

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GENERAL DRIVERS AND HELPERS LOCAL  
UNION NO. 95, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN & HELPERS OF  
AMERICA,

Complainant,

vs.

BI STATE TRUCKING CORP. and  
THOMPSON CONCRETE PRODUCTS CO., INC.,

Respondents.  
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Case I  
No. 14069 Ce-1317  
Decision No. 9924-A

Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Alan  
H. Levy, appearing on behalf of the Complainant.

Lepp & Lepp, Attorneys at Law, by Mr. Charles A. Lepp, appearing  
on behalf of Respondent Bi State Trucking Corp. and  
Respondent Thompson Concrete Products Co., Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner, and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Kenosha, Wisconsin, on October 22, 1970, before the Examiner; and the Examiner having considered the evidence and arguments of Counsel and being fully advised in the premises makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereinafter referred to as the Complainant, is a labor organization having its principal office at 6758 - 14th Avenue, Kenosha, Wisconsin.

2. That Bi State Trucking Corp., hereinafter referred to as Respondent Bi State or Bi State, is a corporation engaged in the business of trucking concrete products in and around the city of Kenosha, Wisconsin, having an office at 6321 - 23rd Avenue, Kenosha, Wisconsin, and is an employer within the meaning of Section 111.02(2) of the Wisconsin Employment Peace Act.

3. That Thompson Concrete Products Co., Inc., hereinafter referred to as Respondent Thompson, is a corporation engaged in the business of making concrete products in the city of Kenosha, Wisconsin, having an office at 3506 - 67th Street, Kenosha, Wisconsin, and is an employer within the meaning of Section 111.02(2) of the Wisconsin Employment Peace Act.

4. That Thomas G. Thomsen, also known as Gilbert Thomsen, is a stockholder, president and general manager of Respondent Thompson; that Carl Thompson, a brother of Thomas G. Thomsen, is a stockholder and secretary-treasurer of Respondent Thompson; that neither Thomas G. Thomsen or Carl Thompson is presently a stockholder or officer of Respondent Bi State; and that Thomas G. Thomsen has never been a stockholder or officer of Respondent Bi State.

5. That Respondent Thompson has been engaged in the business of making concrete products in the city of Kenosha, Wisconsin, since 1952; that Respondent Thompson trucked its own product to its customers from 1952 until approximately October 1966; that sometime during the year of 1961 Carl Thompson helped organize Respondent Bi State through his Attorney Robert J. Joling; that Respondent Bi State initially did some work in Illinois but thereafter remained an inactive corporation until approximately October 1966; that sometime after 1961 and before October 1966 stock in Respondent Bi State was acquired by Clarence Frank, President, and Edward Perrault, Vice President; that prior to acquiring stock in Respondent Bi State, Clarence Frank drove a truck for Respondent Thompson; that prior to acquiring stock in Respondent Bi State, Edward Perrault worked for American Motors Company in Kenosha, Wisconsin, but said Edward Perrault had previously worked for Respondent Thompson; and that Howard McMahon is Secretary of Respondent Bi State but that prior to becoming an officer of Respondent Bi State and at all times relevant herein said McMahon was not an employee of Respondent Thompson.

6. That sometime after June 1, 1966, and before October 1966, Respondent Bi State purchased all of the trucks that then belonged to Respondent Thompson as well as several new trucks with money that it received in exchange for a note and mortgage executed in favor of the American State Bank, Kenosha, Wisconsin, by Respondent Bi State's officers and co-signed by Thomas G. Thomsen and Carl Thompson as surities.

7. That after October 1966, and before June 1970, said Clarence Frank, said Edward Perrault, Julius Perrault, Wallace Delaney and Thomas Wells were the only drivers to drive the trucks then owned by Bi State; that said Julius Perrault and Wallace Delaney had never driven for Respondent Thompson before but said Thomas Wells had continuously driven for Respondent Thompson since 1952; that during the period beginning in October 1966 and ending in June 1970, Respondent Bi State hauled all of the concrete products manufactured and sold by Respondent Thompson; and that during the period beginning in October 1966, and ending in June 1970, Respondent Bi State did not haul any other material with its trucks except for some material that was hauled for the Best Block Company of Milwaukee, Wisconsin, which hauling represented a very small percentage of its business.

