

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 953 INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS,

Complainant,

vs.

POLK-BURNETT ELECTRIC COOPERATIVE,

Respondent.

Case 19

No. 53111 Ce-2168

Decision No. 28605-A

Appearances:

Mr. Bruce H. Michalke, Assistant Business Manager, Local Union 953, International Brotherhood of Electrical Workers, P. O. Box 3005, 2206 Highland Avenue, Eau Claire, Wisconsin 54702, appearing on behalf of the Complainant.

Laux & Associates, S.C., Attorneys at Law, by Mr. Timothy J. Laux, P. O. Box 456, 108 Chieftan Street, Osceola, Wisconsin 54020, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Local Union 953, International Brotherhood of Electrical Workers filed a complaint with the Wisconsin Employment Relations Commission on September 13, 1995, alleging that the Polk-Burnett Electric Cooperative had committed unfair labor practices in violation of Sec. 111.06 of the Wisconsin Employment Peace Act by refusing to bargain in good faith over the wage rate of a new position. On December 11, 1995, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on January 30, 1996, in Centuria, Wisconsin. The parties filed post-hearing briefs, the last of which was received on February 13, 1996. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusion of Law and Order.

No. 28605-A

FINDINGS OF FACT

1. Local Union 953, International Brotherhood of Electrical Workers, hereinafter referred to as the Union, is the exclusive collective bargaining representative for all operating, maintenance and construction employes of the Respondent. The Union maintains its offices at 2206 Highland Avenue, Eau Claire, Wisconsin 54702-0154 and at all times material herein, Bruce Michalke was its Assistant Business Manager and has acted on its behalf.

2. Polk-Burnett Electric Cooperative, hereinafter referred to as the Employer, is an Electric Cooperative with its main offices located at 1000 Highway 35, Centuria, Wisconsin 54824-0310. Mr. Steve A. Glaim is its General Manager and, at all times material herein, has acted on its behalf.

3. The Union and the Employer are parties to a collective bargaining agreement which by its terms is effective from November 1, 1993 through October 31, 1996. The collective bargaining agreement contains the following pertinent provisions:

ARTICLE 2 MANAGEMENT RESPONSIBILITIES

2.1 Management Rights - The control and supervision of all operations and the direction of all working forces including the right to hire and determine qualifications; job requirements; the size and character of the working forces; to establish reasonable work rules and schedules of work; to create, combine and modify and eliminate positions (provided that the Cooperative will bargain with the Union, upon demand, over the impact of the Cooperative's decision to create, combine and modify and eliminate positions); to promote, transfer, schedule and assign employees; to suspend, demote, discharge and take other disciplinary action against employees, provided such decision is made for just cause; to maintain the efficiency of operations; to take whatever action is necessary to comply with state or federal law; to introduce new or improved methods or facilities, to determine the size of the work force to be utilized and the number and kind of classifications to perform services; to determine the methods, means and personnel by which operations are to be conducted; to take whatever action is necessary to carry out the functions of the Cooperative in situations of emergency. All of the aforesaid management rights are vested exclusively in the Cooperative except as

modified by the provisions of this agreement.

4. Glaim sent Michalke a letter dated June 13, 1995, confirming a prior phone conversation as well as setting a meeting for June 20, 1995, which letter provided, in pertinent part, the following:

...

2. We plan to eliminate the warehouseman position.
3. We have put in place the new position of warehouse/maintenance supervisor. Scott Wilder has been promoted to this position. Reporting to this position will be the mechanic, general operations assistance (sic) and seasonal grounds helpers. The position description is attached.
4. The new position of general operations assistant will assist in the warehousing and vehicle maintenance areas and will assist the mechanic during the times required (position description attached). We propose the following compensation for this position.
 - a. First 6 months at \$9.50 per hour.
 - b. Next 12 months at \$10.75 per hour.
 - c. After 18 months, \$12.00 per hour.

We see no adjustment in this compensation on November 1, 1995, but will be affected thereafter, as all other union positions in the contract.

5. The parties met on June 20, 1995, with respect to the wages to be paid the General Operations Assistant among other issues. The parties' exchange proposals and the Employer offered to modify the \$12.00 figure to \$12.75 per hour but the Union would not accept this and no agreement on the compensation level for this position was reached.

