COMMONWEALTH OF MASSACHUSETTS (COMMISSIONER OF ADMINISTRATION) AND NAGE, SUP-2380 (8/22/80).

(40 Selection of Employee Representative)
46.12 rival claims of representation
46.121 employer's duty of neutrality
(50 Duty to Bargain)
52.35 bargaining in the face of rival union's petition
(60 Prohibited Practices by Employer)
64.11 bargaining during pendancy of rival petition

Commissioners participating:

Phillips Axten, Chairman
Joan G. Dolan, Commissioner

Appearances:

Manuel S. Lato, Esq. - Counsel for the Commonwealth of Massachusetts

Robert J. Canavan, Esq.
Gordon P. Ramsey, Esq. - Counsel for National Association of Government Employees

Robert Manning, Esq.
Augustus J. Camelio, Esq. - Counsel for the Alliance, AFSCME/SEIU, AFL-CIO

DECISION AND ORDER

Statement of the Case

On February 5, 1980, the National Association of Government Employees (NAGE) filed with the Labor Relations Commission (Commission) a prohibited practice charge alleging that the Commonwealth of Massachusetts (Commonwealth) was violating G.L. c.150E (the Law). Specifically, NAGE contended that the Commonwealth was committing an unfair labor practice by continuing to bargain with the Alliance, AFSCME/SEIU, AFL-CIO (the Alliance) after notice that NAGE sought to represent certain employees currently represented by the Alliance. After a preliminary investigation, the Commission on February 22, 1980 issued a complaint of prohibited practice alleging violations of sections 10(a)(1) and (2) of the Law.

On March 5 and 6, 1980, a formal hearing was held before Joan G. Dolan, Commissioner. The Alliance was permitted to intervene in the proceedings. All parties were present and represented by counsel and were given full opportunity to examine and cross-examine witnesses. Briefs due March 13 were timely filed by all parties.

Jurisdictional Findings

1. The Commonwealth, acting through the Commissioner of Administration, is a public employer within the meaning of section 1 of the Law.

2. The Office of Employee Relations is the designated repre-

sentative of the Commonwealth for the purpose of dealing with state employees in Units 1 and 4.

3. The National Association of Government Employees is an employee organization within the meaning of section 1 of the Law.

4. The Alliance is an employee organization within the meaning of section 1 of the Law and is the certified collective bargaining representative for state employees in Units 1 and 4.

Findings of Fact

In 1976, the Alliance was certified by the Commission as the exclusive representative for state employees in bargaining units 1, 2, 4, 8, and 10. On June 29, 1977, the Alliance and the former Commissioner of Administration and Director of the state Office of Employee Relations (OER) signed a collective bargaining agreement covering the employees in all of the bargaining units represented by the Alliance for the period July 1, 1977 - June 30, 1980. It contained a re-opener clause which obligated the parties to begin negotiations for a successor agreement on or after April 1, 1980 upon written request of either side. The same provision appeared in at least three other agreements between the Commonwealth and unions other than the Alliance which represented other state bargaining units.

At some point prior to the end of August 1979, the Alliance requested "early bird" negotiations[1] with the Commonwealth for its bargaining units. Three other state unions also requested early negotiations. All of the requests were granted by the Commonwealth. On August 21, 1979, the first Alliance bargaining session was held, at which time the Commonwealth's proposals were given to the union. Between August 21 and January 31, 1980, Commonwealth and Alliance negotiators met approximately nineteen times with either full committees or subcommittees in attendance. Although several economic proposals were extended by OER negotiators prior to January 31st, no agreement had been reached by that date.

During the late fall of 1979, the Commonwealth became aware of organizing activity in the state units with contracts terminating on June 30, 1980. On December 18, 1979, OER Director John Sullivan sent a memo to all secretariats, departments, and agencies on the subject of union campaign activities. The document stated the Commonwealth's policy of impartiality in all union matters and set uniform rules regarding campaigning for all state employees.

On the morning of January 31, 1980,[2] OER negotiator Richard Burke

[1]Negotiations commencing before the contractually-required re-opener date.