8. That on most occasions, during the period beginning October 1966, and ending June 1970, the above mentioned truck drivers received paychecks which were drawn on an account held in the name of Respondent Bi State and signed by Howard McMahon as drawer and on other occasions the above mentioned truck drivers received paychecks which were drawn on an account held in the name of Respondent Thompson and signed by Carl Thompson as drawer; that all such amounts paid in the form of wages to the truck drivers by Respondent Thompson were set off against the

amount due to Respondent Bi State from Respondent Thompson for trucking services; that sometime prior to June 1970, Respondent Bi State became indebted to Respondent Thompson for the balance due on a mortgage foreclosure on several trucks which were repossessed by Respondent Thompson; that since October 1966, Respondent Bi State has experienced increasing financial difficulties and has become indebted to Respondent Thompson in the total amount of approximately \$35,000 for the balance due following said foreclosure and for salary and expense payments made on its behalf by Respondent Thompson.

9. That on June 2, 1966, Carl Thompson signed a collective bargaining agreement covering all wages, hours and working conditions for the above named truck drivers effective from May 1, 1966 until May 31, 1971 with the Complainant in the following form:

"GENERAL DRIVERS & HELPERS  
LOCAL UNION NO. 95

FIRM NAME: Bi State Trucking Corp.

BY: William Arb /s/  
WILLIAM ARB, SEC'Y-TREAS.

BY: Carl Thompson /s/ "

10. That on June 3, 1966, Carl Thompson signed a pension fund Participation Agreement effective June 1, 1966, with the Complainant in the following form:

"BI STATE TRUCKING CORP.  
EMPLOYER

GENERAL DRIVERS LOCAL NO. 95  
Union

TRUCKING (THOMPSON CONCRETE PRODUCTS CO.)  
FOR

By Carl Thompson /s/

By William Arb /s/  
WILLIAM ARB  
SEC'Y-TREAS. "

11. That on December 2, 1968, Howard R. McMahon signed a collective bargaining agreement covering all the wages, hours and working conditions for the truck drivers effective from May 1, 1965 until May 31, 1971, with the Complainant in the following form:

"GENERAL DRIVERS & HELPERS LOCAL NO. 95

By William Arb, Sec'y-Treas. William Arb /s/

Firm Name: BI STATE TRUCKING CORP.

By: Howard R. McMahon - Sec. /s/ "

12. That the collective bargaining agreement signed by Howard R. McMahon on December 2, 1968, contains the following provisions which are material herein:

"ARTICLE 1  
Union Shop and Dues

Section 1

(e) The Employer agrees to deduct from the wages of all employees covered by this Agreement the dues and initiation fees of the Union and agrees to remit to the Union all such deductions prior to the end of the month for which the deductions are made. The Union agrees to present to the Employer a written

authorization, signed by each employee for whom such deductions will be made."

. . . .

"ARTICLE 15  
Health and Welfare Benefits

Section 1. On behalf of the employees represented by the General Drivers and Helpers of Local Union No. 93, of Kenosha, Wisconsin, the Employers agrees to provide insurance benefits for employees who have completed thirty (30) days employment with the Employer, such insurance to consist of the benefits as shown in Wisconsin Physicians Service Surgical-Medical Special Service Plan 1."

. . . .

"ARTICLE 16  
Pensions

Section 1. Effective March 1, 1968 the Employer shall contribute to the Central States Southeast and Southwest Areas Pension Fund the sum of \$8.00 per week for each employee covered by this Agreement who has been on the payroll thirty (30) calendar days or more. Effective June 1, 1969 the weekly contribution shall be increased to nine dollars (\$9.00) per week. Effective June 1, 1970 the weekly contribution shall be increased to ten dollars (\$10.00) per week."

. . . .

"ARTICLE 36  
Grievance Procedure

Section 3. If the disposition of the matter by the Employer's duly authorized representative is unsatisfactory, either party within five (5) days must notify in writing the Employer and the Association or the Union, as the case may be, of its intention to submit the dispute to a permanent Joint Grievance Committee consisting of representatives appointed by, and responsible to, the Association and representatives appointed by, and responsible to, the Union. The Joint Grievance Committee shall convene on the \_\_\_\_\_ or during the \_\_\_\_\_ week of every month in which there are pending one or more grievances which either party has submitted in writing as heretofore provided for subject to rules of procedure adopted by the Joint Grievance Committee. In the event, that the Association's representatives and the Union's representatives are unable to reach a decision resolving the dispute, either party may, within five (5) days inform the Co-Chairmen of the Joint Grievance Committee in writing requesting arbitration in accordance with this Article."

