STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

HOTEL EMPLOYEES AND RESTAURANT EMPLOYEES, LOCAL 122, AFL-CIO, Complainant, vs. AIRPORT HAAGEN DAZS, INC. (Formerly known as Garza & Associates), Respondent.	Case 1 No. 50097 Ce-2147 Decision No. 27973-A

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North River Center Drive, Suite 202, Post Office Box 12993, Milwaukee, WI 53212, by Mr. Scott D. Soldon and Ms. Ruth E. Canan, appearing on behalf of the Complainant, HERE Local 122.

Quarles & Brady, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, WI 53202, by Ms. Carmella A. Huser and Mr. Matthew J. Flynn, appearing on behalf of the Respondent, Airport Haagen Dazs, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel J. Nielsen, Examiner: The Hotel Employees and Restaurant Employees, Local 122, AFL-CIO, hereinafter referred to as either the Union or the Complainant, filed a complaint on November 24, 1993 alleging that Graza & Associates and Haagen-Dazs, Inc. had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act by withdrawing recognition from the Union, refusing to sign a collective bargaining agreement previously agreed upon between the parties and coercing employees into seeking to decertify the Union. The Respondent notified the Commission that its name was incorrectly listed on the complaint, that its former name was Garza & Associates, but that it was currently known as Airport Haagen-Dazs, Inc. The Respondent filed an answer denying the commission of any unfair labor practices, and affirmatively alleging that it had a good faith doubt as to whether the Complainant enjoyed majority status among its employees, and that the Complainant did not, in fact, represent a majority of its employees. The Commission appointed Daniel J. Nielsen, an examiner on its staff to hear and decide the case, and to make Findings of Fact and Conclusions

of Law and to issue appropriate Orders. A hearing was held at General Mitchell International Airport in Milwaukee on March 23, 1994 at which time certain evidence was taken. In the course of the first day of hearing, the complaint was amended to add allegations that the Respondent had failed to apply the collective bargaining agreement between the parties to its employees at other concessions in the airport. The Respondent filed an answer to the amended complaint, admitting that it operated other concessions, but denying that the contract was applicable to the employees of those concessions or that it had committed any unfair labor practices. The Respondent affirmatively alleged that the statute of limitations had expired with respect to the allegations in the amended complaint, and that the Complainant had waived its right to bring the complaint or enforce the contract by failing to make any effort to do so in the past. Additional hearing was held at the State Office Building in Milwaukee on August 24, 1994. A transcript was made of the proceedings of both days of hearing. The parties submitted briefs and reply briefs, and the record was closed on December 30, 1994.

Now, having considered the pleadings, testimony, exhibits, other evidence, relevant statutory provisions, the arguments of the parties and the record as a whole, the Examiner makes and issues the following

FINDINGS OF FACT

1. Airport Haagen-Dazs, hereinafter referred to as either the Company or the Respondent, is a business incorporated in the State of Wisconsin in April of 1992. Airport Haagen-Dazs operates concessions at Mitchell International Airport ("Mitchell Field") in Milwaukee. Elia Rita Montoto and her husband Norberto Montoto own a 50% share in Airport Haagen-Dazs, and his brothers, Mario and Jose Montoto own the other 50%. Elia Rita Montoto is the President and Treasurer of Airport Haagen-Dazs, Inc., and the manager of the business.

2. The predecessor to Airport Haagen-Dazs, Inc. was a partnership between Elia Rita Montoto and her brother-in-law Greg Montoto, known as Garza & Associates. Garza & Associates was formed in July of 1990 to operate an ice cream shop at Mitchell Field. Greg Montoto was responsible for negotiating contracts and leases for Garza & Associates, while Elia Rita Montoto was the day-to-day manager of the shop. When Airport Haagen-Dazs was formed, Greg Montoto transferred his half interest to his brothers Mario and Jose. Although Greg Montoto initially served as an agent for Airport Haagen-Dazs in their incorporation, he thereafter played no formal role in the Company, other than as an advisor and an authorized negotiator for leases and contracts.

3. Hotel Employees and Restaurant Employees Local 122, AFL-CIO, hereinafter referred to as either the Union or the Complainant, is a labor organization, which maintains its primary offices at 602 Majestic Building, 231 West Wisconsin Avenue, Milwaukee, WI 53203-1885. Vincent

Gallo is the Business Manager of the Union, and Sam Gallo is the Union's Business Representative.

4. The ice cream shop was operated by Garza & Associates opened in August 1990, under a sublease arrangement with Concession Air, the company that held the right to operate concessions at Mitchell Field. Part of Concession Air's agreement with Milwaukee County was that it would provide business opportunities to minority owned companies. Garza & Associates qualified as disadvantaged business entrepreneurs.

5. Concession Air had a master agreement with the Complainant covering wages, hours and working conditions for its employees at Mitchell Field. The sublease from Concession Air required the ice cream shop to be operated as a union shop. After the ice cream shop opened, Garza & Associates agreed to a three year contract with the Complainant. The contract ran from August 1, 1990 through July 31, 1993. There was no election or card count before recognition was extended to the Complainant. The contract was signed on September 11, 1990, and contained, inter alia, the following provisions:

> WITNESSETH:
>
> ARTICLE I
>
> WHEREAS, it is the desire of the parties of this Agreement to establish and continue a relationship of cooperation whereby the mutual interests of both parties may be promoted by attainment of the highest degree of efficiency so as to produce the best possible quality, and
>
> WHEREAS, it is the intent and purpose of the parties hereto that this Agreement shall promote and improve the industrial and economic relationship between the Company and the Union, and to set forth herein rates of pay, hours of work, and working conditions of employment to be observed between the parties hereto.
>
> NOW, THEREFORE, it is mutually agreed that the following conditions of employment covering employees within the unit of the Company, located on the premises of Mitchell International Airport, Milwaukee, Wisconsin, shall become effective.
>
> ARTICLE II - RECOGNITION
>
> The Company agrees to recognize the Union as the sole and exclusive bargaining representative for all employees of the Company at the location covered by this Agreement, with the exception of Managers, Assistant Managers, Cheif Assistant Manager, office employees and Supervisors. It is understood and agreed that no person or agency other than the Union shall be dealt with or recognized for

bargaining in regard to wages, hours, or working conditions of such persons.

Section 1. "The employer agrees that all obligations under this contract shall become a condition of the sale, transfer or assignment of the business or its assets".

Section 2. "The employer will continue to be liable for the complete performance of this agreement until the purchaser expressly agrees to assume all of its obligations".

. . .

