STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAIRYLAND GREYHOUND PARK, INC., Complainant,

v.

SONJA MCCLURE and TIM SEARS, individuals and TEAMSTERS, LOCAL 744, Respondents.

Case 7
No. 51363
Cw-3657

Decision No. 28135-B

Appearances:

Michael, Best & Friedrich, Attorneys at Law, by **Mr. Jonathan O. Levine** and **Mr. John J. Kalter**, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin, 53202-4108, appearing on behalf of Dairyland Greyhound Park, Inc.

Ms. Sonja McClure, 1530 15th Avenue, Suite 18, Kenosha, Wisconsin, 51340, appearing on her own behalf.

Mr. Tim Sears, 4615 8th Avenue, Kenosha, Wisconsin, 53140, appearing on his own behalf.

Local 744, International Brotherhood of Teamsters did not appear at the hearing, but a post-hearing brief was submitted on its behalf by Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd., Attorneys at Law, 125 South Wacker Drive, Suite 1100, Chicago, Illinois 60606, by **Ms. Susan Brannigan**.

EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 22, 1994, Dairyland Greyhound Park, Inc., filed a compliant with the Wisconsin Employment Relations Commission (WERC) alleging that Respondents Sonja McClure, Tim Sears, and Teamsters Local 744 had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act. The record of this case was procedurally developed as detailed at the outset of the Memorandum Accompanying this decision, including the submission of post-hearing written arguments the last of which was received by the Examiner on January 8, 1996.

The Examiner, having considered the evidence and arguments, makes and issues the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Complainant, Dairyland Greyhound Park, Inc., (Dairyland) is an employer with offices at 5522 104th Avenue, Kenosha, Wisconsin, 53144. Dairyland operates a facility which offers food and beverage services, greyhound races, and pari-mutuel betting at that location.

2. Respondent Sonja McClure (McClure) is an person residing at 1530 15th Avenue, Suite 18, Kenosha, Wisconsin, 53140. Respondent McClure was employed as a bartender at Dairyland from May 21, 1990 to February 15, 1994, prior to being discharged on the basis that she had cash shortages in her till.

3. Respondent Tim Sears (Sears) is an individual residing at 4615 8th Avenue, Kenosha, Wisconsin, 53140. Respondent Sears has been an employe of Dairyland at all times material to this proceeding. Respondent Sears is also Respondent McClure's son.

4. Respondent Local 744, International Brotherhood of Teamsters (Local 744) is a labor organization with offices at 300 South Ashland Avenue, Chicago, Illinois, 60607-2764.

5. Beginning in approximately August of 1990, multiple unions, including Local 744, have attempted to organize Dairyland employes. McClure distributed literature for various unions during her lunch hours and at other times while she was not working. In addition, McClure wore pro-union shirts for various unions when she came to Dairyland during off-duty hours. She talked to employes one-on-one and in small groups, in favor of the unions and of the general concept of unionization of Dairyland employes generally. Since approximately fall of 1992, McClure was recognized by Dairyland employes as a leader of the pro-union movement at Dairyland.

6. In the summer of 1993, McClure began organizing an independent union called the Wisconsin Independent Gaming Union Local 711 and filed and later withdrew a petition requesting WERC to conduct an election with Local 711 on the ballot.

7. In the weeks preceding a WERC representation election scheduled for June 7, 1994 at Dairyland, as a non-employe of Dairyland, McClure engaged in promotional activities exclusively in support of Teamsters Local 744's campaign in that election. She distributed literature to employes promoting representation by Local 744. She sometimes received deliveries of such literature from a Local 744 representative at the Dairyland gate, and on one

occasion she picked it up at Local 744's Chicago office. She also communicated on various occasions with Local 744 representatives concerning the progress of Local 744's campaign.

8. In May of 1994, Dairyland was in the process of producing a video summarizing its previous five years of existence without a union and promoting continued non-union status. Dairyland asked some of its employes who were known to oppose unionization to express their opinions in the video about Dairyland and about why a union was not needed there.