13. That Respondent Bi State has failed since April 1970 to remit to the Complainant certain Union dues which it is obligated to remit under Article 1, Section 1(e), above, on behalf of Clarence Frank, Edward Perrault, Wallace Delaney and Thomas Wells; that the total amount of such arrearage in dues remissions as of September 23, 1970, was \$117.00 for all arrearages including the October dues; and that since September 23, 1970, Respondent Bi State has failed and continues to fail to make dues remissions on behalf of its employees in the amount of \$9.00 each, per month.

14. That Respondent Bi State failed on September 20, 1969, to make a certain payment to the Wisconsin Physicians Service as required by Article 15, Section 1, above, in the amount of \$41.45; that Respondent Bi State has failed since April 20, 1970, and continues to fail to make any payments to the Wisconsin Physicians Service as required by Article 15, Section 1; and that the total amount of this latter arrearage as of September 20, 1970, was \$999.00.

15. That Respondent Bi State has failed since July 5, 1969, to make contributions to the Central States Southeast and Southwest Areas Pension Fund on behalf of Clarence Frank, Edward Perrault, Wallace Delaney and Thomas Wells as required by Article 16, Section 1, above; that the total amount of such arrearage in pension contributions from September 20, 1969, to September 26, 1970, was \$2012.00; and that since September 26, 1970, Respondent Bi State has failed and continues to fail to make contributions to said fund on behalf of its employees since that date.

16. That on April 5, 1968, the Racine and Kenosha Building Material, Ready Mix and Construction Committee, met and considered a grievance filed by the Complainant on behalf of Thomas Wells; that the minutes of that meeting reflect the following disposition of said grievance:

"CASE NO. 68-5

For the Union  
Henry Wambach  
Ray Fularezyk

For the Employers  
Lee Hribar  
Peter W. Fox

LOCAL NO. 95 v. BI-STATE TRUCKING CO and/or THOMPSON BLOCK  
(grievance filed by Thomas Wells, driver)

Thomas Wells, driver, present at meeting.

Robert McRoberts, President of Local No. 95, read the grievance, and stated that they were protesting discharge of 2/25/1968, and asked that Mr. Thomas Wells be reinstated and paid for all time lost.

Clarence Frank stated that he was the representative of Bi-State Trucking Company

Local No. 95 stated that they had not been informed that there was a different representative than, Mr. Carl Thompson, until they opened the mail this morning so that at the time of discharge as far as the Union was concerned, Mr. Carl Thompson was the employer.

DECISION: It was the unanimous decision of the Committee that because of the default of Mr. Carl Thompson in not showing up at the hearing that Mr. Thomas Wells be reinstated and paid for all time lost."

That Clarence Frank was present at said meeting; and that a copy of said minutes was sent to Respondent Thompson in care of Carl Thompson.

17. That on June 9, 1970, the Racine, Kenosha and Walworth County Construction Grievance Panel, a Joint Grievance Committee established pursuant to Article 36, Section 3, above, met and considered two grievances

filed by the Complainant against Respondent Bi State on Behalf of Thomas Wells numbered 70-18 and 70-19; that said Panel upheld said grievances and awarded Thomas Wells \$82.71; and that Respondent Bi State has refused and failed and continues to refuse and fail to pay Thomas Wells the sum of \$82.71.

18. That during the period beginning in October 1966 and ending in June 1970, the drivers who drove for Respondent Bi State received all instructions and directions regarding the performance of their duties from Clarence Frank, Edward Perrault, or in their absence, Carl Thompson; that if the grievances that arose among the drivers who drove for Respondent Bi State during the period beginning in October 1966, and ending in June 1970, could not be adjusted between Howard McMahon and the Complainant's representative, the Complainant's representative would attempt to discuss such grievances with Carl Thompson; that Carl Thompson would discuss and attempt to settle said grievances with the Complainant's representative; and that in those cases where the Joint Grievance Committee, established pursuant to Article 36, Section 3, above, entered an award against Respondent Bi State, the Complainant's representative would contact Carl Thompson, who would see to it that the award was paid by Respondent Bi State.

