STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

In the Matter of the Petitions of	:	Case 4 No. 49762 E-3082
WISCONSIN INDEPENDENT GAMING LOCAL 711 and UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 1444	:	Decision No. 27925
	:	Case 5 No. 49763 E-3083
Involving Certain Employes of	:	Decision No. 27926
DAIRYLAND GREYHOUND PARK, INC.	:	

Appearances:
Michael, Best & Friedrich, Attorneys at Law, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108 by Mr. Thomas W. Scrivner and Mr. Jonathan O. Levine, appearing for the Employer.
Ms. Sonja McClure, Representative, 12015 12th Street, Kenosha, Wisconsin 53144, appearing for Local 711.
Mr. Paul Whiteside, Jr., Secretary-Treasurer, United Food and Commercial Workers Union

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR HEARING

On September 7, 1993, Wisconsin Independent Gaming Local 711 filed a petition requesting the Wisconsin Employment Relations Commission to conduct elections among certain employes of Dairyland Greyhound Park, Inc. In a letter dated September 10, 1993, United Food and Commercial Workers Union, Local No. 1444 intervened in the matter and on October 26, 1993, Local 1444 filed a petition for an election among certain employes of Dairyland Greyhound Park, Inc. A pre-hearing conference was held on October 4, 1993, with Douglas V. Knudson, a member of the Commission's staff. At the conference the parties agreed to file written briefs and let the Commission rule on certain issues prior to a hearing being conducted on other issues. The parties completed the filing of briefs on November 17, 1993. The Commission, being fully advised in the premises, makes and issues the following

FINDINGS OF FACT

1. Dairyland Greyhound Park, Inc., herein the Employer, is an employer with its principal offices at 5522 104th Avenue, Kenosha, Wisconsin 53144-7450.

2. Wisconsin Independent Gaming Local 711, herein WIG, claims to be a labor organization with its principal offices at 12015 12th Street, Kenosha, Wisconsin 53144.

3. The United Food and Commercial Workers Union, Local No. 1444, herein UFCW, is a labor organization with its principal offices at 2001 North Mayfair Road, Milwaukee, Wisconsin 53226.

4. On September 7, 1993, WIG filed a petition for an election among the employes in the following two bargaining units: (1) All regular full-time and regular part-time mutuels employes of Dairyland Greyhound Park, Inc., excluding supervisory, managerial and confidential employes; and, (2) All regular full-time and regular part-time employes of Dairyland Greyhound Park, Inc., excluding mutuels department employes and supervisory, managerial and confidential employes.

5. In a letter dated September 10, 1993, UFCW intervened in the matter. On October 26, 1993, UFCW filed a petition for an election among the employes in the following bargaining unit: All regular full-time and regular part-time mutuels employes of Dairyland Greyhound Park, Inc., excluding supervisory, managerial, confidential and all other employes.

6. A pre-hearing conference was held on October 4, 1993, at which time the parties agreed to brief two issues and to have the Commission rule on those issues without a formal hearing. Hearing then would be held on the remaining issues, if the Commission determined the petitions should be processed. The two issues are: (1) Were the petitions timely filed? and (2) Should each of the petitions be supported by a showing of interest? The parties completed the filing of those briefs on November 17, 1993.

7. On August 5, 1990, a petition for an election among certain of the employes of the Employer was filed by the International Brotherhood of Electrical Workers. Subsequent petitions were filed by several other unions. Unit determination elections were conducted on May 24, 1991. Representation elections were held on August 2, 1991, in three bargaining units, i.e., mutuels, maintenance and residual. The number of challenges to ballots cast by the employes in the maintenance unit election were sufficient to produce an inconclusive result. However, the parties agreed that further proceedings as to the maintenance unit should be held in abeyance. Certification of the results of the elections in the mutuels and residual units was delayed until June 26, 1992, by the resolution of objections to the elections and by litigation over an amended election petition. On August 7, 1992, runoff representation elections were conducted in the mutuels and the residual units. On August 14, 1992, objections to the election in the residual unit were filed by Teamsters Local No. 744 and by the Employer. Objections were not filed with respect to the election in the mutuels unit and the Commission issued a Certification of Results for the election in said unit on August 19, 1992. The Commission dismissed the objection filed by the Teamsters on February 9, 1993, and the Employer withdrew its objections on February 16, 1993. On March 16, 1993, the Commission issued a Certification of Results for the election in the residual unit. On June 4,

1993, the Commission dismissed the petition in the maintenance unit based on the Employer's uncontested assertion that it was no longer the employer of the individuals performing maintenance services.

Based on the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSIONS OF LAW

1. The election petitions were timely filed.

2. The election petitions did not need to be accompanied by any showing of interest.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER

That hearing be held on the remaining issues arising from the petitions filed in the instant matter.

Given under our hands and seal at the City of Madison, Wisconsin this 31st day of January, 1994.

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR HEARING

There are two issues before the Commission: (1) Were the petitions timely filed? and (2) Should each of the petitions be supported by a showing of interest?