9. On May 22, 1994, McClure was present at Dairyland Greyhound Park conversing with various employes. She initiated a conversation with a Dairyland employe named Sanjit Rampal whom she had known and worked with for several years prior to her termination and with whom she had a friendly relationship. On that occasion, McClure told Rampal that she had heard that he had been asked to appear in the video and had agreed to do so. McClure went on to tell Rampal, "It [sic] not a good idea for you to do it. There are people here that want the union bad enough, that if you stand in their way they will harm you. They know what kind of car drive [sic] and know where you live. I can't believe the management would ask you to do that."

10. Rampal was initially not concerned about McClure's statements, but he later concluded that they constituted a warning of what could happen to Rampal or others if they appeared in the video. He thereafter contacted his supervisor, Carrie Barth. Barth and Rampal then talked to Food and Beverage Manager Bruce Cicero and Head of Security Fred Ekornaas, and on May 28, 1994, Rampal signed a written statement describing his May 22 conversation with McClure. Although Rampal had initially decided that he would participate in the video, he ultimately decided, sometime after the conversation with McClure, that he would not do so.

11. By her statements to Rampal on May 22, 1994, McClure coerced and intimidated Rampal in the enjoyment of his right to refrain from assisting labor organizations, and she did so in connection with a controversy as to employment relations consisting of the representation election scheduled for June 7, 1994.

12. McClure's May 22, 1994 statements to Rampal have not been shown by a clear and satisfactory preponderance of the evidence to have been made by her as an agent acting on behalf of Local 744, and Local 744 has not been shown to have been responsible under WEPA in any other way for McClure's conduct in that regard.

13. Sears has not been shown by a clear and satisfactory preponderance of the evidence to have coerced or intimidated employes in the enjoyment of their rights on or about May 27, 1994 at approximately 6:00 PM or at any other time.

CONCLUSIONS OF LAW

1. By her statements to Rampal on May 22, 1994, McClure coerced and intimidated an employe in the enjoyment of his rights, within the meaning of Sec. 111.06(2)(a), Stats., in connection with a controversy as to employment relations, within the meaning of Sec. 111.06(3), Stats. Therefore, by those statements, McClure committed an unfair labor practice within the meaning of Sec. 111.06(3), Stats.

2. Because McClure's May 22, 1994 statements to Rampal have not been shown by a clear and satisfactory preponderance of the evidence to have been made by her as an agent acting on behalf of Local 744 and because Local 744 has not been shown to have been responsible under WEPA in any other way for McClure's conduct in that regard, Local 744 has not been shown to have committed an unfair labor practice within the meaning of Sec. 111.06(2)(a) by reason of McClure's statements to Rampal on that date.

3. Because Sears has not been shown by a clear and satisfactory preponderance of the evidence to have coerced or intimidated employes in the enjoyment of their rights on or about May 27, 1994 at approximately 6:00 p.m. or at any other time, he has not been shown to have thereby committed an unfair labor practice within the meaning of Sec. 111.06(2)(a), Stats., or of any other provision of WEPA.

ORDER

1. The amended complaint allegations that Respondent Sears committed unfair labor practices within the meaning of WEPA are dismissed.

2. The amended complaint allegations that Respondent Local 744 committed an unfair labor practice within the meaning of WEPA is dismissed.

3. As the remedy that the Examiner finds will effectuate the underlying purposes of WEPA as regards the unfair labor practice found above to have been commuted by Respondent McClure,

> Respondent Sonja McClure shall immediately cease and desist from coercing or intimidating any employe of Dairyland Greyhound Park, Inc. in the enjoyment of the employe's rights, including those guaranteed in Sec. 111.04, Stats., on behalf of or in the interest of employes, or in connection with or to influence the outcome of any controversy as to employment relations.

