

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

SCHOOL DISTRICT NO. 6 EDUCATION)
ASSOCIATION UNIT OF COLUMBIA FALLS,)
MONTANA, AFFILIATE OF THE MONTANA)
EDUCATION ASSOCIATION,)
Complainant,) ULP #25-1976
- vs -) #26-1976
COLUMBIA FALLS SCHOOL DISTRICT NO. 6,)
Defendant.)

FINAL ORDER

BOARD OF TRUSTEES, SCHOOL DISTRICT)
NO. 6, COLUMBIA FALLS, MONTANA,)
Complainant,) ULP #27-1976
- vs -) #36-1976
SCHOOL DISTRICT NO. 6, EDUCATION)
ASSOCIATION UNIT OF COLUMBIA FALLS,)
MONTANA,)
Defendant.)

* * * * *

A Findings of Fact, Conclusions of Law, and Recommended Order were issued on August 14, 1978, by Hearing Examiner, Ray Saeman. An Addendum to the Findings of Fact, Conclusions of Law, and Recommended Order was issued on August 21, 1978.

Exceptions to the Proposed Order, Findings of Fact, and Conclusions of Law were filed by Leonard A. Vadala on September 15, 1978. Mr. Leonard W. York filed Exceptions to the Proposed Order, Findings of Fact, and Conclusions of Law on September 21, 1978.

After reviewing the record and considering the briefs and oral arguments, the Board orders as follows:

1. IT IS ORDERED, that the Exceptions to the Hearing Examiner's Proposed Findings of Fact, Conclusions of Law and Proposed Order filed by Mr. Leonard A. Vadala and Mr. Leonard M. York are hereby denied.

2. IT IS ORDERED, that this Board therefore adopts the



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Findings of Fact, Conclusions of Law, and Proposed Order, as amended by Addendum, as the Final Order of this Board.

DATED this 30th day of November, 1978.

BOARD OF PERSONNEL APPEALS

By: Brent Cromley
Brent Cromley, Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, do hereby certify and state that on the 1st day of December 1978, a true and correct copy of the above captioned FINAL ORDER was mailed to the following:

Emilie Loring
Attorney at Law
1713 Tenth Avenue South
Great Falls, MT 59405

Leonard A. Vadala
Attorney at Law
P. O. Box 121
Kalispell, MT 59901

Mr. Leonard W. York
York, Stangell & MacPherson
Board of Trade Building
Suite 310, S. W. Fourth Avenue
Portland, Oregon 97204

Jennifer Jacobson
Jennifer Jacobson



CERTIFICATE OF MAILING

1 I, Ray Harrison hereby certify and state that I
2 did on the 21 day of August, 1978, mail a true and correct
3 copy of the Addendum to ULP#25-1976, ULP#26-1976, ULP#27-1976 and
4 ULP#36-1976, to the following persons at their last known address:

5 Mr. Ben Hilley
6 Attorney at Law
7 1713 Tenth Ave. So.
8 Great Falls, Mt 59405

9 Mr. James Cumming
10 Attorney at Law
11 Columbia Falls, Mt 59912

12 Mr. Leonard York
13 York, Stangell & MacPherson
14 Board of Trade Building
15 Suite 310
16 SW 4th Avenue
17 Portland, Oregon 97204

18 Michael Keedy
19 MEA Uniserv Director
20 P. O. Box 1154
21 Kalispell, Mt 59901

22
23
24
25
26
27
28
29
30
31
32
Ray Harrison

BEFORE THE BOARD OF PERSONNEL APPEALS

1 SCHOOL DISTRICT NO. 6 EDUCATION)
ASSOCIATION UNIT OF COLUMBIA FALLS,)
2 MONTANA, affiliate of the)
MONTANA EDUCATION ASSOCIATION,)

3 Complainant,)

4 -vs-)

ULP#25-1976

5 COLUMBIA FALLS SCHOOL DISTRICT NO. 6,)
COLUMBIA FALLS, MONTANA,)

ULP#26-1976

6 Defendant.)
7

8 COLUMBIA FALLS SCHOOL DISTRICT NO. 6,)
9 Complainant)

ULP#27-1976

10 -vs-)

ULP#36-1976

11 COLUMBIA FALLS EDUCATION ASSOCIATION,)

12 Defendant.)
13

14 STATEMENT OF CASE

15
16 This case includes four separate unfair labor practice charges
17 filed with the Board of Personnel Appeals (herein referred to as
18 the Board) from 8 September 1976 to 13 October 1976. The above-
19 caption states which party filed the complaint under each charge.
20 However, for purposes of continuity I have listed the charges and
21 the counts within a charge and the denials in separate sections
22 of this decision.

23 A hearing on the above-captioned cases was held on 10, 11,
24 12 November 1976, in Columbia Falls, Montana. The Columbia Falls
25 Education Association (herein referred to as the Association) was
26 represented by Mr. Ben Hilley of the law firm of Hilley & Loring,
27 Great Falls, Montana, and Mr. Mike Keedy of the Montana Education
28 Association. The Columbia Falls School District No. 6 (herein
29 referred to as the School Board) was represented by Mr. Leonard
30 York of the Management Consultants firm of York, Stangell and
31 McPherson of Portland, Oregon; and Mr. Jim Cummings, Attorney at
32 Law, Columbia Falls, Montana.

1 As the duly appointed hearing examiner of the Board, I
2 conducted the hearing in accordance with the provisions of the
3 Montana Administrative Procedures Act (Sections 82-4201 to
4 82-4225, R.C.M. 1947).

5 GENERAL

6 For continuity of the record and for marking of exhibits
7 only I designated the school board as the defendant and the
8 Association as the complainant.

9 By pre-hearing stipulation, I combined ULP#25, 26, 27, 36-
10 1976 for the purpose of hearing, briefs and proposed order.

11 A transcript of the hearing was completed 9 February 1977.
12 All briefs and reply briefs were filed by 18 May 1977.

13 MOTIONS

14 All motions for Summary Judgments were denied at the hearing.

15 OBJECTIONS TO EXHIBITS

16 Mr. Hilley's objection to proposed Respondent's Exhibit Q is
17 hereby sustained.

18 I. ULP#25-1976

19 STATEMENT OF CASE

20 On 8 September 1976, the Association filed Unfair Labor
21 Practice #25-1976 against the School Board. The School Board is
22 charged with violating Section 59-1605(1)(a) and (e) and Section
23 59-1603(1).¹ Specifically the Association charges, in part, that:

24 59-1605(1)(e)

25 (1) Although the parties are still in the process of ne-
26 gotiating a master contract and are not at impasse, the school
27 board has instituted or threatened to institute unilateral changes
28 in wages and working conditions.

(2) On or about September 3, 1976, the teachers were in-
formed that they must execute individual contracts containing
wages, hours, and working conditions that day.

(3) The teachers were furthermore informed that by signing
the individual contract they must comply with the board's final
offer and would be subject to all of its terms although the
offer was not agreed to by the Association.

(4) The defendant has engaged in a pattern of individual
bargaining by by-passing the Association which is the exclusive
bargaining representative.

31
32 ¹ See Notice of Hearing Attachment A.

1 (5) The defendant has failed to bargain in good faith by
2 refusing to bargain unless or until the individual contracts are
3 executed by the teachers.

4 (6) On or about 3 September 1976, the board unilaterally
5 instituted its full and final offer and demanded that each teacher
6 sign an individual contract prior to entering the classroom on
7 September 7, 1976.

8 Furthermore, the defendant has specifically violated
9 59-1605(1)(a) as follows:

10 (1) The teachers were threatened with discharge unless
11 individual contracts were signed by 9 September 1976.

12 (2) The defendant utilized the public media to announce the
13 teachers pending discharges in order to coerce the signing of
14 the individual contracts and acceptance of the defendants con-
15 tract proposal.

16 (3) The defendant has locked out all students in the
17 district in a further attempt to prohibit the exercise of their
18 rights.

19 Furthermore, the complainant charges that the above specific
20 acts are in violation of 59-1605(1).

21 On 15 September 1976, the school board filed an Answer which
22 denied that they violated Sections 59-1605(1)(a) and (e) and
23 59-1603(1).²

24 Specifically, the Answer states that the school board bar-
25 gained in good faith as evidenced during mediation sessions.

26 FINDINGS OF FACT

27 After a thorough review of the entire record of ULP#25-1976,
28 including briefs and reply briefs of the parties concerned,
29 sworn testimony, and from my observation of the witnesses, and
30 their demeanor on the witness stand, and upon substantial,
31 reliable evidence, I make the following Findings of Fact pertain-
32 ing to each count of this complaint:

1. On 17 August 1976, the School Board informed the Association
that the teachers must accept or reject the School Boards full
and final offer. If rejected the full and final offer will be
effective 3 September 1976.

2. On September 3, 1976, the School Board instituted unilateral
changes in wages and working conditions.

² See Notice of Hearing Attachment B.

3. On 3 September 1976, the School Board informed the
1 teachers that they must execute individual contracts containing
2 wages and working conditions prior to entering the classroom on
3 7 September 1976.

4 4. The School Board's full and final offer and individual
5 contracts did bypass the Association, the exclusive bargaining
6 representative.

7 5. The School Board refused to bargain with the Association
8 until the teachers executed individual contracts containing wages
9 and working conditions.

10 6. The teachers were threatened with discharge unless
11 individual contracts were signed by 9 September 1976.

12 7. The School Board told the public media that the teacher's
13 employment positions would be open if the teachers did not
14 execute individual contracts.

15 8. The School Board closed the schools from 7 September
16 through 10 September 1976 because no teachers were under contract.

17
18 DISCUSSION

19 1. The Association's Exhibit 6 and the School Board's
20 Exhibit J support the Finding of Fact, number 1, that the School
21 Board informed the teachers that they must accept or reject the
22 School Board's full and final offer.

23 A letter of 17 August 1976 to Ms. Judy Bergstrom, President
24 of the Association from Mr. Richard Taylor, Chairman of the School
25 Board; states in part:

26 "We are requesting that this attached offer be
27 presented to the bargaining unit teachers of this District
28 prior to August 27, 1976, for the purpose of voting to:
29 accept or reject this full and final offer.

