STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CONSTRUCTION AND GENERAL LABORERS UNION LOCAL 464, Complainant, vs. UNITED CONTRACTORS, INC., Respondent.	Case II No. 17018 Ce-1500 Decision No. 12053-A

Appearances:
Mr. Robert C. Kelly, Attorney at Law, appearing on behalf of Complainant.
Respondent did not appear in person or otherwise.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A Complaint of unfair labor practice having been filed with the Wisconsin Employment Relations Commission in the above-entitled matter, and the Commission having appointed Marshall L. Gratz, 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 Sec. 111.07(5) of the Wisconsin Employment Peace Act; and, pursuant to notice, a hearing on said Complaint having been held at Milwaukee, Wisconsin on August 20, 1973 before the Examiner; and on October 5, 1973 Respondent having filed a letter with the Examiner requesting that the Complaint be dismissed; and the Examiner having treated said October 5 letter as a formal motion for dismissal and having denied same in writing; and the Examiner having considered the evidence and the brief of Counsel 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 Construction and Laborers Union Local 464, referred to herein as the Complainant, is a labor organization having its office at 2025 Atwood Avenue, Madison, Wisconsin.

2. That United Contractors, Inc., referred to herein as the Respondent, is an employer whose post office box address is N59 W14508, Bobolink Avenue, Menomonee Falls, Wisconsin 53051; and that

at all times material hereto, Respondent has been engaged in the business of highway construction.

3. That at all times material hereto, Respondent and Complainant have been parties to a collective bargaining agreement, referred to herein as the Agreement, setting forth the wages, hours and condions of employment of certain of Respondent's employes; and the Agreement, in Article VII, provides, in pertinent part, that ". . . all grievances, disputes or complaints of violations of any provision of this agreement shall be submitted to final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. . . ."

4. That disputes arose between Complainant and Respondent over grievances, referred to herein as the Grievances, concerning employes Bart Walsh, Barry Walsh, Ted Nachreiner, Lester Greene and Patrick Breckon, referred to herein as the Grievants, relative to alleged violations by Respondent of Article X (Shifts and Hours of Employment and Overtime Rates of Pay) of the Agreement.

5. That Complainant and Respondent, being unable to settle the Grievances among themselves, jointly requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve said disputes; and that said Commission, by an Order issued on January 17, 1973, appointed Howard S. Bellman for that purpose.

6. That pursuant to written notice to the parties, Arbitrator Bellman held a hearing with respect to the Grievances on March 1, 1973 during the morning portion of which both parties were present and at the afternoon portion of which the Respondent chose not to appear; and that throughout said hearing, the parties were given full opportunity to present oral and written evidence and to make such arguments as were pertinent to the issue.

7. That on June 13, 1973, Arbitrator Bellman issued his Award concerning the Grievances, which Award read, in pertinent part, as follows:

> It is the decision and award of the undersigned Arbitrator, based upon the foregoing and the record as a whole, that the Company violated the collective bargaining agreement with regard to its wage payments to Barry Walsh, Bart Walsh, Ted Nachreiner and Patrick Breckon, as described herein, on the dates specified herein; and that therefore it should immediately pay to said grievants the following amounts: Barry Walsh, $76.32; Bart Walsh, $57.24; Ted Nachreiner, $57.24; Patrick Breckon, $44.52.

8. That a copy of said Award was forwarded by Arbitrator Bellman via certified mail to Mr. James Mews, President of Respondent, on June

13, 1973; that, thereafter, Mews was requested both orally and in writing to comply with Arbitrator Bellman's Award by Attorney Robert C. Kelly on behalf of Complainant and the Grievants; that two such requests were made by letters from Kelly to Mews dated June 14 and June 27, 1973; and that despite said requests, Respondent has not made payments to the Grievants as required by the Arbitrator's Award and has not otherwise complied with such Award.

9. That Respondent's failure to comply with the aforesaid Award of Arbitrator Bellman is wholly without justification and the reasons for such noncompliance stated in Respondent's Answer are frivolous.