ARTICLE V UNION SECURITY

Section 1. It is understood and agreed that, as a condition of continued employment, all persons employed by the Company in the bargaining unit which is the subject of this Agreement shall become members of the Union not later than the sixtieth (60th) day following the beginning of their employment; that the continued employment by the Company in said unit shall be conditioned upon the payment of the periodic dues of the Union. The failure of any employee to become a member of the Union not later than the sixtieth (60th) day of employment shall obligate the Company, upon written notice from the Union, to such effect and to the further effect that Union membership was available to such person on the same terms and conditions generally available to other members, to forthwith discharge such person. Further, the failure of an employee to maintain his/her membership in good standing by his/her failure to pay the periodic dues of the Union shall, upon written notice to the Company by the Union to such effect, obligate the Company to discharge such person.

Section 2. New employees shall be on probation for the first sixty (60) days. During this probationary period, the Company can discharge the employee, and the Union agrees not to oppose such discharge. Purgation may be extended by mutual agreement.

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ARTICLE VIII - GRIEVANCE AND ARBITRATION

In case a grievance or complaint arises, the following steps set forth herein shall be followed in this order:

1. A grievance or complaint shall be presented to the Steward.

2. In order for the Company to give consideration to the grievance or complaint, it must be presented by the Steward to the local Manager of the cafeteria within five (5) working days from the date of said grievance or

complaint.

3. Should the grievance or complaint not be settled by the Steward and the Manager, the complaint shall be reduced to writing and a representative of the Local Union office shall be called in to assist in settling such difficulty or difference.

4. When a dispute cannot be settled between the Local Union office and the local Manager, then the Union shall notify the Corporate Office of the Company, located in Milwaukee, Wisconsin. Such notice shall be given as soon as is practical after it is agreed that a settlement cannot be reached at the local level. The representatives of the Local Union and the Corporate Office shall make every effort to settle the dispute.

5. Should the dispute not be settled within five (5) days from the date of the above notice referred to in Step 4 by the Local Union office and the representative of the corporate office of the Company, the grievance or complaint arising out of or relating to the interpretation or application of this Agreement may be submitted to arbitration through the Federal Mediation and Conciliation Service, or any other mutually agreed-upon Mediation and Conciliation Service, the decision of the arbitrator is to be final and binding upon both parties. The cost of the arbitrator shall be borne equally by the Company and the Union.

6. If the grievance or complaint is not referred to arbitration within fifteen (15) days after Step 4 is exhausted, the issued shall be considered as closed unless mutually agreed otherwise.

ARTICLE IX - CHECK-OFF

During the life of this Agreement, the Company agrees to deduct Union membership initiation fees, dues or reinstatement fees levied by the International Union or Local Union in accordance with the Constitution and By-Laws of the Union from the pay of each employee who executes or has executed an "Authorization for Check-Off of Dues" form, providing this form meets all the requirements of the Labor Management Relations Act, and said form has been presented to the Company for its files.

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ARTICLE XI - HOLIDAYS

Section 1. Each full-time employee who works twenty (20) hours or more per week shall be entitled to the following holidays: New Year's Day, Memorial Day, July Fourth, Labor Day, Thanksgiving Day, Christmas Day, Martin Luther King Day, to be approved by the Company, off with pay at their average pay, provided

they have been in the employ of the Company sixty (60) days or longer, and the employee would have been scheduled to work if the day had not been observed as a holiday. The employee must have worked his/her last scheduled work-day prior to, and their next scheduled work-day after such holiday not worked. This does not apply to employees on approved leaves-of-absence or layoff. In the case of absence, the employee shall not be paid for such holiday not worked unless such absence was due to illness of employee and supported by a recognized physician's statement; and provided further that if an employee fails to report to work any of the holidays herein mentioned when requested to do so by the Company, unless on vacation, he/she shall not be paid for such holidays not worked.

Section 1a. Floating Holidays:

08/01/90 to 09/31/91	0
08/01/91 to 09/31/92	0
08/01/92 to 09/31/93	2

Section 2. Should any of the before listed holidays occur upon a regularly scheduled work-day, the employee shall be paid his/her regularly scheduled day's pay for not working, or double his/her regular rate for all hours worked on said holidays, providing the employee has completed his/her one (1) year probationary period prior to the holiday, and otherwise meets the requirements as outlined in the previous paragraph.

ARTICLE XII - VACATIONS

Section 1. Regular employees who have been in the employ of the Company for a period of one (1) year or more shall be deemed to have earned a paid vacation for each twelve (12) months of continuous service as indicated in Section 3 of this Article. Vacations shall be with pay at the employee's current hourly rate; based on the average number of hours worked per week in the one (1) year preceding the date of vacation.

Section 2. Any employee whose services with the Company are terminated after at least one (1) year's service shall be entitled to prorate vacation pay at the rate of one-twelfth (1/12th) of their vacation allowance, based on their length of service at the date of their last vacation, for each full calendar month worked subsequent to their last vacation anniversary date.

Section 3. Vacation allowances are as follows:

One (1) year but less than two (2) year's service - One (1) week

Two (2) years or more of service	- Two (2) weeks
Five (5) years or more of service	- Three (3) weeks
Fifteen (15) years or more of service	- Four (4) weeks

ARTICLE XIII - HOURLY WAGE RATES

Wage rates shall be as follows:

CLASSIFICATION	EFFECTIVE DATE	STARTING DATE	60 DAYS	120 DAYS	180 DAYS
Snack Bar	08/01/90	4.85	5.10	5.35	5.60
Attendant	08/01/91	5.10	5.35	5.60	5.85
	08/01/92	5.35	5.60	5.85	6.10

SENIORITY PAY

All employees covered by this Agreement shall receive, in addition to the benefits and wages as specified in the Agreement, the following amounts:

For Completion Of:

Three full years of service a total of	- $ .18 per hr.
Four full years of service a total of	- $ .20 per hr.
Five full years of service a total of	- $ .25 per hr.

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ARTICLE XXIII - DURATION

This Agreement shall be in full force and effect from August 01, 1994, to and including July 31, 1993, and shall automatically continue in full force and effect for yearly periods thereafter, unless notice is given, in writing, sixty (60) days prior to July 31, 1993, or any yearly anniversary date thereafter indicating its desire to modify, amend, or terminate the Agreement.

Any such notice shall specify the text of any proposed modification or amendments, and the party giving it shall otherwise follow the provisions of Section 8 (d) of the Labor Management Relation Act, 1947.

It is understood that the authority of this Agreement is Local Union No. 122 a subordinate Local Union of the Hotel Employees Restaurant Employees International Union, which is affiliated with American Federation of Labor and Congress of Industrial Organization.

No referendum vote authorizing the union shop provision was ever held among the employees in the bargaining unit.