30 Please be advised that in the event this offer
31 is rejected, then this full and final offer shall be
32 placed into effect at 8:00 a.m., September 3, 1976,
for bargaining unit teachers employed, or to be employed,
by the District for the duration stated therein."
(emphasis added)

31 In reference to Finding of Fact number 2 and 3, I gave
32 weight to Association's Exhibit 9. A letter to Ms. Judy Bergstrom

from Richard Taylor, states in part:

1 "Our correspondence dated 8/17/76 to the School District
2 #6 Education Association declared an official impasse
and the full and final offer went into effect September
3, 1976.

3 It will be necessary that each teacher sign an individual
4 contract prior to entering the classroom on September
7, 1976.

5 Contracts will be available in the office of the building
6 principals."

7 The issuance and implementation of individual written con-
8 tracts containing unilateral changes in working conditions has
9 been at issue prior to this case. In this instant case the
10 School Board states they issued individual contracts under and
11 in compliance with the following Montana Statute:

12 ... Each teacher shall be employed under written con-
13 tract and each contract of employment shall be author-
14 ized by a proper resolution of the trustees and shall
be executed in duplicate by the chairman of the trustees
and the clerk of the district in the name of the district,
and by the teacher. (75-6102, R.C.M. 1947)

15 The Association charged the School Board with violating the
16 following Montana Statute by issuing the individual contracts:

17 (1)...Public employees shall have, and shall be protected
18 in the exercise of, the right of self-organization, to
19 bargain collectively through representatives of their
own choosing on questions of wages, hours, fringe benefits,
20 and other conditions of employment and to engage in other
concerted activities for the purpose of collective bar-
21 gaining or other mutual aid or protection, free from in-
terference, restraint or coercion. (59-1603, R.C.M. 1947)

22 The above statutes appear to conflict or are being used to
23 conflict by the School Board and the Association. Where there
24 are several provisions or statutes in conflict, a construction
25 is to be adopted that will give effect to all (93-401-15, R.C.M.
26 1947). In the construction of a statute, the intention of the
27 legislature is to be pursued. When a general and particular
28 provision is inconsistent, the latter is paramount to the former.
29 A particular intent will control a general intent that is incon-
30 sistent with a particular intent (93-401-16, R.C.M. 1947).

31 When one statute deals with a subject in general and com-
32 prehensive terms, and another deals with a part of the same sub-

1 ject in a more minute and definite way, the latter will prevail
2 over the former to the extent of any necessary repugnancy be-
3 tween them.³

4 A statutory construction in this case should be such that
5 each section is given effectiveness. To accommodate this con-
6 struction, the school board must issue individual contracts in
7 accordance with Section 75-1602, R.C.M. 1947. Individual con-
8 tracts must be issued with restrictions to avoid conflict with
9 Section 59-1603, R.C.M. 1947. A major restriction on Section 75-
10 1602, R.C.M. 1947 must be the intended use of the individual con-
11 tracts. The individual contracts must not be used to circumvent,
12 delay or hamper any of the rights granted public employees in
13 Section 59, Chapter 16, R.C.M. 1947. The same restrictions
14 were stated by the U.S. Supreme Court.⁴

15 ...Collective bargaining between employer and the representatives
16 of a unit, usually a union, results in an accord as terms
17 which will govern hiring and work pay in that unit. The
18 result is not, however, a contract of employment except
19 in rare cases; no one has a job by reason of it and no
20 obligation to any individual ordinarily comes into exist-
21 ence from it alone. The negotiations between union
22 and management result in what often has been called a
23 trade agreement, rather than a contract for employment....

24 After the collective trade agreement is made, the
25 individuals who shall benefit by it are identified by
26 individual hiring. The employer, except as restricted
27 by the collective agreement itself and except that he must
28 engage in no unfair labor practice or discrimination, is
29 free to select those he will employ or discharge. But
30 the terms of the employment already have been traded out.
31 There is little left to individual agreement except the
32 act of hiring. (emphasis added) This hiring may be by
 writing or by word of mouth or may be implied from conduct.
 In the sense of contracts of hiring, individual contracts
 between the employer and employee are not forbidden but
 indeed are necessitated by the collective bargaining
 procedure.

 But, however engaged, an employee becomes entitled
 by virtue of the Labor Relations Act somewhat as a third
 party beneficiary to all benefits of the collective trade
 agreement, even if on his own he would yield to less
 favorable terms. The individual hiring contract is sub-
 sidary to the terms of the trade agreement and may not
 waive any of its benefits....(emphasis added)

3. *Barth v Ely*, 85 Mont 310, 278.P 1002 *Stevenson's Estate*, 87
Mont 486, 289 P. 566

4. *J. I. Case* (1944) 321 U.S. 332 14 LRRM 501

1 Individual contracts, no matter what the circumstances
2 that justify their execution or what their terms, may not
3 be availed of to defeat or delay the procedures prescribed
4 by the National Labor Relations Act looking to collective
5 bargaining nor to exclude the contracting employee from
6 a duly ascertained bargaining unit; nor may they be used
7 to forestall bargaining or to limit or condition the terms
8 of the collective agreement....

9 If these guidelines are not followed, the Montana Collective
10 Bargaining Act for Public Employees would be meaningless, and
11 contrary to the legislative intent to give public employees full
12 rights to bargain collectively (emphasis added).

13 The Board of Personnel Appeals addressed the issue of indiv-
14 idual contracts in the case of Billings Education Association
15 versus Billings School District #2.⁵ The Board found in that
16 case the same principles and guidelines as set out in the J.I.
17 Case decision.

18 By issuing individual contracts containing normal items of
19 collective bargaining, the School Board, in this case, did violate
20 the guidelines of J.I. Case and ULP#17-1975.

21 In this case, the following evidence supports the Finding
22 that the School Board used the individual contract as a means to
23 circumvent the collective bargaining rights of the teachers.

24 A 7 September 1976 letter to the parents from Mr. R. J.
25 Souhrada, Superintendent of Schools, states, in part: (Association
26 Exhibit 17)

27 "Until such time as School District #6 has teachers under
28 contract to teach, school will be dismissed.

29 Listen to your local radio and television stations for
30 further information."

31 On this issue, the following testimony was presented:

32 Mr. Hilley: "Mr. Souhrada, did you give a press release
to the media that the teachers' jobs would be open unless
they signed the individual contract?"

Mr. Souhrada: "I don't know that that's the exact wording,
there was a press release something like that, yes."

Mr. Hilley: "I referred to Complainant's Exhibit 20 (The
Daily Interlake of 7 September 1976) which says; "Superin-

5. ULP#17-1975

1 tendent, R. J. Souhrada, said this morning the teachers
2 have until 5:00 p.m. (Tuesday 7 September 1976) to sign
3 contracts. Asked what would happen if they didn't sign,
4 he replied; we would consider applications for teaching
5 positions. Asked if that meant the teachers would be
6 fired, Souhrada said, I wouldn't want to be quoted saying
7 that." Is this correct?

8 Mr. Souhrada: That's correct.

9 Mr. Hilley: Then you did make this statement.

10 Mr. Souhrada: Yes, sir. (transcript, page 206)

11 Mr. Wilson, a member of the school board testified as
12 follows on this point:

13 Mr. Hilley: You did indicate, did you not, that that
14 Thursday, that coming Thursday, the individual contracts
15 were not going to be signed, that the Board was going to
16 take action, and I think you indicated pretty drastic action,
17 isn't this correct?

18 Mr. Wilson: I think I indicated that there was that
19 possibility, yes, sir.

20 Mr. Hilley: Right.

21 Mr. Wilson: I think I also said that this is not what we
22 wanted then.

23 Mr. Hilley: Right, Now, we we've discussed, I mean you
24 have discussed negotiations. In other words, you were
25 ready to negotiate and so forth. But you also told the
26 teachers, did you not, that you would negotiate in the
27 future only if they signed the individual contracts?

28 Mr. Wilson; I don't recall that statement.

29 Mr. Hilley: Wasn't signing of the individual contracts
30 primarily a condition of anything being done?

31 Mr. Wilson: I think at that point, yes, that we had
32 considered it necessary that contracts be signed if we
were.

The Association members did not need to vote on the full
and final offer by the fact that the School Board was going to
put the offer into effect for the next two years. With the
dismissal of school and the threat of termination, the teachers
were faced with the loss of income and employment or the execu-
tion of a binding individual contract dated 3 September 1976.
The closing of the schools, and the accompanying letter to the
parents, were designed to force the signing of individual con-
tracts. It was not an action taken to force the signing of a
collective bargaining contract (School Board's full and final

offer) but again an individual contract, which circumvents the exclusive representative.

If the individual contract was only a legal formality to hire, I could not sustain the charge. However a close examination of the Association's Exhibit 15 reveals a binding individual one year contract containing wages with no reference to a master agreement or a rider⁶ until a master agreement is reached with the teachers exclusive representative. The first reference to a contract rider was made in a note to the Association from Mr. R. L. Taylor, dated 8 September 1976.⁷ It requested a meeting on Wednesday, September 8, 1976, between the teachers' negotiators and Mr. Souhrada "to try and work out interim contract agreement rider". The same notes asked the negotiation teams to meet on Friday, September 10, 1976; in hopes for a quick solution. The contract rider came into existence after the schools were closed and the teachers were threatened with termination on September 7, 1976.

Prior to the closing of the schools the School Board attempted through coercive actions (positions vacant-Finding of Fact Number 7) to force the teachers' to sign individual contracts which circumvent the exclusive representative. In fact, wouldn't even bargain with the exclusive representative until the individual contracts, which contained wages and other working conditions, were signed.

CONCLUSION OF LAW

1. The School Board violated Section 59-1605(1)(a) and (e) and 59-1603(1) R.C.M. 1947 by
 - (A) interfering with, restraining or coercing employees of Section three rights
 - (B) threatened with discharge unless individual contracts are signed
 - (C) pending discharge and closing of schools coerce teachers to sign individual contracts

6. Rider means a clause in the individual contract which in effect states that that contract is later subject to the terms agreed to by the Association and the School Board in a master contract.
7. See Association Exhibit 18.

(D) refusal to bargain in good faith with the exclusive representative until individual contracts were signed,

ULP#25-1976 CONTINUED

1 In this unfair labor practice the Association, furthermore,
2 charges the School Board:

3 "During the process of collective bargaining the Board
4 has developed a policy of making nothing but package-
5 offer type concessions only to withdraw such concessions
6 whenever difficult negotiating problems resulted...."

6 FINDINGS OF FACT

7 During the negotiations and the School Board's full and
8 final offer the School Board withdrew concessions they had made
9 earlier.