6. Glaim sent the following letter dated June 21, 1995, to Michalke:

This letter will serve as a summary of the June 20, 1995 meeting held between 9:00 A.M. and 11:45 A.M. The parties present representing Local 953 were you, Bill Lewis, Tom Horn and

Rick Anderson, and those representing PBEC were Marlyn Bottolfson, Joe Sobol, Steve Glaim and Tim Laux. The purpose of the meeting was to discuss my letter to you dated June 13, 1995.

Following a good deal of discussion, the position of the cooperative is:

1. The Warehouse/Maintenance Supervisor position duties will remain according to the (sic) position description.

2. The Area Supervisor position duties will remain according to the position description with the exception of eliminating the words "rotating on call" in No. 10 of said position description, per your request.

3. Following your rejection of moving the General Operations Assistant to the higher level of \$12.75 per hour from the stated \$12.00 per hour, the cooperative will pursue filling the position at the wage stated in the June 13, 1995 letter. Please contact me within a week should you wish to pursue further discussion on this issue.

4. Per your request, we shall withdraw our plan to eliminate the foreman positions and our suggestion to modify Article 15, 15.5 as numbered 5 and 6, respectively in the June 13, 1995 letter. Said withdrawal will be effective through the end of the contract term, which is October 31, 1996.

If you have any questions, please contact me at your convenience.

7. Michalke sent the following letter dated June 23, 1995, to Glaim:

Following is the Union's position to the unsettled proposed changes you are planning to make at PBEC.

Your listed changes - numbers 2, 3, and 4 are tied together as they all relate to the Warehouseperson position.

We are not in agreement with your plan to eliminate the bargaining unit position of Warehouseperson, as spelled out in the

Labor Agreement between Polk-Burnett Electric Cooperative and the
International Brotherhood of Electrical Workers, Local Union 953.

The basic reason for not being in agreement with this is your Position Description for your newly created position of Warehouse/Maintenance Supervisor. The Union requested changes to be made to the new Position Description in Numbers 12 and 13 by adding the words at the beginning "May assist", and at the ending 'when necessary'. You did not agree to do so.

It is the Union's contention that you are unilaterally making a decision to remove a classification from the Labor Agreement and put that work into supervision. This, we cannot agree to without the changes requested.

Your Number #4, creating a new position of General Operations Assistant is at your option, but the wages are negotiable, therefore, the Union has, and is proposing at this time the following:

First 6 months at \$12.60 per hour
Next 12 months at \$13.85 per hour
After 18 months \$15.10 per hour

We are prepared to meet at your convenience to continue negotiations on this issue.

Your Number #7, creating the new position of Area Supervisor is your option, but one again, your Position Description for this job, specifically Number #10, involves bargaining unit work. Therefore, the Union is requesting that you eliminate from the Area Supervisor's Position Description, in it's (sic) entirety, Number 10.

I believe the above spells out the position of the Union regarding the unsettled issues of our meeting held on June 20, 1995.

If I missed anything or if you have any questions concerning our position, please do not hesitate to call.

8. Glaim sent a letter dated June 28, 1995, to Michalke which stated:

I am in receipt of your letter dated June 23, 1995. Apparently at that writing, you had yet to receive my letter dated June 21, 1995.

Both your letter (June 23, 1995) and my letter (June 21, 1995) reflect our respective positions at the close of our conversations on June 20, 1995. The only issue you have expanded upon is the compensation of the General Operations Assistant in the wages for the first 6 months and the following 12 months of being in the position. Your \$15.10 per hour top end is essentially that which you suggested on June 20. As I stated at that time, we have no intention of paying those kind of inflated wages to a position which is a step above basic labor.

I have a suggestion we have not specifically discussed. The positions of Warehouse/Maintenance Supervisor and Area Supervisor are new, they deserve a track record to determine if indeed the positions will ultimately operate as we suggest, or they function as you fear. To fill the respective positions, the related General Operations Assistant position, and to gain that track record by planning work schedules, etc., I would suggest will take a number of months. At that time, and if you see fit, the issue could again be brought up and discussed at greater length armed with the necessary experience of the way the positions have been operating.

Please let me know if this approach is satisfactory to you.

9. Michalke responded by a letter dated July 5, 1995, as follows:

Your statement which compares the position of the General Operations Assistant to a step above basic labor puts me in the position to wonder where did the every day work duties and responsibilities of the Warehouseperson disappear to?