4. Dairyland's request for relief in addition to that noted in 3, above, is denied.

Dated at Shorewood, Wisconsin this 26th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner

DAIRYLAND GREYHOUND PARK, INC.

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

BACKGROUND

Dairyland filed the instant complaint on June 22, 1994, alleging that, "Commencing on or about mid-May, 1994, Sonja McClure and Tim Sears, agents acting on behalf of Teamsters Local 744 have threatened employees of Dairyland Greyhound Park with grievous harm and damage to their persons and property, and intimidated and harassed employees, all for exercising their rights under [WEPA] to refrain from union activity" in alleged violation of Secs. 111.04 and 111.06(2)(a), Stats. By way of remedy, Dairyland's complaint contains requests for an order that Respondents cease and desist and sign "a notice acknowledging the commission of the unfair labor practices listed above and informing employees of their right to refrain from union activity without coercion and intimidations."

In the cover letter accompanying the instant complaint, Dairyland requested that the instant complaint be consolidated with a complaint filed on May 23, 1994 by McClure against Dairyland in Case 6 alleging, among other things, that Dairyland's February 15, 1994 discharge of McClure violated WEPA.

Each of the Respondents' answers denied committing the unfair labor practices alleged by Dairyland, and Respondents McClure and Local 744 expressed opposition to Dairyland's consolidation request.

On July 27, 1994, the WERC denied Dairyland's consolidation request in Dec. Nos. 28134 and 28135. The WERC subsequently assigned the instant complaint case to the undersigned Examiner Marshall L. Gratz, a member of the WERC staff.

On August 2, 1994, the Examiner, on his own motion, requested that Dairyland amend its complaint by setting forth "a clear and concise statement of the facts constituting the alleged unfair labor practice or practices, including the time and place of occurrence of particular acts and the names of persons involved" and suggested that Dairyland identify its available dates for a hearing in the matter from a list of the Examiner's available dates.

On October 6, 1994, Dairyland filed an amended complaint by which it amended its earlier complaint so as to allege the following "facts which constitute the alleged unfair or prohibited practices":

> On or about May 22, 1994, between 12:30 p.m. and 1:00 p.m. near table F500, Sonja McClure, an agent acting on behalf of Teamsters, Local 744, threatened an employee, Sanjit Rampal, with grievous harm and damage to his person and property and intimidated and harassed employee Rampal for exercising his rights under [WEPA] to refrain from union activity.
>
> On or about May 27, 1994, at approximately 6:00 p.m. in the Chef's office, Tim Sears, an agent acting on behalf of Teamsters, Local 744, threatened employees: Jeff Windle, Carla Warwick, Jose' Herrera, Javier Ponce, Mike Topalian, Gretchen Schultze and Scott Duberstein, with grievous harm and damage to their persons and property, and intimidated and harassed employes, all for exercising their rights under the [WEPA] to refrain from union activity.

On December 9, 1994, the Examiner wrote to Complainant's Counsel with copies to the other parties, as follows:

> This is to confirm my understanding that, until I hear from you otherwise, your client (the complainant in the above matter) has no objection to the above matter being held in abeyance indefinitely.
>
> Similarly, I will assume that none of the Respondents objects to the matter being held in abeyance indefinitely unless and until I hear otherwise from them.

On March 20, 1995, the Examiner received a letter from Respondent McClure objecting to the instant case being held in abeyance indefinitely, and requesting that a hearing date be set in the matter as soon as possible. After the Examiner forwarded copies of that letter to the other parties, the Examiner received a letter from Dairyland on April 3, 1995, asserting that Dairyland "continue[s] to believe that the above matter should be held in abeyance until the hearing of Ms. McClure's complaint against Dairyland Greyhound Park, Inc. is completed. . . . [However], if you feel the need to set dates for hearing, please contact me as soon as possible."

Following further communications with the parties, the Examiner caused all parties to be served with a formal notice setting the matter for hearing on June 29, 1995 at the Kenosha Public Library.

