally, the bargaining unit in question contained two members. Following certification by the NLRB of the Union as the exclusive collective bargaining agent for the unit in May of 1990, its two members went on strike. In March of 1991, the Employer learned that both strikers had obtained permanent employment elsewhere, and were thus no longer members of the bargaining unit for whose benefit negotiations were being conducted. Subsequently, the Employer hired one replacement employe who now constitutes the entire bargaining unit membership. Since the bargaining unit now consists of only one person, the NLRB has declined jurisdiction.

10/ Footnote 10/ found on page 13.

10/ This is not to suggest that size should relieve a small Employer of its duty to bargain in good faith (including its responsibility to meet at reasonable times). But unlike the situation in Brooks v. NLRB (348 U.S. 96, 35 LRRM 2158 (1954) cited by the examiner and noted approvingly by the majority, the Employer herein does not seek to be exempted from any of its lawful responsibilities because of diminutive size. Instead, its defense is based on the assertion that under all of the circumstances it has reasonably discharged its duty to bargain in good faith.

Our analysis of those circumstances should, in my view, include consideration of the fact that most small, family-run operations in the private sector cannot afford and thus do not have available to them the same resources as are available to larger companies or, for that matter,

examiner characterized as "hard bargaining" by each side; 12/ under these circumstances, alone, the negotiating impasse experienced by the parties was both predictable and unremarkable;

6) Neither side either proposed or agreed to any negotiating ground rules;

7) Both members of Employer's negotiating team had schedule conflicts which limited their availability for collective bargaining meetings with the Union; 13/

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even smaller municipal units of government. Under this circumstance, in my view, it is not necessarily reasonable to expect the same efforts from a small family business as can be reasonably expected from a larger municipal or private corporation which probably has superior resources. Size and ability thus become circumstances to be considered along with other relevant factors. Together, they all constitute a totality of circumstances, none of which can be equitably or reasonably ignored.

11/ The Employer's negotiating team was an amateur husband-wife combination. The husband, a son of the owner, was active in the business as a registered engineer and master plumber (with other miscellaneous duties). His wife had regular full-time employment of her own as business manager for the Antigo School District, but was not paid for her collective bargaining efforts on behalf of the Employer herein. Although her husband expressed his view that his wife had "extensive" collective bargaining knowledge (compared to his own collective bargaining experience, his wife's undoubtably seemed "extensive"), nothing in the record indicates that the wife's exposure to school district bargaining was in any role other than that of a financial data resource.

While the collective bargaining experience of the Union business agent appears to have been greater than that of his Employer counterparts, it was not extensive. At the time of hearing, for instance, this agent had been employed by the Union for a total of 4 years, 5 months. During that period he negotiated six successor agreements for other locals with their respective employers, but only one "first contract." Prior to employment by the Union, the business agent's occupational experience was as a plumber. Some two months into the last six months of negotiations between these parties, the Union's bargaining team was augmented by the presence of a self-described union organizer. The record gives no hint as to his collective bargaining experience.

12/ Issues on which there was disagreement (and in some cases extensive discussion) ranged from the trivial (e.g., proper name of Union, proper name of Employer) to the more substantive (e.g., wages, pension, union security, union steward access to work sites, work limitations for plumber-helpers). Although tentative agreements were apparently reached verbally with respect to a few issues, the parties never initialed or signed off on them and neither side ever suggested doing so. Predictably (under these circumstances), the verbal T.A.'s all unraveled.

13/ The husband half of the team appears to have had daytime job-site respons-ibilities with the Employer, which included activities in his areas of expertise (engineering, master plumbing) as well as supervision. The wife's employment schedule with the Antigo School District not only

8) Additional delay was caused by the illness of the FMCS mediator; further delay was caused by the same mediator's vacation schedule.

Given these circumstances, the majority's analysis appears to me to be incomplete, its remedy, less than even-handed. It imposes a penance on the Employer for the six month period in question, but awards absolution to the Union for the same period. It does not even provide guidance to the Employer as to what the majority may find to be an acceptable meeting frequency.

It is true that past decisions have ". . . condemned the failure to meet at reasonable times as sufficient alone to violate the duty to bargain." 14/ But these decisions ". . . are careful to note that this conduct occurred in the context of other behavior which betoken bad faith such as unfair labor practices (emphasis supplied)." 15/ They are described as creating an "elastic

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included regular, full-time, daytime hours, but also required her attendance at nighttime meetings of the Antigo School Board or one of its committees. Additional bargaining schedule limitations resulted from the volunteer evening church work in which both husband and wife apparently participated on a regular basis. The Union agreed that given the employment responsibilities of both members of Employer's negotiating team, it was not unreasonable to schedule bargaining sessions for the evening. (The usual starting time was 7:00 or 7:30 p.m.).

14/ Gorman, Robert A., supra.

15/ Gorman, Robert A., supra. Gorman's point can be readily demonstrated by review of the cases relied on by the majority. I list them in the same order as the majority:

Interstate Paper Supply Company, Inc., 251 NLRB 1423 (1980) -- in which the employer not only refused to meet with the union for five months, but further insisted that any accrued seniority of its employes be tolled for any time spent on strike. The NLRB found this proposal to constitute an unfair labor practice (ULP) whether or not it represented anti-union bias.

