STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL UNION NO. 836,		
Complainant,		Case II No. 19524 Ce-1627 Decision No. 13934-C
vs.		
M-K HARTMANN SONS, INC.,		
Respondent.		

Appearances:
Messrs. William Forrest and Ron Stadler, Representatives, for Complainant.
Melli, Shiels, Walker and Pease, S.C., Attorneys at Law, by Mr. James K. Pease, Jr., for Respondent.

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 Stanley H. Michelstetter II, a member of its staff, to act as Examiner to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5), Stats. and, pursuant to notice, a hearing on said complaint having been held at Madison, Wisconsin, commencing November 7, 1975 and continuing on various dates, the last of which was January 23, 1976, before the Examiner, and the last received brief having been filed June 24, 1976; and the Examiner having considered the evidence and the arguments of the parties 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 at all relevant times United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 836, hereinafter referred to as Complainant, was a labor organization with offices at 215 Dodge Drive, Janesville, Wisconsin which represents carpenters and others in its jurisdiction consisting of the Wisconsin counties of Green, Rock and Walworth and parts of Jefferson and Racine and which employed William Forrest and Vern Falkman, hereinafter respectively referred to as Forrest and Falkman as its agents for collective bargaining and other purposes; that Ron Stadler, hereinafter referred to as Stadler, is an agent of United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereinafter referred to as the Brotherhood, for collective bargaining and other purposes.

2. That at all relevant times the corporation, M-K Hartmann Sons, Inc., hereinafter referred to as Respondent, has been an employer primarily engaged in specialized carpentry finishing with main offices at 5861 North Seventy-First Street, Milwaukee, Wisconsin; that at all relevant times its only officers were its President and Treasurer, Michael Hartmann, hereinafter referred to as Michael, and its Vice President and Secretary, Keith Hartmann, hereinafter referred to as Keith, both of whom are individually authorized to agree upon and execute collective bargaining agreements and otherwise act on Respondent's behalf; that at all relevant

times their father, James E. Hartmann, hereinafter referred to as James, was an agent of Respondent for collective bargaining and other purposes, although he is not ordinarily authorized to agree upon or execute collective bargaining agreements on its behalf; that all relevant times Jack Hartmann, hereinafter referred to as Jack, was an Estimator for Respondent and its agent for purposes other than collective bargaining; that at all relevant times Respondent employed Marvin Mathiak, George Urban, Edmund "Fran" Watterson and James' son, Mark Hartmann, hereinafter respectively referred to as Mathiak, Urban, Watterson and Mark, but that at no relevant time has Respondent employed any member of Complainant; that at all relevant times ater June 1, 1975 1/ but not necessarily at the same time, Keith and Mathiak acted as Respondent's foreman for projects in Complainant's jurisdiction; that at all relevant times Michael, Keith, Mathiak and Watterson were members of locals of the Brotherhood other than Complainant, but that Mark was not a member of any local of the Brotherhood.

3. That at all relevant times Complainant and the Southern Wisconsin and Lakeland Contractors Associations have had a collective bargaining agreement in effect for the period June 1, 1975 through May 31, 1979, hereinafter referred to as the area agreement, which agreement contains grievance and arbitration provisions and which states in relevant part:

". . .

Article II

Union Security

Section 2.1 Membership: The Employer agrees to require, during the life of this Agreement, membership in the Union, as a condition of continued employment of all employees covered by this Agreement, within (8) days following the effective date of this Agreement, or within eight (8) days following the commencement of such employment, whichever is later; provided, however, that such membership in the Union is available to such employees on the same terms and conditions generally applicable to other members and that such membership is not denied or terminated for reasons other than a failure by the affected employee to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership.

Section 2.2 Failure to Maintain Membership or Join: Upon written notice from the Union advising that an employee covered by this Agreement has failed to maintain membership in the Union in good standing as covered above, by payment of uniform initiation fees and/or dues as required, the Contractor has reasonable grounds for believing that membership was not available to the employee on the same terms and conditions generally applicable to other members, or that membership was denied or terminated for reasons other than for failure of the employee to tender periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership.

Section 2.3 Written Notice: The Contractor shall not discharge or cause an employee to lose any work under this article except by written notice from the Business Manager as set forth herein.

Section 2.4 The Union agrees to furnish journeymen and apprentices on a non-discriminatory basis, as required by

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1/ All dates are in 1975 unless otherwise noted.

the Employer, within forty-eight (48) hours after notice by the Employer. If the Union fails to furnish journeymen and or Apprentice Carpenters as required by the Employer within the time limit provided, the Employer may draw from whatever sources are available to meet his requirements at the time.