At the time and place specified in the notice, an appearance was initially entered only by Dairyland. For that reason, prior to opening the record, the Examiner contacted the Respondents by telephone to determine why they were not present for the hearing. Upon being reminded of the hearing by the Examiner's phone contact, Respondents McClure and Sears proceeded to the hearing site and participated fully in the hearing. Upon being contacted by the Examiner, Mr. John Zochowski, president of Local 744 stated that to his knowledge Local 744 did not intend to enter an appearance at the hearing.

The Examiner ultimately convened the hearing later that morning. Complainant Dairyland presented its case-in-chief consisting of testimony from Mr. Sanjit Rampal, and adversely from Respondents Sears and McClure. Respondent McClure presented additional testimony as her case in chief. The only exhibit received into evidence was Complainant's Exhibit 1 consisting of a one-page statement signed by Rampal and dated 5-28-94.

Because Respondent McClure testified that she could not recall a meeting allegedly convened by WERC at Dairyland's premises concerning challenged ballots, Complainant was granted the right to submit with its brief additional evidence consisting of portions of transcripts of other WERC hearings concerning that meeting and McClure's role and status during that meeting. (tr. 72-73). The Examiner also granted Dairyland's request during the hearing, that official notice be taken of the contents of the relevant Commission case file(s) if and as necessary to determine the date of the above meeting. (tr. 70-71).

All parties present at the hearing were offered an opportunity to order a copy of the transcript from the reporter. Complainant ordered a copy of the transcript; Respondents Sears and McClure chose not to order one.

Each party present offered closing remarks on the record. Those parties also reserved the right to submit additional arguments in the form of sequential written briefs, beginning with the Complainant and followed by the Respondents.

Following the hearing, the Examiner wrote Local 744 with general information about what occurred at the hearing and about Local 744's opportunities to order a copy of the transcript and to submit a post-hearing brief. Local 744 ultimately chose to order a copy of the transcript and to submit a post-hearing brief. All other parties submitted briefs, as well, in accordance with the sequence specified by the Examiner. Dairyland included with its brief pages 411 and 412 of the transcript of the February 28, 1995 hearing in Case 6 (regarding McClure's May 23, 1994 complaint against Dairyland). Consistent with the Examiner's ruling at the hearing, those pages are treated as part of the record evidence in this case.

The Examiner received the last of the parties briefs on January 8, 1996, marking the date as of which the case was ready for decision.

POSITIONS OF THE PARTIES

In its brief, Dairyland argues that both McClure and Sears threatened employes in violation of WEPA and that McClure did so as an agent acting on behalf of Local 744, such that all Respondents should be ordered to cease and desist and to sign notices to employes for posting on Dairyland's premises. In their briefs in response to Dairyland's, McClure and Sears deny that they threatened employes in violation of WEPA and deny that they were agents acting on behalf of Local 744. In its brief in response to Dairyland's, Respondent Local 744 argues McClure was not Local 744's agent and that Local 744 is therefore not responsible for any violation of WEPA that she may be found to have committed.

The detailed contentions and citations of authority advanced by the parties in support of those positions have been considered by the Examiner, but they are recited in greater detail in the **DISCUSSION**, below, only to the extent necessary to explain the rationale for the Examiner's decision.

DISCUSSION

The issues presented in this case are whether Dairyland has proven by a clear and satisfactory preponderance of the evidence that McClure and/or Sears engaged in the conduct alleged in the amended complaint; and, if so, whether Local 744 was responsible under WEPA for their conduct. As to any violation of WEPA found, there is the additional question of what remedy will effectuate the underlying purposes of WEPA.

As the Complainant, Dairyland bears the burden of proving the essential elements of its case by a clear and satisfactory preponderance of evidence. Sec. 111.07(4), Stats.