[2]All dates hereafter refer to 1980 unless otherwise specified.

delivered a further economic proposal to a subcommittee of the Alliance. At 3:54 p.m. on January 31, NAGE, the certified bargaining representative for state Unit 6, filed with the Commission a petition seeking certification as the exclusive bargaining agent for the employees in Unit 1 (administrative and clerical). Copies of the petition were sent certified mail that day to both the Alliance and Secretary of Administration and Finance Edward Hanley.[3] On February 1, the Alliance subcommittee met with the full Alliance negotiating team to discuss the Commonwealth's last proposal. Negotiator Burke was notified by telephone that day that the Alliance negotiating committee had accepted the Commonwealth's January 31st proposal. Also on February 1, NAGE filed with the Commission a representation petition for Unit 4 (institutional security). Again, copies of the petition were sent that same day to the Alliance and Secretary Hanley by certified mail.[4]

On the afternoon of Saturday, February 2, NAGE counsel Gordon Ramsey delivered to Secretary Hanley in hand a letter written by Ramsey which stated that NAGE had filed petitions for Units 1 and 4. The letter advised Secretary Hanley of NAGE's view that the Law mandated that the Commonwealth cease and desist from any further bargaining with the incumbent Alliance. On the morning of February 4, negotiator Burke met with an Alliance subcommittee to work out language items which had been tentatively agreed to between the Alliance and the Commonwealth. Some of the matters discussed related generally to all Alliance units, while others involved only units other than 1 and 4. Also on February 4, Ramsey phoned OER attorney Peter Lyons and informed him of the filing of the petitions, the notification to Hanley, and NAGE's view on the Commonwealth's obligation to stop bargaining. Lyons later that day called Ramsey and told him that Lyons' colleagues at OER did not agree with NAGE's interpretation of the Commonwealth's obligations.

On February 5, the language discussions of the previous day between the Commonwealth and the Alliance continued during the morning. In the afternoon, Mr. Burke returned to his office, where he was informed by Director Sullivan of the filing of the Unit 1 and 4 petitions. Sullivan had learned of the petitions in a phone call from Hanley, who forwarded them to OER, where they were received on February 5. Also during the afternoon of February 5, the charge which gave rise to this case was filed with the Commission by NAGE.

On February 11, the Commission sent a Notice of Hearing, including a copy of the Unit 4 petition, to OER and all unions which had, or might have had, an interest in Unit 4. The same form notice, with a copy of the Unit 1 petition, was sent to OER and interested unions on February 12.

Also on February 12th, OER presented to the Alliance a final package

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[3]Certified mail receipts show delivery to the Alliance on February 4 and Hanley on February 7.

[4]The Alliance copy was received February 7 and Hanley's on February 8.

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offer which incorporated the money and language items discussed on January 31, February 4, and February 5. The proposal was rejected by the Alliance on the grounds that it lacked seven or eight items the Alliance leadership felt were necessary. The Commonwealth stated that no further movement could be expected.

Between February 12th and 26th, there was no communication between the Commonwealth and the Alliance. On February 26, a letter written by Alliance Chairman Bonavita was hand-delivered to OER Director Sullivan. In it, Bonavita requested further bargaining for all Alliance units on March 3. Sullivan responded on February 28 with a letter stating that the Commonwealth withdrew its offer to Units 1 and 4 until after the pending representation question had been resolved. The Commonwealth offered to bargain further, and has done so, on matters concerning Alliance units other than 1 and 4. Sullivan closed his February 28 letter with a statement that the Commonwealth would be happy to meet and negotiate a successor agreement for Units 1 and 4 after the representation issues had been concluded. Sullivan did not specify that such negotiations would occur with the Alliance.

At the March 5 opening of hearings in this case, the hearing officer informed the parties that the Commission had voted to dismiss the Unit 4 petition for lack of a sufficient showing of interest. Although an initial check of the face of the petition and the accompanying cards had indicated an adequate showing of interest, a subsequently obtained employer list of Unit 4 employees showed that there was a larger number of employees in the unit than estimated on the face of the petition. The number of cards submitted did not constitute 30% of the number of employees in the unit, as required by Commission Rules and Regulations 402 CMR 14.05.[5] NAGE filed a request for reconsideration of the dismissal, alleging that extenuating circumstances led to its failure to obtain the requisite number of cards, but

[5]This situation should be distinguished from that discussed in our decision in the Unit 1 case. Commonwealth of Massachusetts, (Unit 1), 6 MLC 2123 (1980). In Unit 1, NAGE timely requested an employee list from the Commonwealth. It obtained its showing of interest on the basis of the number of employees contained on the Commonwealth's list. The Alliance contended that the showing of interest was insufficient in that there were more employees in the unit than the Commonwealth had stated. We held that a union can reasonably rely on an employer-supplied list in its pre-filing showing of interest calculations, and that neither an employer nor another union may challenge the length of the list so long as it appears to reasonably correlate with the size of the unit. Commonwealth of Massachusetts (Unit 1), 6 MLC at 2125.