Southside Electric Cooperative, 243 NLRB 390 (1979) -- in which the employer refused for seven months to submit an economic proposal in response to the proposal made by the union, subsequently withdrew recognition of the union, unilaterally granted bargaining unit members increases in wages and benefits (ULP), threatened employes that union supporters would not receive increases (ULP), and discharged a leading union adherent because of his union activities (ULP).

Coronet Casuals, Inc., 207 NLRB 304 (1973) -- in which the employer insisted as a condition of executing the labor agreement, that the union agree to indemnify the employer against any threat, coercion, harassment or intimidation of employes who were not members of the union by payment to the employer of the sum of $1000 per occurrence (non-mandatory subject of bargaining), and further refused to reinstate any strikers (ULP).

Quality Motels of Colorado, Inc., 189 NLRB 332 (1971) -- in which the employer initially refused to bargain with the union at all so there

concept (which) invites the conclusion that a delay of a certain period can be 'reasonable' when done in good faith but not when other indicators suggest the purpose of delay is to frustrate negotiations." 16/

The record is barren of any such indicators in the instant matter. Other than the majority's perception that the Employer participated in an inadequate (though apparently regular) number of meetings, there is not even a whisper of illegal Employer conduct. The most of which the record admits is bargaining inexperience (on both sides), what the examiner describes as "hard bargaining" (by both sides), a bargaining impasse, mutual frustration, and, finally, Employer's petition for a decertification election. 17/ None of these ". . . betoken bad faith such as an unfair labor practice."

In my view, my colleagues' instincts, however well-intentioned, play them false in this instance. They cite NLRB decisions in support of the one they reach herein, but, unlike the examples of those cases, fail to assess the

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was a three month lapse between the union's first request for bargaining and the first meeting, held only two bargaining meetings in five months, and unilaterally granted employes a wage and benefit package which it had earlier withheld from the union after contract negotiations had stalled (ULP).

Radiator Specialty Company, 143 NLRB 350 (1963) -- in which the employer, while negotiations were proceeding, warned its employes that it would close the plant and never sign a contract, insisted on a no-strike clause without any form of arbitration as well as on a provision granting the employer unilateral and unreviewable control over ultimate disposition of grievances, refused to consider seriously any union proposals to improve

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15/ Continued

existing wages and conditions of employment, insisted on inclusion of a liability clause which gave the employer no greater rights than it already had under the law (since such clause was not a mandatory subject of bargaining) and refused to meet the union with sufficient regularity and frequency.

In the instant matter, the employer's conduct was positively angelic by comparison with the conduct described in the cases listed above.

16/ Gorman, Robert A., supra.

17/ This petition cannot be fairly viewed in a vacuum. The only negotiator for the Employer who testified (husband) stated that the Employer wanted to reach an agreement. That statement is unrefuted by either record testimony or other indicators to the contrary. Moreover, the sole member of the bargaining unit for whose benefit negotiations were presumably being conducted had, unsolicited, advised the Employer that he had no desire to be represented. Filing a decertification petition, of course, is a lawful act permitted the Employer and cannot be fairly deemed as evidence of unlawful anti-union bias. It probably does constitute evidence that in view of the lack of any appreciable bargaining progress, the Employer finally came to regard the chances of obtaining a collective bargaining agreement as remote to impossible.

totality of circumstances before red-flagging the employer for delay. By this omission, they effectively "de-elasticize" a concept which has served well over the years as a protector of collective bargaining rights, and transform what has been for this Commission since at least 1973 an exercise in subjective interpretation 18/ to one of mere formalistic rote.

18/ Adams County, supra.

For we all agree that the law does not require that the parties have a certain number of meetings within a given time period or that meetings take place with any particular frequency. 19/ If it did, I am confident the majority would so advise the parties. But all the law requires is that the parties bargain in good faith. Based on "a total review of the facts," 20/ I believe the Employer adequately discharged its duty in this respect.

Dated at Madison, Wisconsin this 29th day of September, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

19/ Radiator Specialty Company, supra at 368.

20/ Price County, supra. Contrary to the apparent misperception of the majority, this approach should not be interpreted as giving any greater credence to "personal commitments" than any other relevant factors. Under no circumstances do personal commitments "excuse" or absolve the employer from complying with its duty to meet at reasonable times, nor should they. Personal commitments, however, can be of assistance in defining whether bargaining delays are reasonable or unreasonable. Similarly, as a matter of fundamental evidentiary prudence, whether or not the employer engaged in illegal or other blameworthy conduct is clearly relevant in making the subjective determination of whether the employer complied with its duty to meet at reasonable times.

The majority appears to define that duty as "meeting at intervals which would reflect a genuine effort to reach an agreement." This is not an inaccurate definition, provided it is not read as suggesting an erroneous corollary to the effect that compliance will be measured by whether or not the parties have reached an agreement. That, of course, is not the law. (See, e.g., Sec. 111.70(1)(a): ". . . The duty to bargain, however, does not compel either party to agree to a proposal or agree to the making of a concession . . ."

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