Section 2.5 Residential Agreement: The Employers recognize the Union as the sole and exclusive bargaining agent for all carpenters, apprentices, and trainees for all carpenter work as defined in the Statewide Residential Working Agreement and are automatically bound by the provisions therein when performing residential work within the geographical jurisdiction of this Agreement. The Union shall furnish a copy of the Statewide Residential Working Agreement to all Employers.

Section 2.6 All Contractors working with tools shall be required to maintain membership or become members of Local 836 within eight (8) days when performing work in our jurisdiction.

Article III

Grievances and Arbitration

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Section 3.5 The Trustees and/or administrators of the fringe benefit funds and plans, health and welfare, pension, vacation plan, apprenticeship and training (to which payments are required to be made by employers under this agreement) may for the purpose of collecting any payments required to be made to such funds and plans, including damages and costs, and for the purpose of enforcing rules of the Trustees and/or administrators concerning the inspection and audit of payroll records, seek any appropriate legal, equitable and administrative relief, and they shall not be required to invoke or resort to this grievance or arbitration procedure.

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Article VII

Health and Welfare and Pension

Section 7.1 Health and Welfare: During the life of this Agreement, each employer covered thereby shall pay the sum of thirty cents ($.30) per hour for each paid hour to all employees covered by this Agreement to the Central Depository. These payments shall be made not later than the 15th day of each month following the month for which payment is being made. Central Depository to remit same to Wisconsin State Carpenters Welfare Fund.

. . .

Section 7.4 Pension: Effective June 1, 1975 each employer covered thereby shall pay the sum of $.25 per hour and effective June 1, 1976 the sum of $.40 per hour for each hour paid to all employees covered by this agreement to the Central Depository. These payments shall be made not later than the 15th day of each month following the month for which payment is being made. Central Depository to remit same to Wisconsin State Carpenters Pension Fund.

Article VIII

Vacation Plan

The Employer agrees to withhold from the wages of the employee, after all legal deducations such as Social Security, taxes, etc.

have been made, forty cents per man hour worked for the Vacation Savings Plan. Said monies to be submitted to the Central Depository, which will remit same to the Blackhawk Credit Union, 164 South Academy Street, Janesville, Wisconsin 53545, monthly on the remittance forms furnished and to be submitted at the same time as Health & Welfare, Pension, Training Fund and Dues Checkoff with a copy of said remittance form to be mailed directly to the Union, 215 Dodge Street, Janesville, Wisconsin 53545.

Article IX

Apprenticeship & Training Fund

Section 9.1 During the life of this agreement each Employer covered by this agreement shall pay the sum of four cents ($.04) for each hour worked by all employees covered by this agreement to Southern Wisconsin apprenticeship and Journeyman Training Fund. Payment to such training fund must be made not later than the 15th of each month following the month for which payment is being made to the Central Depository which will remit same to the First National Bank, Janesville, Wisconsin 53545.

Section 9.2 Apprenticeship and Journeyman Training Fund is a trust fund created for the purpose of perpetuating, promoting and improving apprenticeship training and to further and increase the technological education of journeymen in all branches of the carpentry trade and for related purposes.

Section 9.3 The 'Contractor' or 'Employer' and the 'Union' covered by this agreement agree to be bound by all the terms of the trust agreement creating the Southern Wisconsin Apprenticeship and Journeyman Training Fund and by all of the actions and rules of the trustees administering such training fund in accordance with the trust agreement and regulations of the trustees, provided that such trust agreement, actions, regulations and rules shall not be inconsistent with this agreement. Each employer covered by this agreement hereby accepts as trustees appointed under and in accordance with such trust agreement and all succeeding trustees will be appointed under and in accordance with the trust agreement. Such employer hereby ratifies all actions already taken or to be taken by such trustees within the scope of their authority.

Section 9.4 The trustees are hereby authorized to establish a schedule of liquidated damages to be assessed against, and to be paid by, any employer who fails to make timely payments to Apprenticeship and Journeyman Training Fund in accordance with Section 9.1.

Section 9.5 To eliminate a situation where the financial status of the Apprenticeship and Training Fund would become insufficient or excessive and thereby have an effect on the technological education of journeymen or number of apprentices indentured or to be indentured, an annual review of the financial condition of the fund will be held each year immediately following the annual audit.

This review shall be made by the trustees of the fund who shall be appointed under and in accordance with such trust agreement. Should the analysis of this review indicate the need for an adjustment in the contribution rate, it shall be the duty of the negotiating committee to meet and negotiate the details for the adjustment. The aforementioned negotiations shall pertain to Article IX only and shall have no effect on the rest of this agreement.

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Article XI

General and Miscellaneous Provisions

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Section 11.11 Stewards: A. The union shall have the right to appoint its own steward without interference from the employers -- said steward to be employed on the job at all times when work covered by this agreement is being performed -- provided he is qualified to perform the work. Any dispute of his qualifications shall be resolved between the Union and contractor. In no case shall the steward be discharged because he acted in that capacity. In the event the steward is laid off and his activities on behalf of the union are found to be the cause, he shall be reinstated in the same capacity. Stewards shall be allowed reasonable and sufficient time to see that this agreement is being conformed to and to calling unsafe conditions to the attention of the employer. At any time the steward on the job thinks he cannot settle a question, he has the right to call the Business Manager or Representative on the job site. The superintendent or foreman shall make arrangements to meet the Business Manager or Representative when notified by same. The Steward shall see to it that an injured member's tools, properties and personal belongings are properly protected. Upon demand of the job steward or Business Manager or Representative members on the job shall present for inspection all remunerations received for work performed. In the event of a layoff of employee(s) covered by this Agreement, the Business Manager or Representative personally shall be notified two (2) hours in advance. If not able to contact the Business Manager or Representative, the Steward shall be given one (1) hour notice of the impending layoff. It will not be considered a violation of our present working agreement if a work stoppage occurs if this section pertaining to stewards is violated.

B. NO FOREMAN MAY ACT AS A STEWARD UNLESS HE IS THE ONLY CARPENTER ON THE JOB.

C. To be eligible to be a steward a member must be in good standing in Local 836 for a period of six (6) months.

. . .

Section 11.14 Pre-Job Conference: The Contractor shall notify the Union of each project prior to requiring services of Bargaining Unit members. The Union may if it desires request of the Contractor a Pre-Job Conference. Upon such request the Union and Contractor shall jointly establish a time and place for a pre-job conference. Said conference may be held by telephone if prime Contractor does not require services of a subcontractor who would employ Bargaining Unit members. Pre-Job Conferences may be held by telephone if mutually agreeable.

The maximum number of Union Carpenters not members of Local 836 on any project or job shall be determined by the pre-job conference or agreement between the Contractor and Business Manager or Business Representative of the Union. At no time shall the number of non-836 members exceed the number of 836 members on the Contractor's payroll on that project or job.

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Article XVII

Separability Clause

Section 17.1 It is the intention of the parties herein to comply with all applicable state and federal laws and they believe that each and every part of the contract is lawful. All provisions of this contract shall be complied with unless they are held to be invalid by a state or federal court, or administrative agency. If any provision of this contract is held to be invalid, remaining provisions shall not be affected thereby. However, any provision that has been held to be invalid, may be renegotiated at the request of either party."

4. That on June 23, 1975, Jack and James met with Forrest and Falkman for the purpose of collective bargaining; that during the course of said meeting the parties discussed matters related to Respondent's assumption of the terms of the area agreement; that during the course of said discussion Complainant orally agreed to allow Respondent to continue its practice of sending "fringe benefits" for its Milwaukee based employes to their relevant Milwaukee area trust funds; that Forrest told Respondent's agents Complainant was prepared to initiate its internal disciplinary procedures against Mark, Keith and Mathiak with respect to conduct which occurred June 19.

5. That on June 25th, Keith, Jack, James, Mark, Forrest, Falkman, and Stadler met at 11:30 a.m. at the Glen Nelson Restaurant, Lake Geneva, Wisconsin during which meeting Respondent by its agent Jack acting within the scope of his apparent authority executed a bonding agreement and a letter of assent, the latter of which provides in relevant part:

". . . The undersigned firm hereby agrees to comply with all of the terms and conditions of employment contained in the aforementioned agreement [area agreement] and all approved amendments and addenda thereto. It is further agreed that the signing of this Letter of Assent shall be as binding on the undersigned firm as though it had signed the above referred to agreement, addenda and any approved amendments thereto."

that during the course of the meeting the parties entered into several contemporaneous oral agreements by which: (1) they renewed the June 23rd agreement with respect to "fringe benefits", (2) they agreed Respondent need not use a member of Complainant as the first employe on any of its projects, but that on all of its projects in Complainant's jurisdiction other than the Glen Nelson project the second and fifty per cent of all succeeding employes actively employed at each project would be members of Complainant, (3) they agreed one of Respondent's men in Complainant's jurisdiction could be its foreman; that thereafter, but still during the course of said meeting Complainant informed Respondent it would not require work permits from Respondent's employes while working at the Nelson project; that Respondent never expressly or impliedly conditioned the existence of the agreement on Complainant's issuance of work permits to any of its employes or any other matter.

6. That thereafter, but no later than the end of June 26th, Forrest learned James may not have had actual authority to execute the aforementioned documents and learned both Michael and Keith definitely have such authority.

7. That thereafter, but no later than the end of June 26th, Forrest telephoned Respondent's office which call was received by Jack and stated in effect that Respondent was not a signatory to the area agreement because it had not executed the appropriate forms by an authorized agent and that he needed Michael or Keith's signature on the appropriate forms.

8. That although Respondent's agents received the replacement forms, none of them took any action with respect to the foregoing telephone conversation or executed the forms except as specified in finding of fact 9 below.

9. That at all relevant times after June 26th, Complainant adopted a course of conduct designed to directly and indirectly put economic pressure on Respondent to re-execute copies of the documents executed June 25th and to otherwise recognize the agreement, which course of conduct included, but is not limited to, a restrictive administration of its work permit rules and mailing Respondent two letters dated August 25th asserting Respondent had violated the agreement; that in response thereto, Respondent, by letter dated August 28th and received shortly thereafter by Complainant, repudiated said agreement.

10. That after June 25th Michael performed unit work in Complainant's jurisdiction for only four work days commencing August 22nd and including August 25th; that Mark did so only on June 26th; and that Urban did so for not more than four days.

11. That at various times after June 25th Respondent actively employed two or more non-members of Complainant on projects in its jurisdiction other than the Glen Nelson project; that membership in Complainant does not bear any appreciable relationship to length of service with Respondent, the industry or in any particular geographical area; nor does such constitute a training or other experience qualification for employment.

12. That on October 1, at all relevant times thereafter, Respondent refused and continues to refuse to permit agents or the trustees of funds created under Articles VII, VIII and IX of the area agreement to audit relevant payroll records.

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

CONCLUSIONS OF LAW

1. That Respondent M-K Hartmann Sons, Inc. is an employer within the meaning of the Wisconsin Employment Peace Act and the Labor Management Relations Act, as amended, over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.

2. That since Complainant, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local Union No. 836 has failed to establish by a clear and satisfactory preponderance of the evidence that Respondent has violated Article II, Article VI and Article XI, Section 11.11 and related oral agreements, all of a collective bargaining agreement in existence between the parties, Respondent did not, and is not committing an unfair labor practice within the meaning of Section 111.06(1)(f), Stats., by its conduct with respect thereto.

3. That since Respondent has failed to make contributions to the Southern Wisconsin Apprenticeship and Journeyman Training Fund pursuant to Article IX and a related oral agreement, all of a collective bargaining agreement in existence between the parties, Respondent has, and is, committing an unfair labor practice within the meaning of Section 111.06(1)(f), Stats., by said conduct.

4. That since the second paragraph of Article XI, Section 11.14 and related oral agreements are unlawful, Respondent did not, and is not,

Milwaukee area of any [Milwaukee] people we have, and anybody that we hire in the 836 area . . . their fringes are sent to [the 836 area funds]." Keith and Jack indicated the June 25th discussion was with respect to "fringes" without any specification as to what was included in the concept and what was not. Stadler, who was present only at the June 25 meeting, at first implied the concept of "fringes" had been more thoroughly refined, but later testified as if the conversation had been about "fringe benefits" without further definition. Forrest did not testify as to the nature of the discussions, but only with respect to his policy or practice. Jack's testimony suggests agreement was reached June 23rd and only confirmed June 25th. In any case, the Examiner concludes the parties talked in terms of "fringe benefits" on both days without specifically defining which items were and which weren't fringe benefits.

Manning under Section 11.14

During the June 25th meeting, Complainant originally sought under Section 11.14 to require Respondent to hire and use only members of Complainant for work in its jurisdiction. Respondent, on the other hand, wanted to use only its own employes, none of whom were members of Complainant. Respondent's witness, without direct contradiction, 4/ testified the parties reached a contemporaneous oral agreement (as contemplated by Section 11.14) by which Respondent could continue to use its own employes to finish the then nearly complete Glen Nelson Restaurant project, could use its own employes on projects requiring one employe, but on projects requiring more than one employe, the second and fifty percent of all succeeding employes would be members of Complainant. The foregoing is credited.

