STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 317, AFL-CIO, Complainant,

vs.

MILWAUKEE ATHLETIC CLUB, Respondent.

Case 18
No. 59037
Ce-2205

Decision No. 29953-A

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Mark A. Sweet**, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of the International Union of Operating Engineers, Local 317, AFL-CIO.

Michael, Best & Friedrich, LLP, by **Attorneys Mark E. Toth** and **Ronald S. Stadler**, Suite 3300, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Milwaukee Athletic Club.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Union of Operating Engineers, Local 317, AFL-CIO, filed a complaint with the Wisconsin Employment Relations Commission on July 10, 2000, alleging that the Milwaukee Athletic Club had committed unfair labor practices in violation of Secs. 111.06(1)(a), (d) and (f), Stats., by unilaterally hiring a new employee at the rate of $17.00 per hour which was $1.81 more than any employee in that classification. On August 8, 2000, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner 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 September 13, 2000, in Milwaukee, Wisconsin. During the hearing, the Union amended its complaint to include a

charge of denigration of the Union. The parties filed post-hearing briefs which were exchanged on December 4, 2000. The Examiner, having considered the evidence and arguments of counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. International Union of Operating Engineers, Local 317, AFL-CIO, hereinafter referred to as the Union, is the certified and exclusive bargaining representative for employees of the Milwaukee Athletic Club in the Repair and Maintenance Department, excluding supervisory, confidential, managerial and executive employees. The Union maintains its offices at 3152 South 27th Street, Milwaukee, Wisconsin 53215.

2. The Milwaukee Athletic Club, hereinafter referred to as the Employer, is an employer whose principal place of business is 758 North Broadway, Milwaukee, Wisconsin 53202.

3. The Union and the Employer have been parties to a series of collective bargaining agreements and the latest agreement was effective for the period of April 1, 1998 through March 31, 2001. The collective bargaining agreement provides a grievance procedure in Section 4 but does not provide for the final and binding arbitration of grievances.

4. The collective bargaining agreement between the parties contains the following provisions:

> SECTION 5
> WAGES
>
> Engineers will be classified as Engineer I, Engineer II, or Utility Person.
>
> An Engineer I is a skilled operator/mechanic, possessing the thorough knowledge and ability needed to trouble shoot systems, repair equipment, assist in planning, lead jobs, train others, and make decisions in order to maintain the facility.
>
> An Engineer II is a skilled operator/mechanic who is able to perform all utility tasks, work without supervision, repair equipment, and analyze maintenance problems without assistance.

A Utility Person is able to perform utility tasks, make minor repairs, assist in other repairs, and understands how facility systems operate.

An Engineer I will be paid not less than Fourteen Dollars ($14.00) per hour.

An Engineer II will be paid not less than Eleven Dollars ($11.00) per hour.

A Utility Person will be paid not less than Nine Dollars ($9.00) per hour.

All employees will be afforded the opportunity to advance in grade when their qualifications and job performance are acceptable as determined by management.

. . .

SECTION 20
TRAINING AND TUITION REIMBURSEMENT

MAC management will work with a Local 317 appointed in-house Engineer to develop and maintain a training program.

Employees will be reimbursed for actual out-of-pocket costs of tuition and books for courses of study successfully completed (a passing grade of C or better). In addition, upon successful completion of the course as above-mentioned, the employee will receive a pay increase of not less than Ten Cents ($.10) per hour, effective on the next payroll period following presentation to the Club of copies of the final grades, and other evidence of completion of the course. The books shall become the property of the Club and shall be kept at the Club.

To be eligible for reimbursement and pay increase (as above outlined) each course of study must receive prior approval of the Department Head or the Manager of the Club.

. . .