10. That as a result of its bringing the instant Complaint proceeding for the purpose of enforcing Arbitrator Bellman's Award, Complainant incurred costs and disbursements totaling $324.94, which consisted of $300.00 in attorney's fees, $20.80 in travel expenses and $4.13 in telephone expenses for all of which Complainant has been or will be billed by its legal counsel.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the aforesaid Award issued by Arbitrator Howard S. Bellman on June 13, 1973 was issued in a fair and impartial manner, pursuant to the jurisdiction vested in said Arbitrator by the collective bargaining agreement material herein and in full conformity with law.

2. That Respondent, United Contractors, Inc., by failing to comply with the June 13, 1973 Award of Arbitrator Bellman within a reasonable time has violated and is violating Article VII of the Agreement between the Complainant and the Respondent, and has committed and is committing unfair labor practices within the meaning of Sec. 111.06(1)(f) and Sec. 111.06(1)(g) of the Wisconsin Statutes.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that United Contractors, Inc., its officers and agents shall immediately:

(1) Cease and desist from refusing to comply with the Award of Arbitrator Howard S. Bellman dated June 13, 1973

concerning the aforesaid Grievances.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

(a) Comply with the Award of Arbitrator Howard S. Bellman dated June 13, 1973 by paying to the following Grievants the following sums of money:

To Barry Walsh:	$76.32
To Bart Walsh:	57.24
To Ted Nachreiner:	57.24
To Patrick Breckon:	44.52

(b) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order as to what steps it has taken to comply herewith.

Dated at Milwaukee, Wisconsin, this 13th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 24, 1973, the Complainant filed the instant Complaint with the Commission alleging that Respondent had committed unfair labor practices within the meaning of Secs. 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act by refusing to abide by the Award of an arbitrator made pursuant to an arbitration provision contained in a collective bargaining agreement existing between the parties, notwithstanding its agreement to do so. By way of remedy, Complainant requested that the Respondent be ordered to cease and desist from said unfair labor practices, and to comply with the Award of the Arbitrator by paying stated amounts to named grievants and, further, to pay to Complainant ". . . the costs and disbursements of this action, including attorney's fees, incurred by it in seeking to enforce the arbitration award as set forth herein."

The Respondent filed a letter, signed by its President, Jim Mews, which letter the Examiner has treated as its Answer; said Answer, in pertinent part, alleged as follows:

> Gentlemen: We are formally requesting a new hearing. This is our firms [sic] first involvement with the Wisconsin Employment Relations Commission and after reviewing the transcript of the March 1st [arbitration] hearing and the award of the arbitrator, it is apparent our firm needs to be represented by councel [sic] for the following reasons:
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> Item #1 - We claim the first hearing was conducted in a biased manner due to our lack of legal councel [sic] representation.
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> Item #2 - Arbitrator award does not state the facts in this case in our behalf and insinuates our supervisor, Frank Watson engaged in unreliable practices which no evidence was given to substantiate this opinion. The first hearing was conducted in an air of prejudice because Mr. Watson is black. The record quite carefully does not mention this fact. Evidently we were off the record when these remarks were made. It is imperative that Frank Watson be given an opportunity to defend himself.
>
> Item #3 - Arbitrator accepted hearsay evidence on behalf of the witness not present who [sic] character was established by their employment record. In fact the reliability of these people is so poor that

they are claiming show-up time when on one specific day one party was on a hunting trip.

Item #4 - We believe the union was given preferential treatment in this case.