19. That when Thomas Wells began driving a truck for Respondent Bi State in October 1966, he claimed approximately 15 years of seniority with Respondent Bi State; that sometime in June 1970, said Wells was told by Clarence Frank that Respondent Bi State was in financial difficulties and that Wells would have to find another job; that the next day after said conversation with Clarence Frank, Thomas G. Thomsen and Carl Thompson told Thomas Wells that he could drive a truck for Respondent Thompson; that said Wells began driving a truck for Respondent Thompson in June of 1970, and continues to do so; that said Wells claimed approximately 18 years of seniority when he began driving a truck for Respondent Thompson in June 1970; that on August 21, 1970, Thomas Wells received a check in the amount of \$143.85 for one week's vacation for the week ending on that date drawn on an account held in the name of Respondent Thompson and signed by Thomas G. Thomsen as drawer; and that the amount of said check was added to the indebtedness owing from Respondent Bi State to Respondent Thompson.

20. That as of October 22, 1970, Respondent Bi State was continuing to operate two trucks to transport some of the concrete products manufactured by Respondent Thompson, Respondent Thompson was paying the salary of Clarence Frank and Edward Perrault, which payments were added to the debt owed by Respondent Bi State to Respondent Thompson, and all sums that became due from Respondent Thompson to Respondent Bi State for trucking services rendered were being set off against the debt owed by Respondent Bi State to Respondent Thompson.

21. That Respondent Thompson has refused and continues to refuse to comply with any of the terms of either of the collective bargaining agreements or the pension fund participation agreement described above and has refused and continues to refuse to pay the award issued by the Racine, Kenosha and Walworth County Construction Grievance Panel, described above.

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

CONCLUSIONS OF LAW

1. That Thompson Concrete Products Co., Inc. is not a successor to Bi State Trucking Corp.; and that Thompson Concrete Products and Bi State Trucking Corp. are not a single employer or joint employers for purposes of labor relations.

2. That Thompson Concrete Products Co., Inc. did not become and is not a party to the collective bargaining agreements executed by Carl Thompson on June 2, 1966 and Harold McMahon on December 2, 1968 or the pension fund participation agreement executed by Carl Thompson on June 3, 1966; that Carl Thompson had the apparent or actual authority to bind Bi State Trucking Corp. to the collective bargaining agreement signed by him on June 2, 1966 and the pension fund participation agreement signed by him on June 3, 1966; that Harold McMahon had the actual authority to bind Bi State Trucking Corp. to the collective bargaining agreement signed by him on December 2, 1968; that Bi State Trucking Corp. was bound by the terms of the collective bargaining agreement signed by Carl Thompson on June 2, 1966 until said agreement was rescinded on December 2, 1968; and that Bi State Trucking Corp. was bound and is bound by the terms of the collective bargaining agreement signed by Harold McMahon on December 2, 1968 and the pension fund participation agreement signed by Carl Thompson on June 3, 1966.

3. That Bi State Trucking Corp., by failing to remit certain union dues, make certain payments to the Wisconsin Physicians Service and make certain contributions to the Central States Southeast and Southwest Areas Pension Fund, described above, has violated and is violating the terms of a collective bargaining agreement and committing unfair labor practices within the meaning of Section 111.06(1)(f) of the Wisconsin Statutes; that Bi State Trucking Corp., by refusing and failing to pay a certain award of the Racine, Kenosha and Walworth County Construction Grievance Panel, described above, has refused and failed and is refusing and failing to recognize or accept as conclusive the final determination of a tribunal having competent jurisdiction within the meaning of Section 111.06(1)(g) of the Wisconsin Statutes.

4. That Thompson Concrete Products Co., Inc., by refusing to comply with any of the terms of the current collective bargaining agreement and the pension fund participation agreement existing between the Complainant Union and Bi State Trucking Corp. and refusing to pay the award issued by the Racine, Kenosha and Walworth County Construction Grievance Panel has not committed and is not committing any unfair labor practices within the meaning of Section 111.06 of the Wisconsin Statutes.

2. That Bi State Trucking Corp. shall immediately:

(a) Cease and desist from violating the following provisions of the collective bargaining agreement currently in effect between it and General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America:

- (1) Article 1, Section 1(e), which requires it to deduct union dues from the wages of its employees and remit same to the union.
- (2) Article 15, Section 1, which requires it to provide health insurance benefits to its employees through the Wisconsin Physicians Service.
- (3) Article 16, Section 1, which requires it to contribute \$9.00 per week effective June 1, 1969 and \$10.00 per week effective June 1, 1970 on behalf of each of its employees to the Central States Southeast and Southwest Areas Pension Fund.

(b) Cease and desist from refusing and failing to pay valid awards of the Racine, Kenosha and Walworth County Construction Grievance Panel.