In contrast, in Unit 4 no employer list was requested until the next to the last day of the open period. OER staff were unable to compile the list of Unit 4 employees in the brief time before the end of the open period. The petition as file contained on its face an estimate of the number of employees in the unit. In the course of the Commission's continuing investigation of the showing of interest, it became apparent that NAGE's estimate was short. When given the opportunity, NAGE could allege no sufficient uncommon or extenuating circumstance which excused the failure to obtain cards from 30% of the actual number of employees in the unit. Thus, the Commission dismissed the petition.

it subsequently withdrew the request.

Opinion

At issue in this case is the question of whether or not the Law requires that an employer stop bargaining with an incumbent union when a rival seeks representation rights. NAGE urges us to adopt the doctrine announced by the National Labor Relations Board (NLRB) in Midwest Piping and Supply Co., 63 NLRB 1060, 17 LRRM 40 (1945) (hereafter Midwest Piping). Under Midwest Piping, an employer faced with competing claims of representation must remain completely neutral and deal with none of the rival unions. An employer who establishes or continues a bargaining relationship will be found to have violated sections 8(a)(1) and (2) of the National Labor Relations Act (NLRA) on the theory that such dealings interfere wtih employee free choice and constitute impermissible assistance to one of the unions vying for selection.[6] Shea Chemical Corporation, 121 NLRB 1027, 42 LRRM 1486 (1958). If the doctrine is adopted, it must also be determined at what point the obligation of strict neutrality arises.

In light of the fact that this is the first case in which the Commission has considered the Midwest Piping doctrine, it is appropriate to discuss briefly the experience of the NLRB and its reviewing courts, as well as the approaches taken by other states with statutes similar to G.L. c.150E. As the Supreme Judicial Court has observed, Massachusetts collective bargaining laws are derived from the NLRA; thus federal private sector law offers guidance in interpreting the Massachusetts statutes. City Manager of Medford v. Massachusetts Labor Relations Commission, 353 Mass. 519, 233 N.E.2d 310 (1968). Additionally, the approach of other states in dealing with public sector employees provides a further source of experience with the Midwest Piping doctrine.

In dealing with Midwest Piping situations, the NLRB and the courts have attempted to reconcile competing interests inherent in the NLRA. On the one hand, industrial stability and labor peace are fostered by the requirement that employers bargain with unions which represent a majority of their employees. Insubstantial challenges to a union's representational rights by rival unions lacking employee support undermine labor-management stability. On the other hand, employees have the statutory right at appropriate times to select or replace their bargaining agent. Employer conduct which interferes with employee free choice, assists one of the rival unions, or impedes employee use of NLRB election procedures is impermissible. Midwest Piping, supra; Suburban Transit Corp. v. NLRB, 499 F.2d 78, 86 LRRM 2626 at 2635 (3rd Cir. 1974).

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[6]The NLRB has constructed a qualification to this principle where there is an incumbent with an existing contract and a rival files a valid representation petition. Although further bargaining is prohibited under Midwest Piping, the incumbent may continue to administer its contract and process grievances. Shea Chemical Corp., supra, 42 LRRM at 1487.

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The NLRB has focused on employee rights to free choice by examining the representation claims of a union alleging a Midwest Piping violation. If the representation claim is not clearly unsupportable and lacking in substance, the NLRB will, despite disapproval from the courts, find that a question of representation has arisen and will require that an employer cease and desist from dealing with the rival. Playskool, Inc., 195 NLRB 560, 79 LRRM 1507 (1972), enf. den. 477 F.2d 66, 82 LRRM 2916 (7th Cir. 1973).

In contrast, the Circuit Courts have taken a somewhat different tack, focusing on labor stability. The courts will look to the support held by the union with whom the employer has a bargaining relationship. They will determine whether there was majority support for the union with which the employer was dealing and whether or not that support was tainted by illegal employer conduct. Ascertaining untainted majority support, the courts will find that the rival union's claim does not raise a question of representation despite the fact that a petition has been filed with the NLRB. No Midwest Piping violation will be found. NLRB v. Swift and Co., 294 F.2d 285, 48 LRRM 2699 (3rd Cir. 1961), reversing Swift and Co., 128 NLRB No. 87, 46 LRRM 1381 (1960).