SECTION 21
EXISTING PRACTICES

All existing practices pertaining to working conditions not specifically mentioned herein shall continue in force as at present until they are adjusted by

> mutual agreement between the Club and the Union. Nothing shall be construed as a practice unless it meets each of the following tests:
>
> It must be (a) long continued; (b) certain and uniform; (c) consistently followed; (d) generally known by the parties hereto; and (e) must not be in opposition to the terms and conditions of this Agreement.

5. On or about December 13, 1999, the Employer hired John Heidecker as an Engineer I at the rate of $17.00 per hour which was $1.96/hour higher than any other Engineer I. Heidecker was hired based on his experience in HVAC and Refrigeration. The Employer did not bargain or offer to bargain Heidecker's starting rate with the Union. On May 23, 2000, the Union filed a grievance over the Employer's hiring rate of Heidecker and the grievance was denied.

6. Heidecker's predecessor was Dennis Rainer who left the Employer on July 13, 1999. When Rainer was hired on July 29, 1996, his starting rate was $12.50 per hour, which was $1.57 above the minimum rate for an a skilled employee. David Shimi was hired on August 4, 1997, and received a starting rate of $9.00 per hour and the minimum was $7.64 for new employees. No bargaining occurred over the starting rate for Rainer and Shimi and no grievances were filed on them.

7. Sometime in March, 2000, Robert Cosher received a raise, and Dave Kronshage, Building Manager, told him not to tell other employees so they would not get mad. Kronshage's statement did not denigrate the Union.

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

CONCLUSIONS OF LAW

1. The Employer did not violate the collective bargaining agreement between the Employer and the Union by hiring Heidecker at a starting rate of $17.00 per hour and therefore has not violated Secs. 111.06(1)(f) or (a), Stats.

2. Inasmuch as the collective bargaining contained provisions on wages, the Employer had no obligation to bargain with the Union over Heidecker's wage rate and therefore, there is no violation of Sec. 111.06(1)(d) or (a) Stats.

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

ORDER

IT IS ORDERED that the complaint as amended be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 20th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Lionel L. Crowley, Examiner

MILWAUKEE ATHLETIC CLUB

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating this proceeding, the Union alleged that the Employer violated Secs. 111.06(1)(a), (d) and (f), Stats. by hiring a new employee at a rate higher than any present bargaining unit member without negotiating with the Union. The Employer answered the complaint denying that it had committed any unfair labor practices. The Union also alleged that by Kronshage telling Cosher not to tell others of his raise, the Employer denigrated the Union.

Union's Position

The Union contends that the Employer's decision to hire a new employee at a rate higher than any other bargaining unit employee without bargaining with the Union violated the terms of the collective bargaining agreement. It asks the Examiner to apply the plain meaning of the contract to determine that the unilateral decision to pay Heidecker more than anyone in the unit violated the contract. It also claims that the equities of the situation dictate a finding that the Employer violated the contract. It points out that the present contract is the first which does not have a specific section on the "not less than" wage requirements for new employees. It argues that meaning should be given to this change and refers to the maintenance of standards clause. It observes that the Employer relied on outside experience and that Heidecker had specific training in refrigeration which added value to his employment and it claims that the Employer never recognized the value of specific training of its current and prior employees. It asserts that the Union's request that the Employer meet its contractual obligation to afford employees the opportunity to advance in grade and to provide a training program has been denied. It concludes that the Employer violated the plain meaning of the contract and ignored the past practice of hiring at the minimum rate and of negotiating individual pay rates with the Union.

It notes that the Employer's asserted motive in the wage rate for Heidecker was to attract a qualified refrigeration specialist but the Employer had a duty to bargain with the Union if it was creating a different job classification and difficulty in attracting a qualified employee does not justify violating the contract. It argues that while attracting qualified employees may be a reason to attempt to negotiate with the Union, it does not permit the Employer to unilaterally violate the agreement.