On August 2, 1973, Respondent was duly served with a copy of said Complaint and of a notice of hearing. Pursuant to said notice, hearing was convened on the matter on August 20, 1973 at 10:00 a.m. By reason of Respondent's failure to appear at 10:00 a.m., the Examiner placed three phone calls to Respondent's place of business, asking for Respondent President Jim Mews. On each such occasion, the Examiner was informed that Mews was out of the office but that attempts would be made to have him return the Examiner's calls as soon as possible. Having received no such return call from Mews by 1:00 p.m., the Examiner reconvened the hearing at that time, and conducted same _ex parte_. At the Examiner's request, Complainant presented evidence concerning each of the allegations in its Complaint and each of the affirmative defenses alleged in Respondent's Answer. Since that presentation of evidence did not include specifications as to the precise amounts of money sought as attorney's fees and other litigation-related expenses, the Examiner requested that the Complainant submit such a specification by way of post-hearing affidavit. The hearing was closed at 2:30 p.m. Two hours later, the Examiner received a call at his Milwaukee office from Jim Mews. Mews indicated that he was responding to the Examiner's calls to his receptionist; that he had not appeared at the hearing because Respondent was unable to find suitable labor relations counsel and because he had been unable to leave certain projects then under his supervision unattended during the time the hearing was to be in session; Mews gave no excuse for his failure to inform the Examiner prior to the hearing of his anticipated difficulties in attending same at the scheduled time.

On August 30, 1973, the Examiner, in writing, informed Respondent, _inter alia_, that he had a right to demand a copy of the transcript if he were willing to pay for same at the rates set forth in Chapter 90, Laws of 1973; that he had the opportunity to file written argument within ten days of the transmittal of such transcript and in said letter of August 30, the Examiner enclosed a copy of Complainant's affidavit with respect to costs and fees incurred. Thereafter, Respondent, by its President, Jim Mews, requested a copy of the transcript. Such copy was sent to Mews on September 15, 1973. Then, on September 28,

1973, the Examiner notified the parties, in writing, that "the time for filing of written arguments or motions in the above-noted case has passed." Nevertheless, in the same letter, the Examiner expressly reopened the record ". . . for the purpose of receiving any written position, argument or statement of legal authority which the parties wish to present on the question of whether the Commission ought to include attorney's fees and related expenses as a part of a remedy in the instant unfair labor practice proceeding."

In response to the Examiner's September 28 letter, Mews, on October 5, 1973, filed what the Examiner has treated as a formal Motion of Dismissal which read as follows:

> In response to your letter of September 28, 1973, kindly be advised that no OFFICER of this corporation has ever entered into a contract with Laborers Local #464. A check with the Secretary of State will confirm who are the corporate officers.
>
> Therefore, I wish to advise you that this corporation does not have any agreement or obligations as charged by Local #464. Further, we do not believe your department has any jurisdiction in this matter.

On October 12, the Examiner denied Respondent's aforesaid Motion to Dismiss for the reasons that the Commission does have jurisdiction of a complaint of unfair labor practice in violation of the Wisconsin Employment Peace Act (citing Sec. 111.07[1] of the Wisconsin Statutes) and because "Respondent's assertion, contrary to allegations in the Complaint, that it is not a party to a collective bargaining agreement with Complainant, has not been timely raised either by way of answer [citing Commission Rule ERB 2.04] or even by way of motion within the time period set by the Examiner for the submission of same in the Examiner's August 30, 1973 letter to the parties." In addition, the Examiner informed Respondent that he had granted Complainant's request for an extension of the due date for briefs referred to in the Examiner's September 28 letter to October 19, 1973. The Examiner received Complainant's brief concerning attorney's fees and related expenses on October 18, 1973.

<u>Violation of Sections 111.06(1)(f) and (g) of the Wisconsin Employment Peace Act</u>

The Commission has expressed its intent to apply the statutory tests provided in Sec. 298 of the Wisconsin Statutes in cases where the party to a collective bargaining agreement is seeking enforcement of an

arbitration award issued pursuant thereto. [1] Section 298.10 (1) provides as follows:

> In either of the following cases the court in and for the county wherein the award was made must make an order vacating the award upon the application of any party to the arbitration:
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> (a) Where the award was procured by corruption, fraud or undue means;
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> (b) Where there there was evident partiality or corruption on the part of the arbitrators, or either of them;
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> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

A careful review of the evidence presented in the instant case, including a review of the transcript of the arbitration hearing leading up to the issuance of the Award, reveals no evidence whatever that would tend to establish any one or more of the grounds for vacation of the Award set forth above.

Respondent's Answer does not specifically deny any of the allegations in the Complaint. For that reason alone, the allegations in the Complaint could be deemed by the Commission to be ". . . admitted to be true, and may be so found by the Commission." [2] More importantly, substantial evidence was presented at the hearing supporting Complainant's allegations that Respondent committed unfair labor practices within the meaning of Secs. 111.07(1)(f) and (g). As a result of Respondent's failure to appear at the hearing or to request a postponement of same,

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[1] H. Froebel & Sons, Dec. No. 7804 (11/66); Harker Heating and Sheet Metal, Inc., Dec. No. 6704 (4/64). Said policy is equally applicable to awards issued pursuant to collective bargaining agreements between an employer and a labor organization representing employes in an industry affecting commerce as defined in the Labor Management Relations Act as it is to awards issued pursuant to other collective bargaining agreements.

[2] Commission Rule ERB 2.04.

no case-in-chief was presented in opposition to the allegations in the Complaint.

The defenses asserted in Respondent's Answer are either without support in the record evidence or invalid on their face as defenses to the unfair labor practices complained of.

In evaluating Respondent's stated defenses, some background facts concerning the arbitration hearing are elucidative. Following his appointment as Arbitrator, Mr. Bellman notified the parties, in writing, that the hearing of the arbitration would be conducted on February 20, 1973. On that date, Arbitrator Bellman, the Union representatives, its Counsel and witnesses gathered at the appointed time and place of the hearing (the Madison offices of the Wisconsin Employment Relations Commission), but neither Mr. Mews nor any other representative of Respondent appeared at that time. Arbitrator Bellman then telephoned the Respondent at its Menomonee Falls office, spoke with Mr. Mews and inquired as to his intentions concerning an appearance at the arbitration hearing. At that time, Mr. Mews requested a postponement with respect to which the Union did not object. Thereafter, Arbitrator Bellman scheduled the hearing for March 1, 1973 at the Madison Public Library. Prior to the March 1 hearing, Complainant had caused Mews, Respondent's President, to be served with a subpoena duces tecum requiring that he be present at such hearing and that he bring with him certain of Respondent's payroll records. Mews did, in fact, attend and participate in the morning portion of said hearing, stating that he had received the aforesaid subpoena, that he was appearing without counsel and that he was aware of his rights to present witnesses, personally give testimony, cross-examine Complainant's witnesses and present oral arguments. During the morning session of the hearing, Mews cross-examined one of Complainant's witnesses, presented his own testimony under oath, subjected himself to examination by the Arbitrator and to cross-examination by Complainant's Counsel and stipulated as to the issue for arbitration proposed by Complainant and restated by the Arbitrator. Mews was informed by the Arbitrator of his right to receive a copy of the transcript upon his agreement to pay his share of the cost thereof, and he agreed to pay such cost and requested that he receive such transcript. Mews was informed by the Arbitrator that the hearing would continue following a lunch break and that he had a right to appear at the post-lunch continuation of the hearing. Nevertheless, Mews informed the Arbitrator of his intent not to return to the hearing

following the lunch break, whereupon the Arbitrator informed Mews of his opportunity to file a post-hearing brief in the matter should he choose to do so. Mews neither appeared at the hearing following the lunch break nor filed a written post-hearing brief.

In its Answer herein, Respondent first contends that ". . . the first hearing was conducted in a biased manner due to our lack of union councel [sic] representation." The Examiner's view of the transcript of said arbitration hearing provides no support whatever for the assertion that Arbitrator Bellman conducted that hearing or issued his Award in a biased manner. Nor is there any other evidence now before the Examiner suggestive of such a conclusion. The arbitration hearing transcript makes clear that Mews was aware that he could have been represented by counsel had he chosen to do so. [3] Mews raised no objection to proceeding in the absence of counsel nor did he ask for a postponement for the purpose of obtaining counsel (though it is clear from his prior request for such a postponement that Mews knew that such a request would at least be considered by the Arbitrator). For the foregoing reasons, the Examiner finds Respondent's first defense to be without merit.

Respondent's second defense is that "Arbitrator [sic] award does not state the facts in this case in our behalf and insinuates our supervisor Frank Watson engaged in unreliable practices which [sic] no evidence was given to sustain this opinion. The first hearing was conducted in an air of prejudice because Mr. Watson is black. The record quite carefully does not mention this fact. Evidently we were off the record when these rules were made. It is imperative that Frank Watson be given an opportunity to defend himself." The functions of finding and expressing the facts are matters reserved by the law to the exclusive discretion of the Arbitrator unless in performing such functions he exceeds his powers or so imperfectly executes them as to fail to provide a mutual, final and definite award upon the subject matter. The record herein contains no evidence of any such imperfection in the manner in which the Arbitrator drew and expressed his factual findings. Contrary to Respondent's assertion, the record of the arbitration hearing does contain substantial evidence supportive of a conclusion that Frank Watson engaged in unreliable practices. [4]

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[3] Arbitration hearing transcript (Exhibit 3) at pp. 2-5.

[4] See Exhibit 3, pp. 38-49; cf., id. at pp. 26, 32, 39-40.

The Examiner finds no basis in record fact for the assertion that the arbitration hearing was conducted in an air of prejudice because Mr. Watson is black. True, the fact of Mr. Watson's race is not mentioned on the arbitration hearing record, but there is uncontroverted evidence before the Examiner that it was not discussed at the hearing at all. That being the case, there would be no reason for the Arbitrator to make an express finding concerning Mr. Watson's race. Had Mr. Mews desired to have prejudicial off-the-record comments preserved, he could have but did not request that they be made on the record; nor did he object on the record to their having been made off the record. The Arbitrator offered Respondent the opportunity to present a case-in-chief, and such case-in-chief could have included the testimony of Frank Watson but did not. Moreover, the record amply supports the inferences that Mews was aware that the Union had an interest in the contents of certain company time records kept by Watson and that Mews was further aware that the Union sought to elicit testimony from Watson as well. For all of the foregoing reasons, the Examiner finds the Respondent's second defense to be without merit.

Respondent's third defense was that "Arbitrator accepted hearsay evidence on behalf of the witness not present who [sic] character was established by their employment record. In fact the reliability of these people is so poor that they are claiming show-up time when on one specific day one party was on a hunting trip."

Under the Sec. 298 standards set forth above, it is clear that an arbitrator's decision concerning the admission of evidence regardless of its nature and of the weight to be accorded such evidence is left to the exclusive discretion of the arbitrator unless it is shown that the arbitrator has engaged in misbehavior by which the rights of any party have been prejudiced. It does not appear that Mr. Mews raised any objection during the hearing to the receipt into evidence by the Arbitrator of any evidence on the grounds that same constituted inadmissible hearsay. Thus, Mr. Mews did not give the Arbitrator the opportunity to obviate the error which he now complains of. Moreover, the record is devoid of evidence suggesting that the Arbitrator is guilty of any misbehavior within the meaning of Sec. 298.10(c).

In the second sentence in Respondent's third defense, it appears that Respondent disagrees with Arbitrator Bellman's evaluation of the credibility of the Union's witnesses. Notwithstanding the "hunting

trip" concern voiced by the Respondent, the Arbitrator expressly indicates in the Award that his credibility determinations were based upon his observations of the deameanor of the witnesses. Such determinations are for the impartial arbitrator to make.

For the foregoing reasons, Respondent's third defense is found to be without merit.

Respondent's fourth and final defense is that "We believe the Union was given preferential treatment in this case." The fact that the Grievances were resolved by the Arbitrator in favor of the Complainant is not evidence supportive of a claim that the Arbitrator lacked impartiality. If such were the case, the arbitration process would no longer be "final and binding". Moreover, a review of the record provides no evidentiary support whatever for the assertion that the Arbitrator gave the Union preferential treatment.

Thus, in the absence of any facts which would establish the lack of impartiality or the lack of due process or acts of misbehavior or of imperfect exercise of powers, the Commission will not set aside the Award. The parties have an agreement providing for final and binding arbitration, and they have thereby agreed to be bound by awards issued by arbitrators pursuant thereto. The matter was submitted to the Arbitrator, and he has issued his Award. The Commission has no jurisdiction to relitigate the issues determined by the Arbitrator. The Award does not violate any positive provision of law; therefore failure to comply with it constitutes an unfair labor practice. Accordingly, the Commission has ordered the traditional remedy in such a case; that is, an order that Respondent cease and desist from the unfair labor practices found and an order that Respondent affirmatively comply with the Award and notify the Commission of steps taken by it in that regard.

Complainant's Request for Attorneys' Fees and Other Enforcement-Related Costs

In addition to the traditional Commission remedy noted above, Complainant has requested that Respondent also be ordered to pay to Complainant the sum of $324.96, to make the Complainant whole for the fees, travel costs and telephone disbursements billed to Complainant by its attorney, Robert C. Kelly, solely because Respondent's failure to comply with Arbitrator Bellman's Award required Complainant to institute the instant enforcement proceeding before the Commission.

The Commission, however, has not, to date, seen fit to grant attorney's fees or costs except in cases where the parties have, by agreement,

indicated that such remedy would be appropriate under the extant circumstances. 5/ The Complainant has presented the Examiner with no Commission precedent setting forth a contrary policy.

Instead, in support of its request Complainant has argued, on brief, as follows:

1. That "[i]n resolving labor management disputes under Section 111.06(1)(f) in industries affecting commerce, the Commission is empowered and required to apply the federal substantive law." 6/

2. That the well-settled rule followed by the federal courts in cases such as the one at bar ". . . is that attorneys fees should be awarded against a party, who, without justification, refuses to abide by the award of an arbitrator." 7/

3. That Respondent's refusal to abide by the Award in question herein was without justification and that the defenses asserted in Respondent's Answer are frivolous. 8/

5/ See, e.g., Monona Grove Joint School District No. 4, Dec. No. 11614-A (7/73).

6/ Citing Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1964); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957); Local 174, Teamsters Union v. Lucas Flour Co., 369 U.S. 95 (1962).

7/ Citing, Local 149, UAW v. American Brake Shoe Co., 298 F. 2d 212 (CA4, 1962), Cert. Den., 369 U.S. 873 (1962); Mine Workers District 50 v. Bowman Transportation Inc., 421 F. 2d 934 (CA5, 1970); United Steelworkers of America v. U.S. Gypsum Co., ____F. Supp.____, 79 LRRM 2833 (N.D. Ala., 1972); Linbeck Constr. Corp. v Carpenters, ____F. Supp. ____, 79 LRRM 2735 (S.D. Tex., 1972).

8/ The Examiner has so found for the reasons that Respondent's Answer defenses are, as earlier discussed, either wholly without foundation in record fact or invalid on their face and that Respondent's conduct before, during and after the Complaint hearing herein was inconsistent with the conduct that could reasonably be expected of a party considering himself to have justification for failure to comply with an award. For example, before the instant hearing, Respondent made no response whatever to unequivocal union demands for such compliance except by way of an Answer to the instant Complaint. At the Complaint hearing, Respondent could have but did not obtain counsel in the matter at any time between the June 13, 1973 Award issuance, through at least the August 20, 1973 date of the Complaint hearing.