6. Elia Rita Montoto managed and worked in the ice cream shop and was responsible for all personnel decisions. The bulk of the personnel employed were classified as sales clerks. The following chart summarizes the hirings, terminations, pay and benefit history of the sales clerks at the ice cream shop from August of 1990 through March of 1994:

EMPLOYEES OF AIRPORT HAAGEN DAZS ICE CREAM SHOP

Name	Date Hired	Date Terminated	Pay Raises	Pay Rate	Benefits Provided
Tana Brudos	4/8/93		4/8/93 4.80 6/17/93 5.00 10/10/93 5.25	5.25	1 week vacation
Gabriel Huguet	1/17/92	1/30/92	1/17/92 4.80	4.80	
Maria Martin	7/17/92		7/17/92 5.00 10/23/92 5.25 10/10/93 5.50	5.50	1 week vacation $100 bonus
Angela Montoto	1/4/91	Summer	1/4/91 4.80	4.80	
Brenda Montoto	2/28/92	5/19/93	3/12/92 4.80 3/29/92 5.00 10/23/92 5.25	5.25	
Elia Rita Mototo	8/2/90		8/2/90 6.00 8/14/92 6.50	8.00	1 week vacation

			5/6/93 7.00			
			8/1/93 7.50			
			11/7/93 8.00			
Elizabeth Montoto	8/18/90		8/18/90 5.00		5.50	1 week vacation
			7/3/92 5.25			
			6/17/93 5.50			
Fernando Montoto	3/9/94			5.00		
Greg Montoto	7/31/92	8/27/92			5.50	
Mario Montoto	3/4/91	4/23/92	3/4/91 4.80		5.00	
			3/29/92 5.00			

In addition, Elia Rita Montoto was employed as the Manager, and Yolanda Montoto was employed as the Assistant Manager. Their personnel histories were:

Name	Hired	Terminated	Pay Raises	Pay Rate	Benefits
Elia Rita Montoto	8/2/90		8/2/90 $6.00	$8.00	1 week vacation
Yolanda Montoto	7/90	3/6/92	7/90 $6.00	$6.00	Health Insurance

7. The wages paid to employees at the ice cream shop, and the benefits provided, were not calculated on the basis of the Union contract. Instead, when she had a question about pay or benefits, Elia Rita Montoto would consult with an employee of Concession Air who had experience dealing with the Union. Otherwise, she would act as she felt appropriate in matters of wages, hours and working conditions.

8. Many of the employees at the ice cream shop were related to Greg or Elia Rita Montoto. Elizabeth ("Lisa") Montoto is Elia Rita's daughter. Rita Montoto is Greg Montoto's daughter. Brenda Montoto is the wife of Greg Montoto's brother Mario. Mario Jr. is Brenda and Mario's son.

9. Although she objected to joining the Union, Elia Rita Montoto became a member of Local 122 pursuant to the union security clause and paid monthly dues to the Union. Brenda, Elizabeth, Rita and Mario Montoto also became union members and paid dues when they worked for the ice cream shop.

10. Maria Martin was the only unrelated employee who, at the time of the first day of hearing in this matter, had worked for the ice cream shop for more than the 60 days allowed in the contract without joining the Union and paying dues. When Martin was hired, Elia Rita told her about the Union, and Martin said that she did not wish to join. Elia Rita took no steps to compel her to join the Union or to terminate her employment.

11. When Maria Martin was married, she received a $100 bonus from the ice cream shop. When she became pregnant, she took a leave from the shop. Upon returning from the leave, Elia Rita Montoto again mentioned the Union to her, and she said that she did not wish to join.

12. In April 1992, Garza & Associates was disbanded and reorganized into Airport Haagen-Dazs, as described in Finding of Fact #2. The Union was not informed of the reorganization, nor of the change in Greg Montoto's status from owner to agent.

13. In the Fall of 1992, Greg Montoto was approached by the general manager of Concession Air, who asked if the Montotos would be interested in taking over a vacant space at the airport that had previously held a Famous Amos Cookie shop. They negotiated over the terms and

permissible uses of the space, and an agreement was reached to have Airport Haagen-Dazs operate a bakery which would supply baked goods to the airport restaurant and sell to the general public. The bakery was named LeCroissant. LeCroissant opened in November of 1992 under the management of Elia Rita Montoto, who also continued to manage the ice cream shop.

14. The Montoto's did not advise the Union of the opening of the bakery. Business Agent Sam Gallo was aware that the Montotos had negotiated with Concession Air to operate a baker, through a conversation with Concession Air's general manager.

15. The bulk of the employees at the bakery were employed in the classification of sales clerk, just as at the ice cream shop, and were paid on the same basis as those employees, although no benefits had been provided as of the first day of hearing in this matter. The personnel histories for the sales clerks at the bakery were as follows:

Name	Date Hired	Date Terminated	Pay Raises	Pay Rate
Rosa Landeros	11/27/92	1/14/94	11/27/92 4.35 1/16/93 4.50 2/27/93 5.00 6/19/93 5.25	5.25
Veronica Ramos	1/27/92	2/2/93	11/27/92 4.25	4.25
Elia Patricia Montoto	2/13/93	3/12/93	2/13/93 4.50	4.50
Yolanda Espinosa	3/31/93	12/31/93	3/31/93 5.00	5.00
Jose Miquel Gomez	6/7/93	6/18/93	6/7/93 5.25	5.25
Gabriela Huguet	6/19/93	12/3/94	6/19/93 5.00	5.00
Angelica Martin	11/20/93	11/20/93	5.00	5.00
Neil Montoto	11/20/93		11/20/93 5.00	5.00
Marwill Santiago	11/20/93		11/20/93 5.00	5.00

Name	Date Hired	Date Terminated	Pay Raises	Pay Rate
Marisol Romero	12/4/93		12/4/93 5.00	5.00
Stella Haros	1/1/94		1/1/94 5.00	5.00
Maria Villanueva	2/26/94		2/26/94 5.00	5.00
Elvera Cerda	2/26/94	3/11/94	2/26/94 5.00	5.00
Francisco Rodriguez	3/12/94		3/12/94 5.00	

In addition, Sandra Azeituna and Luis Martinez were employed as Bakers, and Guadalupe Montoto was employed as a Baker/Supervisor. Their Personnel Histories were:

Name	Date Hired	Date Terminated	Pay Raises	Pay Rate
Sandra Azeituna	11/20/93			$5.00
Luis Martinez	3/94	5/94		$5.00
Guadalupe Montoto	3/12/94			$5.00 as Baker $100 per pay period as Supervisor

Although not listed as an employee, Elizabeth Montoto would also help at the bakery as needed, at the same rate of pay as she received from the ice cream shop.

16. The Respondent did not treat the bakery as part of the bargaining unit or apply the contract to the employees at LeCroissant. No employee at LeCroissant ever became a member of or paid dues to the Complainant.

17. During the term of the 1990-93 collective bargaining agreement, no representative of the union had direct personal contact with any employee of the Respondent other than Greg Montoto. Members of the Union did receive newsletters, notices of dues increases and other general mailings from the union.