This comparison, more or less, reflects the reasoning for my disagreement with your Numbers 12 and 13, as stated in your Position Description of the Warehouse/Maintenance Supervisor.

Your suggestion concerning the new positions deserving a track record to determine if they will ultimately operate as you suggest and that if I see fit in a number of months, I could bring the issue up again for discussion, could be beneficial to both parties. But for me to agree with this method, I would first like to settle the wage issue of the General Operations Assistant and

have a written statement from you explaining your position as to how the Warehouse/Maintenance Supervisor and Area Supervisor will ultimately operate.

Hopefully, these two issues can be settled so that it really won't be necessary to discuss them again in the future. Let me know what your thoughts are.

Please let me know as soon as possible when you can meet to negotiate the wages of the General Operations Assistant.

10. Glaim responded by a letter dated July 13, 1995, which stated as follows:

Thank you for your letter dated July 5, 1995. Let me again explain Polk-Burnett Electric Cooperative's (PBEC's) newly created Warehouse/Maintenance Supervisor and General Operations Assistant positions.

Your letter asks where the "every day work duties and responsibilities" of the Warehouseperson have "disappear[ed] to." I think your question works off the assumption that PBEC's intent was to take work away from a member of the bargaining unit. That is not the case. Perhaps some background would be beneficial in setting the record straight.

PBEC continues to grow. As a result, the jobs our employees perform -- whether members of the bargaining unit or not -- continue to grow and develop with the organization. This is the case with the former Warehouseperson position. You should note that the last time the Warehouseperson job description was updated was many, many years ago. There has always been a manual labor aspect of the Warehouseperson position, and that aspect will continue to be performed by the General Operations Assistant. There has also been, for lack of a better term, an acquisition aspect to the Warehouseperson position. In the future, some of that work will still be performed by the General Operations Assistant, but more of that work will be performed by the Warehouse/Maintenance Supervisor.

As PBEC has grown, the world in which it operates and

competes has changed. In the past the acquisition aspect of the Warehouseperson position was a routine matter. PBEC was required to purchase certain supplies and equipment with mandated specifications from certain approved vendors. The Warehouseperson's function was little more than to ensure that PBEC had adequate supplies on hand to meet anticipated needs. Now, with the transformation of the Rural Electrification Administration to the Rural Utilities Service, PBEC's buyout of former REA obligations, and the highly competitive atmosphere evolving in the mid-1990s, supply and equipment acquisition has taken on a distinctly more significant, managerial, decision-making character.

As you can see, the Warehouseperson position has evolved considerably. Along with that, PBEC is imposing greater accountability over the position by recognizing the job's managerial discretion and adding a supervisory aspect. It goes without saying that these decisions are wholly within PBEC's management prerogative. Personnel decisions have to result in the greatest efficiency to the cooperative and the least impact on the bargaining unit. I know that you do not contend that if a position evolves to the point where it has engulfed managerial aspects or requires supervisory functions, it nevertheless must remain in the bargaining unit.

What PBEC accomplishes by eliminating the Warehouseperson position is a more proper allocation to the General Operations Assistant the routine warehousing and acquisition functions along with the assistant mechanic functions; and, to the Warehouse/Maintenance Supervisor the past and future anticipated functions not appropriate to a member of the bargaining unit.

From PBEC's perspective, this decision actually results in no impact as far as the bargaining unit is concerned. There is no termination or layoff involved in this decision. The only question that might be construed as an impact of the decision is what wage is appropriate as to the General Operations Assistant position.

You already know PBEC's position regarding that wage. Perhaps this explanation helps you understand why PBEC feels the proposed wage level is most appropriate. If you wish, however, to meet again on this wage issue, please select several dates in August

from which we can arrange a meeting.

While I have yet to address the Area Supervisor position, it is also the product of the ever-changing environment affecting the cooperative. The duties of these positions are somewhat different but the reasoning is the same as outlined for you with the Warehouse/Maintenance Supervisor.

Again, please let me know if you wish to meet sometime in August.

11. The parties met on August 14, 1995, as to the wages appropriate to the General Operations Assistant position. The Union made a counterproposal on the wages of the General Operations Assistant but the Employer rejected it. The Employer informed the Union that it intended to fill the position and to pay it at the wage it originally proposed. The Employer filled the position on August 21, 1995, at the wage rate set forth in its June 13, 1995 letter.