The Union argues that the Employer's setting of Heidecker's pay rate and its simultaneous refusal to discuss training opportunities with the Union was a change in the terms and conditions of employment without negotiations with the Union, thereby denigrating the Union. It alleges that the Employer refused to establish required guidelines regarding opportunities and informed Union employees they could not get a raise because of the Union. It argues that the Employer cannot rely on the "not less than" language to justify hiring a new employee with recognition of added value connected to his specialized skills while refusing to recognize similar values and skills of other bargaining unit employees. It cites cases for the proposition that an employer cannot unilaterally increase wages of employees represented by a union while refusing to discuss wage increases with that union as this violates 111.06(1)(f), Stats. It insists that the Employer was required to bargain with the Union before setting Heidecker's rate. It submits that it has not waived its right to negotiate regarding a modified job classification or to pay a rate to a new hire that exceeds everyone else's. It claims that unilaterally determining the skill set that will permit advancement for a new employee and refusing to meet with the Union to discuss advancement in classification for the other employees is an unfair labor practice.

It concludes the complaint must be sustained and a cease and desist order be given and that employees be given raises not less than Heidecker's retroactive to the date of Heidecker's employment and any other remedy deemed appropriate.

Employer's Position

The Employer contends that the unfair labor practice charges are unfounded and should be dismissed. It submits that there was no violation of the collective bargaining agreement as the clear terms of the contract were followed. It points out that the agreement provides: "An Engineer I will be paid not less than Fourteen Dollars ($14.00) per hour." It claims that the Agreement only provides a minimum starting rate, not a maximum rate. It cites arbitral authority to support its position that there is no limitation on the maximum that can be paid to employees. It further notes that there is no specific pay rate or range spelled out and without mandatory language it was within its authority to pay more than the minimum.

The Employer maintains that its starting rate for Heidecker was consistent with the parties' past practice. The Employer observes that new employees have consistently been hired above the minimum contractual rate. It points to Dennis Rainer who started 14 per cent above the contractual minimum and David Shimi who was hired at a rate 18 per cent higher than the minimum. It states that the Union never asked to bargain those wage rates and did not protest the rates as established by the Employer. It insists that by contract language and its conduct, the Union acquiesced in the Employer's conduct and waived its right to bargain over the wage rates.

The Employer denies that it had any duty to bargain over Heidecker's starting rate because the clear and unambiguous terms of the collective bargaining agreement, agreed to by the Union, allows the Employer to set the starting rate and the past practice establishes that the Union acquiesced in the Employer's action.

The Employer argues that there is no evidence of any conduct by the Employer that would interfere with, restrain or coerce employees in the exercise of their rights. It notes the only evidence was that the Building Manager told an employee not to discuss his merit wage increase with other employees. It states that comments by an employer violate the law where the comments denigrate the union and convey the impression to employees that their efforts to achieve collective bargaining would be futile. It insists that this statement simply fails to meet the requirement that collective bargaining is futile.

The Employer argues in the alternative that if it should be found to have committed an unfair labor practice, the only remedy is a cease and desist order. The Employer claims that the Union's request to raise all employes' wage rates to $17.00 is inappropriate as it would grant them a wage increase without bargaining. The Employer states that it never agreed to a minimum of $17.00 and this must be achieved at the bargaining table.

It concludes that the Union's allegations are unfounded and the charge should be dismissed.

DISCUSSION

Section 5 of the parties' collective bargaining agreement sets forth the classifications for Engineers and sets forth the distinctions between an Engineer I, a II and a Utility Person. That section further states that an Engineer I will be paid not less than Fourteen Dollars ($14.00) per hour. The words "not less than" indicates a minimum and not a maximum. It appears that on February 8, 1998 all Engineer I's were paid more than $14.00 per hour (Jt. Ex. 3). The plain language of the contract allows the Employer to pay above the $14.00 per hour rate and the language prevents only paying less than that amount. The prior collective bargaining agreements also contained a provision that the Employer would pay "not less than" a certain amount. (Jt. Ex. 1, U. Ex. 1, Company Ex. 1).