18. On April 22, 1993, Vincent Gallo sent a letter to Greg Montoto seeking to open negotiations for a successor contract. Montoto met with Vincent and Sam Gallo at a restaurant on May 6, 1993 to discuss the terms of the contract. The Gallos characterized the changes in the new contract as minor, and noted that the insurance plan had not yet been finalized in

negotiations with the area hotels. Since the hotels had a "most favored nation" clause on insurance, the Union insisted on applying identical terms to the other employers it dealt with. Montoto told them that he saw no problems with the contract, and that he would check it with the partners and get back to them. Vincent Gallo told him to sign it and mail it in if there were no problems, and to call the Union office if there were problems.

19. After meeting with the Gallos, Greg Montoto discussed the contract with Elia Rita. Elizabeth Montoto was present during the discussion and told them that the employees were not interested in the Union. Greg Montoto did not know what to do about this, and after a time consulted with his attorney. He passed on the attorney's advice that she should contact the National Labor Relations Board if she wanted to do something about the Union. Neither Greg nor Elia Rita Montoto made any inquiries of other employees about their attitudes towards the Union, nor did they make any efforts to determine whether the Union did in fact enjoy the support of a majority of the employees.

20. After the discussion with Elizabeth, Greg Montoto took no further action to discuss the contract with the stockholders of Airport Haagen-Dazs or to execute the contract. He was contacted by Vincent Gallo about the contract, and put him off. Later in the summer, he told Gallo that the employees did not want a union, and that he would not sign the contract. Gallo responded that the time for such objections was during the window period for filing election petitions before the contract expired. Montoto refused to sign the contract.

21. In late September, 1993, the Union's attorney sent Greg Montoto a letter demanding that he sign the 1993-96 contract. Montoto's attorney responded that there had never been agreement on a contract, and that Montoto had reason to doubt the majority status of the Union. Elizabeth Montoto filed a decertification petition with the regional office of the National Labor Relations Board on October 22nd. The Complainant responded with an unfair labor practice charge on November 2nd, asserting that the Respondent had refused to bargain and had illegally promoted the decertification effort and coerced employees into supporting the decertification. On November 4th, the Regional Director dismissed the decertification petition on the grounds that the ice cream shop did not meet the dollar volume jurisdictional standards of the Board. The Union then voluntarily withdrew its charge.

22. No decertification petition was filed, through the date of the first day of hearing in this matter, with the Wisconsin Employment Relations Commission.

23. The Union filed the instant complaint on November 24, 1993 essentially restating the complaint filed with the NLRB. In the course of the first day of hearing on March 23, 1994, the Union amended the complaint to include an assertion that the Company had violated the Wisconsin Employment Peace Act by failing to apply the terms of the contract to employees at LeCroissant,

and by unilaterally changing terms and conditions of employment to discourage support for the Union.

24. The Recognition Clause of the 1990-93 collective bargaining agreement recognized the Complainant as "the sole and exclusive bargaining representative for all employees of the Company at the location covered by this Agreement..." This includes employees at the LeCroissant bakery as well as the Respondent's ice cream shop.

25. The Complainant Union has never made a specific demand for bargaining over the wages, hours and working conditions of employees at LeCroissant.

26. The provisions of the 1990-93 collective bargaining agreement applicable to sales clerks at the ice cream shop are equally applicable to the sales clerks at the bakery.

27. Neither the Complainant Union, nor any employee of the ice cream shop or the bakery has ever filed a grievance protesting any violation of the collective bargaining agreement.

28. The Complainant has failed to exhaust its internal contractual remedies with respect to violations of the collective bargaining agreement or failure to maintain the status quo ante pending the satisfaction of the Respondent's duty to bargain.

29. There was no final agreement between Greg Montoto and representatives of the Complainant on terms for a 1993-96 collective bargaining agreement.

30. The Respondent lacked objective grounds for doubting the majority status of the Complainant as the bargaining representative of its employees.

31. The Respondent, its officer and agents, did not take any action to coerce employees into supporting an effort to decertify the Complainant, to undercut support among employees for the Complainant.

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

CONCLUSIONS OF LAW

1. The Respondent, Airport Haagen-Dazs, Inc. is an employer within the meaning of Section 111.02(7), WEPA.

2. The Complainant, Hotel Employees and Restaurant Employees, Local 122, AFL-CIO, is a labor organization, and is a "representative" of employes within the meaning of Sec. 111.02(11), WEPA.

3. By the acts described in Findings of Fact Nos. 18, 19, 20 and 30, supra, the Respondent refused to bargain with the Complainant and committed an unfair labor practice within the meaning of Sec. 111.06(1)(d), WEPA, and a derivative violation of Sec. 111.06(1)(a), WEPA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the

Examiner makes and issues the following

ORDER 1/

The Respondent, Airport Haagen-Dazs, Inc. is directed to cease and desist from refusing to recognize the Complainant's status as the exclusive bargaining representative of its employees, and is ordered to bargain with the Complainant on demand over the wages, hours and conditions of employment of all employees of the Respondent at Mitchell International Airport. As further remedy the Respondent will sign and post the attached Notice in the place customarily reserved for the posting of notices to employees for a period of thirty days following the date of this Order.

Dated at Racine, Wisconsin this 9th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Section 111.07(5), Stats.

(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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

NOTICE TO EMPLOYEES OF AIRPORT HAAGEN-DAZS, INC.

Pursuant to an Order by an Examiner appointed by the Wisconsin Employment Relations Commission employees are hereby notified that:

AIRPORT HAAGEN DAZS, it officers, directors, and agents, will refrain from refusing to recognize Hotel Employees and Restaurant Employees Local 122, AFL-CIO as the exclusive bargaining representative of employees of the Company's operations at Mitchell International Airport.

AIRPORT HAAGEN DAZS, its officers, directors, and agents, will refrain from refusing to bargain with Hotel Employees and Restaurant Employees Local 122, AFL-CIO over the wages, hours and working conditions of employees of the Company's operations at Mitchell International Airport.

AIRPORT HAAGEN DAZS, its officers, directors, and agents, will refrain from interfering with the rights of employes to form, join or assist labor organizations, and to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; or the employees' right to refrain from any or all such activities.

AIRPORT HAAGEN-DAZS, INC.

By ________________________ ________________________

Signature Title

This Notice will be posted in the locations customarily used
for posting notices to employees for a period of 30 days.

This Notice is not to be covered or obscured in any way.

Airport Haagen-Dasz

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I. Background

A. Initial Recognition and the 1990-93 Contract

In June of 1990, Greg Montoto and his sister-in-law Elia Rita Montoto formed Garza & Associates, an equal partnership, to operate an ice cream shop at Mitchell International Airport in Milwaukee, a county run facility. The Montotos operated the business under a sublease from Concession Air, the primary contractor for food service at the airport. By doing business with the Montotos, Concession Air received credit for dealing with disadvantaged business entrepreneurs ("DBE"), a requirement of its contract with Milwaukee County. Concession Air had a master national agreement with the Hotel Employees and Restaurant Employees International Union. In Milwaukee the contract was administered by Local 122, through its business manager Vincent Gallo and business representative Salvadore ("Sam") Gallo. The sublease with Concession Air contained a stipulation that the ice cream shop be a union shop. On September 11, 1990, Greg Montoto and the Gallos negotiated a three year contract for the ice cream shop. The contract was essentially a mirror of the contract with Concession Air. The Preamble of the contract stated in part:

> NOW, THEREFORE, it is mutually agreed that the following conditions of employment covering employees within the unit of the Company, located on the premises of Mitchell International Airport, Milwaukee, Wisconsin, shall become effective.