10 DISCUSSION

11 In reference to withdrawal of concessions during the nego-
12 tiating process I have relied on the following testimony. Spec-
13 ifically as to the withdrawal of concessions of 17 May 1976 the
14 record is as follows: (tr. page 14)

15 Mr. Hilley: Now take the period from February to May
16 1976. I presume that the parties were able to clear
17 several of the issues off the board for negotiations,
18 is that correct?

18 Ms. Bergstrom: Yes, it was between, well it was the first
19 three meetings from February through March that we had
20 cleared up eight items in the proposed packages and just
21 through, on those three meetings, we had tentatively
22 agreed to eight items.

21 Mr. Hilley: And then what happened?

22 Ms. Bergstrom: Then at the May meeting the School Board
23 withdrew all of those agreed items and presented us with
24 a proposal. That proposal included all of the same items
25 that they had proposed in February except they had added a
26 professional advisory committee. And those were the only
27 differences between February and to that point in April.

25 On cross examination Mr. York testified as follows:

26 (tr. page 154)

27 Mr. Hilley: ...On Number Y, letter Y, it says, "our present
28 Board's proposal withdrawn on all previous offers." So
29 what does this necessarily mean?

30 Mr. York: Again, Mr. Hilley, I assume what you're asking
31 me is a question on Exhibit A there, dated 5-17.

31 Mr. Hilley: That's what I asked you, yes.

32 Mr. York: I'm sorry, I did not glean that. I explained

1 in previous testimony what the notes represented to me in
its brief fashion or summary fashion.

2 Mr. Hilley: Well, what I'm asking you is did the Board
withdraw all previous offers?

3 Mr. York: Yes, sir.

4 Mr. York's later testimony is clear that previous agreements
5 were withdrawn when the full and final offer was presented to the
6 Association on 17 August 1976.

7 Mr. Hilley: All right now, where did you get the language
8 on August 17, 1976, for the various final and finding, I
9 mean final offer that you made. Did you redo the language
or did you work off of the June document?

10 Mr. York: No sir, I did not work off of the June document
11 entirely. However, I, a review of the full and final
12 offer as presented on August the 17th will reflect language
that was tentatively agreed to sometime between June and
February. _____ some language that was not agreed to.

13 Mr. Hilley: Okay, then my question is primarily this, the
14 language that was agreed to, was that changed in the final
offer on August 17, 1976.

15 Mr. York: As I previously testified, and my notes will
16 reflect, that the full and final offer represented proposals
17 made which would reflect, not completely withdrawing a
principle subject, but a retreat from a position that was
previously offered.

18 Mr. Hilley: Let's try one more time. The language that was
19 agreed to tentatively, or whatever, was any of that lang-
uage changed in your final offer made on August 17? Was
20 there any changes whatsoever?

21 Mr. York: Yes, sir. I testified to that.

22 In reference to a reason for the 17 May 1978 withdrawal, Ms.
23 Bergstrom testified as follows: (tr. page 15)

24 Mr. Hilley: Well, what did they say? Disturbed or what?

25 Ms. Bergstrom: They, Mr. York had said that he did not like
26 our proposal that we had given him previously. He had felt
that ours was not right, so he had withdrawn everything.

27 Mr. Hilley: Did he indicate why in the sense of the teacher
lesson or what was he saying?

28 Ms. Bergstrom: No, he had warned us that if there were any
29 problems with negotiating that this is what he would do.
And he did.

30 Mr. Hilley: What did he mean "problems"? Did he explain what
31 he meant by that?

32 Ms. Bergstrom: Coming to a problem would mean coming to a
point where we could not agree upon certain items or the

negotiating became difficult.

1 Mr. Hilley: So he withdrew and took back all the concessions?

2 Ms. Bergstrom: He took back seven out of eight. He left
3 one.

4 In SAN ANTONIO MACHINE CORP. vs NLRB⁸ the fifth circuit
5 ordered the enforcement of an NLRB findings of bad faith bargain-
6 ing when the Court stated, in part:

7 At the meeting on May 16, Clifford Shawd, a professional management
8 consultant newly hired by petitioner, joined in the
9 negotiations. Shawd stated that some of the tentative
10 agreements previously reached might have to be re-examined
11 in the light of administrative cost and offered to present
12 a proposal on economic matters at the next meeting.

13 The next meeting was held on May 23. A new contract proposal
14 was presented to Ray (the union representative) by petition-
15 er's representatives. According to Ray, as he read over the
16 new proposal he "blew his stack," since he found that "the
17 whole thing had been changed up considerably from what we
18 had already agreed upon."

19 Ray also testified that when he asked Shawd whether this
20 meant that the company was withdrawing the tentative agree-
21 ments already reached, Shawd replied: "Yes, the company has
22 withdrawn all the tentative agreements they had with you."

23 The same Circuit Court in a later case stated, in part.⁹

24 It is well established that withdrawal by the employer of
25 contract proposals tentatively agreed to by both the employer
26 and the union in earlier bargaining sessions, without good
27 cause, is evidence of a lack of good faith bargaining by the
28 employer in violation of §8(a)(5) of the Act (NLRA), regard-
29 less of whether the proposals constituted valid offers sub-
30 ject to acceptance under traditional contract law.

31 The Eighth Circuit Court addressed the same defense the School
32 Board used in this instant case when it argued that all conces-
33 sions are only tentative and may be changed at anytime. The Court
34 states, in part:

35 While all agreements are tentative until the final "package"
36 has been ratified, the entire context of the bargaining ses-
37 sions in this case gives the distinct impression that Hart-
38 ford had no intention of reaching an agreement after the
39 sixth bargaining session. The Board was warranted, on this
40 evidence, in finding a failure to bargain in good faith.

41 In this case, there was no good cause stated in the record

8. 363 F 2d 633, 62 LRRM 2674.

9. American Seating Co. vs NLRB, 424 F2d 206: 73 LRRM 2996.

for the withdrawal of concessions.

Also, in light of the above and the two arbitrary withdrawals
1 of concessions, the School Board's actions are strong evidence of
2 bad faith bargaining.

3
4 CONCLUSION OF LAW

5 2. The School Board violated Section 59-1605(1)(e) R.C.M.
6 1947, by engaging in bad faith bargaining. Specifically, by
7 withdrawal of previous agreed to provisions without good cause.

8 On another count the Association's charge states in part:

9 The defendant has failed to bargain in good faith by, can-
10 celling negotiation sessions, refusing to schedule sessions
11 at reasonably frequent intervals and refusing to bargain.

12 FINDINGS OF FACT

13 Between 24 February 1976 and 2 August sixteen bargaining
14 sessions were scheduled. Two of the scheduled sessions were sub-
15 sequently cancelled.¹⁰

16 DISCUSSION

17 Upon a close examination of the frequency of bargaining ses-
18 sions, topics discussed, and the number of sessions cancelled,
19 during this time frame, the Association's charge is not substan-
20 tiated.

21 First, the record is not totally clear as to the tenure, ser-
22 iousness or negotiating process of the various sessions. Obvious-
23 ly, there were some scheduling difficulties and negotiating prob-
24 lems. But, the evidence does not support the Association's charge
25 that the School Board used these scheduling tactics as an effort
26 to engage in bad faith bargaining.

27 Secondly, the Courts and the NLRB have both ruled in favor
28 of and against similar charges under approximately the same cir-
29 cumstances.

30 CONCLUSION OF LAW

31 On the above count, the School Board did not violate Section

32 ^{10.} School Board Exhibit A and tr. 10

1 In ULP 25-1976, the Association also charges that:

2 "The defendant on or about August 17, 1976, notified the
3 Association that it had elected to call "an official impasse"
and refused to bargain further or threatened not to bargain
further."

4 FINDINGS OF FACT

5 On August 17, 1976, the School Board called "an official
6 impasse".

7 DISCUSSION

8 A 17 August 1976 letter to Ms. Judy Bergstrom, President of
9 the Association, from Mr. Richard Taylor, Chairman of the School
10 Board, states in part:

11 The Board of Trustees, after a thorough examination and
12 serious consideration of the lack of progress achieved between
13 the parties in collective bargaining, have elected to call
14 an official impasse. It would be fruitless for the parties
15 to continue bargaining, since it is apparent that neither
16 party is willing or able to concede or compromise any further.
We have reviewed the administrative language progress realized
to date between the parties and, after due consideration of
your position, have instructed our representative to prepare
and present you with the attached "full and final offer".

17
18 Please be advised that: in the event this offer is
19 rejected, then this full and final offer shall be placed into
20 effect at 8:00 a.m., September 3, 1976, for any bargaining
21 unit teacher employed, or to be employed, by the District
22 for the duration stated therein.

23 The Association President, Ms. Bergstrom wrote the following
24 reply to Mr. Richard Taylor on 1 September 1976:

25 The teachers of School District #6, in their meeting of Sep-
26 tember 1, 1976, felt that they were unable to accept and
27 ratify the board's proposal of August 17, 1976. It is the
28 desire of the teachers that negotiations continue. If the
29 board wishes to proceed to mediation at this point, we will
30 be willing to present a joint request. However, we would wish
31 to continue negotiations through the mediation process.
32 To this end we request that the board's negotiating team
contact our negotiators relative to setting the next nego-
tiating meeting time and place at their earliest convenience.

There is no question that the School Board called an official
impasse. But, did an impasse exist between the two parties? The
question of impasse is an important one to both management and
labor, especially in the public sector. There have been a number
of court and NLRB cases on the issue of impasse. The Courts and
the NLRB have generally ruled that an employer may make unilateral

1 changes in working conditions that are being negotiated. But in
2 making the unilateral changes two important elements must exist--
3 impasse and good faith. Also, the employer must notify the Union
4 and offer to discuss the changes. The same general rules apply
5 to a lockout by the employer. Unilateral changes in working condi-
6 tions and/or a lockout are strong collective bargaining weapons of
7 management.

8 To avoid a stall by either party, the courts and the NLRB
9 have generally stated that neither party is required to carry on
10 fruitless negotiations. Fruitless negotiations was stated by the
11 U.S. Supreme Court as follows in part:

12 NLRB vs. American Insurance Co. 343 U.S. 395; 30 LRRM 2147

13 "Thus it is now apparent from the statute itself that the
14 Act (NLRA) does not encourage a party to engage in fruitless
15 marathon discussions at the expense of frank statement and
16 support of his position.