12. On August 16, 1995, Glaim sent a letter to Michalke which provided, in pertinent part, the following:

This letter summarizes our discussion on August 14, 1995, regarding the wage rate to be paid the new position of General Operations Assistant (GOA).

...

... The meeting on August 14 was the second time we have met to discuss the issue, and we remain mindful of our obligation to bargain regarding that issue. In addition, we have exchanged numerous letters on the matter and consider that correspondence part of our obligation to address the issue in good faith. Thus, if you would like to revisit the matter and conduct further face-to-face meetings, just inform me.

What troubles me is that at no time throughout the negotiations relating to the GOA wages have you presented any support for the level of compensation you demand for the work the Cooperative anticipates will be performed by the person filling the job. You rest solely on the presumption that the GOA will perform duties equivalent to those of the former Warehouseperson position. We have disputed that proposition based both on the written job description of the GOA and the plans we already have described to

you in detail.

...

We remain interested in discussing the GOA wages at any time that you are ready to treat that issue completely separate from any others. Moreover, we would be receptive to basing such negotiations on labor market facts either side can corroborate. Absent that, we are prepared to enter into an interim agreement as an addendum to the main agreement which sets forth the wages to be paid the GOA at the level we proposed.

13. The parties again met on September 11, 1995, to negotiate the wage rate to be paid the General Operations Assistant position. The Employer presented market and labor force data for the Union's consideration and the Union presented comparable wage rate comparisons for the Employer's consideration. The parties were unable to reach an agreement and no further meetings were held.

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

CONCLUSION OF LAW

The Employer did not refuse or fail to bargain in good faith with the Union over the impact of the Employer's decision to create a new position of General Operations Assistant, specifically with respect to the wages paid to said position, and therefore, the Employer did not violate Sec. 111.06(1)(d) or any other provision of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint be, and the same hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin, this 12th day of April, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ See footnote on Page 11.

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

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- 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).

POLK-BURNETT ELECTRIC COOPERATIVE

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

In its complaint initiating these proceedings the Union alleged that the Employer committed an unfair labor practice by engaging in bad faith bargaining by unilaterally establishing a wage rate for the General Operations Assistant and then engaging in surface bargaining with no intent to reach agreement with the Union. The Employer denied that it engaged in surface bargaining, or that it bargained in bad faith or that it engaged in any unfair labor practice.

UNION'S POSITION

The Union contends that the Employer created a new position and unilaterally established a wage rate prior to informing the Union. It submits that the Employer did agree to meet and discuss its proposal but had no intent in reality to change what it had proposed in the June 13, 1995 letter. The Union also asserts that the work description of the new classification of General Operations Assistant has the majority of the responsibilities of the former Warehouseman position and should be compensated in accordance with the wage rate set forth in the parties' collective bargaining agreement. The Union requests that the Examiner sustain its complaint, and order the Employer to meet and negotiate with the Union in good faith to determine a fair and equitable wage for the General Operations Assistant.

EMPLOYER'S POSITION

The Employer contends that it did not engage in any unfair labor practice. It asserts that in order for the Union to prove an unfair labor practice it must establish that the Employer is prohibited by the bargaining agreement from making the sort of changes which were proposed in June, 1995; the Employer failed to bargain in good faith to impasse on the issue; and the Employer was motivated by anti-union animus.

As to the first element, the Employer states that the parties stipulated as a matter of fact that the parties' collective bargaining agreement provides that it is allowed to make the changes it proposed.

As to the second element, the Employer points out that the parties met on three occasions over the wage issue and they communicated extensively over it and actually settled six of the seven initial matters during the period of June 20 through September 11, 1995. It argues that the Employer's willingness to meet and discuss the matter, the Union's rejection of the Employer's

June 20, 1995 counterproposal as well as the Union's failure to present any data supporting its position until the September 11, 1995 meeting demonstrate good faith bargaining by the Employer. It notes that no one ever told the Union that the General Operations Assistant's wage was not negotiable. It submits that whether the parties bargained to impasse is a factual determination which should be made in light of all the facts and circumstances. It maintains that it acted properly and that its decision after the second meeting was fair and reasonable and had further negotiations borne fruit, a different agreed-upon wage could have been paid.