The Recognition Clause stated:

> The Company agrees to recognize the Union as the sole and exclusive bargaining representative for all employees of the Company at the location covered by this Agreement, with the exception of Managers, Assistant Managers, Chef Assistant Manager, office employees and Supervisors. It is understood and agreed that no person or agency other than the Union shall be dealt with or recognized for bargaining in regard to wages, hours, or working conditions of such persons.

The term of the contract was from August 1, 1990 through July 31, 1993, with a provision for automatic year-to-year renewal unless written notice of reopening was given 60 days prior to the expiration date. The contract contained a wage schedule, benefits such as holidays and insurance, and a union security clause requiring employees to become members of Local 122 on the 60th day of employment and to thereafter maintain their membership and pay monthly dues to the Local. Elia Rita Montoto did not take part in the negotiations, and never met the Gallos. Greg Montoto and Elia Rita Montoto signed the contract as co-owners. Elia Rita used the name "Rita Montoto" to sign the contract.

Elia Rita Montoto was the day to day manager of the ice cream shop. Much of the work force at the shop was drawn from the Montoto family. After the contract was signed, Elia Rita Montoto became a member of the Union, as did, at various times during the contract term, Elizabeth, Mario Jr., Brenda, Rita Elena and Yolanda Montoto. Elizabeth ("Lisa") Montoto is Elia Rita's daughter. Rita Montoto is Greg Montoto's daughter. Brenda Montoto is the wife of Greg Montoto's brother Mario. Mario Jr. is Brenda and Mario's son. Yolanda Montoto is a relative, but not a spouse or child of anyone who ever held an ownership interest in the Company. In July of 1992, Maria Martin was hired as a sales clerk at the ice cream shop. Maria is not related to the Montotos. Elia Rita told her about the Union when she was hired, but Maria told her she did not want to belong to the Union, and did not join or pay dues. The Company made no effort to force her to join the Union.

Elia Rita Montoto had no contact with the Union during the term of the 1990-93 contract, nor did anyone associated with Garza & Associates or Airport Haagen-Dazs, Inc., other than Greg Montoto. She had copies of the contract and provided them to each employee. She did not, however, apply the specific terms of the contract to the employees, nor did she attempt to contact the Union if she had questions. She instead consulted with a manager from Concession Air, which had a similar contract, and followed that person's advice as to how much to pay people and what benefits to provide. When Yolanda Montoto became eligible for health insurance under the contract, Rita Montoto did remit payments according to statements sent by the Union.

B. The LeCroissant Bakery

In April of 1992, the Montotos dissolved Garza & Associates and formed Airport Haagen-Dazs, Inc. Greg Montoto's interest in Garza was transferred to his brothers Mario and Jose, who each became 25% owners, and the remaining interest was held by Elia Rita and her husband Norberto. Greg Montoto acted as the agent for Airport Haagen-Dazs when it incorporated, but thereafter limited his role to advising the business, with authority for negotiating leases and contracts on behalf of the corporation. He was not an officer or stockholder in the new entity. The Union was not notified of the change from Garza to Airport Haagen-Dazs, nor of any change in Greg's role.

In the fall of 1992, Greg Montoto was contacted by a representative of Concession Air, who asked if he was interested in taking over the vacant shop formerly operated by Famous Amos Cookies. That operation, which had been non-union, had gone out of business five months earlier, and Concession Air was eager to attract a new business for the space. Greg said he might be interested, but that it would have to be more than just a cookie shop. Sam Gallo became aware of the discussions between Montoto and Concession Air about a bakery through a conversation with Concession Air's general manager. While the discussions were on-going, Concession Air was replaced by Host Marriott. Negotiations continued, and Greg Montoto reached an agreement with Host to have Airport Haagen-Dazs operate a bakery and kiosk called LeCroissant, which would

provide baked goods to the airport restaurant and to the general public. The initial agreement was a month-to-month arrangement.

LeCroissant was opened in November of 1992. Elia Rita Montoto took charge of daily management of the bakery, and continued to manage and work at the ice cream shop. She paid the employees the same wages and benefits as she paid to the workers at the ice cream shop. Her daughter Elizabeth worked at both the bakery and the ice cream shop. Airport Haagen-Dazs employed some ten other workers at LeCroissant for periods in excess of 60 days between its opening and the hearing in this matter. None of these employees became members of the Union.

C. The 1993-96 Negotiations

Vincent Gallo sent a letter on April 22, 1993, advising Greg Montoto that the Union wished to negotiate a successor contract:

> Dear Mr. Montoto:
>
> This will serve as the Union's notice that it wishes to open the contract covering employees at Haagen-Dazs at Mitchell International Airport for all classifications respectively, to modify and amend the terms of the agreement regarding wages, hours, working conditions and other conditions of employment.
>
> We trust that a meeting can be agreed upon as soon as possible so that a new agreement can be concluded by the anniversary date of the agreement.
>
> We will forward to you in the near future, specific proposed contract changes and/or amendments, at which time we can arrange a meeting regarding the same.
>
> . . .

On May 6, 1993, Greg Montoto met with Vincent and Sam Gallo to discuss a new labor agreement. The Gallos presented him with a draft which mirrored the contract negotiated with Host. The changes from the prior contract were described as minor. The Gallos noted that the insurance provisions had not yet been finalized in negotiations with the Greater Milwaukee Hotel Association, and that those terms would govern the benefits in the airport contracts. Montoto told them that he would take it back and discuss it with the partners, but that he did not see any problems with the contract. Vincent Gallo told him that if there were no problems with the contract, he should sign it and mail it in, and if there were problems, Montoto should call him.

After meeting with the Gallos, Greg Montoto discussed the contract with Elia Rita at the ice cream shop. Elizabeth Montoto was present during the conversation, and told them that the employees were not interested in the Union. Greg consulted with his attorney, and told Elizabeth that if the employees did not want the Union, she should contact the NLRB. No other employee expressed any view on the Union after Elizabeth Montoto's comment.

The Union attempted to get a signed copy of the contract from Greg Montoto after the May

meeting, and he put them off. When contacted again, he told Vince Gallo that the employees did not want to belong to the Union. Gallo told him that they should have said something during the window period for raising such issues. On September 28, 1993, the Union's attorney sent Greg Montoto a letter asking him to sign the contract and advising him that, if he did not, the Union would "take appropriate action, including the filing of NLRB charges against you and your Company." On October 6th, the Company's attorney responded, denying that any contract had been reached and stating that "subsequent to the meeting with Vince and Sam Gallo, Mr. Montoto received information that the employees at the Haagen-Dazs facility no longer wanted to be represented by the Union."