Alleged Unfair Labor Practice by Respondent McClure

The Examiner has concluded that Dairyland has met its burden of proving that McClure's interaction with Rampal on May 22, 1994 violated WEPA. Rampal's testimony basically confirmed his March 28, 1994 statement to the Company to the effects that,

> Between 12:30 PM and 1:00PM on Sunday, 5-22-94 I was standing near table F500 when Sonja McClure appeared at the top of the stairs on the concourse level. She said "Hi" and I walked up to talk to her. I asked her what she was doing and she said she was here to see someone and that she had heard that he was going to do the commercial.

> I did not respond to her remark in any way. She went on to say, "It not [sic] a good idea for you to do it. There are people here that want the union bad enough, that if you stand in their way they will harm you. They know what kind of car drive [sic] and know where you live. I can't believe the management would ask you to do that."

Rampal testified that at first he was unconcerned about McClure's statements; but that, upon reflection, he considered them to be "some kind of a warning against me and people who are involved in the video." (tr. 30). Accordingly, Rampal reported McClure's statements to supervisors and thereafter to Dairyland's head of Security and signed and dated the above statement. He also testified that although he had initially decided to participate in the video, sometime after his May 22 conversation with McClure he ultimately chose not to do so. (tr. 95 and 28-29).

McClure in her testimony, acknowledged that she had a conversation with Rampal which touched on both the subject of the video and the idea that harm could come to the person or property of an employe participating in that video because unnamed persons feel strongly that there should be a union at Dairyland. However, McClure asserted that she was merely repeating concerns that she had heard another employe express, rather than asserting them as beliefs of her own. McClure also testified that Rampal had already decided not to participate in the video by the time of the conversation in question. (tr. 103). She also testified that she and Rampal were friends, and she stated that she had no intention of harming Rampal or of threatening him or his property with harm. McClure argues that because it was well known for many years that Rampal did not and would not support unionization at Dairyland, there would have been no reason for McClure to have tried to pressure him to support the Union at the time of the conversation in question. She also argues that Rampal's written statement and testimony have untruthfully twisted what actually happened between them, either because Rampal misunderstood what she said to him or because Rampal, as an employe of Dairyland then and now, felt and feels explicit or implicit pressure from Dairyland to twist the facts into something different than what actually happened. McClure also points out that if Rampal and Dairyland believed that she had in fact threatened Rampal, it would not have taken several days for his statement to have been reduced to writing and Dairyland would likely have contacted law enforcement authorities.

On balance, the Examiner finds Rampal's testimony more credible than McClure's where they differ. It is undisputed that McClure and Rampal were friendly and that McClure did not threaten to personally cause Rampal any harm. It is also quite possible that she did not intend her remarks to be threatening to him. Nevertheless Rampal, after thinking over those remarks, took them as a warning, and reasonably so in the circumstances. Rampal then brought the remarks to management's attention; signed a statement preserving those remarks; and voluntarily appeared to testify about them at the hearing.

McClure's claim that Rampal felt pressured to sign the statement and to testify as he did are speculative and unsupported by any evidence other than Rampal's employment status, which, standing alone is unpersuasive. Neither the delay between the date of the incident and Rampal's signing of the statement concerning it nor the apparent fact that Dairyland did not involve law enforcement authorities in the matter is a persuasive basis on which to credit McClure's over Rampal's version of the May 22, 1994, conversation between them, either.

The fact that Rampal was a confirmed non-supporter of unionization does not make it unlikely that McClure could have been motivated to discourage him from cooperating in the employer's production of a video promoting the values of non-union status during the course of the then-on-going representation election campaign. Indeed, Rampal ultimately chose not to appear in the video after having the conversation with McClure.

WEPA Sec. 111.06(3) makes it "an unfair labor practice for any person to do . . . in connection with . . . any controversy as to employment relations any act prohibited by subs. . . . (2)." Subsection (2)(a) of that section makes it "an unfair labor practice for an employe individually or in concert with others . . . to coerce or intimidate an employe in the enjoyment of the employe's legal rights, including those guaranteed in S. 111.04." And Section 111.04, Stats., provides that employes shall have "the right to refrain from . . . such activities" as assisting labor organizations and engaging "in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection."