(c) Take the following affirmative action which the Examiner finds will effectuate the policies of the Act:

- (1) Immediately make payment by certified check payable to the order of General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and mail same to 6758 - 14th Avenue, Kenosha, Wisconsin for all delinquent remissions of dues deductions including the \$117.00 that was due and owing as of September 23, 1970.
- (2) Immediately make payment by certified check payable to the Wisconsin Physicians Service and mail same to General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6758 - 14th Avenue, Kenosha, Wisconsin, as remitting agent, for all delinquencies in payments for coverage provided under the Wisconsin Physicians Service Surgical-Medical Special Service Plan 1, including the \$1040.45 that was due and owing as of September 20, 1970 or, if no such coverage was provided during any period prior to the date of this order, make such payment in the amount of the delinquencies for all such coverage actually provided and pay to any of its employees the amount of any actual surgical-medical expenses incurred that would have otherwise been paid by Wisconsin Physicians Service if said employees had been covered during such period.



- (3) Immediately make payment by certified check payable to the Central States Southeast and Southwest Areas Pension Fund, and mail same to General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6758 - 14th Avenue, Kenosha, Wisconsin, as remitting agent, for all delinquencies in pension contributions including the \$2012.00 that was due and owing as of September 26, 1970.
- (4) Immediately make payment by certified check payable to Thomas Wells and mail same to General Drivers and Helpers Local Union No. 95, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, 6758 - 14th Avenue, Kenosha, Wisconsin, as remitting agent, for the June 9, 1970 award of the Racine, Kenosha and Walworth County Construction Grievance Panel in grievances numbered 70-18 and 70-19 in the amount of \$82.71.
- (5) Notify the Wisconsin Employment Relations Commission within twenty (20) days after receipt of a copy of this Order of the steps it has taken to comply therewith.

Dated at Madison, Wisconsin, this 8<sup>th</sup> day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli  
George R. Fleischli, Examiner

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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GENERAL DRIVERS AND HELPERS LOCAL  
UNION NO. 95, AFFILIATED WITH THE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
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Case I  
No. 14069 Ce-1317  
Decision No. 9924-A

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

In its Complaint, the Complainant alleged that Carl Thompson represents both Respondent Thompson and Respondent Bi State for purposes of labor relations and that both Respondents are subject to the collective bargaining agreement signed by Carl Thompson on June 2, 1966 and the pension fund participation agreement signed by him on June 3, 1966. It alleges that both Respondents are responsible for and have refused to pay an award issued pursuant to the grievance procedure in the amount of \$82.71; that Respondent Thompson assumed the operations of Bi State on or about August 21, 1970 but has refused to recognize the Complainant or to comply with the collective bargaining agreement; that the collective bargaining agreement requires both Respondents to make health insurance payments, pension contributions and dues remissions on behalf of the employees of Bi State and that Bi State has failed to make certain health insurance payments, pension contributions and dues remissions. The Complainant contended that the above conduct is in violation of Sections 111.06(1)(a)(d)(f) and (g) of the Wisconsin Statutes and asked for appropriate relief.

Respondent Thompson filed an answer wherein it denied that Carl Thompson was authorized to represent either of the Respondents for purposes of labor relations; that Respondent Thompson is subject to any labor agreement with the Complainant; that it had violated any labor agreement with the Complainant including any requirement to pay any money to Thomas Wells under any such agreement; that it has knowledge of any alleged violations of a collective bargaining agreement by Bi State; that it has assumed the operations of Bi State; that it has any authority to bargain with the Complainant on behalf of Bi State; that it has any obligation or agreement to make health insurance payments or pension contributions on behalf of its employees; and that it has any knowledge concerning Bi State's liability. Respondent Thompson contends that it has not engaged in any conduct in violation of the Wisconsin Employment Peace Act and moved that the complaint be dismissed as to it.

Respondent Bi State did not file an answer. However, at the hearing Counsel for Respondent Thompson also entered a general appearance for Bi State.

At the hearing the Complainant made no argument and entered no evidence in support of its allegations that the Respondents have violated Section 111.06(a) and (d) of the Wisconsin Statutes. In its post hearing brief the Complainant disclosed that:

"There is also pending an unfair labor practice case in which Local 95 has alleged that Thompson has refused to recognize and bargain with it and has refused to acknowledge and comply with its collective agreement. The case here at bar is intended to enforce that contract and the arbitration award of June 9, 1970. NLRB Case No. 30-CA-1388." 1/

The Complainant has apparently abandoned its claim before this Commission that the Respondents are in violation of Sections 111.06(a) and (d) of the Wisconsin Statutes, and therefore those allegations are omitted from the following discussion.