On October 22nd, Elizabeth Montoto filed an RD-Decertification petition with the Milwaukee office of the National Labor Relations Board. On November 2nd, the Union filed an unfair labor practice charge, alleging that the Company had refused to bargain in good faith, refused to execute an agreed upon contract, promoted a decertification effort, and coerced employees into supporting the decertification. On November 4th, the Regional Director dismissed the RD petition on the grounds that the volume of receipts from the sales of ice cream and other confections did not meet the NLRB's jurisdictional standards applicable to retail establishments. The Union subsequently withdrew its charge.

The Union filed the instant complaint with the WERC on November 24, 1993 essentially restating the complaint filed with the NLRB. In the course of the first day of hearing on March 23, 1994, the Union amended the complaint to include an assertion that the Company had violated the Wisconsin Employment Peace Act by failing to apply the terms of the contract to employees at LeCroissant, and by unilaterally changing terms and conditions of employment to discourage support for the Union.

II. The Arguments of the Parties

A. The Arguments of the Complainant, Local 122, HERE:

The Complainant argues that the Respondent clearly violated WEPA by ignoring the collective bargaining agreement, refusing to sign the 1993-96 labor agreement and actively attempting to have the Complainant decertified. The Complainant asserts that the complaint was brought six months after agreement was reached on the 1993-96 contract, and shortly after the Complainant became aware of the full extent of the Respondent's unfair labor practices. The one year statute of limitations runs from the point at which the Complainant becomes aware of the unfair labor practices, and thus the matter is properly before the Commission for decision. The Complainant notes that, even if the statute of limitations had run with respect to some aspect of the unfair labor practices, the actions of the Respondent represent a continuing violation of the law, and the right to file a complaint cannot be extinguished by the running of the statute.

The Union rejects any suggestion that it somehow waived its right to enforce its contract or act as the exclusive representative of employees. The Respondent claims that the notice of reopening served by the Union was defective, but Greg Montoto accepted the notice, met with the Union and agreed to terms on a successor contract without making any objection to the form or timing of the

notice of reopening. The Respondent had no reasonable basis for assuming that the Union had somehow abandoned the bargaining process. As for contract administration, the Union had no reason to believe that there was a need to visit the work site, since no employee had made a complaint about wages or working conditions. The Union kept in touch with members in a variety of ways, and the failure of the employees to raise concerns cannot be interpreted as indifference by the Union. Since the Union had no knowledge of any contract violations, it cannot be held to have waived its right to enforce the contract once it became aware of the pattern of violations by the Montotos.

The Complainant maintains that the Respondent violated 111.06(1)(f) of WEPA by breaching the 1990-93 contract at the ice cream shop and the bakery. At the ice cream shop, the Respondent ignored the Union's status as exclusive bargaining representative by consulting with an employee of Concession Air about the proper application of the contract rather than with the Union. As a result of her failure to consult with the Union, Rita Montoto failed to pay its employees the appropriate contractual wage rates, and violated the Union Security Clause by allowing employee Maria Martin to work without paying Union dues. At the LeCroissant bakery, the Respondent did not apply any of the terms of the contract, even though the contract, by its express terms, covers "... employees within the employing unit of the Company, located on the premises of Mitchell International Airport, Milwaukee, Wisconsin..." While the Respondent claims that the Union waived its right to enforce the contract while LeCroissant was still a tenuous operation, the evidence does not demonstrate any such agreement. Even if such an agreement was made, it obviously did not continue once the Respondent operated LeCroissant for nine months and negotiated a ten year lease for the bakery.

The Complainant argues that the Respondent committed further unfair labor practices in refusing to execute and apply the 1993-96 labor agreement negotiated between Greg Montoto and the Union. Montoto had full authority to speak for the employer. He accepted the terms discussed in the May 6, 1993 meeting, and no representative of the employer ever contacted the Union thereafter to reject or express any reservations about the terms of the 1993-96 contract. Greg Montoto admitted that his failure to sign the contract was solely caused by Lisa Montoto's comment that the employees did not want Union representation. This does not suffice to create any good faith doubt about the Union's majority status and does excuse his repudiation of the contract. One comment by the owner's daughter falls far short of being objective evidence of opposition to the Union by a majority of the employees. Absent any good faith doubt, there is simply no defense to the refusal to execute the contract and abide by its terms. Even if a good faith doubt existed about the degree of support for the Union, the Complainant argues that the Respondent's continuing violations of the contract may reasonably be viewed as having created the employee dissatisfaction in the first place.

The Respondent further violated WEPA by encouraging Lisa Montoto's efforts to decertify the Union. The Respondent provided Lisa with the information necessary to start the decertification process after a lengthy pattern of violating the contract and denigrating the Union's status by unilaterally setting wages, benefits and terms and conditions of employment. Given the close knit nature of a small business, this had the inevitable effect of undercutting the Union and setting the stage for the decertification effort.

B. The Arguments of the Respondent, Airport Haagen-Dazs, Inc.

At the outset, the Respondent argues that large portions of the complaint and the amended complaint are barred by the one year statute of limitations. Beyond, that the Respondent argues that there is no credible evidence of any unfair labor practices.

The Company reasonably believed that the Union had lost its majority status. Lisa Montoto made an unsolicited report of the employees' sentiments against the Union to Greg and Rita Montoto after she overheard them discussing the terms of the proposed 1993-96 contract. They took no steps to encourage her or assist her in her effort at decertification, other than to answer her question by telling her to contact the NLRB. There is no proof that Greg or Rita Montoto made any effort to involve themselves in the employees' efforts.

While the Union complains that the Company failed to sign the 1993-96 agreement, the Respondent argues that there was no agreement on terms, and thus no contract to be signed. Even Sam and Vince Gallo admitted that Greg Montoto told them that he would have to speak with his partners and get back to the Union about the contract. That does not bespeak an agreement on terms. Indeed, there could not have been an agreement, because the Union had not completed negotiations with the hotel association over insurance, and the insurance provisions of this contract tracked those of the hotel association. Greg Montoto took the Union's proposal back to discuss with Rita, and before they could reach any consensus, they learned that the employees did not want to continue in the Union. Thus there was no agreement on a 1993-96 contract, and no unfair labor practice by refusing to sign a 1993-96 contract.

The Respondent argues that there can have been no unfair labor practice arising from the relationship between the Company and the Union, because the original voluntary recognition was based on a mistake of law and fact. Greg and Rita Montoto were led to believe that they had to sign a contract with the Union in order to operate their shop. They recognized the Union and signed a contract without taking into account the wishes of their employees. Since the employees had no say in the matter, the Union is not validly selected and cannot enforce its contract.