17 The U.S. Supreme Court in May Department Stores vs NLRB¹²
18 address the effect of unilateral wage changes without negotiations
19 as follows in part:

20 By going ahead with the wage adjustments without negotiation
21 with the bargaining agent, it took a step which justified
22 the conclusion of the Board as to the violation of Section
23 8(1) (NLRB). Such unilateral action minimizes the influence
24 of organized bargaining. It interferes with the right of
25 self-organization by emphasizing to the employees that there
26 is no necessity for a collective bargaining agent. If suc-
27 cessful in securing approval for the proposed increase of
28 wages, it might well, as the Board (NLRB) points out, block
29 the bargaining representative in securing further wage
30 adjustments.

31 In NLRB vs GREAT DANE TRAILER INC.,¹³ the U.S. Supreme Court
32 set forth the following principles in unilateral conduct in
part:

From this review of our recent decisions, several principles
of controlling importance here can be distilled. First, if
it can reasonably be concluded that the employer's discrim-
inatory conduct was "inherently destructive" of important
employee rights, no proof of an anti-union motivation is
needed and the Board can find an unfair labor practice even
if the employer introduces evidence that the conduct was

12. 326 U.S. 376; 17 LRRM 647

13. 388 U.S. 26, 65 LRRM 2465

1 motivated by business considerations. Second, if the ad-
2 verse effect of the discriminatory conduct on employee rights
3 is "comparatively slight," an anti-union motivation must be
4 proved to sustain the charge if the employer has come for-
5 ward with evidence of legitimate and substantial business
6 justifications for the conduct. Thus, in either situation,
7 once it has been proved that the employer engaged in dis-
8 criminatory conduct which could have adversely affected
9 employee rights to some extent, the burden is upon the em-
10 ployer to establish that it was motivated by legitimate
11 objectives since proof of motivation is most accessible to
12 him.

13 The Courts and the NLRB have excepted impasse where nego-
14 tiation meetings have been frequent, numerous and exhausting.¹⁴

15 Whether a bargaining impasse exists is a matter of judgment.
16 Through case history a test for impasse has been developed:¹⁵

- 17 (1) The bargaining history
- 18 (2) The good faith of the parties in negotiations
- 19 (3) The length of the negotiations (frequent, numerous,
20 exhausting - Exploring all grounds for settlement.
- 21 (4) The importance of the issue or issues as to which there
22 is disagreement (mandatory subject of bargaining)
- 23 (5) The contemporaneous understanding of the parties as to
24 the state of negotiations (position solidified)

25 The Montana Public Employee's Collective Bargaining Act
26 impasse procedures includes both mediation and fact finding.
27 Therefore, another test that should be added is: Has mediation
28 or fact finding been called? What has been the actions of the
29 fact finder or the mediator?

30 Application of the above test in this instant case:

31 1. The record contains little past bargaining history, therefore, it
32 would be inappropriate to apply this fact to this case.

23 2. The withdrawal of concessions by the School Board on 17
24 May 1976, and 17 August 1976, are evidences of bad faith bargain-
25 ing. The August withdrawal included items previously conceded by
26 the School Board and agreed to by the Association.

27 3. The record indicates that the parties met four major times
28 on economic items. On 17 August 1976 the School Board declared
29 an official impasse and issued their full and final offer. The

30 ¹⁴. NLRB vs Intra-Coastal Terminal, Inc., 5th Circuit 286 F2d 954;
31 47 LRRM 2629, Celanese Corp. of America, 28 LRRM 1362.

32 ¹⁵. Taft Broadcasting Co. 163 NLRB No. 55 affirmed 395 F2nd 622.

1 parties negotiated a total time of three hours and twenty minutes
2 for the meetings of 13 July and 2 August 1976, plus several hours
3 for the meetings of 29 June and 1 July 1976. The economic items
4 were, but not limited to, the dollar cost or increased cost in
5 Health; optical and dental insurance; the percentage of the total
6 cost of the insurance each is to pay; salary for one, two or three
7 years; disability income; and the distribution of wage increases
8 for about 118 teachers. Any one of the economic items could have
9 taken hours of negotiating to resolve. I could not find a case
10 which would support a contention that the parties in this case
11 spent an adequate amount of time to reasonably explore or to re-
12 solve all of the economic items in the hours they did negotiate.

13 4. All economic items are mandatory subject of bargaining
14 and are extremely important to both parties.

15 5. A review of the Association's Exhibits 6 and 7 gives some
16 understanding of negotiations. The School Board's collective
17 bargaining representative's notes (School Board Exhibit A) for
18 August 2, 1976, state in part:

19 J.B (Judy Bergstrom): Reject officer (sic).
20 10:50 9000 (a) 4.5; dental 50/50; Guarantee that
21 Assn' will look at other sal. sched. for next yr with
22 no commitments for next yr.

23 Note: Aug. 10th at 11:00 a.m. next meeting prepare a
24 "full and final" offer.

25 Ms. Bergstrom testified as follows on this point: (tr. 304,
26 305)

27 Mr. Hilley: Did you hear him testify that the parties were
28 to submit final offers on August 17, 1976?

29 Ms. Bergstrom: I heard Mr. York say that.

30 Mr. Hilley: Is that true?

31 Ms. Bergstrom: No it is not.

32 Mr. Hilley: Can you explain your answer?

Ms. Bergstrom: When Mr. York told us that he would be
getting us the full and final offer, we asked for an explana-
tion of the full and final offer. We were still confused
at that point after the explanation of what exactly a full
and final offer was. We did not know according to law if we

1 had to give them a full and final offer or what we had to do.
2 Therefore, we felt this as a question as when we arrived on
3 August 17th we didn't have a full and final offer because we
4 found out that it was not necessary, we wished to continue
5 negotiations.

6 Mr. Hilley: Did you tell Mr. York, I, sometime, I presume
7 August the 17th, 1976, that there was no commitment on any-
8 thing or whatever?

9 Ms. Bergstrom: The term no commitment was applied to a pro-
10 posal, it was a, a two year proposal given by us. That first
11 year we wanted to be on a salary schedule with the MEA attain-
12 ment level 4.5. And that we would agree to have a committee
13 study salary schedules, go through them and look at them, but
14 we could not guarantee that we would go off the attainment
15 level the second year. Therefore, the word no commitment
16 meant that we could not commit ourselves to going off the
17 attainment level.

18 6. The record and exhibits indicate that the Association
19 wished to continue negotiations after the 17 August "official
20 impasse" declaration by the School and prior to the September
21 mediation request. This was an understandable position because
22 the meetings were not frequent, numerous and exhausting. The
23 parties did not bargain to impasse.

24 Only after bargaining to impasse with good faith negotiations
25 and exhausting the prospect of a labor agreement, (my emphasis)
26 the employer does not violate NLRA by making unilateral changes
27 in working conditions. ¹⁶

28 In this case the School Board could not have been bargaining
29 in good faith because (a) withdrawal of previous agreements on
30 17 August (b) attempting to make unilateral changes in (mandatory
31 subjects of bargaining), economic items being negotiated, (c)
32 attempting to make unilateral changes in working conditions on
3 September 1976. ¹⁷

We hold that an employer's unilateral change in conditions of employment
under negotiation is similarly a violation of §8(a)(5) (NLRA), for
it is a circumvention of the duty to negotiate which frustrates the
objections of §8(a)(5) (NLRA) much as does a flat refusal.

The School Board closed the schools to force the teachers to

31 16. NLRB vs Intra-Coastal Terminal Inc. 286 F.2d 954, 47 LRRM 2629
32 17. NLRB vs KATZ 69 U.S. 736, 59 LRRM 2177

1 sign individual contracts. The school closure had the same effect
2 as a lock out. The School Board did not lock out the teachers
3 while negotiating a master agreement only. The School Board
4 surely did not meet the requirements for impasse.

5 Furthermore, if the School Board had met the requirements
6 by bargaining in good faith to impasse it still does not allow
7 the legislative intent of the impasse procedures to be ignored.
8 Without using the impasse procedures outlined in the Montana
9 Act it does not appear that the parties used or exhausted all the
10 possibilities of reaching a labor agreement.

11 CONCLUSION OF LAW

12 The School Board violated Section 59-1605(1)(e) R.C.M. 1947
13 by specifically implementing it's "full and final offer" before
14 impasse, and

15 Locking out the teachers because they would not execute
16 individual contracts containing wages before impasse.

17 ULP# 26-1976

18 STATEMENT OF CASE.

19 On 15 September 1976, the Association filed unfair labor
20 practice charge #26 against the School Board.

21 The charge states in part:¹⁸

22 Defendant has violated and continues to violate Section
23 59-1605(1)(e) by failing to bargain collectively in good
24 faith...On September 11, 1976,...the defendant requested
25 fact finding and refused to further meet with the Educa-
26 tion Association of Columbia Falls maintaining that by
27 requesting to go to fact finding the statutory obligations
28 of the defendant, failing to bargain in good faith or fail-
29 ing to bargain at all, was relieved and no further bargaining
30 would be held...The Education Association of Columbia Falls
31 maintains that fact-finding does not relieve the defendant
32 of such statutory obligations and further requests injunc-
33 tive relief in order to effectuate the purposes of Section
34 59-1601 R.C.M. 1947.

35 The School Board denied the charge that they failed to bar-
36 gain because they participated in mediation sessions prior to
37 their fact finding request.¹⁹

38 ^{18.} See Notice of Hearing Attachment C

39 ^{19.} See Notice of Hearing Attachment D

FINDING OF FACT

1 After the School Board made its decision to call for fact
2 finding, the School Board refused to bargain and/or mediate with
3 the Association.

4 DISCUSSION

5 The parties stated no factual disagreement on the School
6 Board's call for fact-finding and then refusing to negotiate.

7 1. To understand the circumstances of the fact-finding
8 request a general review of the bargaining positions is necessary.
9 The parties at the end of one thirty-one hour mediation session
10 still had major differences on salary, salary index, disability
11 income and health, dental and optical insurance.

12 The School Board made the decision to call for fact-finding
13 on the afternoon of 11 September 1976. A number of contested
14 items were submitted to the fact finder.