Both the Pennsylvania Labor Relations Board and the New York Public Employment Relations Board have decided cases similar to the one before us. Pennsylvania Labor Relations Board v. Commonwealth of Pennsylvania (Pennsylvania Liquor Control Board), Case No. PERA-C-10, 618-C (January 10, 1979); In the Matter of County of Rockland, 10 New York PERB 3168 (1977). Apparently finding Midwest Piping's neutrality obligation appropriate in the public sector, both New York and Pennsylvania have adopted the doctrine, taking an approach similar to that of the NLRB rather than the courts.

Turning to the case before us, we note that this matter is extremely narrow in scope. Both NAGE's charge and the Commission's complaint of prohibited practice allege only that a question of representation was raised by the Unit 1 and 4 petitions as filed on January 31 and February 1; that the Commonwealth had notice of the competing claims of representation; and that the Commonwealth continued to bargain with the Alliance despite the pendency of the NAGE petitions. Thus, unlike most of the fact situations found in the NLRB and Circuit Court decisions, this case involves no allegations or proof of illegal employer assistance to a favored union other than the pure continuation of an established bargaining relationship.[7]

[7] An early exception to the Midwest Piping doctrine permitted employers to continue bargaining and conclude contracts when one of the competing unions was an incumbent. William D. Gibson Co., 110 NLRB 660, 35 LRRM 1092 (1954). The rationale for the exception was found in the statutory purpose of encouraging labor stability through uninterrupted collective bargaining. William D. Gibson Co., 35 LRRM at 1093. The NLRB reasoned that an ongoing relationship should not be disrupted, with the caveat that no contract achieved between an employer and an incumbent could bar an election which would give employees the choice between the incumbent and the rival. Without explanation, the incumbency exception was eliminated by the NLRB when it ruled in Shea Chemical Corporation, supra, four years later than an employer must stop bargaining with an incumbent upon the raising of a question of representation.

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Arguing that there are no impediments to applying Midwest Piping in the public sector, NAGE would have us adopt the doctrine and rule that an employer's obligation of neutrality arises as of the time it has notice that a representation petition has been filed. It contends that the Commonwealth, through its representative Secretary Hanley, had notice as of February 2. Thus, any bargaining which occurred after February 2 was in derogation of the neutrality obligation and hence a violation of sections 10(a)(1) and (2) of the Law. Additionally, NAGE urges a further independent violation in OER Director Sullivan's letter of February 28 in which he stated to the Alliance that the Commonwealth would be happy to meet and negotiate an agreement for Units 1 and 4 after the representation issue had been concluded. NAGE argues that the obligation to avoid bargaining relates to holding oneself out as ready to bargain to the same degree as engaging in actual bargaining. Thus, if NAGE's view is adopted, the sessions of February 4, 5, and 12, as well as the Sullivan letter of February 28, all constitute violations of the Law since they were undertaken after notice to the Commonwealth on February 2. Finally, NAGE contends that the dismissal of the Unit 4 petition on March 5 is irrelevant to the question of whether there were illegalities between February 2 and February 28.

As a threshold issue, the Alliance argues, in essence, that NAGE had no standing to file the charge which is the subject of this case. The Alliance bases this contention on its reading of Commission Rule and Regulation 402 CMR 14.05. The rule states that "no petition shall be entertained... unless the Commission determines that the petitioner has been designated by at least thirty (30) percent of the employees involved to act in their interest." The Alliance construes "entertain" to mean that the Commission has no jurisdiction in a representation matter until it has determined that the showing of interest is adequate. Continuing, the Alliance argues that the Commission's determination of the showing of interest was not completed until the end of February. Since the petitions could not be "entertained" until that point, they were untimely filed since the open period expired on February 1. NAGE has no standing since its petitions were invalid, and it could not have been harmed by bargaining between the Commonwealth and the Alliance.