#### Complainant's Theory of The Case

The Complainant contends that Respondent Thompson ought to be held responsible for performance of the terms of the labor agreement existing between it and Bi State either because it is a successor to Bi State or because Respondent Thompson and Bi State are a "single employer" or "joint employers". At the hearing the Complainant conceded that this case does not fit the normal successorship model in that Bi State has not yet been completely merged with Respondent Thompson. However, it contends that Carl Thompson has the authority to act for both Respondents in matters of labor relations and in fact has dominated Bi State's labor relations practices. It argues that Carl Thompson's activities along with the tangled financial relationship existing between the two Corporate entities; the fact that several of the employees and all of the trucks that belonged to Respondent Thompson were employed and purchased by Bi State; the fact that Bi State trucked almost exclusively for Respondent Thompson; and the employment practices in the case of Tom Wells should be enough evidence to consider them as "single employer" or a "joint employer" for labor relations purposes and establish that Respondent Thompson is responsible equally with Bi State for the obligations arising under the labor agreement with the Complainant. The Complainant cites numerous cases where the courts, arbitrators and administrative agencies have held successor employers and related employers equally responsible for the performance of obligations under labor agreements.

on said agreement. The Respondents contend that they are separate corporate entities without common ownership or direction. They argue that the labor agreement and pension fund participation agreement signed by Carl Thompson are in no way binding on Respondent Thompson because the evidence clearly establishes that he signed on behalf of Bi State as an accommodation to Frank and Perrault who did not take over the actual operation of Bi State until four months later. The financial relationship that exists between Respondent Thompson and Bi State is described as a simple creditor-debtor relation and the salaries paid to Frank and Perrault are described as further advances in an effort to allow the owners of Bi State to pay off the debt which is owed to Respondent Thompson.

Alleged Successor, "Single Employer"  
or "Joint Employer" Status  
Of Respondent Thompson

It is clear that Respondent Thompson does not stand in the position of a successor employer within the meaning of the rule laid down in Wiley v. Livingston. 2/ In that case the Court said in part:

"We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all the rights of the employees covered by the agreement and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement" 3/

Bi State has not ceased operations; it continues to operate two trucks with which it continues to haul a portion of Respondent Thompson's products. Since there has not yet been a "disappearance by merger" it is not necessary to apply the test of successorship set out in Wiley. 4/

Nor does Respondent Thompson stand in the position of "single employer" or "joint employer" with Bi State. It is a well established rule that employers cannot avoid their responsibilities as employers under the National Labor Relations Act or the Wisconsin Employment Peace Act through the use of complex corporate or other arrangements. Where there is common ownership and control along with integrated operations the National Labor Relations Board, the courts, arbitrators and this Commission have all held that two or more corporations will be held to constitute a single employer for labor relations purposes. 5/

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2/ John Wiley and Sons, Inc. v. Livingston 55 LRRM 2769, 34 Sup. Ct. 909 (1964)

3/ Ibid at 2772

4/ For an example of a case wherein the Wiley successorship test was applied by this Commission see Overhead Door Company of Wausau, Inc. (9055-A) 6/70.

5/ ALPB v. Concrete Haulers, Inc. 212 F. 2d 477 (5th Cir., 1954); Kanz Trucking, Inc. 46 LA 1057 (Anderson, Arb.); Boyle Lithographing and Printing Co. (8216-F) 12/68.

But here, those very essential elements of common ownership and control, are almost entirely lacking. There is no evidence of any common ownership of stock during the crucial period in question here. It may be, although the evidence did not establish such to be the fact, that Carl Thompson had partial or total ownership of Bi State sometime prior to October 1966. However, there is absolutely no evidence that he held any stock during the period when the Complainant was recognized as the bargaining representative of the truck drivers in question, and the evidence of record is clear that he does not presently own any stock in Bi State. Nor is there any evidence of record that Carl Thompson ever held any office in Bi State during its recent operations. There is un rebutted evidence of record that Thomas G. Thomsen is not presently and never has been a stockholder or officer of Respondent Bi State.