As to the third element, the Employer asserts that the Union never alleged anti-union animus and three Employer representatives testified that anti-union animus played no part in the setting of the General Operations Assistant wage.

The Employer takes the position that the Union failed in its burden of proof under Sec. 111.07(3), Stats. It notes that the Union made no opening statement and called no witnesses and presented nothing to shift the burden to the Employer. It concludes that no conclusion is warranted but that the Employer has not engaged in an unfair labor practice and the complaint should be dismissed.

DISCUSSION

Section 111.07(3), Stats., provides that the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence. The Union failed to meet its burden of proof.

The Union primarily contends that the Employer engaged in surface bargaining over negotiations on the wage rate for the new position of General Operations Assistant so as to avoid its obligation to bargain the rate which the Employer unilaterally established as non-negotiable and then implemented it.

In the instant case, the Employer created the position of General Operations Assistant which it was free to do under Article 2 of the parties' collective bargaining agreement. Article 2 also provides that, upon demand, the Employer must bargain over the impact of its decision to create a position. The parties did meet for impact bargaining over the wage rate for the position. Under Section 8(d) of the National Labor Relations Act, an employer and its employees' representative are mutually required to "meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession." When reviewing a claim that a party has failed to bargain in good faith, the Commission must apply the "totality of conduct" or "totality of the circumstances" test. See, NLRB v. Schwab Foods Mfg., 858 F.2d 1285, 1292 (7th Cir. 1988). A party is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree. NLRB v.

Advanced Business Forms Corp., 474 F.2d 457, 467 (2d Cir. 1973).

In order to determine whether an employer has engaged in hard bargaining or is unlawfully endeavoring to avoid any agreement, certain conduct has been examined to determine a lack of good faith. 2/ These include:

1. Delaying tactics. 3/
2. Unreasonable bargaining demands. 4/
3. Unilateral changes in mandatory subjects of bargaining. 5/
4. Efforts to bypass the Union. 6/
5. Failure to designate an agent with sufficient bargaining authority. 7/
6. Withdrawal of already agreed-upon provisions. 8/
7. Arbitrary scheduling of meetings. 9/

2/ See, Morris, The Developing Labor Law, (2d Ed., 1983).

3/ NLRB v. Wonder State Mfg. Co., 344 F.2d 210, 59 LRRM 2065 (8th Cir. 1965); Crane Co., 244 NLRB 103, 102 LRRM 1351 (1979).

4/ NLRB v. Holmes Tuttle Broadway Ford, 465 F.2d 717, 81 LRRM 3026 (9th Cir. 1972).

5/ NLRB v. Fitzgerald Mills Corp., 133 NLRB 877, 48 LRRM 1745 (1961), enfd. 313 F.2d 260, 52 LRRM 2174 (2d Cir. 1963), cert. denied 375 U.S. 834, 54 LRRM 2312 (1963).

6/ Cal-Pacific Poultry, 163 NLRB 716, 64 LRRM 1462 (1967).

7/ Billups Western Petroleum Co., 169 NLRB 964, 67 LRRM 1323 (1968), enfd. 416 F.2d 1333, 72 LRRM 2687 (5th Cir. 1969).

8/ Valley Oil Co., 210 NLRB 370, 86 LRRM 1351 (1974).

9/ Moore Drop Forging Co., 144 NLRB 165, 54 LRRM 1024 (1963).

A review of the evidence shows that none of these are present in the instant case. The evidence establishes that the parties met on three occasions which were mutually agreed to and had additional phone and written communications. The Employer offered to increase its top wage proposal by \$.75 per hour. The Employer never presented a "take it or leave it" attitude and continued to agree and encourage meeting to resolve the issue. The Employer offered justification for its position and why it was firm on its wage rate. This alone does not constitute bad faith. The totality of conduct established that the Employer merely engaged in hard bargaining, not surface bargaining.

The Union objected to the implementation of the wage rate but because establishment of the position was provided by the parties' collective bargaining agreement and only impact bargaining was required, the obligation to bargain impact does not preclude implementation of the decision. 10/ Implementation does not extinguish the continuing obligation to bargain impact and the parties did so on September 11, 1995. It appears that impasse was reached so implementation did not violate any duty to bargain.

For these reasons, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin, this 12th day of April, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

10/ Milwaukee Board of School Directors, Dec. No. 20093-A (WERC, 2/83).