Turning to the substance of the case, the Alliance contends that adoption of the Midwest Piping doctrine is inappropriate in the context of Massachusetts public sector bargaining. Without specifying any constitutional or statutory command that bargaining be completed by a date certain, the Alliance contends that to apply Midwest Piping would delay bargaining and frustrate the budgetary process in state government. Additionally, the Alliance finds the underpinnings of Midwest Piping in employer practices of signing "sweetheart" contracts containing union security provisions with favored unions. It states that the Commonwealth is a neutral employer with no desire to subvert the statutory election process conducted by the Commission or to favor one union over another.

Finally, the Alliance contends that, if Midwest Piping is adopted, the neutrality obligation should not arise until after the Commission has determined that the showing of interest is sufficient and can thus "entertain" the petitions. The Alliance argues that the obligation did not arise until the

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end of February in the case of Unit 1 and never arose in the case of Unit 4 since the petition was dismissed. Since bargaining ceased long before the end of February, there is no violation and the case should be dismissed.

In its brief, the Commonwealth takes no position on whether or not the Midwest Piping doctrine should be adopted. Rather, it appears to focus on a contention that it cannot be charged with notice of NAGE's petitions until a point after negotiations ceased. Additionally, it argues that the neutrality obligation should not arise until after the Commission has determined the adequacy of a union's showing of interest. Under either view, the Commonwealth contends that it has not violated the Law since it did not bargain after notice that there was a valid question of representation raised by NAGE's petition.

We hereby adopt the Midwest Piping doctrine and hold that an employer commits a per se violation of sections 10(a)(1) and (2) of G.L. c.150E if it bargains with an incumbent once a question of representation has been raised by a rival union. We further determine that the obligation of strict employer neutrality arises as of the point the employer has notice that the Commission has made its initial determination that the rival union's petition and showing of interest are adequate to raise a question of representation. In applying these principles to the facts of this case, we hold that the Commonwealth did not violate its duty of neutrality since it did not bargain with the Alliance at any point after its obligation of neutrality arose.

Law review commentators have criticized the NLRB for its failure to explain fully the rationale underlying its Midwest Piping decisions.[8] We will articulate our views on why adoption of the doctrine will effectuate the purposes of G.L. c.150E.

This case raises the same significant problems in the relationship among certain provisions of G.L. c.150E as are presented under the NLRA. Section 6 of our Law mandates stability of labor relations by requiring that employers bargain with their employees' chosen representative. An employer refusing to bargain violates Section 10(a)(5). Section 2 guarantees employees the right to choose initially or to change unions. Section 10(a)(1) enforces Section 2 rights by making it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in their statutory right to choose bargaining agents. Under Section 10(a)(2), it is a prohibited practice for an employer to aid or assist one union over another. When a rival union seeks to oust an incumbent during the course of the incumbent's bargaining for a new contract, the interplay among statutory rights and obligations becomes delicate.

All parties are placed on the horns of a dilemma. If negotiations continue with the incumbent, the rival union may in effect be frozen out by a

[8] See, e.g., M. Freeman, The Employer's Duty of Neutrality in the Rival Union Situation: Administrative and Judicial Application of the Midwest Piping Doctrine, 111 U. Pa. Law Review 930 (1963).

course of bargaining designed, or appearing, to undercut its position. The incumbent faced with a challenge is placed under the gun to achieve a contract, a fact which may grant undue bargaining strength to the employer. Employees' interests may suffer from the incumbent's need to obtain a contract. Economic considerations may also compel employees to vote for an incumbent who has reached an agreement on the rationale that a "bird in the hand" achieved immediately after an election is preferable to waiting for whatever unknown benefits might be obtained from the rival union at an undefined future point. Additionally, employees may be unduly influenced by the apparent strength and favored position of the incumbent as bargaining continues. As the New York Board noted in County of Rockland, supra, 10 N.Y. PERB at 3170, an employer also faces an unpalatable choice. If it grants the incumbent a favorable contract, it can be accused of supporting the incumbent or undermining the challenger. Conversely, if the employer's proposals to the incumbent are unacceptable, the incumbent may accuse the employer of being obdurate with the intent of disparaging the incumbent for ulterior motives.

Also faced with a dilemma is the neutral agency charged by statute with ensuring labor stability, as well as resolving questions of representation as rapidly as possible through the union election process mandated by law. As the NLRB has noted, an agency which administers the election process must make every effort to eliminate the litigation of factual issues in the context of representation cases. Appalachian Shale Products Co., 121 NLRB 1160 at 1162, 42 LRRM 1506 at 1507 (1958). Litigation prolongs the process, thus impeding the resolution of the underlying question of which union, if any, the employees wish to choose to represent them. In a case such as this, a legal principle which requires extensive proofs of parties' motivation and/or effects on employees of continued bargaining must inevitably result in lengthy and complex legal proceedings which can only retard the election process.