Position of the Employer:

Timeliness:

The election bar period of one year should commence on the date of the certification of the most recent election proceeding. During the pendency of the prior election petition, i.e., from August 1990 to March 1993, the Employer's ability to effectuate unilateral changes in wages, hours and conditions of employment was severely restricted. The Employer sees its employes as a whole, rather than as separate bargaining units. Thus, it would be absurd to suggest that wages and benefits could be adjusted for the mutuels employes, while withholding equivalent changes for the other larger group of employes due to the pendency of the objections to their election. The Employer makes wage and benefit changes on a universal basis and not on a piecemeal basis depending on whether the results of an election for a group of employes has been certified.

The purpose of the one year period between elections is to provide stability of labor-management relations for a limited period of time. WEPA purports to be a neutral statute with a stated objective of mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. The Employer should be afforded at least one year of stable employment relations starting with the date of dismissal of the objections on March 16, 1993, since an Employer has little, if any, legal ability to make unilateral changes in wages, hours and conditions of employment during the pendency of either an election petition or any objections to the conduct of an election. Such a policy would allow the Employer time to deal with employe concerns related to hours, wages and conditions of employment before a new election proceeding is initiated. That approach would be consistent with the policy declarations of WEPA, the authority of the Commission to establish election procedures and the factual history of the prior election, as well as the unique status of the racing industry under both federal and state laws.

Showing of Interest:

The Commission should adopt a showing of interest requirement, at least for repeat petitions, before ordering another election. The Commission expended considerable time and effort, not only on the more routine unit determination issues, but also on the election procedures which were needlessly complicated by the frivolous participation of some unions, as evidenced by the fact that some unions received either no or few votes.

The NLRB adopted its showing of interest rule in 1947 and has not deviated from that rule. If the Commission followed that rule, at least for repeat elections, frivolous petitions would be precluded. An employer gains nothing substantive from such a rule, except protection against the disruption of repeated petitions which are wholly lacking in employe support. WEPA clearly recognizes the right of employes to enjoy, at their choice, non-union status without the intrusion of a representation election on an annual basis when there is no employe support for the elections. A union should be required to demonstrate a reasonable hope of success in order to justify the restrictions imposed on the work place once an election petition is filed.

In the mid-1940's the Commission determined that no showing of interest would be required of a petitioner where no previous election had been held. That rule was based on the untested belief that, in the main, election petitions were filed in good faith by unions. Where the Commission has had contrary evidence, it has required a showing of interest by the petitioner and any intervenor. The experience of the prior proceeding involving this Employer provides such evidence; three unions quickly withdrew their petitions, three unions received zero votes in the elections and one union received less than 5% of the ballots.

Moreover, a showing of interest requirement is consistent with other provisions of Wisconsin labor statutes. SELRA mandates a 30% showing of interest requirement for the petitioner and a 10% requirement for each intervenor. Given the level of state regulation of the racing industry, it is appropriate to afford the same election procedures to the Employer as the State has accorded itself in its dealings with election petitions.

Position of the Unions:

WIG believes its petition is timely pursuant to the Commission's policy as expressed in Village of Deerfield, Dec. No. 26168 (9/89). WIG also opposes any showing of interest requirement in this situation, since the Commission has not had such a requirement in the past.

UFCW did not file a brief, but at the pre-hearing conference it opposed the Employer's positions on both issues.

DISCUSSION:

Timeliness:

The NLRB will not conduct a second election in the same bargaining unit within a twelve-month period. The twelve-month period begins to run from the date of the balloting in the first election and not from the date of the final determination of the results in the first election. (Bendix Corp., 179 NLRB 18, 1969, 72 LRRM 1264; Fruitvale Canning Co., 85 NLRB 122, 1949, 24 LRRM 1451).

The Commission has adopted the same method of calculating the twelve month period when the employes do not vote to be represented by a labor organization. In the Village of Deerfield, Dec. No. 26168 (WERC, 9/89, the Commission stated:

> In summary, in the future, where a valid election is conducted and the employes do not elect to be represented for the purposes of collective bargaining, the Commission will not normally entertain a petition for a subsequent election until one year after the date of the conduct of the original election.

The policy of calculating the twelve month period from the date of the conduct of the election is of a longstanding duration. 1/ In the Adelman Laundry Company case, the employer also objected to the conduct of a second referendum because a petition for review involving the first referendum had been dismissed by a Circuit Court less than a month prior to the filing of the petition for the second referendum. Clearly, the Employer's argument herein has previously been considered and rejected by the Commission. The Commission is not persuaded by the facts and arguments in the instant case that it should modify or overturn its policy of calculating the twelve-month period between elections.

Showing of Interest:

The Commission is not persuaded that there is a sufficient current basis to change the Commission's longstanding policy of not requiring a showing of interest for petitions seeking an election among unrepresented employes.

However, there may be reason for concern that unions having little or no support among the employes may delay the election procedure by intervening after the hearing and attempting to raise additional issues. But the Commission can

---

1/ Adelman Laundry Company, Dec. No. 5799 (WERC, 8/61).

resolve this concern through the exercise of its discretionary authority to control the timing of requests to intervene in the instant proceeding so as to minimize any delay resulting from such intervention.

Accordingly, the Commission will not allow any labor organization to intervene in this proceeding after the hearing has commenced.

Dated at Madison, Wisconsin this 31st day of January, 1994.

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