The Respondent notes that, even if the collective bargaining agreement were valid, the Union Security provision is not. Wisconsin statutes require that all-union agreements involving voluntarily recognized unions be authorized by a majority of the employees before they become effective. There was never a referendum of any type among these employees. Since the Union has not been certified by either the WERC or the NLRB, its Union Security clause is void, and there can be no unfair labor practice in the Company's failure to honor it.

Assuming for the sake of argument that the 1990-93 contract was valid, the Respondent argues that it was not legally applicable to the vast majority of the persons who worked at the ice cream shop because they were the spouses and children of the owners. Spouses and children of owners

are not "employees" under the labor laws of Wisconsin. Furthermore, Rita Montoto, as an owner, was specifically excluded from the bargaining unit by the terms of the contract itself. The Gallos unlawfully coerced her into joining the Union, taking advantage of the Montotos' unfamiliarity with labor law to collect dues from someone who was clearly a manager.

Turning to the Complainant's claims that the employees of the LeCroissant bakery should have been covered by the contract, the Respondent asserts that this was never the intent of either the Montotos or the Union. The only discussions in 1990 concerned the ice cream shop. No one contemplated the existence of a second operation, much less extension of the contract to such an operation. The suggestion that the contract could automatically cover employees of the bakery is completely contrary to the concept of employee free choice that is imbedded in the labor laws.

The Union was well aware that the bakery existed when it made its proposals for a 1993-96 contract, yet neither included specific provisions relating to the bakery nor raised the subject in its discussions with Greg Montoto. No effort was made to represent those employees, or to claim the right to represent them. The only overt manifestation of interest in the bakery by the Union came after the filing of the instant complaint, when it blocked the signing of a ten year lease with the County because the bakery was non-union. The Union has failed to meet its burden of proof to show that the workers at the LeCroissant bakery were covered by the terms of the contract, and these allegations should therefore be dismissed.

The Respondent maintains that, whatever the rights of the Union might have been, and for whatever reason, the Union has waived the right to assert an unfair labor practice against the Company. With respect to the bakery employees, the Union's failure to assert any representational status after it knew of the operation constitutes a knowing waiver of its right to now raise the issue. With respect to all of the employees of the Company, the Union is estopped from claiming violations of the collective bargaining agreement. Although the Union claims that Rita Montoto's administration of the contract was improper, it had no contact with her or with any employee at any time. Its only connection with the Company was two negotiating sessions with Greg Montoto and acceptance of dues payments sent by Rita. Rita Montoto made conscientious efforts to comply with the contract as she understood it. Even though she did not follow the wage provisions accurately, she attempted to provide pay increases on a regular and appropriate basis. Throughout, she acted in good faith with no input from the Union. The Union's only interest came once it learned that the employees wanted nothing more to do with it. The Union cannot now insist on strict compliance with a contract where it completely ignored its role in contract administration and contributed to any mistakes that might have been made.

C. The Complainant's Reply Brief

The Complainant dismisses the Respondent's argument that the 1990-93 agreement should not have been entered into by noting that it was entered into and then ignored by the Company. No one forced the Montotos to recognize the Union and bargain a contract. They did so as a business decision and have never before questioned the validity of the contract. Moreover, there is no proof whatsoever that the Union did not enjoy majority status in the bargaining unit when the 1990-93 contract was signed or during its term. Nothing in the Wisconsin Peace Act prohibits voluntary inclusion of non-statutory employees in a bargaining unit or coverage for such employees under a

contract. The only legal effect of having a unit comprised of family members is that the Union could not have sought a referendum to authorize its union-security clause. Family members are not eligible to vote in such elections, and thus the Respondent's attack on the validity of the clause is defeated by its own arguments concerning the make-up of the unit.

The Complainant also rejects the Respondent's attempts to exclude the employees of LeCroissant from the bargaining unit. The contract defines the bargaining unit as all of the employees at the airport. Since both the bakery and the ice cream shop are retail food establishments requiring similar skills and presenting similar working conditions, with interchange of employees and common supervision, the combined unit is statutorily appropriate. Since the unit as defined by the contract clearly encompasses both operations, and since the unit is appropriate, the examiner should find that the 1990-93 agreement applies with equal force to employees of the bakery and the ice cream shop, and hold the Respondent liable for its failure to honor the contract in either shop.

D. The Respondent's Reply Brief

The Respondent reiterates its arguments that the 1990-93 agreement was based on a mistake of law and fact, and that the union security provision was legally invalid. It notes that the ice cream shop had only four employees, including Rita, and that Lisa's statement that she and the other employees did not want the Union mathematically eliminates the possibility of majority support. Even if Rita is not counted as an employee, the testimony of Maria Martin shows that she did not support the Union, and thus Lisa's statement was true.

Although the Complainant asserts that Greg and Rita Montoto encouraged the decertification effort and discouraged membership in the Union, there is simply no proof of this. Greg met with the Union and was prepared to negotiate a three year contract with it. Had he wanted to decertify the Union, he would instead have told the employees to file for an election during the window period before expiration. For her part, Rita Montoto provided copies of the contract to each employee and contrary to the Union's accusations never promised better or additional benefits to employees if they abandoned the Union. The Respondent argues that the employees had ample reason to be dissatisfied with the Union, without any involvement by the Company. The Union had no contact with employees other than to deduct dues from their checks.

The Respondent repeats that the Union's inaction over a three year period caused Rita Montoto to believe that she was properly administering the contract, and that it should be estopped from now complaining that she made errors. As to the alleged 1993-96 contract, the Respondent again notes that the contract was merely a proposal, and that Greg Montoto specifically told the Gallos that he would have to review it with his partners before signing it. There is no way that the examiner can conclude that a meeting of the minds took place over the terms of the 1993-96 contract. Since there was no agreement, the Company cannot have committed an unfair labor practice by refusing to sign a contract.

Finally, the Respondent argues that the Union misreads the 1990-93 contract in its effort to extend coverage to the workers at LeCroissant. The preamble to the contract merely extends the agreement to the "unit" of the employer's operations at Mitchell Field. The singular term "unit" logically refers to the ice cream shop alone. Given this, and lacking any evidence of a claim of

representational status by the Union, much less an agreement between it and the Company, there is no basis for involving the bakery employees in this dispute.

III. Discussion

The issues include whether the bargaining unit includes employees at the Company's LeCroissant Bakery, whether the Company violated the collective bargaining agreement with respect to employees at the ice cream shop and/or bakery, whether the Company unlawfully refused to bargain with the Union by failing to execute a 1993-96 contract, whether the Company had a good faith doubt as to majority status, and whether the Company coerced employees into seeking to decertify the Union. Each is addressed in turn.

