

STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE #18-78:

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL #185,)
Complainant,)
- vs -)
HELENA SCHOOL DISTRICT NO. 1,)
Defendant.)

FINAL ORDER

A Findings of Fact, Discussion and Recommended Order in the above matter was issued on December 20, 1978, by Hearing Examiner Rick D'Hooge.

Exceptions to the Hearing Examiner's Decision were filed on behalf of the Complainant on January 25, 1979, by Robert D. Kurnick, Attorney for Complainant.

The parties waived oral argument before the Board of Personnel Appeals and agreed to present their respective positions on briefs. After reviewing the record and considering the briefs, at its meeting on June 20, 1979, the Board orders that the Exceptions to the Findings of the Hearing Examiner be denied.

IT IS ORDERED, therefore, that the Findings of the Hearing Examiner in this matter be sustained and be adopted as the Final Order of this Board.

DATED this 11 day of July, 1979.

BOARD OF PERSONNEL APPEALS

By Brent Crowley
Brent Crowley, Chairman

CERTIFICATE OF MAILING

I, Jennifer Jacobson, hereby certify that on the 16 day of July, 1979, I mailed a true and correct copy of the above

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FINAL ORDER to the following persons:

C.W. Leaphart, Jr.
Attorney at Law
1 North Last Chance Gulch, #6
Helena, MT 59601

W. Leroy Halpine
Business Manager
Local Union #185
International Brotherhood of
Electrical Workers
110 North Warren
Helena, MT 59601



Jennifer Jacobson

BEFORE THE BOARD OF PERSONNEL APPEALS
OF THE STATE OF MONTANA

1 In the Matter of Unfair Labor)
Practice #18-78:)
2 International Brotherhood of)
Electrical Workers, Local 185,)
3 Complainant,)
4 vs.)
5 Helena School District No. 1)
6 Defendant.)

7 * * * * *

8 FINDING OF FACTS, DISCUSSION AND RECOMMENDED ORDER

9 * * * * *

10 I. INTRODUCTION

11 The major question before the Board of Personnel Appeals
12 (BPA) is the Helena School District No. 1 (School District) right
13 to terminate the current labor agreement with International
14 Brotherhood of Electrical Workers, Local 185 (Local 185 or IBEW)
15 and to contract out the work performed under the labor agreement.
16 The question is further coupled with charges of refusing to open
17 a contract for negotiation and charges of coercion for union
18 activities.

19 I will divide the opinion in this matter (ULP #18-78) into
20 the major areas of Statement of Charge, Findings of Fact, Discussion,
21 Conclusion of Law and Recommended Order.

22 Because the BPA has very little precedent, I will cite
23 federal statutes and cases for guidance in the application of
24 Montana's Collective Bargaining Act, Title 59, Chapter 16, R.C.M.
25 1947 (ACT). The Federal Statutes will generally be the National
26 Labor Relations Act, 29 USCA, Sections 151-166 (NLRA). The
27 Montana Supreme Court in State Department of Highways vs. Public
28 Employees Craft Council, 165 Mont. 249, 529 P 2d 785 at 787
29 (1974) approved this principle:

30 "When legislation has been judicially construed and a
31 subsequent statute on the same or an analogous subject is
32 framed in the identical language, it will ordinarily be
presumed that the Legislature intended that the language as
used in the later enactment would be given a like

1 interpretation. This rule is applicable to state statutes
2 which are patterned after federal statutes. [Citing
3 cases] Although the cases which have interpreted the
4 italicized words involved private employees, the act before
5 us incorporates the exact language, consisting of 16 words,
6 found in the earlier statutes, and it is unlikely that the
7 same words would have been repeated without any qualification
8 in a later statute in the absence of an intent that they be
9 given the construction previously adopted by the courts.

10 "We think similar standards of judicial construction apply
11 in the present case. For example, section 19-102, R.C.M.,
12 1947, provides:

13 "Words and phrases used in the codes or other statutes of
14 Montana are construed according to the context and the
15 approved usage of the language; but technical words and
16 phrases, and such others as have acquired a peculiar and
17 appropriate meaning in law, or are defined in the succeeding
18 section, as amended, are to be construed according to such
19 peculiar and appropriate meaning or definition." (Emphasis
20 added).