The Complainant would have the Commission find that the extensive debtor-creditor relationship combined with Respondent Thompson's practice of paying debts on behalf of Bi State is a substitute for the evidence of common ownership which is invariably present in the cases cited in its brief. It states in part:

"Beyond a doubt Thompson and Bi State are commonly financed, directed, managed and controlled corporations engaged in one highly integrated business enterprise. Both companies are, essentially, corporate extensions of the Thompson brothers, who have taken responsibility for Bi State's financing debts, grievance adjustments, collective bargaining negotiations and contracts, and even the direction of its work force." 6/

Such a conclusion would equate debt with equity and ignore the practical as well as the legal consequences of the distinction between the two. Respondent Thompson has no legal right to any profits that might be generated by Bi State's operations. Likewise Respondent Thompson has no legal right to exercise any control over the operation of Bi State. The most Respondent Thompson can hope to gain from its relation with Bi State is payment of the debt owed to it by Bi State. Even if Bi State is getting the worst of the bargain, as the Complainant seems to suggest, the present owners of Bi State have the power to terminate its operations. As a substantial creditor, Respondent Thompson could also force Bi State to terminate its operations but it cannot force the owners of Bi State to continue operations which are desirable only to Respondent Thompson. One very practical consequence of being a creditor rather than an owner is that Respondent Thompson does not ultimately control whether or not its relation to Bi State will continue.

Some actual control over the labor relations practices of Bi State was exerted by Carl Thompson personally. He signed the June 2, 1966 collective bargaining agreement and the June 3, 1966 participation agreement on behalf of Bi State and his authority to do so was ratified by the subsequent conduct of Bi State. Likewise, he exercised considerable influence over the handling of grievances that arose under that collective bargaining agreement and the December 2, 1963 collective bargaining agreement which replaced it. Again, the owners and officers of Bi State ratified his conduct thereby giving him the apparent, if not actual authority, to bind Bi State by his actions. In addition Carl Thompson often gave the Drivers Directions and otherwise supervised their activities.

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6/ Complainant's brief, p. 6.

The officers and owners of Bi State also exercised control over labor relations. Both Frank and Perrault directed and controlled the activities of the men. Because they were drivers themselves, it is not surprising that the other drivers often required directions and supervision from Carl Thompson in their absence. Bi State's trucking services were performed almost exclusively for Respondent Thompson and they operated out of Respondent Thompson's yard. If either Frank or Perrault was the only one who could convey instructions he would not be free to drive a truck himself.

Carl Thompson's signing of agreements and handling of grievances is some evidence suggesting possible common control. Such conduct appears to be somewhat inconsistent with Carl Thompson's lack of any proprietary or official interest in Bi State. However, that evidence alone is not enough to find common control which is a significant element of "single employer" relationships. The evidence discloses that McMahon, a corporate officer of Bi State, handled its financial transactions and also adjusted grievances. The evidence did not disclose whether or not McMahon actually owned stock in Bi State, but it did demonstrate that he had no prior or present connection with Respondent Thompson. His exercise of control over the financial activities and labor relations practices of Bi State is in direct contradiction to the Complainant's claim that Carl Thompson dominated Bi State.

It is true that when a grievance could not be adjusted with McMahon or an award was entered against Bi State the union representative would contact Carl Thompson who would try to adjust the unresolved grievance or see to it that the award was paid. There is an explanation for such conduct that is compatible with Carl Thompson's lack of a proprietary or official interest in Bi State. It is possible that Carl Thompson was acting as an interested intervenor in settling disputes that could adversely affect Respondent Thompson and that he was allowed to so act on behalf of Bi State because of his greater expertise in such matters. These actions go a long way toward establishing him as an agent of Bi State, but they fall far short of proving common control.

There is insufficient evidence to find that there is common ownership and control exercised by the Thompson brothers over the two Respondents so as to find that they should be considered as one for labor relations purposes. 7/ This is not to say that the Thompson brothers would have to wholly own Bi State or totally control its operations, before the two Respondents would be found

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7/ The Complainant also argues that the claim of continuous seniority on the part of Thomas Wells and the wording of the April 3, 1968 award of the Racine and Kenosha Building Material, Ready Mix and Construction Committee are evidence that the Respondents should be treated as one. These are essentially bootstrap arguments in that Wells' claim and the applicability of that award to Respondent Thompson are both dependent on whether or not the Respondents should be treated as one employer.

to be a single employer. Here, there is no evidence of common ownership and very little evidence of common control.