By her conversation with employe Rampal on May 22, 1994, McClure coerced and intimidated Rampal in the enjoyment of his right to decide whether to participate in the Dairyland video production in which employes who opposed unionization at Dairyland were asked to express their thoughts on camera about their employment and why a union was not needed at Dairyland. (tr. 27-28). In doing so, she engaged in an what would have been an employe unfair labor practice under Sec. 111.06(2)(a), and did so in connection with the on-going representation election campaign which constituted a "controversy as to employment relations" within the meaning of Sec. 111.06(3), Stats. Thus, although McClure was not working for Dairyland as of May 22, 1994, she was nonetheless a "person" answerable for the subject conduct by reason of Sec. 111.06(3), Stats.

The Examiner has therefore concluded that McClure committed an unfair labor practice within the meaning of Sec. 111.06(3), Stats.

Alleged Unfair Labor Practice by Respondent Sears

The Examiner has concluded that Dairyland has not met its burden of proving its allegation that Sears violated WEPA as alleged in the amended complaint or otherwise.

The only evidence offered by Dairyland in support of its amended complaint allegation against Sears was testimony it elicited by questioning Respondent Sears, himself. In that testimony, Sears denied or did not recall engaging in the conduct attributed to him in the amended complaint.

Sears did admit saying to fellow employe Bernie Glynn something to the effect that if this were Chicago, cars would be on fire as a result of employes appearing in the video that Dairyland had produced and was playing for employes at various times on television monitors located on its premises. However, Sears further testified that Glynn was a known union supporter who lives in Chicago, and that Sears made that statement to him jokingly and in passing. Even if the amended complaint were deemed to be conformed to that evidence, the Examiner would not find Sears' admitted conduct to constitute a violation of WEPA.

Alleged Local 744 Responsibility for McClure's Unfair Labor Practice

The Examiner has concluded that Dairyland has not proven that Local 744 is responsible under WEPA for McClure's statements to Rampal on May 22, 1994. More specifically, the Examiner has concluded that Dairyland has not met its burden of proving by the requisite clear and satisfactory preponderance of the evidence that McClure was acting as an agent on behalf of Local 744 when she engaged in that conversation with Rampal, or that Local 744 is responsible under WEPA in any other way for McClure's conduct during that conversation.

There is no contention or showing that Local 744 in any way directed, authorized or ratified McClure's subject statements to Rampal. There is also no contention or showing that Local 744 compensated McClure for any of her activities in support of Local 744 or agreed with her that she should engage in those activities for any particular period of time.

Rather, Dairyland bases its claim against Local 744 on the existence of a general agency relationship between that organization and McClure, relying on the following NLRB cases: TEAMSTERS LOCAL 377, 159 NLRB 1313, 62 LRRM 1326 (1966); INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, 79 NLRB 1487, 23 LRRM 1001 (1948); and FURNITURE AND PIANO MOVING, 210 NLRB 838, 86 LRRM 1461 (1974). Dairyland asserts (at page 16 of its brief) that "it was clear to employes like Rampal that McClure's actions represented the Teamsters" because she had organized on the Teamsters' behalf in prior elections at Dairyland, distributing their literature, talking to employes about the benefits of the Teamsters and attending Teamsters functions, and because in the weeks preceding the June, 1994 election, when she no longer had a personal stake in the representation election due to her earlier termination, McClure was active exclusively on behalf of Local 744, distributing literature to employes and regularly discussing the campaign progress with representatives of Local 744.