Although the assertion in the text was not specifically alleged in the Complaint, Complainant's Counsel, in his opening statement at the Complaint hearing, made quite clear his intent to prove that Respondent's defenses were frivolous in nature, since Respondent was provided with a copy of the transcript of said proceeding and with an opportunity to file written motions or arguments subsequent to his receipt of said transcript, it cannot be said that Respondent could reasonably believe that the assertedly frivolous nature of his defenses was not at issue herein.

4. That, therefore, the Commission is empowered and required to apply the above-noted federal rule, entitling the Complainant to the litigation expenses requested.

Complainant's argument does not convince the Examiner to grant the extraordinary remedy requested for several reasons. First, it is surely true that the federal rule cited by Complainant would be applicable only to a proceeding for enforcement of a collective bargaining agreement ". . . between an employer and a labor organization representing employees in an industry affecting commerce as defined in [the Labor Manager Relations Act (LMRA)]".[9/] Technically speaking, Respondent has neither alleged nor proven that the instant Agreement meets that criterion.

Second, even if the federal "rule" cited by Complainant were applicable, the Examiner and Commission could, in their discretion, choose not to grant the extraordinary remedy sought. The federal rule relied upon by Complainant is best stated and documented in the American Brake case. [10/] Therein, the Fourth Circuit Court of Appeals issued dictum to the effect that where, as here, ". . . no statute authorizes attorneys' fees. . .", the federal district courts' power to award attorneys' fees arises out of the ". . . historical equity powers of federal courts." The Court's dictum continued,

> The question remains as to how this traditional equitable power should be used to effectuate the policy of the [Labor Management Relations Act] under the mandate of the Supreme Court. [11/] The answer to this question will depend upon the particular facts of the case presented in the light of the policy of the Act. In an appropriate case attorneys' fees should be awarded against a party, who, without justification, refuses to abide by the award of an arbitration. [Emphasis added.] [12/]

In view of the emphasized portions above, the federal "rule" relied upon by Complainant amounts to a policy that "should", not must, be applied,

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9/ Section 301 (a) LMRA. The enforcement of other collective bargaining agreements would be entirely a matter of state law.

10/ Supra note 7.

11/ In Textile Workers Union v. Lincoln Mills, supra note 7 at 457, the

which policy should be applied only in those cases of unjustified award noncompliance in which ". . . the particular facts of the case presented in the light of the policy of [the LMRA]" constitute, in the trial judge's discretion, "an appropriate case" for the imposition of the extraordinary remedy. For reasons discussed below, the Commission, in its discretion, has apparently concluded that, all things considered, it would not effectuate sound labor policy, national or state, for the Commission to grant such a remedy except by way of enforcing a provision in the parties' agreement that such a remedy is appropriate.

Third, even if the Commission's approach to the attorney's fees remedy question were inconsistent with the cited federal rule, that rule is not a part of the "federal substantive law" such that the Commission is prohibited from applying incompatible local law. 13/ The purpose of the Lincoln Mills mandate for the creation of a federal common law of collective bargaining agreements and the purpose of the Lucas Flour Court in preventing state forums from applying local laws incompatible with the federal substantive law developed was, essentially, to avoid the disruption of peaceful negotiations and administration of agreements that would occur if the same agreement language could be given different

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13/ Assuming arguendo that the instant case involves parties in commerce, the Commission has recognized that it is bound to apply substantive law that is consistent with the federal law established by the federal courts pursuant to Section 301. Research Products Corp., Dec. No. 10223-A (12/71) citing Tecumseh Products Co. v. WERB, 23 Wis. 2d 118 (1963) which, in turn, cites Lincoln Mills, supra note 6 and Lucas Flour, supra note 6.

The Commission has, in the past, departed from federal rules of law in "procedural" matters in cases raising issues of the sort dealt with by Sec. 301 (a) of the LMRA. See, e.g., Handcraft Co., Inc., Dec. No. 10300 at 15 (5/71) ("Unlike procedures which are common in the courts under Section 301 of the Labor-Management Relations Act, it has been the practice of this Commission to dismiss complaints demanding relief under Section 111.06(1)(f) where it has found that the complaint was prematurely filed and that arbitration is available to the parties under their contract.")