A. The Union's Representational Status at LeCroissant

This relationship is based upon voluntary recognition of the Union, and the bargaining unit was defined by the parties in their initial contract. Article II acknowledges the Union as "the sole and exclusive bargaining representative for all employees of the Company at the location covered by this Agreement..." There is no question that the workers at LeCroissant were employees of the Company. No separate corporation was established to operate the bakery, and the daily management of both operations was left to the same person, Elia Rita Montoto. However, the bakery was not in existence when the contract was signed, and the dispute centers on whether the parties intended that the "location covered by this Agreement" would be limited to the ice cream shop. This is a question of contract interpretation.

The best evidence of mutual intent is the language used in the contract. The only ambiguity in the Recognition Clause is the reference to "the location covered by this Agreement." Immediately preceding this clause is a preamble clause, Article I of the agreement, which states that "it is mutually agreed that the following conditions of employment covering employees within the unit of the Company, located on the premises of Mitchell International Airport, Milwaukee, Wisconsin, shall become effective" (emphasis added). This language leaves little room for doubt as to the "location" covered by the contract.

Neither party contemplated the opening of LeCroissant when they executed the 1990-93 contract, but the clear language of the agreement accommodates the addition of employees and the expansion of operations. The fact that the product line at the bakery is different than that at the ice cream shop has little impact, given that it remains a food service operation, with the primary work being that of sales clerk. The Company's admission that it compensates its clerks at both operations in an identical fashion confirms the similarity of the work, as does the interchange of Elizabeth Montoto between the two work sites. Thus the examiner has concluded that the contract extended the bargaining unit to all of the Company's employees at Mitchell Field, including those at

LeCroissant. 2/

B. Violation of Contract

The Company admittedly did not follow the contract in many respects, including wage rates, seniority pay, union security payments, and vacations. The contract itself includes an enforcement mechanism in the form of a grievance and arbitration procedure for contract violations. The procedure is open to individual employee grievances and to Union-initiated grievances. The contract requires that grievances be submitted within 5 working days of the date that the grievance arose. There is no evidence that a grievance has ever been filed over any contract violation by or on behalf of employees at the ice cream shop or the bakery.

Where an unfair labor practice complaint asserts a violation of the collective bargaining agreement, the Commission requires the Complainant to prove that it has exhausted its internal remedies, 3/ or that any attempt to do so would have been futile. 4/ As noted, the Union has made no attempt to exhaust the grievance procedure with respect to any of the contract violations alleged. The contract claims were not even asserted until the first day of hearing in this case when the complaint was amended. The Union argues, in connection with the dispute over the statute of limitations, 5/ that it did not have reason to know of the contract violations until this litigation was commenced, but this assertion is not persuasive. Each of the employees had reason to know what they were being paid and what benefits they were receiving. There was no steward on site, but that is a choice made by the Union, and that choice carries with it with the inherent risk that contract violations would go unchallenged. The Company made no effort to disguise its pay and benefit policies, and these are not technical questions that only an experienced business agent would recognize as violations of the contract. In short, the Union's decision not to police its contract does not relieve it of the obligation to comply with the time limits and the substance of the grievance procedure.

C. Refusal to Execute a Contract

2/ The negotiated terms set a wage rate for the sales clerks, but do not make any provision for wage rates for bakers. There is no evidence that the Union ever demanded to bargain with respect to wages for those employes.

3/ Mahnke v. WERC, 66 Wis.2d 524, 529-30 (1974).

4/ Mews Ready-Mix Corp., 29 Wis.2d 44 (1965).

5/ Given the conclusion on the contract violations, I have not found it necessary to address the argument over the statute of limitations.

The negotiations between Greg Montoto and the Union over a 1993-96 contract consisted of a brief discussion on May 6, 1993. The Union briefed Greg Montoto on the changes from the 1990-93 agreement, including the fact that the insurance provisions had not been finalized in negotiations with the area hotels. While Montoto did not raise any specific objection to the Union's proposal, the record does not support a finding that agreement was reached. Greg Montoto testified that he told the Gallos he would have to speak with the partners and get back to them. Vincent Gallo testified that he told Montoto to sign the contract and return it if there were no problems, and if there were problems, he should contact the Union. Neither version

is consistent with a final agreement on terms. The men all left open the possibility that there might be objections or additional points to be resolved. Given the lack of any final agreement on terms for a 1993-96 collective bargaining agreement, the refusal of the Company to execute the contract does not constitute an unfair labor practice.

D. Good Faith Doubt

The Company asserts that it had a good faith doubt about the Union's majority status in May of 1993, and is thus excused from bargaining over a 1993-96 contract. The sole basis for the good faith doubt is a comment made by Elia Rita Montoto's daughter Elizabeth that the employees were not interested in the Union. Neither Greg nor Elia Rita Montoto had conversations with any other employees regarding the Union, and after the dismissal of the decertification petition by the NLRB, no further action was taken to determine the Union's majority status.

In order to excuse a refusal to bargain, a good faith doubt of majority status must be based upon objective considerations. 6/ The comment of one employee that the work force did not want a union, without any indication that there was even a discussion of the subject among employees or any other basis for the statement, simply does not meet the standard of "objective considerations". Even if Elizabeth were not the daughter of an owner, the Company would not have been entitled to rely on this one statement as the basis for withdrawing recognition from Local 122. 7/

Given the lack of any objective basis for doubting the Union's continuing status as majority representative, the Company had an obligation to continue to bargain over the 1993-96 contract. The Company refused to bargain after the summer of 1993, and thus violated Section 111.06(1)(d), WEPA.

E. Coercion

The Complainant accuses the Respondent of coercing employees into supporting a decertification drive. There is absolutely no evidence of this. The record evidence shows that

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6/ Kitchen Creations, Dec. No. 22415-A (7/85).

7/ Maria Martin had previously indicated that she did not want to join the Union. This statement is ambiguous, in that it may have meant that she did not want to pay dues, was opposed to the Union itself, or had some other objection. Neither Elia Rita nor Greg Montoto cited this statement as a basis for withdrawing recognition from Local 122.

Elizabeth Montoto raised the issue, and that Greg Montoto told Elizabeth to go to the NLRB if she wanted to pursue it. There is no evidence of any other communication with the employees about the Union by any of the owners or their agents. Four months after Elizabeth was told that the NLRB was the proper place to go, she filed a petition. After it was dismissed for lack of jurisdiction, she did not pursue the matter with the WERC because she was too busy to go to Madison.

The Complainant's argument that the Company's failures to follow the contract or bargain with the Union are inherently coercive might be valid in a different factual context. Here there is no evidence that the employees had any idea that the Union contract was not being followed or that negotiations were not proceeding. It appears that neither party communicated with the employees about such matters. While there is a derivative act of interference flowing from the commission of unfair labor practices, there is no similar doctrine which allows a finding of coercion solely on the basis of other, unrelated violations. Thus the record does not demonstrate any coercion of employees, and this portion of the complaint has been dismissed.

Dated at Madison, Wisconsin this 9th day of May, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner