STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS, AFL-CIO, Complainant, vs. NAPIWOCKI CONSTRUCTION, INC., Respondent.	Case I No. 16867 Ce-1491 Decision No. 11941-A

Appearances:

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

Mr. Francis Napiwocki, President, Napiwocki Construction, Inc., appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter, and the Commission having appointed Sherwood Malamud, a member of its staff, to act as an Examiner and to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and, pursuant to Notice, a hearing on said complaint having been held at the Portage County Courthouse, Stevens Point, Wisconsin, on July 25, 1973, before the Examiner; and the Examiner having considered the evidence and the post-hearing correspondence of the parties and being fully advised in the premises, makes and issues the following findings of fact, conclusions of law and order.

FINDINGS OF FACT

1. That Wisconsin River Valley Council of Carpenters, AFL-CIO, hereinafter referred to as the Complainant Union, is a labor organization having its offices at 318 Third Avenue, Wausau, Wisconsin.

2. That Napiwocki Construction, Inc., hereinafter referred to as the Respondent, is an employer with offices located at Route #2, Box 55, Stevens Point, Wisconsin 54481; Respondent Employer is in interstate commerce and is under the jurisdiction of the National Labor Relations Board.

3. That from April 1, 1969 through April 1, 1971 Complainant and Respondent were parties to a collective bargaining agreement which set forth the wages, hours and working conditions for certain of Respondent's employes; said collective bargaining agreement was renewable automatically unless either party served on the other party notice of termination at least sixty days prior to the expiration date, April 1, 1971. Article XVI of said collective bargaining agreement provides as follows:

"ARTICLE XVI
DURATION OF AGREEMENT

This Agreement shall continue in full force and effect from April 1, 1969, to April 1, 1971, and continue in full force and effect from year to year thereafter, and shall be subject to amendment or termination by either party only if either party notifies the other party in writing of their desire to amend or terminate the same sixty (60) days prior to April 1, 1971, or sixty (60) days prior to April 1 of any subsequent year. Since it is the intention of the parties to settle and determine subjects of collective bargaining between them, it is expressly agreed that there shall be no reopening of this Agreement for any matter pertaining to rates of pay, wages, or hours of work during the term of this Agreement. The Agreement may be reopened on matters pertaining to other contract terms and conditions of employment upon mutual consent of the Wisconsin River Valley Contractors Association and the Wisconsin River Valley District Council of Carpenters."

The other pertinent sections of the '69-'71 agreement are as follows:

"ARTICLE III
WAGES

. . .

Effective Date	Hourly Rate Carpenter*	Hourly Rate Foremen	H&W	Pension*
. . .				
October 1, 1970	6.23	6.78	.15	.10

. . .

ARTICLE IV
HEALTH AND WELFARE

Section 1. During the life of this Agreement, each Employer covered by this Agreement shall pay the sum of fifteen cents (15¢) for each hour worked by all employees covered by this Agreement to the Wisconsin River Valley District Council Health Fund. Payment to such Health Fund must be made at the end of each quarter, but not later than the fifteenth (15th) day of the following month.

. . .

ARTICLE V
PENSION PLAN

Section 1. During the life of this Agreement, each Employer covered by this Agreement shall pay the sum of ten cents (10¢) per hour for each hour worked by all employees covered by this Agreement to the Trustees of the Wisconsin River Valley District Council Pension Trust. These payments shall be made not later than the fifteenth (15th) day of each month following the quarter for which payment is being made.

. . ."

4. That in the spring of 1971, the Complainant attempted to terminate the 1969-71 collective bargaining agreement and open negotiations concerning the wages, hours and working conditions of certain of Respondent's employes; the Union's efforts to reopen were untimely under the agreement and Section 8(d) of the NLRA; nevertheless, Complainant precipitated a work stoppage against Respondent. On February 15, 1972, the parties entered into a collective bargaining agreement which contained an expiration date of June 1, 1972; the 1972 agreement contained a clause which reads as follows:

"ARTICLE XVI
DURATION OF AGREEMENT

This Agreement shall continue in full force and effect from Oct. 18, 1971 to June 1, 1972, and continue in full force and effect from year to year thereafter, and shall be subject to amendment or termination by either party only if either party notifies the other party in writing of their desire to amend or terminate the same sixty (60) days prior to June 1, 1972, or sixty (60) days prior to June 1 of any subsequent year. Since it is the intention of the parties to settle and determine subjects of collective bargaining between them, it is expressly agreed that there shall be no reopening of this Agreement for any matter pertaining to rates of pay, wages, or hours of work during the term of this Agreement. The Agreement may be reopened on matters pertaining to other contract terms and conditions of employment upon mutual consent of the Union and the Employer."

5. That on February 15, 1972, Respondent Employer filed a charge with the National Labor Relations Board, charging Complainant Union with a violation of the National Labor Relations Act, Sections 8(b), 1(A) and 8(b)(3). That on September 5, 1972, Counsel for Complainant Union and on November 27, 1972, the Regional Director for the National Labor Relations Board executed a settlement agreement, and pursuant to that agreement, on January 3, 1973, Complainant executed a notice wherein Complainant agreed inter alia to "rescind and abrogate the collective bargaining agreement which it had required Napiwocki Construction, Inc. to enter into on February 15, 1972"; a copy of said notice (charge and settlement agreement, as well) are attached hereto and made a part of the within findings of fact.

6. That on March 21, 1972 the Employer notified the Union that the Employer was terminating the 1972 agreement unless a new agreement was reached prior to June 1, 1972, the expiration date of the 1972 agreement.

7. That after March 21, 1972 and pursuant to the notice of termination served by the Employer on Complainant the parties entered into negotiations in order to achieve a new collective bargaining agreement; that from March 21, 1972 to the date of hearing, the parties had failed to conclude a new collective bargaining agreement.

8. Under the 1969-71 collective bargaining agreement and in the 1972 collective bargaining agreement Respondent agreed to make certain payments to the Health and Pension Funds administered by the Complainant, and that Respondent did make such payments through July, 1972.

9. That under the 1969-1971 agreement Respondent had agreed to pay a journeyman carpenter $6.23 per hour and a foreman $6.78 per hour;

that from June 7, 1972 1/ Respondent paid a journeyman carpenter $6.00 per hour and the foreman $6.50 per hour. That Complainant's claim for differential rates of pay and for contributions to the Health and Pension Funds are for a period which commences on June 7, 1972.

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

CONCLUSIONS OF LAW

1. That no contract was in existence between the parties on June 7, 1972, and that no collective bargaining agreement existed between the parties up to and including July 25, 1973; there being no contract in existence at the time Complainant's claim arose, Respondent was under no contractual obligation to pay the wage rate claimed by the Union, nor make any contribution to the Health and Pension Fund. Therefore Respondent did not violate Section 111.06(1)(f) of the Wisconsin Statutes.

2. That since Respondent is in interstate commerce, and under the jurisdiction of the National Labor Relations Board, therefore the Commission lacks jurisdiction to decide Complainant's allegations that Respondent violated Section 111.06(1)(a), (c)1, and (d) of the Wisconsin Employment Peace Act.

NOW, THEREFORE, it is

ORDERED

That the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin, this 19th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner

1/ Complainant filed its complaint on June 7, 1973. The Examiner limited his findings to conform to the one year statute of limitations provided in unfair labor practice cases under 111.07(14).

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant alleges in its complaint filed on June 7, 1973 that Respondent Napiwocki Construction has committed unfair labor practices in violation of Sec. 111.06(1)(a), (c)1, (d) and (f) of the Wisconsin Statutes in its failure to pay wage rates, and make contributions to the Health and Welfare, and Pension funds pursuant to a collective bargaining agreement between the parties.

Respondent did not answer the complaint. However, at the July 25, 1973 hearing Respondent denied the existence of a collective bargaining agreement between Complainant and Respondent.

On July 27, 1973, Respondent submitted a letter from Complainant to Respondent for Examiner's consideration. On August 2, 1973 the Examiner received a letter from Counsel for Complainant objecting strenuously to the receipt in evidence of Respondent's proposed exhibit. Counsel added that in order for the Examiner to consider the letter, it would be necessary to reopen the record and reconvene the hearing; to-wit, Complainant objected.

On November 13, 1973, Complainant submitted a four page letter containing legal citations and argument; on November 21, 1973 Respondent submitted another letter between Complainant and Respondent for the Examiner's consideration. On November 27, 1973 Complainant responded to the Employer's argument of November 20, 1973. At the July 25, 1973, hearing the parties agreed that no briefs would be submitted; and that argument would be limited to the oral presentation at the hearing. 2/

The Examiner has not considered any of the exhibits or post hearing arguments submitted by the parties. The record was closed on July 25, 1973 and the only reservation made for argument was Complainant's submission of legal citations. Those citations were considered by the Examiner.

Complainant's claim for the difference between the wage rate paid by the Employer and the wage rate established by the '69-'71 collective bargaining agreement and its claim for payment to the Health and Pension Funds administered by the Union are based upon the existence of a collective bargaining agreement between the parties. The existence of a collective bargaining agreement between the parties is the central issue in this case. In order to determine that issue, the Examiner must determine the consequence of the November 27, 1972 settlement agreement between the Complainant Union and the National Labor Relations Board rescinding the 1972 collective bargaining agreement.

SETTLEMENT AGREEMENT BETWEEN COMPLAINANT AND NLRB

The Examiner takes judicial notice of the formal papers filed with the National Labor Relations Board in this case, namely the charge, settlement agreement and the notice executed by Complainant Union pursuant to the settlement agreement. Complainant's Counsel, who was

---

2/ Complainant made reference to "citations" during its argument. On July 26, 1973 the Examiner referred a letter to the Complainant with a copy to Respondent requesting the Complainant's legal citations.

counsel to Wisconsin River Valley District Council of Carpenters, AFL-CIO before the National Labor Relations Board advised the Examiner that the charge against the Complainant arose out of the Union's failure to give the Employer timely notice in its attempt to reopen the '69-'71 collective bargaining agreement as required by Section 8(d) of the National Labor Relations Act. 3/ On January 3, 1973, the Union executed the notice which was issued pursuant to the settlement agreement between the Union and the National Labor Relations Board; the Union thereby agreed to rescind and abrogate the 1972 collective bargaining agreement. The legal effect of this Act was to nullify that agreement. In addition, the Wisconsin River Valley District Council agreed to:

> ". . .(4) Continue in full force and effect without resorting to strikes all the terms and conditions of any existing contract pursuant to 8(d)(4) of the Act; . . . Notice to members posted pursuant to a settlement agreement approved by a regional director of the National Labor Relations Board. Dated January 3, 1973."

The complaint filed in the instant matter is an attempt by Complainant to comply with (4) of the notice quoted above, by enforcing "any existing

---

3/ Section 8(d) of the National Labor Relations Act provides as follows:

> ". . .(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and 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 if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: 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--
>
> (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;
>
> . . .
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and. . ."

contract", which Complainant contends is the 1969-1971 collective bargaining agreement.

Complainant's attempt to reopen the 1969-1971 collective bargaining agreement was untimely under the NLRA and the agreement.4/ A strike ensued and a collective bargaining agreement was the product of that strike; ultimately, the Union agreed to a settlement with the National Labor Relations Board, whereby the 1972 agreement was rescinded. Since the Union's attempt to reopen the 1969-1971 agreement was untimely, it therefore follows that the renewal clause contained in Article XVI of that agreement operated to renew the '69-'71 agreement for a period of one additional year. On March 21, 1972 approximately one month after the Employer had executed the 1972 collective bargaining agreement (the agreement was signed on February 15, 1972), the Employer notified the Union of the Employer's intention to terminate the 1972 collective bargaining agreement.

The Employer claimed at the hearing that this March 21 notice was mailed for the purpose of terminating the 1969-1971 agreement. However, in the mediation notice which the Employer directed to the Federal Mediation and Conciliation Service on March 21, 1972, the Employer noted that the expiration date of the contract which it desired to terminate was June 1, 1972. The 1972 collective bargaining agreement bore the expiration date of June 1, 1972. The '69-'71 collective bargaining agreement bore an April 1 expiration date. Due to the fact, that the mediation notice refers to the expiration date of the 1972 agreement, it is the Examiner's finding that the Employer was indeed attempting to terminate the 1972 agreement and not the 1969-1971 agreement.

The mailing of the March 21, 1972 notice and the decision of the Union to enter into negotiations pursuant to that notice were based upon the mutual mistake of the parties that the 1972 agreement was in effect. However, with the recission of the 1972 agreement, the act of mailing the notice and the negotiations between Complainant and Respondent which ensued pursuant to that notice, are events and activities which occurred which were not rescinded and could not be rescinded by the settlement agreement between the Union and the National Labor Relations Board. The reopening provision contained in Article XVI of the '69-'71 collective bargaining agreement provides that the entire agreement may be reopened or amended upon notice sixty days prior to termination. A similar clause was present in the 1972 collective bargaining agreement. It is clear, when the parties sat down to negotiate a new agreement after March 21, 1972 that there was an expectation in both parties that the agreement would terminate unless a new agreement was reached. By entering into negotiations, the Union acknowledged that whatever agreement was in effect would expire unless a new agreement was reached. The bargaining relationship between the parties establishes that no matter what agreement was in effect in March, 1972, the parties embarked on negotiations with the intent of achieving a successor agreement. The failure to achieve a new agreement cannot be used as the basis to revive an agreement which expired.

4/ Since sixty days notice is the statutory and contractual requirement for reopening the agreement, the Examiner has drawn the inference that failure to comply with the statutory notice requirements resulted in a failure to meet the contractual requirements, as well.

The Examiner concludes that the '69-'71 agreement was terminated, and was not in effect in June, 1972 when the Union's claim arose.

Dated at Madison, Wisconsin, this 19th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sherwood Malamud
Sherwood Malamud, Examiner