21 II. STATEMENT OF CHARGE

22 On June 28, 1978, Local 185 filed ULP #18-78 which states in
23 part:

24 "When Local 185 International Brotherhood of Electrical
25 Workers refused to open the contract by mutual consent and
26 downgrade wages during the life of the agreement; the Board
27 froze the wages and terminated our members Harold A. Holmquist
28 and Michael P. O'Brian the entire crew involved for pursuing
29 their rights and after we hired an attorney to obtain back
30 pay they now serve notice to terminate our agreement on at
31 the expiration date June 30th, 1978 at the expiration date
32 refusing our notice to open for wages only.

see 59.1605 (1) (a), (1) (c), & (1) (e)

A hearing in ULP #18-78 was held on August 23, 1978 followed
with a brief filed by the defendant on November 8, 1978.

III. FINDINGS OF FACT

After a thorough review of the briefs, exhibits, testimony
and the demeanor the witnesses, I set forth the following:

1. By stipulation, the parties have agreed to the following:
 - A. The School District is a public employer as defined by Section 59-1602 (1) R.C.M. 1947. Tr 1(10).
 - B. Local 185 is a labor organization as defined by section 59-1602 (5) R.C.M. 1947. Tr 1 (17).

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C. The BPA has jurisdiction in this case. Tr 1. (17)

D. The Hearing Examiner in ULP #18-78 for the hearing held on August 23, 1978 would only rule on the validity of the allegations. If the allegations are confirmed, a second hearing will be held to consider damages. Tr 6 (6-13).

2. Prior to 1971, the School District's maintenance work, including electrical work, was done by a private contracting firm. Over the past ten years, the School District has changed to their own extensive maintenance crew. Tr 23, 24, 31, 32, 54. Starting on or about August 7, 1978, the electrical work for the School District was contracted to and performed by a private electrical contracting firm, Atlas Electric. Tr 25.

3. A Labor Agreement was first entered into between Local 185 and the School District on July 1, 1971. The current labor agreement, which includes the basic agreement of 1971, was effective from July 1, 1975 until July 1, 1978. This agreement was approved by the International Brotherhood in April, 1975. School District Exhibit B; Tr 17, 18. The original draft of the 1971 agreement was prepared and submitted by Local 185. Tr 23, 28.

Article I of the current labor agreement states the following in part:

Effective Date -- Termination - Amendments - Disputes

Sec. 1. This Agreement shall take effect July 1, 1975 and shall remain in effect until July 1, 1978. It shall continue in effect from year to year thereafter, from July 1st of each year, unless changed or terminated in the way provided herein.

Sec. 2. Either party desiring to change or terminate this agreement must notify the other in writing at least 60 days prior to July 1st of any year. When notice for changes only is given, the nature of the changes desired must be specified in the notice, and until a satisfactory conclusion is reached in the matter of such changes the original provisions shall remain in effect in full force and effect.

1 Mr. Weir, Assistant Superintendent, testifies as follows
2 regarding communications about negotiations:

3 EXAMINER: Did the electrical workers or the School District,
4 either one of them, offer to negotiate a method of sub-
5 contracting or the type of subcontracting that would be
6 done? Was there any communications on a willingness to sit
7 down and negotiate subcontracting?

8 WEIR: I don't know what there would be to negotiate.
9 Tr 34 (6-11).

10 5. On April 26, 1978, Local 185 notified the School
11 District as follows:

12 In accord with Article 1, Sec. 2 of the agreement between
13 Local Union 185, International Brotherhood of Electrical
14 Workers and School District #1, Helena, Mt., This is Local
15 Union #185's notification that we wish to open the Contract
16 at the expiration date, July 1st, 1978 for wages only.

17 Sincerely yours,

18 W. Leroy Halpine, B.M.
19 LU #185, I.B.E.W.

20 School District Exhibit C

21 Mr. Halpine testifies that he had no reply from the School
22 District concerning the above letter. Tr 20, 21.

23 Neither the School District or Local 185 proposed a neg-
24 otiation meeting, states Mr. Campbell. Tr 36.

25 6. Mr. Holmquist and Mr. O'Brian, School District Elec-
26 tricians, were informed on June 2, 1978 by letter as follows:

27 Please be informed that your services with the Helena
28 School District #1 will be terminated effective June
29 30, 1978.