After consideration of the statutory policies and practical realities of the situation raised by this case, we find that adoption of the Midwest Piping doctrine will alleviate many of the problems discussed above. The Alliance has not raised, and we cannot discern, any statutory or constitutional bars to the doctrine. It is obvious that bargaining delays are undesirable and may impact on the state or municipal budgetary processes relevant to a particular contract. It is also true, however, that the failure to achieve contracts by governmental budget submission deadlines is a fact of life in Massachusetts public sector bargaining. See, e.g., G.L. c.150E, s.7. Adoption of the doctrine will be salutary in terms of clarifying through a readily identifiable rule the responsibilities of employers faced with competing representation claims in the incumbency context. It will also facilitate employee free choice by removing any course of dealings which appears to favor one of the competitors, thus leading to inevitable speculation among employees and consequent effect on their choice in the election process. The rule should also provide all concerned with a legal principle amenable to easy application, ready explanation, and the promotion of expeditious handling of representation matters through the removal of an area of avoidable related litigation.

In adopting Midwest Piping, we are also concerned, however, with another balancing process which is necessary in determining the point at which the neutrality obligation arises. On one side is the need to take into account

the problem of frivolous representation claims. To require the cessation of bargaining between an employer and an incumbent on the basis of an unsupported challenge by a rival undermines labor stability and deprives employees of the benefits of their union's efforts. On the other side is the consideration that the neutrality obligation must arise at a meaningful point in the organization process. If the duty of neutrality arises too late in the process, the harm be avoided might well have already occurred. We have, therefore, determined the point at which the obligation arises in view of the goal of the doctrine, principles established by the Law and our Rules, and the practical considerations involved in Commission practices.

In an effort to ensure that union claims are sufficiently supported by employees to warrant the holding of an election, we, like the NLRB, require that representation petitions be accompanied by a 30% showing of interest. MRC Rules and Regulations, 402 MCR 14.05. Also required is an investigation by the Commission in order to determine whether a question of representation is indeed raised by petitions filed with us. Both the Law and our Rules call for an ongoing investigation which has two readily identifiable points. First is an initial determination that there is reasonable cause to believe that a petition raises a question of representation. Following such a determination, the parties receive a notice of a hearing at which issues related to the question of representation may be raised. G.L. c.150E, s.4; 402 CMR 14.08. Such matters might include, for example, the existence of contract or certification bars or the appropriateness of the unit sought. Never litigable however, is the sufficiency of a showing of interest. Local 829, Teamsters, 4 MLC 1673 (1973). Matters related to the showing of interest may arise throughout the investigatory process, and the Commission always handles them administratively. Commonwealth of Massachusetts (Unit 1), supra, 6 MLC at 2125.

Although the Commission's investigation is as vigorous as possible at all stages, the nature of the process is such that showing of interest matters may arise throughout the course of handling representation cases. At one extreme, the initial reasonable cause determination may produce a dismissal after an investigation based on the face of the petition and accompanying cards. At a middle point, after the reasonable cause determination is made questions may arise in the course of hearings. See, e.g., Commonwealth of Massachusetts (Unit 1), supra. At the other extreme, a decision after hearings may raise new showing of interest matters. See MBTA and Metropolitan Boston Building Trades Council, 6 MLC 1419 at 1448 (1979).

In this case, NAGE argues that the Commonwealth's neutrality obligation arose as of February 2 when Secretary Hanley received notice of the Unit 1 and 4 petitions.[9] It contends that the sessions of February 4, 5 and 12, and OER Director Sullivan's letter of February 28 constituted Section 10(a)(1) and (2) Midwest Piping violations. Setting the neutrality point much later, the Alliance and the Commonwealth would have us find the relevant point to be the end of February in the case of Unit 1 and never in the case of Unit 4.

[9]For purposes of this decision, we assume without deciding that notice to Secretary Hanley was legally sufficient notice to the Commonwealth.