The Respondents argue that the record does not support the existence of such a relationship between Local 744 and McClure. Local 744 relied on the following NLRB cases: INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, above; SOUTHERN CALIFORNIA GAS CO., 302 NLRB 456, 138 LRRM 1040 (1991); UNITED BUILDERS SUPPLY CO., Inc., 287 NLRB 1364, 127 LRRM 1338 (1988) and PIERCE CORPORATION, 288 NLRB 97, 128 LRRM 1014 (1988), citing the latter two cases for the proposition that, "In the context of an organizing campaign, during which the alleged statements were made in this case, the NLRB is loathe to find a general agency relationship based merely on the individual's membership on an organizing committee, or solicitation of authorization cards, or because the individual is a vocal supporter of the union." Local 744 brief at 4-5.

Dairyland variously asserts that McClure admitted during her testimony that she was an agent of Local 744. In support of that contention, Dairyland cites transcript page 22 at which McClure stated, "I was a union organizer;" transcript page 64 at which McClure admitted that her "organizing activities" came to be focused "For the Teamsters alone" in the weeks preceding the 1994 election; transcript page 66 where McClure was asked if "it's correct that at that point that you became an agent of Teamsters Local 744?" to which she ultimately answered "I would say just prior to the election I was running around telling people that Teamsters would probably do the best job, yes." While McClure thereby admitted various facts with a potential bearing on the existence or nonexistence of an agency relationship between herself and Local 744, they do not constitute an admission that she was an agent of Local 744. It can also be noted that McClure further testified that "on the 22nd of May I was not working for the Teamsters . . .". (tr. 53).

Dairyland also asserts that when McClure attended a WERC meeting to discuss procedural aspects of a pending representation case, she did so as a representative of Local 744, citing transcript page 70 and the portions of the Case 6 transcript attached to Dairyland's brief by prior arrangement at the hearing. However, again, the Examiner does not find the record references sufficient to support the assertions for which Dairyland cites them. At page 70 of the transcript, McClure was asked if she "participated with Tom Noonan in some meetings that the WERC held on how to resolve [certain] objections [to the conduct of the election that had been filed by Local 744]." McClure initially answered "Yes" but subsequently testified that she did not recall the meeting in question. The portion of McClure's Case 6 testimony submitted with Dairyland's brief established only that McClure "gave [her] two cents [worth] as a Dairyland employee . . . " at that meeting.

Dairyland has also relied on the facts that McClure was variously mentored and guided over the years in her pro-union activities by a non-Dairyland-employe named Tom Noonan. The record establishes that Noonan provided McClure with Teamster literature in the fall of 1990 and variously communicated with her at various times about efforts to unionize Dairyland employes. The record further establishes that Noonan came to be known at Dairyland as

"Tommy Teamster" because of his various activities in support of Teamster efforts to organize Dairyland employes. However, the record does not establish whether and to what extent Noonan was employed or otherwise directed, controlled or authorized to act on behalf of Local 744. For example, McClure argued in her opening statement that Noonan "has never been an organizer, never has ever worked for the Teamsters" (tr. 12), and she testified that she did not know whether Noonan was employed by Local 744 as an organizer (tr. 55-56) and further testified "I don't think Mr. Noonan has ever really worked for the Teamsters . . .". (tr. 74).

On the other hand, it is undisputed that over the years that she was employed at Dairyland, McClure was a visible and active proponent of unionization of Dairyland's employes; that she was known to her fellow employes as the leading pro-union activist in the food and beverage areas of Dairyland's operations; and that she attended union-sponsored gatherings of employes, wore pro-union tee-shirts, distributed union literature and spoke in favor of various unions and unionization to employes individually and in small groups. Following her termination in February of 1994, McClure continued to engage in activities in support of unionization of Dairyland's employes, as well. It is also undisputed, however, that McClure engaged in such activities over the years on behalf of numerous labor organizations, including but not limited to Local 744.

The record also establishes that at the time the subject conversation with Rampal took place, McClure's activities were focused exclusively in support of Local 744. It also establishes that during that time period Local 744 provided literature to McClure for her use in support of Local 744's on-going campaign to win the up-coming representation election scheduled for June 7, 1994. In that regard, McClure acknowledged that on various occasions a Local 744 representative delivered literature to her at the Dairyland gate and that on one occasion she picked up literature at Local 744's office in Chicago. She also acknowledged that she communicated on various occasions with various Local 744 representatives regarding the progress of Local 744's representation campaign at Dairyland.

Upon consideration of all of the foregoing and of the record as a whole, the Examiner does not find the record evidence sufficient to establish by a clear and satisfactory preponderance of the evidence that Local 744's conduct created a general agency relationship with her such as would render Local 744 responsible for her conversation with Rampal. As Local 744 aptly concludes in its brief (at p.7), the fact "that McClure distributed literature for a number of unions, spoke to employees about the benefits of union representation and of the probability that Local 744 could do 'the best job' of representing the employes, attended union meetings, and wore tee-shirts of the several competing labor organizations does not constitute a manifestation of agency status broad enough to support finding McClure a general agent of Local 744 or that she was cloaked with apparent authority, either express or implied, to act as the Union's agent."

However, under Wisconsin law, determinations whether a labor organization is responsible for acts of individuals other than its employes are based not only on general agency principles, but also on whether the employe(s) being coerced or intimidated "would have just cause to believe that" the coercive or intimidating statements were being made "for and on behalf of the" respondent labor organization. CHRISTOFFEL V. WERB, 243 Wis. 332, 345-46 (1943).

In the instant case, Rampal testified that he knew McClure to be "heavily involved" in union organizing activities at Dairyland because she communicated pro-union information to Rampal at Dairyland and at union-sponsored functions and because "She always had brochures of the unions and [was] telling me how it would be better if we had the union at the track." (tr. 26-27). When asked if he would characterize her as "a lead organizer" during the campaign from September 1993 through June of 1994, he agreed that she was "one of the leads." (tr. 27).

However, Rampal was not asked and did not specifically testify that he perceived McClure to be acting for and on behalf of Local 744 when she made the subject comments to him on May 22, 1994. In that regard, it is significant that Rampal knew that McClure had actively supported and promoted various unions over the years and that she was strongly committed to the general objective of unionization of Dairyland employes. In those contexts, the facts that she was focusing her activities on Local 744 as of May 22, 1994 and that she was no longer employed by Dairyland as of that date do not combine with the balance of the record to clearly and satisfactorily establish that Rampal had just cause to conclude that McClure was acting for and on behalf of Local 744 when she made her comments to him. Rather, in all of the circumstances, Rampal could just as readily have concluded that McClure was making her May 22, 1994 comments to him strictly as the individual Rampal had known over the years to have been active in pursuit of the objective of unionization by any one of several labor organizations. Rampal could also have just as readily concluded that McClure's stated concerns about the video and her continued promotion of unionization of Dairyland employes after her termination earlier that year all stemmed from her strong personal commitment to the general objective of unionizing the Dairyland employes, rather than from any relationship she had with Local 744.

For those reasons, and based on the record as a whole, the Examiner has concluded that Local 744 is not responsible under WEPA for the unfair labor practice that McClure has been found to have committed in this case.

Remedy

By way of remedy for the WEPA violation found to have been committed by McClure, the Examiner has ordered that McClure cease and desist from such conduct in the future.

Dairyland's counsel concluded his opening statement at the hearing by stating, "It is a threat in violation of the Peace Act, and it's entitled to a remedy. And we would ask that the remedy be granted in the form of a cease and desist order. Thank you." (tr. 10). When the Examiner then asked if the additional notice relief requested in the complaint and amended complaint was no longer a part of Dairyland's relief request, Dairyland's counsel replied the that Dairyland was "mostly concerned with the cease and desist order," but that it was also seeking the notice relief.

In light of the foregoing, and upon consideration of the isolated nature of the violation involved and the record as a whole, the Examiner has concluded that a cease and desist order alone suffices in this case to effectuate the underlying purposes of WEPA.

Dated at Shorewood, Wisconsin, this 26th day of March, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/
Marshall L. Gratz, Examiner