In its opening statement at the hearing the Complainant contended that the respondents could be found to be either a "single employer" or "joint employers". It did not set these out as separate characterizations in its post hearing brief but it strenuously argued that the respondents should be treated as one employer. In a 1961 case the National Labor Relations Board specifically found that two separate employers could be treated as one for purposes of labor relations even though there was no evidence of common ownership on the theory that they were "joint employers" as distinguished from a "single employer". 8/ In that case the two employers exerted extensive joint control over the total operation of the business and entered into a formal written agreement that specifically provided for joint control over the employees. Here the evidence is that Carl Thompson exercised some personal control over the labor relations of Bi State in a way that is more consistent with a finding that he was acting as an agent of Bi State rather than both Respondents. On the two occasions when he signed labor agreements he clearly set out that he was signing them on behalf of Bi State. The facts in this case are not sufficient to support a finding that the Respondents should be treated as one either because they are a "single employer" or "joint employers". 9/

The Labor Agreement and Respondent  
Bi State's Violation Thereof

Both the labor agreement signed by Carl Thompson on June 2, 1966 and the one signed by Howard McMahon on December 2, 1968 purport to cover all the wages, hours and working conditions of the truck drivers employed by Bi State. The beginning and expiration dates of both agreements are the same. Both agreements were binding on Bi State since both Thompson and McMahon had the apparent or actual authority to sign on Bi State's behalf. The agreement signed on December 2, 1968 was apparently intended to replace the prior agreement; so the prior agreement is taken as rescinded by the parties as of December 2, 1968. Even so, the provisions of the December 2, 1968 agreement are similar to those in the prior agreement.

Some of the acts alleged to be in violation of the current labor agreement occurred more than one year prior to the filing of the complaint

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8/ Edward's Super Market, et al 133 NLRB 1633. See also F.A. Buttrey Co. et al 188 NLRB 44 (1971) for a recent application of this distinction. There seems to be considerable confusion of terms in the cases in this area. Use of the expression alter ego has been avoided here in order to avoid further confusion. That term appears to be used most frequently in those successorship cases where the successor employer is so identified in ownership and control with the employer it succeeded that the successor employer is held responsible for the unfair labor practices of its predecessor as well as the terms of its labor agreement.

9/ There would appear to be no practical difference in the results of either characterization. The Examiner is inclined to agree with the dissent in the Dearborn Oil and Gas Corporation et al 125 NLRB 645, which took issue with the majority's reasoning that common ownership was a sine qua non of a finding that two entities constitute one employer. Common ownership is merely one, very important, aspect to be considered in such cases.

in this case on September 17, 1970. Section 111.06(14) clearly states that the right of any person to proceed under the Wisconsin Employment Peace Act does not extend beyond one year from the occurrence of the acts complained of. Therefore, those acts in violation of the current labor agreement which occurred prior to September 17, 1969 have not been considered except for purposes of establishing a course of conduct.

The current labor agreement provides a method for the final disposition of grievances involving alleged violations of the agreement. Ordinarily the Commission will not assert its jurisdiction to consider alleged violations of the labor agreement under Section 111.06(f) where the parties have such a provision in the agreement. Here, neither Respondent raised any objection to the Complainant's failure to exhaust the contractual procedure. In fact, Bi State did not deny that it is in violation of the agreement. To require the Complainant to exhaust those procedures in this case would be to require the Complainant to do a useless thing. Bi State has made no effort to comply with the recent award of the Joint Grievance Committee and, in view of its undisputed insolvency there is little likelihood that it will do so voluntarily. 10/ Under the circumstances, extant in this case, the Commission will assert its jurisdiction and order Bi State to pay what it so obviously owes.

For the above and foregoing reasons the Examiner concludes that Respondent Bi State has violated and is violating the terms of a collective bargaining agreement by its failure to remit union dues, provide health insurance, and pay into the pension fund and has refused and is refusing to recognize the final award of a competent tribunal, all in violation of Section 111.06(f) and (g) of the Wisconsin Statutes and Respondent Thompson has not violated and is not violating any of the provisions of Section 111.06 as alleged and has ordered Respondent Bi State to cease and desist from engaging in the prohibited conduct and to take appropriate affirmative action and has dismissed the complaint against Respondent Thompson.

Dated at Madison, Wisconsin, this 18<sup>th</sup> day of February, 1971.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli  
George R. Fleischli, Examiner

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10/ This award of the Joint Grievance Committee is enforceable as an arbitration award under Section 111.06(g). Swenson Brothers, Inc. (3983); General Drivers Local No. 89 v. Kiss and Co. 372 SS 517.