If the traditional choice of law rule were applied, the Commission would be free to impose remedies according to its own rules of law. For the traditional rule is that matters of remedy (as distinguished from determinations of the parties' rights) are governed by forum law; see, Textile Workers Union v. American Thread Co., 113 F. Supp. 137, 141-2 (D.C. Mass., 1953) (Wysanski, J.) (Alternate holding).

meanings in different states. [14/] That purpose would not be advanced by finding that the Commission is required to apply the federal rule herein, however. For whether or not attorney's fees are provided in cases of unjustified award noncompliance does not impose an interpretation or application of the instant parties' Agreement that is in any way different from or incompatible with the result that would likely be reached on the instant facts in federal district court. The contract language is interpreted herein under standards that are compatible with federal law. [15/] Moreover, Complainant has been granted an order for specific performance of the agreement reflected in the arbitration clause herein just as would be granted in federal court. Since an employer, deciding whether, without justification, to fail to comply with an arbitration award cannot know whether the union will seek enforcement in a federal or a state forum, the effects of the Commission's application of its policy concerning attorney's fees rather than the policy of the federal courts would likely have little preventive impact upon future primary conduct in the area of Award compliance.

Fourth, and finally, there are good reasons for the Commission to choose its existing practice rather than adopting a policy similar to that followed in the federal courts. For example, the Commission was created by the legislature in order ". . . to provide a convenient, expeditious and impartial tribunal . . ." for the adjudication of rights and obligations in employment relations. [16/] Practice before the

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14/ In Lucas Flour, supra note 6, at 103-104, the Court noted that under such circumstances, neither party would be certain of the rights it was obtaining or conceding by a particular move in negotiations. Thus, the parties would often engage in the difficult and time-consuming effort at coming to agreement on language that is acceptable to each and which has the same meaning under the laws of more than one state. Moreover, disputes during a contract term concerning contract administration would be complicated and prolonged with the possibility of conflicting substantive interpretations issuing from multiple forums. Such possibilities might impede both parties' willingness to agree to terms providing for final arbitral or judicial resolution of disputes since each party would hold dear the opportunity to seek out contract interpretation under the most favorable substantive rule of law. Thus, since no-strike agreements are often withheld as the quid pro quo for agreements to binding arbitration of grievances, the proliferation of no-strike agreements would be encouraged if the same substantive law were applied to alleged contract violations in all forums.

15/ See, Research Products Corp., Dec. No. 10223-A.

16/ Section 111.01 (Declaration of Policy) of the Wisconsin Employment Peace Act.

Commission, being often more geographically convenient to the parties than federal court and presenting fewer formalities of procedure and practice and a more expeditious hearing procedure than federal court, it seems fair to conclude that the costs of proceeding before the Commission are likely to be lower--considering hours of travel, hours of attorney's time needed, need for witnesses, and the like--than would be the case in proceeding before a federal court on a similar matter. Furthermore, the goal of an expeditious adjudication of an award enforcement proceeding could be significantly hindered by the addition of potentially controversial issues concerning what costs and disbursements were actually incurred, which of those types of costs should be granted, what is a reasonable amount of each type of cost, what constitutes a frivolous defense, did the Respondent have justification for non-compliance, etc. Where the parties have agreed that the extraordinary remedy is appropriate under certain circumstances, the Commission will ordinarily enforce that mutual intent. But Complainant, by choosing to enjoy the convenience, informality and other advantages of the WERC as its enforcement forum must, absent an agreement of the sort described above, accept the disadvantageous aspects of proceeding here as well--one of which would appear to be the Commission's adherence to the policy concerning attorney's fees and costs described hereinabove. 17/

For the foregoing reasons, Complainant's request for attorneys fees and other enforcement-related costs has been denied.

Dated at Milwaukee, Wisconsin, this 13th day of December, 1973.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz
Marshall L. Gratz, Examiner

17/ See note 5 and text accompanying.