15 2. The record indicates requests for collective bargaining
16 sessions and the reason for denying the requests. The request
17 of 11 September 1976, 5:30 p.m. the School Board's collective
18 bargaining representative's notes state in part: (School Board
19 Exhibit A)

20 "The District #6 Education Association's negotiations will
21 be at City Hall Sunday, September 12, 1976, to continue
22 good faith negotiations. We hope you will join us at 9:00
a.m.

s/ Judy Bergstrom

23 LWY (Leonard W. York): Hand delivered in hall
24 of Columbia Falls City Hall by a Jerry Olson at
approximately 5:30 p.m., 9/11/76."

25 On September 12, 1976 letter to Mr. Richard Taylor, Chairman
26 of the School Board, from Ms. Judy Bergstrom, President of the
27 Association, contains a second request for negotiations which
28 states in part: (Association's Exhibit 10)

29 School District Six Education Association requests that
30 your negotiating team meet with our representatives for
31 the purpose of negotiating on the following days and
times:

32 - Tuesday, September 14, at 6:00 p.m.
Wednesday, September 15, at 6:00 p.m.
Thursday, September 16, at 6:00 p.m.
Friday, September 17, at 6:00 p.m.
Saturday, September 18, at 6:00 p.m.

Sunday, September 19, at 9:00 a.m.
If any of those dates and times is unsatisfactory, please let us know why and alternative dates and times, no later than 6:00 p.m., Tuesday, September 14.

1
2 The School Board's reply on 16 September 1976, signed by
3 Mr. Taylor, states in part: (Association Exhibit 12)

4 I was unaware, at the time, the other negotiators would be
5 unavailable on Wednesday. However, the Board's position
6 remains that both the negotiations and the mediation
7 processes have reached an impasse and we feel that further
8 negotiations at this time would be fruitless and are now
9 awaiting the selection of a Fact Finder and subsequent
10 recommendations.

11 A 22 September reply letter to Mr. Taylor from Ms. Bergstrom
12 states in part:

13 As it is our (the Association's) continued belief that a
14 continuation of negotiations between teachers and board is
15 neither fruitless nor unnecessary prior to and during
16 the fact-finding process, we again request a resumption
17 of the negotiating meetings at a time and date of your
18 choosing. We will appreciate your response at your earliest
19 convenience.

20 The School Board never replied.

21 The witnesses differed in their views of the mediation
22 efforts just prior to the fact-finding request. (tr. page 238)

23 Mr. Hilley: And you indicated to the parents at that
24 meeting, didn't you, that the parties were getting
25 closer together as far as reaching an agreement?

26 Mr. Wilson: I believe that that meeting took place in
27 the early afternoon?

28 Mr. Hilley: Yes.

29 Mr. Wilson: And at 8:30 that morning I felt that probably
30 by noon that we would have an agreement.

31 Mr. Hilley: All right. And yet within one hour after
32 meeting with the parents you made a motion for fact finding
and refused to further bargain, isn't that correct?

Mr. Wilson: I didn't make any motion.

Mr. Hilley: Well, someone made a motion on your side for
fact finding and you refused to bargain.

Mr. Wilson: I believe I also told the parents at that time
that as events here turned out that to use the word of the
mediator was a blood bath in the streets with printed docu-
ments being handed by teachers in business places and on
the street corners. That emotions had risen so high at
that point that any full bargaining did not take place and
that it was our position at that time when I told the par-
ents that we would apply for a fact finder.

Later testimony on this point: (tr. page 272-273)

Mr. Cumming: Now, following the, your's and the Board's discovery of this statement of facts (the hand bills), what then did you do?

1 Mr. York: Mr. Painter after I asked him he would define
2 what the rules meant to him so that I could instruct my
3 client, he and Kathy Walker excused themselves and called
4 Mr. Jensen on an outside line somewhere in town, and as I
5 recall, somewhere around 10:00 in the morning they returned
6 back to the police judge's chambers and at that time the
7 chambers, I mean the corridor adjacent to the chambers
8 was beginning to fill up with all manners of peoples. Mr.
9 Painter came back into the Board room and he said that he
10 had received an understanding of what the language meant
11 by Mr. Jensen and that he was sorry, but he could not gag,
12 there was no gag rule, in essence to what he was saying to
13 us; at that...point I informed Mr. Painter that, and Ms.
14 Walker at the time that under the conditions that were exist-
15 ing at that present moment, it would be impossible for the
16 parties to attempt to mediate further and Kathryn Walker
17 suggested that the Board give her another opportunity to go
18 into the teachers and request that they stop all the activi-
19 ties that they were doing and that to address themselves
20 simply to mediation and she came back in at a little later,
21 it didn't take her long to do this. She said after walking
22 down the hall and observing so many people there and that
23 the environment that existed at that moment, that she agreed
24 that mediation should cease, however, she was instructing
25 the parties that they would return tomorrow morning at a
26 given time and be present and this was already a Saturday,
27 and I was a long ways from home and I did not have clothes
28 nor did I have a clean clothes and things that I needed and
29 I simply told the mediator that I would not be present the
30 next day or on the following Monday, I'm not certain but I
31 believe it was a Sunday, she was requesting, she was making
32 a sincere attempt on her part to reschedule another date
in time and she then left the room, where she went, I don't
know. But there was continually people, massing outside
of the police judge's chambers, in the hall, and by this
time it was quite full, so we shut the doors and we discussed
what they should do at that point in time. And then as
we was discussing it more members of the Board of Trustees
began to join us in the council's cha, I mean in the judge's
chambers. And at that point a decision was made that we
would notify the mediator that since, the conditions were
existing as they were at the time that we would simply call
off the mediation and petition the Board to move into fact
finding so that the Board's endeavors, offers and such that
were publicized erroneously, in the opinion of myself and
the Board, could be stated correctly to the public by virtue
of the fact finder. And that I also notified Kathy Walker
and Mr. Painter at that time that we would not bargain any
longer until the Board of Personnel Appeals responded to
our petition for fact finding and a fact finder was
appointed, pursuant to those rules and we met on the record
with the fact finder.

3. Application of the impasse test as set forth in III,
Count 3, C.

a. The record contains little evidence about past collective
bargaining history.

b. From 17 August 1976 to the call for fact findings, the

1 School Board did commit several unfair labor practices by issuing
2 and attempted application of individual contracts. (See Section
3 16).

4 c. The total hours of negotiating on major economic items
5 have increased by one, thirty-one hour mediation session. The
6 total hours of major economic items negotiated is about thirty-
7 five plus hours. The additional hours are for the meetings of
8 29 June and 1 July 1976. The one, thirty-one hour mediation
9 session may have been exhausting, but the overall negotiating
10 sessions do not meet the frequency and/or numerous test. Thirty-
11 five plus hours, total time, is not enough time to adequately
12 explore, and hopefully reach an agreement, on all economic items
13 for a two year labor agreement affecting 118 teachers.

14 d. Economic items are mandatory subjects of bargaining.

15 e. In the testimony of a School Board member, (tr. 238 above)
16 the witness believes a labor agreement would be reached by noon
17 that day. In the School Board's Exhibit A. notes of negotiations,
18 the author of the notes made no record of the items of impasse
19 or total impasse. In giving more weight to Mr. Wilson's testimony,
20 I find that the written contentions of the School Board in the
21 Association's Exhibit 12 to be self-serving.

22 The Association states they do not believe further negotia-
23 tions to be fruitless. The Exhibits and/or notes of mediation
24 do not indicate either party was unwilling to move and/or had
25 not moved on proposals. There was some progress during mediation.

26 f. At the time, the mediator was trying to schedule a second
27 meeting. By the actions of the mediator, I can only believe that
28 the mediator did not see the chances of additional progress or
29 of an agreement as zero.

30 The negotiating and mediation sessions have not been frequent
31 numerous, and only once exhausting. On 11 September 1976, the
32 understanding of one party, and possibly both parties, was that
no impasse existed. Neither party appeared to be solidified in

1 their position to the point that further negotiating sessions
2 would have been fruitless. The record does not support impasse.

3 4. The Association did publicly circulate the School Board's
4 proposals and/or counter-proposals and/or the Association's state-
5 ment of facts. The record did not establish the Association as
6 the direct motivating group behind a petition drive to remove the
7 School Board's Collective Bargaining Representative. In it's
8 defense of ULP#26, the School Board asserted that the actions of
9 the Association harmed the School Board and the School Board could
10 not effectively negotiate. Some courts adhere fairly consistently
11 to the Tort Doctrine that the intentional infliction of harm is
12 unlawful only when the person inflicting the harm is not pursuing
13 some lawful interest of his own. These courts generally hold
14 that labor activities, when engaged in by working people in their
15 own economic interest, are lawful even though they may injure the
16 employer or other persons against whom they are directed. Of
17 course, if the labor activities are violently or fraudulently con-
18 ducted they are not excused by the self-interest doctrine; for then
19 they clearly violate other common-law sanctions. In the absence
20 of fraud or violence, the activities are often held privileged,
21 even though they may result in harm to an employer's business.
22 Such cases are held to be like the cases in which one businessman
23 is harmed by the business competition of another. Business com-
24 petition is sanctioned by common-law, and harm resulting from
25 lawfully conducted competitive practices is therefore, held not
26 actionable. Similarly, improvement of one's economic position is
27 a protected interest, and harm resulting from lawfully conducted
28 activity in that interest is held not actionable.²⁰ The Assoc-
29 iation was involved in a self-interest action concerning a matter
30 of a contract. Several Labor cases address the situation discussed

31 ²⁰. See Commerce Clearing House Labor Law Reports #1422 (1966)

1 above. The First Circuit Court held in *NLRB vs Worchester Woolen*
2 *Mills, Corp.*,²¹ that the employer was not justified in refusing to
3 bargain with a certified union on the grounds that union issued
4 circulars containing a severe criticism of the employer's Presi-
5 dent and Treasurer. In *Superior Engraving Co. vs NLRB*²² the
6 Seventh Circuit Court held that the employer was not relieved of
7 its statutory duty to bargain with the union because of the union
8 circulated letter to the employer's competitors listing certain
9 of the employer's accounts which "might be solicited" and the
10 names of the employer's salesmen who "should be encouraged to
11 join with one of our union plants". The union resorting to self-
12 help is not conclusive evidence of a lack of good faith so as to
13 relieve the employer of its statutory duty to bargain with the
14 union. The NLRB in *Paramount General Hospital*²³ held the employer
15 that operates a hospital violated the NLRA by refusing to bargain
16 with newly certified union despite the contention that the union
17 distributed to patients, the public, and persons having business
18 relations with the employer copies of a hand bill stating that a
19 hospital corporately related to employer was forced to close down
20 due to irregularities in its operations.