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We reject both of the extremes offered by the parties.[10] NAGE's point is too early in light of the goal of avoiding labor instability caused by frivolous representation claims. As of the date it urges, there had been no initial investigation by the Commission to determine whether there was reasonable cause to believe that a question of representation existed. This determination was made and a notice of hearing sent to the parties on February 11 for Unit 1 and February 12 for Unit 4. Our Rules create a presumption that Commission notices are received three days after their issuance. 402 CMR 12.07(2). Lacking any evidence to rebut the presumption, we assume that the Unit 1 and 4 notices were received by the Commonwealth on February 14 and 15 respectively. The only event complained of after these dates is the Sullivan letter of February 28, which NAGE claims constitutes a violation in that the Commonwealth held itself out as ready to bargain with the Alliance. We need not decide whether an employer's holding itself out as ready to bargain is legally equivalent to actually bargaining in light of the fact that the letter, the sole evidence on this point, merely states that the Commonwealth will bargain once the representation question is resolved. There was no suggestion in the letter that such bargaining would be with the Alliance. The document is completely neutral.

While rejecting the NAGE February 2 date as too early, we also find the Alliance and the Commonwealth points too late. Our reasonable cause determination in the case of Unti 1 was made prior to February 12. At the Unit 1

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[10] We also reject the Alliance's related extreme procedural point detailed at pp.15-16 above. This argument is that NAGE's petitions had to be filed by February 1; that the Commission has no jurisdiction until it determines that a showing of interest is adequate; and that since that determination was not made until after February 1, NAGE's petitions were not timely filed. Thus, NAGE had no standing to raise this case.

An answer to this argument requires a common sense reading of Section 4 of the Law and sections 14.05, 14.06, and 14.08 of our Rules. Rule 14.06 states that no petition will be "entertained" unless filed in the open period, i.e., by February 1 in this case. Rules 14.06 states that no petition will be "entertained" unless the Commission determines that there is a 30% showing of interest. Section 4 of the Law and Rule 14.08 mandate a Commission investigation in the form discussed above in the text. There is no command that the Commission must conclude its investigation by the end of the open period stated in Rule 14.06.

It is obvious that the use of the word "entertain" in connection with the showing of interest requirement cannot mean, as the Alliance urges, that the Commission has no jurisdiction until it has determined that the showing is adequate. If it has no jurisdiction, it cannot determine anything, including the sufficiency of the showing of interest. Clearly, a reasonable construction of the Law and the Rules can only be that representation petitions are to be investigated by the Commission and dismissed (i.e., not "entertained") if they prove to be untimely filed, inadquately supported, or deficient in some other respect. NAGE's petitions wre timely filed, and appared to be adquately supported during the period relevant in this case. NAGE had standing to raise this matter.

hearings in March, the Alliance raised showing of interest considerations and submitted materials for further administrative investigation to the Commission on April 8. As our May 9 decision in the Unit 1 case illustrates, the materials submitted by the Alliance in April revealed no reason for the Commission to reverse the pre-February 12 determination that the showing of interest was adequate. Commonwealth of Massachusetts (Unit 1), supra. In Unit 4, however, the ongoing investigatory process resulted in the reversal of our pre-February 11 determination that the showing was sufficient. The Unit 4 petition was dismissed on March 5.

As noted above, the neutrality obligation must be applied at a juncture early enough for it to have some significance. Under the view urged by the Commonwealth and the Alliance, an employer could continue to bargain until the Commission's Decision and Direction of Election following the hearing stage of our investigatory process. As all concerned are aware, the period during Commission hearings is one of vigorous campaign activity, and the time between our direction of an election and the actual vote is very short. To permit bargaining during the active period urged would not only nullify the purposes of applying Midwest Piping but would also encourage parties bent on mischief to prolong the investigatory process. In selecting the point of notice to the parties of the Commission's initial determiantion that there is a question of representation, we share the view of the Pennsylvania Labor Relations Board that this is the most reasonable point in the process. Pennsylvania Labor Relations Board v. Commonwealth of Pennsylvania (Pa. Liquor Control Board), supra. The loss of a few weeks of bargaining, as occurred with Unit 4 in this case, is the least significant of the considerable harms which may occur in Midwest Piping situations.

The Commonwealth has not violated Sections 10(a)(1) and (2) of the Law. The charge is dismissed.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
LABOR RELATIONS COMMISSION

PHILLIPS AXTEN, Chairman
JOAN G. DOLAN, Commissioner