30 Malcolm J. Streeter
31 Director of Buildings and
32 Grounds

IBEW Exhibit #1 and #2.

7. Mr. Holmquist, an electrician for the School District
for the past nine years, was involved in union negotiations. Mr.
Holmquist was never disciplined or told that his work was improper.

1 Tr 2, 3. Mr. Holmquist was given no reason for termination.
2 When he questioned Mr. Weir, Mr. Weir stated there was nothing to
3 talk about because the matter had been taken to the BPA. Tr 4,
4 31. About two weeks before this hearing, Mr. Holmquist began
5 working at the School District for an electrical contractor
6 Atlas Electric. Mr. Holmquist is performing the same work for
7 Atlas Electric as he did before his termination using the School
8 District's equipment and trucks. Tr 9, 12, 51, 52.

9 8. Mr. O'Brian, an electrician for the School District for
10 the past seven years, was involved in some discussion of salaries
11 at contract time. Tr 9, 10. Mr. O'Brian was only warned once
12 for talking too much with the secretary, but never warned about
13 inability to perform his job. Tr 10. Shortly before the 30th of
14 June, 1978, Mr. Streeter, Director of Buildings and Grounds, told
15 Mr. O'Brian that he thought things would get straightened out.
16 Mr. O'Brian had no other reasons or warnings for termination. Tr
17 10, 11, 12.

18 9. The transcript of the hearing is silent about Mr.
19 Holmquist's and Mr. O'Brian's grievances on frozen wages, back
20 pay, and other related union activities. (see charge p. 2)

21 The record is silent in the area of past requests for
22 negotiations, negotiation session, and notice to open the labor
23 agreement at the end of the labor agreement.

24 10. Mr. Weir states the reasons the School District terminated
25 Local 185's contract were economic and, "conjecture on his part,"
26 public relations. Tr 24,32. Mr. Campbell testifies that the
27 decision to terminate Local 185's contract and the discussion of
28 other craft union contracts was held on the 4th Tuesday of March
29 1978. Mr. Campbell indicates the discussion of other union
30 crafts contracts was not a matter of formal business, but planning
31 Tr 43, 44, 45.

32

1 11. Mr. Weir, Mr. Campbell and Mr. Streeter do not have any
2 dollar savings or cost figures on electrical subcontracting. Tr
3 25, 33, 35, 45, 59. At the hearing, Mr. Campbell projects the
4 School District would use only one electrician through a sub-
5 contractor as compared to using two School District's electricians.
6 By paying for one less electrician, the School District would
7 save a minimum of \$20,000.00. Tr 35, 36, 45, 46.

8 12. The School District is paying Atlas Electric for
9 electrical work at the rate of cost plus 15%. Tr 25, 26, 41, 57.
10 When Mr. Weir was asked how this was cheaper for the School
11 District he replied as follows:

12 WEIR: I think it's cheaper simply because we're getting
13 work done that is necessary to get done rather than have two
14 people on the payroll and make work for them. Tr 26 (7-9).

15 Mr. Weir, Mr. Campbell and Mr. Streeter do not have any
16 figures on make work, feather bedding, non-productive work,
17 unnecessary work or lack of work for electricians. Tr 32, 33,
18 42, 44, 46, 51. When questioned about non-productive work, Mr.
19 Streeter states the following:

20 STREETER: I don't call it non-productive work, and they
21 have never been to my knowledge without work to do. I do
22 say that if we are to contract the work out, much of the
23 work that has been done by these people probably will not be
24 done. Tr 49 (13-17).

25 13. Mr. Streeter testifies that the quantity of electrical
26 work performed will not be the same by a subcontractor. Tr 57.

27 Mr. Campbell indicates the School District would use only
28 one electrician through a subcontractor as compared to using two
29 School District electricians. Tr 46. Mr. Campbell also states:

30 LEAPHART: Is there any present need to have an electrician
31 at all times or do you know?

32 CAMPBELL: I don't know.

 LEAPHART: Are there periods of time when there is not a
 necessity for an electrician?

 CAMPBELL: My feelings are there are periods of time, yes.
 But I can't say that with all certainty. Tr 37 (4-10).

1 When Mr. Weir was questioned about how many electricians
2 will be needed, he replied, "Probably not over one or two." Tr
3 26 (20). Mr. Streeter states he has no idea how much electrical
4 work is going to be contracted out. Mr. Streeter also states the
5 School District currently has more than two electricians working
6 through the subcontractor. Tr 52, 53, 54.

7 When Mr. Campbell was asked if the School District ever
8 discussed employing only one electrician with Local 185, he
9 replied as follows:

10 CAMPBELL: No. Not just one---as it has already been stated,
11 it's a matter of contract versus the subcontracting work to
12 local contractors. Tr 41 (26-28).

13 Mr. Weir testified that no electrical maintenance work was
14 done for the School District from July 1 to August 7, 1978. Tr
15 25.

16 14. The School District subcontracts with private firms for
17 carpentry, painting, plumbing and possibly other work. The
18 School District subcontracts only when additional employees are
19 needed. The employees of the subcontractors do not replace the
20 School District's regular maintenance employees. Tr 9, 24, 33,
21 56.

22 15. Mr. Streeter testifies as follows to the reason for the
23 1969 change from a private contracted maintenance crew to the
24 School District's own maintenance crew:

25 WILLIAMS: What was the reasoning at that time to employ
26 full-time employees rather than contract the work out?

27 LEAPHART: I object. It is irrelevant and immaterial.

28 EXAMINER: What was that question again?

29 WILLIAMS: The question was, what was the reasoning at the
30 time in 1969 to employ full-time maintenance people rather
31 than contract the work out?

32 EXAMINER: Answer the question please.

 STREETER: I guess that I would have to say it was my own
idea. I was given the instruction when I was employed by
the Board to improve the custodial and maintenance operation.
I saw enough work to be done that I thought I could do it
more economically with a full-time employee. Tr 54 (10-23)

1 16. The hearing is laced with many objections which were
2 overruled. I direct the parties attention to 59-1607(1) and 82A-
3 1014(C) R.C.M. 1947 which basically states the BPA is not bound
4 by statutory or common law rules of evidence.

5 IV. DISCUSSION

6 The discussion will be divided into the subjects of termination
7 of the electricians for union activities, termination of the
8 labor agreement, and refusing to open the agreement for wages.

9 A.

10 In the area of termination of the electricians for
11 union activities, the charge states the following:

12 When Local 185 International Brotherhood of Electrical
13 Workers refused to open the contract by mutual consent and
14 downgrade wages during the life of the agreement; the Board
15 froze the wages and terminated our members Harold A. Holmquist
16 and Michael P. O'Brian the entire crew involved for pursuing
17 their rights and after we hired an attorney to obtain back
18 pay....See 59.1605(1)(a), (1)(c)....

19 Section 59-1605 states the following in part:

- 20 Unfair labor practices of employer or labor organization.
21 (1) It is an unfair labor practice for a public employer
22 to:
23 (a) interfere with, restrain, or coerce employees in
24 the exercise of the rights guaranteed in section 59-
25 1603 of this act;...
26 (c) discriminate in regard to hire or tenure of
27 employment or any term or condition of employment to
28 encourage or discourage membership in any labor organ-
29 ization; however,....

30 Because the hearing is void of any evidence of a grievance,
31 demand for back pay or other like union activities, I cannot
32 confirm the alleged violation of Section 59-1605(1)(a) and (1)(c)
R.C.M. 1947. F F 9.

33 B.

34 When reviewing the School District's termination of the
35 labor agreement, the School District complied with the language
36 and the intent of the contract. The School District's letter of
37 termination of the labor agreement was within the time limit set
38 forth in the agreement. Local 185 did not allege or argue the

1 letter of termination was not concise or understandable. FF 3,
2 4.

3 Next, I direct my attention to any requirements set forth by
4 Montana's collective bargaining act, rules of the BPA or BPA
5 cases. A section of the NLRA is partly comparable to a section
6 of Montana's collective bargaining act.

7 NLRA

ACT

8 Sec. 8....

59-1605....

9 (d) For the purposes of
10 this section to bargain
11 collectively is the per-
12 formance of the mutual
13 obligation of the employer
14 and the representative of
15 the employees to meet at
16 reasonable times and confer
17 in good faith with respect
18 to wages, hours, and other
19 terms and conditions of
20 employment, or the neg-
21 otiation of an agreement,
22 or any questions arising
23 thereunder, and the
24 execution of a written
25 contract incorporating any
26 agreement reached if
27 requested by either party,
28 but such obligation does not
29 compel either party to agree
30 to a proposal or require the
31 making of a concession:
32 Provided, That where there
is in effect a collective
bargaining contract covering
employees in an industry affecting
commerce, the duty to bargain
collectively shall also mean that
no party to such contract shall
terminate or modify such contract,
unless the party desiring such
termination or modification-

(3) For the purpose of this act,
to bargain collectively is the
performance of the mutual obligation
of the public employer, or his
designated representatives, and the
representatives of the exclusive
representative to meet at reasonable
times and negotiate in good faith
with respect to wages, hours, fringe
benefits, and other conditions of
employment, or the negotiation of an
agreement, or any question arising
thereunder, and the execution
of a written contract incorporating
any agreement reached. Such
obligation does not compel either
party to agree to a proposal or
require the making of a concession.

(1) serves a written
notice upon the other party to
the contract of the proposed
termination or modification sixty
days prior to the expiration date
thereof, or in the event such
contract contains no expiration
date, sixty days prior to the
time it is proposed to make such
termination or modification;

1 (2) offers to meet and
2 confer with the other party for
3 the purpose of negotiating a new
4 contract or a contract containing
5 the proposed modifications;

6 (3) notifies the Federal
7 Mediation and Conciliation
8 Service within thirty days after
9 such notice of the existence of
10 a dispute, and simultaneously
11 therewith notifies any State
12 or Territorial agency established
13 to mediate and conciliate disputes
14 within the State or Territory
15 where the dispute occurred,
16 provided no agreement has been
17 reached by that time; and

18 (4) continues in full force
19 and effect, without resorting to
20 strike or lock out, all the terms
21 and conditions of the existing
22 contract for a period of sixty days
23 after such notice is given or until
24 the expiration date of such contract
25 whichever occurs later:....

26 29 USCA Sec 158(D)

27 In applying the above federal statute, the School District
28 may have violated Section 8 (d)(2) of the NLRA by not offering to
29 meet with Local 185. F F 4.

30 A review of the legislative history of Section 59-1605(3)
31 R.C.M. 1947 finds that the original draft of the collective
32 bargaining legislation did not contain the remaining part of NLRA
33 Section 8 (d). I strongly believe in the requirements set forth
34 in NLRA Section 8. My strong belief is founded on the principle
35 that a lot of labor strife can be averted by maintaining a full,
36 honest and continuous line of communication. I cannot, however,
37 impose the requirements of the NLRA Section 8(d) without either a
38 BPA rule or statutory authority. Therefore, the School District
39 is not guilty of any unfair labor practice in its termination or
40 its method of termination of the labor agreement.

41 The National Labor Relations Board (NLRB) has, however,
42 dealt with the issue of subcontracting outside the 8(d) provision
43 quoted above. It has decided the question on an 8(a)(5) charge,

1 failure to bargain in good faith, which is similar to our section
2 59-1605(1)(e), R.C.M. (See Discussion C). Using the NLRB cases
3 for guidance in deciding this matter, the NLRB states that bargaining
4 on subcontracting is not required where:

- 5 A. the subcontracting is motivated solely by economic
6 reasons;
- 7 B. it has been customary for the company to subcontract
8 various kinds of work;
- 9 C. no substantial variance is shown in kind or degree from
10 the established past practice of the employer;
- 11 D. no significant detriment results to employees in the
12 unit;
- 13 E. the union has had an opportunity to bargain about
14 changes in existing subcontracting practices at general
15 negotiating meetings.

16 See: Westinghouse Electric Corporation vs. International
17 Union of Electrical, Radio and Machine Workers, AFL CIO.
18 (1965); 150 NLRB No. 136; 58 LRRM 1257. 153 NLRB No.
19 33; 59 LRRM 1355. East Bay Union of Machinists vs. NLRB.
20 (Fiberboard Paper Products) (1964); 379 US 203;
21 57 LRRM 2609. Town and Country Mfg. Corp. vs. NLRB
22 (1962) 316 F2d 846; 53 LRRM 2054.

23 The BPA adopted the above guidelines in ULP #3-75, United
24 Brotherhood of Carpenters and Joiners of America, Local Union
25 No. 112 vs. Board of County Commissioners, Silver Bow County.

26 The testimony indicates that the School District did not
27 meet all the above requirements. FF 4, 5, 10, 11, 12, 13, 14,
28 15. Therefore, the School District failed to bargain in good
29 faith in violation of section 59-1605(1)(e), R.C.M. 1947.

30 Local 185 filed ULP #18-78 on June 28, 1978. Mr. Halpine
31 states that he first was informed of the subcontracting when
32 Local 185 put up a picket. Although testimony did not establish
the date that picketing commenced, presumably the date was after
the expiration of the labor agreement, June 30, 1978. Therefore,
if I read Local 185's complaint on termination of the labor
agreement to mean also a complaint on subcontracting, I would be
ignoring Local 185's lack of knowledge on subcontracting at the
time the ULP was filed. F F 4.

1 I, therefore, must dismiss the charge. But, by dismissing
2 this section of ULP #18-78, I do not wish to imply that I am
3 giving a general broad based approval of the termination of the
4 labor agreement and subcontracting. Also I am not implying that
5 a charging party has no leeway in setting forth their complaint.

6 C.

7 The record contains a request by Local 185 to open negotiation
8 for wages only. The record contains no request for a bargaining
9 session by Local 185. The record is also silent in the area of
10 past request for contract negotiations with the contract expiring
11 FF 5, 9.

12 Looking for a guideline, I find a part of Section 8 of the
13 NLRA comparable with a part of Section 59-1605 of Montana's
14 collective bargaining act as follows:

15 NLRA

ACT

16 Sec. 8. (a) It shall be an
17 unfair labor practice for
an employer...

59-1605. Unfair labor
practices of employer or labor
organization. (1) It is an
unfair labor practice for a
public employer to:

18 (5) To refuse to
19 bargain collectively with the
representatives of his
20 employees, subject to the
provisions of Section 9 (a)...

(e) refuse to bargain
collectively in good faith with
an exclusive representative...

21 29 USCA Sec. 158 (5)

22 In the decision PBM Industries, Inc. (1975) 217 NLRB No. 28,
23 88 LRRM 1549 at 1550; the NLRB states:

24 The Administrative Law Judge found that Respondent did not
25 refuse to bargain with Local 208 in violation of Section
26 8(a)(5) of the Act and recommended dismissal of that portion
27 of the complaint. We agree, but so find because there is no
evidence in the record of a request to and/or a refusal by,
Respondent to bargain with Local 208.

28 Adopting the above guidelines, the School District is under
29 no obligation to bargain with Local 185 without a request for a
30 bargaining session.

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V. Conclusions of Law

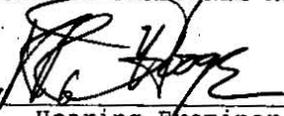
From the charge filed, the evidence presented at the hearing and the brief submitted; I conclude the School District did not violate Section 59-1605(1)(a),(1)(c) and (1)(e) R.C.M. 1947 as charged by IBEW.

VI. Recommended Order

For the reasons set forth above, I ORDER that ULP #18-78 be dismissed.

Dated this 20th day of December, 1978.

BOARD OF PERSONNEL APPEALS

By  Hearing Examiner

NOTE: As provided by Section 59-1607(2) R.C.M. 1947 and BPA Rule 24.26. 584, Exceptions, this RECOMMENDED ORDER becomes a FULL AND FINAL ORDER of the BPA if no written exceptions are filed within twenty (20) days after service upon the parties.

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CERTIFICATE OF MAILING

I, Anita Moon, do hereby certify and state that I did on the
20th day of December, 1978 mail a true and correct copy of the
above PROPOSED FINDING OF FACTS, DISCUSSION AND ORDER to the
following:

C. W. Leaphart, Jr.
Attorney at Law
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W. Leroy Halpine
Business Manager
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Internation Brotherhood of
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Anita Moon