21 The record does not support a contention that the Association
22 engaged in violent, fraudulent or unlawful conduct clearly not to
23 any extent as to relieve the School Board of its duty to bargain
24 collectively. The actions of the Association was for their own
25 lawful contract done in a self-help manner.

26 5. The record indicates the School Board called for fact
27 finding to delay negotiations. The School Board's Exhibit A,
28 notes of negotiations, adds to the indication by stating in part:

29 " (Sic) 3:47 p.m. (11 September)

30 ^{21.} 172 F. 2d 13; 22 LRRM 2605

31 ^{22.} 183 F. 2d 783; 26 LRRM 2534

32 ^{23.} 223 NLRB No. 151; 92 LRRM 1171

D.T. (determined) 2 - press releases.
3.- File for fact finding
1.- Let things cool down.

1
2 Med: (mediator) wants to cont. to med. req. a mt. for
9:00 a.m. 9/12/76

3 D.T.: We wanted to go to fact finding and shall petition
4 for such. No, we will not meet further in neg. med.
with teachers.

5 Adj;: 4:40 p.m.

6 From the above Exhibit, it appears the School Board made
7 the following decisions in this order and importance:

- 8 a. let things dool down
9 b. press release
10 c. file for fact finding

11 The School Board filed for fact finding as a collective bar-
12 gaining weapon to delay negotiations and cool things down - not
13 because negotiations were fruitless. It is doubtful that the
14 legislative intent of the fact finding procedure was to delay
15 negotiations.

16 The School Board contends they are under no obligation to
17 bargain once fact finding is called. That may be the case if
18 impasse truly exists. In this case impasse did not exist, there
19 is little evidence to support a position that further negotiating
20 or mediation sessions would have been fruitless, especially on
21 the date of the fact-finding request.

22 If fact finding or mediation has been requested, the parties
23 indicate they are at impasse and that all possibilities of a
24 labor agreement have been explored. If that is the situation,
25 the parties are under no obligation to bargain until a fact
26 finder or mediator arrives. If the cause of impasse has changed
27 during or after the request for fact finding or mediation, the
28 parties are, once again, under an obligation to bargain even
29 though the mediator or fact finder has not arrived. The change
30 may be, but is not limited to, an indicated change in positions
31 by one of the parties or a change in general conditions. If
32

1 fact finding or mediation has been requested and the parties
2 are not at impasse or all possibilities of a labor agreement
3 have not been explored or one party has not relieved the other
4 party of its obligation to bargain by proving an unfair labor
5 practice; the parties must bargain at reasonable times even though
6 the fact finder or mediator has not arrived.

7 A review of mediation and/or fact finding requests to the
8 Board of Personnel Appeals supports the contention that some
9 parties request those procedures for some general assistance to
10 resolve problems - not because the parties are at impasse. Further-
11 more, there are case examples where the parties requested med-
12 iation and/or fact finding, but were able to resolve the issues
13 by collectively bargaining prior to the arrival of the third
14 party. There are also case examples where the parties reached
15 an agreement after the mediator left the sessions. The point is
16 that for one party to simply call for third party assistance and
17 then to not bargain with the other party during the interim
18 (except when true impasse exists) would be contrary to the legis-
19 lative intent and to actual mediation and/or fact finding request
20 experiences.

21 CONCLUSION OF LAW

22 The School Board violated Section 59-1605(1)(e) by specific-
23 ally using a request for fact finding as a delaying tactic in
24 negotiations, and by refusing to negotiate, while not being at
25 impasse, until a fact finder arrives.

26 III. ULP #27- 1976

27 STATEMENT OF CASE

28 On 15 September 1976, the School Board filed Unfair Labor
29 Practice #27 against the Association. The School Board seeks the
30 following relief in part:²⁴

31
32 ²⁴. See Notice of Hearing Attachment E

1 "1. That a temporary Restraining Order be issued forthwith,
2 enjoining and restraining Defendant, and all of them and each
3 of them from verbally abusing and harassing Complainant,
4 Complainant's employees, Complainant's authorized representa-
5 tive; from committing injurious and tortuous acts to com-
6 plainant or complainant's employees, complainant's authoriz-
7 ed representative; from threatening, intimidating, coercing
8 complainant, complainant's employees, or complainant's author-
9 ized representative; from obstructing complainant's property
10 or assembling in mass on any of the complainant's property.

11 2. For an order from the court setting a date for a hearing
12 to determine why said temporary restraining order and injunc-
13 tion should not be made permanent.

14 3. For such other and further relief as the court may deem
15 just....

16 The first charge states in part:

17 (The Association) ...attempted to force and require the
18 complainant to terminate his selection of representative by
19 initiating a petition and seeking signatures thereto at a
20 meeting called by them on Saturday, September 11, 1976, cir-
21 culating said petition Sunday, September 12, and Monday,
22 September 13, 1976, acts and conduct prescribed by Section
23 59-1605(2) (a)....

24 FINDING OF FACT

25 There is no evidence on the record to support the charge
26 that the Association attempted to force or require the School
27 Board to terminate its selected representative by initiating and
28 seeking signatures on a petition.

29 DISCUSSION

30 The record and the charge indicate the existence of a peti-
31 tion calling for the termination of the School Board's collective
32 bargaining representative. This is a very serious charge under
both the Montana Act and the NLRA. The record fails to demon-
strate who initiated and/or circulated and/or presented the
petition. Without this evidence, the charge cannot be supported.

The second charge states in part:

...September 6, 1976, it, (the Association) attempted to
bargain directly with the complainant, thereby forcing and
requiring the complainant to establish dates, times, places
and concessions in collective bargaining without the oppor-
tunity to first confer with his authorized representative,
acts and conduct prescribed by Section 59-1605(2) (b)....

FINDING OF FACT

The Association did attempt to bargain directly with the
School Board.

DISCUSSION

1 The following evidence pertains to this charge:

2 1. The Association's Exhibit 4; a February 12, 1976 letter
3 to Mr. Robert Goodman, former Association President, from Mr.
4 Richard Taylor, School Board Chairman; states in part:

5 This will serve to notify you that Leonard York may be
6 retained as the Negotiator for the Board of Trustees.

7 2. Transcript page 71:

8 Mr. Hilley: Now, Judy, I think that you have testified
9 that the only notice that you have received from the
10 School Board that Mr. York was going to be anything was
11 that of a spokesman at the bargaining session because the
12 letter before said maybe, is this correct?

13 Ms. Bergstrom: Correct.

14 Mr. Hilley: Now have you received any correspondence from
15 Mr. York himself stating that only through him can you reach
16 the School Board?

17 Ms. Bergstrom: No.

18 Mr. Hilley: Have you received any correspondence from Mr.
19 York even asking you to send carbon copies of your communi-
20 cations with the School Board to him?

21 Ms. Bergstrom: No.

22 3. Mr. York testified that he has developed a routine pat-
23 tern in explaining his role of representing a client during col-
24 lective bargaining: (transcript page 77)

25 "When I'm engaged to represent a client in collective
26 bargaining....at that time, at the very initial meeting,
27 and at subsequent meetings thereafter, I inform the parties
28 that I am a limited agent on behalf of my client and that
29 any agreement reached with me would be tentative and sub-
30 ject to the ratification and approval of the principle, then
31 I explain to the party that when I make proposals and counter
32 proposals, those proposals then again would have to seek
the ratification and approval not only of the article or
the provision of the contract that I'm negotiating on but
tentative with respect to final approval of the entire docu-
ment.

33 4. Transcript 128 and 129:

34 Mr. Cumming: Would you please explain those notes?

35 Mr. York: Well, on June 29th the parties, the Association,
36 the teachers' Association representatives, and myself I
37 felt had developed a good understanding of the problems we
38 were moving along quite well...

39 Mr. Hilley: Objection. State the facts. What he felt is
40 irrelevant.

1 Mr. Examiner: I'm sure that what Mr. York is testifying to
2 is what he felt. That this, this is important, his under-
3 standing of the case, whether or not it is true, it's what
4 he felt and that is all that he is testifying to. Objection
5 overruled.

6 Mr. York: And the uh, my feelings was that the parties
7 were now, at that point in time, where most administrative
8 language had been fairly well discussed and rediscussed
9 and some type and some type of a tentative agreement reach-
10 ed on most of the language and at that particular moment
11 it would be necessary now for me to discuss economics with
12 the teachers. And I believe that the teachers agreed with
13 me because we had previously on, off the record discussions
14 agreed that when we discussed economics I would have along
15 with me Mr. Souhrada, the Superintendent of the School Dis-
16 trict, and Mr. Jacoby, the business manager and financial
17 recordkeeper for the School District. I would have them at
18 the meeting with me so that they could present in an intel-
19 ligent fashion to the teachers.

20 5. The Association's Exhibit 6, August 17, 1976, letter to
21 Ms. Judy Bergstrom from Mr. Richard Taylor, states in part:

22 We trust that this offer will be afforded the utmost
23 attention by your committee and bargaining unit teachers
24 and thereafter be approved. Kindly provide Superintendent
25 Souhrada with the teacher's decision at the earliest
26 possible date, as the school year shall soon commence.

27 6. The 7 September 1976 Order from the Board of Personnel
28 Appeals to Ms. Bergstrom and to Mr. Taylor states in part:

29 (Association Exhibit 23)

30 In response to the Columbia Falls Education Association's
31 request the Board of Personnel Appeals has scheduled a
32 mediation session for Wednesday, September 8, 1976, at
33 2:00 p.m., in the City Council Chambers, Columbia Falls,
34 Montana. Negotiating representatives for the Columbia
35 Falls Education Association and the Columbia Falls School
36 District #6 are ordered to attend and participate in this
37 session. This order confirms the telephone conversation
38 of September 7, 1976.

39 7. Transcript 44-45:

40 Mr. Hilley: And this lasted, I think, that you've already
41 testified, for two days.

42 Ms. Bergstrom: This session on September 8 lasted
43 approximately an hour. The session that lasted for two
44 days began on September 10 and ran through September 11,
45 1976.

46 Mr. Hilley: Why only an hour, Judy?

47 Ms. Bergstrom: Kathryn Walker came back and told us that
48 the Board did not wish to begin mediation at that time
49 because Leonard York was not present.