The Union has pointed out that the present contract does not contain language on new employees as the other contracts did. This is true, but the old expired contracts did not contain classifications but merely referred to employees who are classified as skilled, whereas the present contract establishes three different classifications and the new employee language was eliminated. It follows that new hires would be assigned to one of the classifications and paid "not less than" the amount specified in the contract. The Employer did this in the hiring of Heidecker.

The Union claims that Heidecker was hired in a newly-created classification, but the evidence failed to support this position. Heidecker falls within the definition of an Engineer I. (Jt. Ex. 2, Tr. 136-137). The starting rate for an Engineer I cannot be less than that specified in the contract, but can be more, as the contract specifies a minimum, but not a maximum. The plain language therefore allows the higher payment. Additionally, the record established that employees were hired above the minimum in the past (Company Ex. 2). It is concluded that the Employer had the right under the express terms of the contract to pay more than the minimum, so there is no contractual violation and no Sec. 111.06(1)(f), Stats. violation.

The Union has argued that the Employer had an obligation to bargain over Heidecker's starting rate. Generally, an employer is not obligated to bargain over subjects that were discussed in negotiations and embodied in the parties' collective bargaining agreement. Furthermore, a union may waive whatever rights it has to bargain by contract language or by discussions during negotiations for a collective bargaining agreement. Additionally, past practice may be persuasive evidence of waiver, or failure to protest action may evidence waiver.

The parties' collective bargaining agreement as discussed above contains express language on wages including a minimum but no maximum. Additionally, there were prior cases where individuals were hired above the contractual minimum. It appears that no Engineer I is paid at the minimum. It is noted the employees have gotten raises during the term of the agreement either with or without the Union's involvement (Tr. 38, 69, 113-116) (Company Ex. 2). Thus, the record fails to establish any obligation on the part of the Employer to bargain on wage rates above the minimum set forth in the contract and this is supported by past practice. Therefore, there is no violation of Sec. 111.06(1)(a) and (d), Stats.

The Union has raised certain allegations of discrimination related to paying different rates where the value of the employee's services are the same to the Employer. Employees may be of the same value, however market conditions may require different wage rates. There may be a shortage of plumbers and a glut of painters such that market conditions would dictate a higher wage rate for plumbers than painters. In this case, it appears that it is difficult to hire HVAC and refrigeration qualified employees because of market conditions. (Tr. 128-129). The Union arguments on value simply fail to prove any discrimination.

The Union also argued that the Building Manager gave Robert Cosher a raise and told him not to tell anyone about it and this denigrated the Union. In ANDERSON WOOD PRODUCTS, INC., 104 LA 1017 (Cocalis, 1995), the arbitrator held that giving overscale wages and asking employees not to divulge their wages did not violate the agreement because the Union knew about it or acceded to it. Here too, the Union was aware of increases granted to individual employees and even negotiated them. The rates above the minimum were not uniform and the Union knew that as signified by the signed document acknowledging it. (Jt. Ex. 3). The

series of agreements negotiated over the years contained the "not less than" language and the Union signed off on it. The parties could have negotiated a minimum and a maximum or a single rate for each class but they did not, so rates above the minimum could be granted. It cannot be concluded that the Union was denigrated by the Building Manager asking that employees who got raises to keep these quiet. Furthermore, there was no evidence that the Employer granted any increases to discriminate against the Union in whole or in part, and there is no proven violation of either Sec. 111.06(1)(d) or (a), Stats.

The Union raised an issue with respect to a refusal to bargain or discuss training opportunities, yet the evidence failed to show any refusal to discuss or bargain over the issue of training. (Tr. 131-135). The evidence presented in this case failed to demonstrate any violation of the collective bargaining agreement or Sec. 111.06, Stats. Thus, the complaint has been dismissed in its entirety.

Dated at Madison, Wisconsin this 20th day of December, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Lionel L. Crowley, Examiner

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