50 Mr. Hilley: So you postponed it. Did you agree to post-
51 pone this meeting?

1 Ms. Bergstrom: No, we did not. We wished to, we had wanted
2 to start immediately to resolve any of the problems that we
3 had.

4 Mr. Hilley: So when was your next meeting, on Friday?

5 Ms. Bergstrom: Our next meeting was then on Friday at 10:30.

6 Mr. Hilley: And no bargaining took place on Thursday?

7 Ms. Bergstrom: No, nothing happened on Thursday.

8 And transcript page 187:

9 Mr. York: Who made the decision, from the 7th to the 10th,
10 to send the pupils home?

11 Mr. Souhrada: The administration was instructed by the
12 Board to send the students home and the school would be
13 closed.

14 8. Transcript 202-203:

15 Mr. Hilley: And did Mr. York advise that the kids be sent
16 home?

17 Mr. Souhrada: I don't believe Mr. York was here.

18 Mr. Hilley: All right, who did advise this then?

19 Mr. Souhrada: We talked about it and that was the, the
20 consensus that if there was not a signed contract they
21 would not teach.

22 9. Mr. Wilson testified that Mr. York was not at the meet-
23 ing nor did he advise the School Board pertaining to their action
24 to close the schools. (tr. 213-214)

25 10. Transcript page 61: ²⁵

26 Mr. Hilley: Now, did at any time School District #6,
27 Education Association Unit of Columbia Falls, Montana, re-
28 ceive notice from the School Board that you were only to
29 deal through Mr. York?

30 Ms. Bergstrom: I did not receive a communication from them.

31 Mr. Hilley: Did you receive anything from the Board of
32 Personnel Appeals, that he was the exclusive representative?

Ms. Bergstrom: No sir.

Mr. Hilley: As a matter of fact, isn't it true, from all
of the correspondence we have now in the record, that over
90% of the correspondence is between the Association and
the School Board?

Ms. Bergstrom: Yes.

25. Also see Association Exhibits 18 and 19, plus tr. 82.

11. In Borden Inc.²⁶ the NLRB adopted the trial examiner's

1 decision which states in part:

2 ...The record shows that Moon (the union's secretary-
3 treasurer) and the employer's local representatives
4 (Green and Bryant) have corresponded with each other
5 about their bargaining and contractual relations and that
6 arrangements for meetings have been perfected by them.
7 It is also clear that the employer's Houston managers
8 are not mere errand boys, because Bryant not only partic-
9 ipates in bargaining, but he said that he and Green,
10 his superior, share with Yonell and Pelton (the employer's
11 chief negotiators) the responsibility for "calling the
12 shots" in negotiations. Moreover, Pelton made it clear to
13 Moon many times that he was a busy man operating on a
14 very "tight schedule". The comments which Moon made to
15 Pelton about whom he would meet with are ambiguous
16 enough on their face. Therefore, in the context I have
17 described, and because he never said he would not bargain
18 with Pelton, or only bargain with local representatives,
19 and because there is no evidence that he ever tried to
20 implement the "implication" which Pelton sensed in his
21 remarks, but did, as a matter of fact, continue to meet
22 with Pelton, and to insist that Pelton meet with him, I
23 find both of his remarks, which Pelton described with
24 not too much clarity, too equivocal to support a finding
25 in support of the allegations of the complaint.

26 The above record demonstrates the Association was bargain-
27 ing with the School Board and with the School Board by way of
28 Mr. York. The School Board was making the decisions, including
29 some requests to meet with the Association directly. The record
30 has no evidence of the Association refusing to meet with the
31 School Board's collective bargaining representative.

32 The School Board was not excused from its duty to bargain
because their collective bargaining representative was not avail-
able.

The NLRB in Southwest Chevrolet Corp. did not excuse
the employer under the following actions, in part:²⁷

...Respondent seeks to explain the extended periods of
delay during which it provided the Union with no oppor-
tunity for bargaining meetings by pointing to various
circumstances which, in its view, excused it from the duty
to bargain. In the main, Respondent relies on the
following facts: in the interval between the dispatch
of the union's initial request on April 23 and the first
bargaining session on July 2 Burns (for the employer)
explained to Griffith (for the union) that he was trying
to get his people together but found it difficult to

26. 196 NLRB No. 172; 80 LRRM 1240

27. 194 NLRB No. 157; 79 LRRM 1156

1 coordinate his schedule with that of his client's; the
2 fact that in June both the management and sales force
3 at Southwest were overhauled; the fact that in July
4 Burns was concerned with negotiations involving other
5 employers and, in addition, was faced with a new management
6 at Southwest; the fact that in August the principal nego-
7 tiators for both sides were on vacation....

8 The record does not support the above School Board's charge.

9 The third School Board charge states in part:

10 (The Association)....refused to bargain in good faith by
11 prolonging caucuses, thereby frustrating the parties and the
12 mediators in collective bargaining. Further, by submitting
13 counter proposals in a dilatory manner with a purpose to
14 frustrate collective bargaining. Furthermore, by attempting
15 to destroy the collective bargaining process by circulating
16 Complainant's proposals and counter-proposals to the public
17 without first seeking mutual approval, acts and conducts
18 prescribed by Section 59-1605(3)....

19 FINDING OF FACT

20 There is no evidence in the record to support the charge
21 that the Association refused to bargain in good faith by prolong-
22 ed caucuses and submitting counter-proposals in a dilatory manner.
23 The Association did publicly circulate the School Board's proposal
24 and counter-proposals.

25 DISCUSSION

26 1. The record indicates that during the September mediation
27 session the Association had several long caucuses. The record
28 has no evidence that the long caucuses were used as a stalling
29 tactic. The record has no evidence that the Association submitted
30 counter-proposals in a dilatory manner.

31 2. Circulating the School Board's proposals and counter
32 proposals were actions of self-help by the Association. A self-
help action similar to informational pickets. The record has
little or no evidence that the public circulation of the School
Board's proposals and/or counter proposals and the Association's
fact sheet was coercive or fraudulent. The record contains no
evidence that the public circulation was for the purpose of a
secondary boycott and/or hot cargo contract and/or some other
unlawful contract provision. I fail to understand how any "gag
rule" could be upheld under these circumstances. There may be

1 "gentlemen" agreements not to publicize proposals during collec-
2 tive bargaining negotiations. But to state that a violation of
3 such an agreement is an unfair labor practice falls on the face
4 of the freedom of speech provisions of our Constitution.

5 Eventually, all the voters of a School District approve or
6 disapprove a School Board's actions by voting on Bond issues or
7 Board Members.

8 It is not uncommon for a mediator to request that the
9 parties not discuss proposals, bargaining etc. with the media dur-
10 ing mediation. But, this is merely a request for a "gentlemen's"
11 agreement not to do so. Surely, it is not a "gag order" request
12 which is enforceable.

13 The record does not support the third School Board charge.

14 The fourth count of ULP#27 states in part:

15 (The Association)...refused to bargain in good faith by
16 attempting to force the Complainant to negotiate on
17 subjects regarding the entire budget rather than wages
18 and fringe benefit amounts. Further, by attempting to
19 force and require the Complainant to agree to fringe bene-
20 fit amounts without first providing written copies of
21 insurance plans, premiums and other relevant material in
22 order for the Complainant to make an intelligent estimation
23 of its economic impact, acts and conduct prescribed by
24 Section 59-1605(3)....

25 FINDING OF FACT

26 The Association did not attempt to force the School Board
27 to bargain on the entire budget rather than wages and fringe
28 benefits. The Association attempted to bargain with the School
29 Board to gain wages and fringe benefits equal to the amount bud-
30 geted for during that time frame. The School Board and the Assoc-
31 iation had agreed on a labor-management Committee and/or commit-
32 tees to adjust the current insurance plan and/or review, select
and implement a new insurance plan. The cost of such a plan and/
or plans was stated in proposals and counter proposals at X
dollars and/or no specified dollar amount with each party paying
a stated percentage of the total cost.

DISCUSSION

1 There is evidence that the Association presented an economic
2 package to the School Board, via the Mediator, which indicated
3 that their proposal was equal to the amount budgeted for. Though
4 the School Board contends that the computation of the total dollar
5 amount was in error, it does not become an unfair labor practice
6 for the Association to present a specific economic proposal which
7 may be equal to or greater than what the School Board budgeted.

8 The insurance negotiations will be discussed in a later
9 section.

10 The fifth count in ULP#27 states in part:

11 (The association)...attempted to force and require the
12 complainant to bargain collectively upon matters other than
13 matters specified in Section 59-1605(3)...Furthermore,
14 the Defendant forced and required the Complainant to agree
to a June, 1976, proposal that it had withdrawn in August,
1976, acts, and conducts prescribed by Section 59-1605(3)....

15 FINDING OF FACT

16 The record gives no evidence to support the charge that the
17 Association forced or required the School Board to bargain on
18 matters other than those specified in Section 59-1605(3). The
19 Association did not withdraw the "June 1976 proposal".

20 DISCUSSION

21 1. In regard to negotiating on other matters, the School
22 Board's collective bargaining representative did not present any
23 evidence or testimony on this charge.

24 2. In reference to the Association's actions regarding the
25 June 1976 proposal, the parties did not start negotiating on
26 economic items until 29 June 1976. The "June 1976 proposal" was
27 the Association's summary of negotiations to date with a cover
28 letter dated 8 June 1976. The cover letter to the summary to Mr.
29 Leonard York, from Alida Blair, a member of the Association nego-
30 tiation team, states in part: (School Board Exhibit I)

31 ...This outline is, I believe, an accurate assessment of
32 our progress to date. Obviously, many of the items marked
NA - not agreed, need little further discussion as we seem

1 near agreement on them at this time. The items discussed
2 in the May 25 meeting as needing re-wording and/or recon-
3 sideration. All items upon which, to the best of my recol-
4 lection, we had reached tentative agreement prior to the
5 May 17 resubmission of the Board's original proposal are
6 marked with an asterisk(*).

7 Mr. York testified that the June document was "a rendition
8 made by the teachers as to their understanding what the parties
9 had agreed to". He also testified that the June document was not
10 discussed until mediation in September. (Transcript 173-174)

11 The Association believed the "June 1976 proposal" to contain
12 a summary of tentative agreements reached to that date. The
13 School Board's Collective Bargaining Representative did not cor-
14 rect or review the "June Proposal" with the Association. There
15 is no evidence that the Association retreated from the items they
16 understood to have been agreed to by the parties as listed on
17 the June summary. The evidence does not support the School Board's
18 charge.

19 IV. ULP #36-1976

20 STATEMENT OF CASE

21 On 15 October 1976, the School Board filed Unfair Labor
22 Practice charge #36 against the Association. The School Board
23 requested that the Board of Personnel Appeals issue an immediate
24 cease and desist order on several bargaining matters.

25 The first charge states in part: (See Notice of Hearing
26 Attachment G)

27 (The Association)...attempted to force and require the Com-
28 plainant to collective bargain over the implementation of a
29 dental plan to be included as an economic benefit into a
30 renewal collective bargaining agreement without offering the
31 complainant any details other than the fact that the com-
32 plainant would be required to pay a cost therefor in the
amount of sixty (60) percent thereof; that...it, (the
Association)...entered upon the official record of the Fact
Finder the same demand for a dental plan to be included in
the renewal collective bargaining agreement for which the
complainant would be required to pay an amount of sixty (60)
percent of the total cost.

33 FINDING OF FACT

34 On 1 July, 10 September and at the Fact Finding on 8 and 9
35 October 1976; the Association intermittently proposed a dental

1 plan on a 60/40 percentage pay of the total cost without referenc-
2 es to the total cost.

3 DISCUSSION

4 1. The School Board's collective bargaining representative's
5 notes for the meeting of 29 March 1976 (School Board Exhibit A),
6 states the following:

7 "2/NOTE: Draft 'meet and confer' with teeth".

8 The record indicates that the parties agreed on a labor-
9 management committee to "meet and confer" on a dental plan or
10 plans. Generally, the committee was to review and select a
11 dental insurance plan within the money negotiated. A labor-
12 management committee also existed for health insurance.

13 2. Next, the parties tried to determine the amount in per-
14 centage of the total cost each party was to pay. The Association
15 proposals ranged from a 80/20 split to a 50/50 percentage share
16 of the dental plan costs. The parties did not agree on the per-
17 centage until just before fact finding. In an effort to reach an
18 agreement on the percentage, the Association made several propos-
19 als in reference to percentage to be paid by each party. No
20 reference to total cost.

21 3. The question of total cost of dental insurance was sub-
22 mitted to the fact finder. (School Board Exhibit R)

23 It appears that the parties agreed in principle to dental
24 insurance on 29 March 1976. This agreement may have been with-
25 drawn by the School Board on 17 May 1976. The total cost of the
26 dental insurance to the School Board was an unknown percentage of
27 the total cost. Though the percentage and total cost were un-
28 known to the School Board (as it was to the Association because
29 there was no agreement on this fringe benefit) it must be pointed
30 out that the School Board was not in the dark. They had every
31 opportunity to negotiate percentages and establish costs: (a) The
32 School Board had a representative(s) on the labor-management
dental insurance committee and, therefore, input into the review

1 and selection of an insurance plan. (b) The School Board was
2 definitely involved in negotiating the percentage each party was
3 to pay of the total cost. (c) The School Board was negotiating
4 the total cost (the maximum benefits) of the dental insurance plan.

5 The record has no evidence of what type of additional infor-
6 mation the School Board needed or requested. The above three-
7 step approach in negotiating the type of, percentage and the cost
8 of dental insurance gave the School Board every opportunity to
9 effectively and efficiently negotiate this issue. The negotiating
10 of this issue does not support the School Board's charge.

11 The School Board's second charge states in part:

12 That on or about October 8, 1976, (the Association)...
13 attempted to bargain to an impasse over the demand that the
14 Complainant collectively bargain over a four (4) day
15 official school closure; that on or about October 9, 1976,
16 it, (the Association)...entered upon further attempts to
17 mediate to an impasse over the Complainant's decision to
18 officially close school on four (4) days.

16 FINDING OF FACT

17 Not on 8 and 9 October 1976, but on 10 September 1976, the
18 Association attempted to bargain and or mediate the issue of pay
19 for the four days the school was closed.

20 DISCUSSION

21 The schools were closed on September 7, 8, 9, and 10, 1976.
22 Mr. York testified as follows on the issue of pay during the
23 closure. (Transcript 257-258)

24 Mr. Cumming: What was the, what were substantially the
25 terms of the counter proposal?

26 Mr. York: Well, as I recall, there were four items that I
27 felt that did not have anything whatsoever to do with con-
28 tract negotiations. It had to do with the settlement of a
29 dispute which properly should have been heard in another
30 forum. And that item was what the Board intended to do with
31 respect to the teachers' pay for the last four days. And
32 another item was that the teachers were making some type of
a proposal based upon a cost of living index and another ad-
ministrative question, or two administrative questions that
Kathryn Walker discussed with the Board and the Board then
turned to Exhibit K-7, and said the answer to the question
lies in the language that the parties now have agreed to on
that particular article and section.

1 The above is also stated in Mr. York's notes which state in
2 part: "1-4 days or PIR days-compensation?"

3 The School Board's counter proposal of 5:27 p.m. on 10
4 September 1976, states in part: (School Board's Exhibit L)

5 Regarding school closure and make-up day-past practice
6 reveals that District has required teachers to make-up days.

7 The Association's proposal of 8:30 p.m., on 10 September 1976,
8 states in part: (School Board's Exhibit M)

9 Have the School Board decide how the 4 days teachers worked
10 this week will be treated;

11 During the school closure, a certain percentage of teachers
12 and students were in the classrooms. If there was no labor dis-
13 agreement in Columbia Falls, the schools would have been open and
14 teachers employed. The teachers requested pay for the four days
15 the schools were closed.

16 The NLRB held in Royal Plating and Polishing Co.,²⁸ the
17 employer, who refused to bargain on the effect of plant closure
18 and pay some back wages.

19 The Association offered a proposal to minimize the effect of
20 the school closure. There is no evidence that the Association
21 attempted to bargain to an impasse the four day pay proposal. It
22 is a negotiable item and it was submitted as such. The evidence
23 does not support the School Board's second charge.

24 The third School Board charge states in part:

25 On or about October 9, 1976, it, (the Association)...entered
26 into collective bargaining via mediation and demanded salary
27 schedules demanded in late February and leading up to August
28 rather than salary schedules reflecting the defendant's
29 posture reached in prior mediation talks on or about September
30 8th through the 11th....

31 FINDING OF FACT

32 On September 11, 1976, the Association proposed a salary
33 schedule costing \$1,607,890 but on 8 October 1976, the Association
34 offered a salary schedule costing \$1,610,000. On 9 October 1976,

35 ^{28.} 160 NLRB No. 72; 63 LRRM 1045

1 the Association proposed a starting wage of \$9100 per year. The
2 starting salary of \$9100 per year is an increase from starting
3 salaries proposed on September 10, 11, 1976.

4 DISCUSSION

5 The Association did increase the demand for the first year
6 starting wage from \$8900 to \$9100 per year. At the same time,
7 the Association changed the wage distribution from the Montana
8 Education Association's 4.5 index level to the School Board's
9 wage schedule. The Association also dropped optical insurance,
10 proposed no maximum cost of health and dental insurance, and put
11 a ten percent ceiling on the cost of living increase. The change
12 in the wage distribution was a major change for the Association.
13 The Association, with the School Board opposed, tried to negotiate
14 a higher wage increase for the most senior teachers.

15 There is no evidence that the teachers were surface bargain-
16 ing at any time. Though the total cost of the wage proposal
17 did change slightly it must be noted that at the same time the
18 Association was willing to change to wage distribution closer
19 to the School Board's proposal. There is no evidence of the
20 Association unwillingness to sign any of their proposals as a
21 contract. The School Board's charge is not supported.

22 RECOMMENDED ORDER

23 IT IS HEREBY ORDERED that the Board of Trustees of School
24 District No. 6, Columbia Falls, Montana cease and desist from:

- 25 1. Issuing individual contracts containing language which
26 will circumvent, hamper or delay collective bargaining with the
27 exclusive representative,
- 28 2. attempting to implement the above individual contracts
29 by any means,
- 30 3. withdrawing of concessions made in earlier negotiations
31 with good cause,
- 32 4. implementing the full and final offer of 17 August 1976,

1 5. locking out the teachers because they would not execute
2 individual contracts containing wages and before impasse was
3 reached,

4 6. using fact finding as a method to stall negotiations,

5 7. refusing to negotiate, while not being at impasse, until
6 a fact finder arrives.

7 IT IS FURTHER ORDERED that the School Board make all indiv-
8 idual contracts that contain wages executed from 17 August 1976 to
9 date subject and secondary to the master agreement by attaching
10 the following statement: "If this individual contract contains
11 any language inconsistent with the collective bargaining agreement,
12 the collective bargaining agreement shall be controlling.

13 Charges not addressed in this Recommended Order are hereby
14 dismissed.

15 NOTICE: Exceptions may be filed to these Findings of Fact,
16 Conclusions of Law, the Recommended Order within twenty (20) days
17 service thereof. If no exceptions are filed with the Board within
18 the period of time, the Recommended Order shall become a Final
19 Order. Exceptions shall be addressed to the Board of Personnel
20 Appeals, 35 South Last Chance Gulch, Helena, Montana 59601.

21 Dated this 14th day of August, 1978.

22 BOARD OF PERSONNEL APPEALS

23 By Ray Gaeman
24 Ray Gaeman
25 Hearing Examiner
26
27
28
29
30
31
32

CERTIFICATE OF MAILING

1 I, Trena Scoffield, hereby certify and state that I did
2 on the 14th day of August, 1978, mail a true and correct copy of
3 the FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER
4 in ULP#25-1976, ULP#26-1976, ULP#27-1976 and ULP#36-1976 to the
5 following persons at their last known address:

6 Mr. Ben Hilley
7 Attorney at Law
8 1713 Tenth Ave. South
9 Great Falls, Mt 59405

10 Mr. James Cumming
11 Attorney at Law
12 Columbia Falls, Mt 59912

13 Mr. Leonard York
14 York, Stangell & MacPherson
15 Board of Trade Building
16 Suite 310
17 SW 4th Avenue
18 Portland, Oregon 97204

19 Michael Keedy
20 MEA Uniserv Director
21 P. O. Box 1154
22 Kalispell, Mt 59601

23
24
25
26
27
28
29
30
31
32

Trena Scoffield