CONDITION PRECEDENT

The evidence does not support the Respondent's assertion it expressly or impliedly conditioned effectiveness of the agreement on Forrest's issuance of permits to its employes. At one point during the June 25th meeting, Forrest directed or instructed Falkman to issue permits to certain of Respondent's employes either after July 1 or effective July 1 at their work sites. Respondent's witnesses assert Forrest had also, on at least one occasion in the meeting, pushed the Letter of Assent to James and asked him in effect what it would take to get him to sign it. This Forrest denies. Assuming it did occur at sometime, the evidence does not establish it ever happened in temporal relation to the "July 1" statement. There is no evidence at all of an express demand from Respondent for Forrest to issue permits.

By contrast the evidence of the circumstances surrounding the meeting strongly suggests Respondent did not do so. In the June 23rd meeting Forrest announced he would not then issue permits, apparently for the purpose of pressuring Respondent to agree to Complainant's terms for settlement. During the June 25th meeting Forrest himself often raised points concerning the administration of the permit system to instruct Respondent as to how to comply with Forrest's policies. During the discussion immediately preceding the heavily relied on "July 1" statement, Forrest had indicated the employes at the Glen Nelson Restaurant project had failed to properly call-in to secure work permits. In order to put Forrest on the defensive 5/ in the ensuing discussion,

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4/ Stadler and Forrest may have meant to obliquely imply no such agreement was reached by testifying as if Section 11.14 did not specifically contemplate such oral agreements. If so, these implications are discredited.

5/ Tr. pp. 130-1, 154.

James raised an example of a former business representative of another local who had caused employes substantial inconvenience by requiring them to travel to his office to pick up work permits rather then having them delivered to each employe's assigned work site. 6/ With this context, the "July 1" statement was at most a demonstration of Forrest's positions; work permits would be issued on site, would not be required for the last days of June, and an implicit withdrawal of his previous refusal to issue work permits. Had Respondent expressly or impliedly conditioned existence of the agreement on Forrest's issuance of permits, a notation thereof should have appeared in Jack's notes. It did not. Assuming Respondent had been concerned about the issuance of work permits, its secret attempt to make the agreement unilaterally cancelable by deliberately having an unauthorized person execute the agreement, suggests Respondent felt itself in too poor a bargaining position to actually create a condition of any kind. Finally, the nature of the relation of issuance of work permits to the contract and its performance make it a matter which parties similarly situated would not make a condition precedent. On the basis of the above and the record as a whole, the Examiner concludes Respondent did not condition the existence of the agreement on the happening of any event.

REPUDIATION

Forrest testified his June 25 conversation with Jack consisted of his merely accepting Jack's assurances that James had the authority to execute the instant documents. By this version the letter of assent he later mailed to Respondent was simply part of a mass mailing. On the other hand Jack asserts Forrest said:

> "You're not signatory to that contract. I don't - - don't have the correct signature on there. I need Mike's signature on there. I need Mike's, or Keith's signature." 7/

Jack's testimony is corroborated by Michael and James with respect to his note of the conversation. By contrast Forrest's later self-help conduct for the purpose of pressuring Respondent to re-execute the oral agreement is inconsistent with his version. The Examiner credits Jack's version of the June 26 conversation.

In any case, the foregoing discussion was not a repudiation of the agreement. First, Forrest continually attempted to have Respondent re-execute it. Secondly, Forrest did not withdraw a quid pro quo for the agreement (his dropping the internal union proceedings against Mathiak, Keith and Mark for conduct prior to June 25.) 8/ Finally, Complainant attempted to enforce specific provisions of the agreement. 9/

James' testimony indicates he recognized Complainant was attempting to force it to recognize and execute the instant agreement. 10/ Thus, when James' sent his August 28th letter to Complainant stating "What contract?" it was his intention to repudiate the June 25th agreement. The Examiner finds James, not Forrest, repudiated the instant agreement.

6/ Tr. pp. 29, 39, 100, 129-130, 159.

7/ Tr. p. 135, both Respondent and Complainant share the same mistaken view of the law with respect to the existence of the agreement.

8/ See Exhibits 9 and 10, 12 and 24, Forrest confused Michael and Mark; also see Tr. pp. 46-47.

9/ See Exhibits 8 and 10.

10/ Tr. p. 77.

VIOLATION OF CONTRACT

Article II

Respondent's president, Michael, worked in Complainant's jurisdiction for four work days commencing Friday, August 22 and including Monday, August 25. 11/ Since Michael is a "contractor" within the meaning of Section 2.6, the other sections of Article II are not relevant. Section 2.6 requires membership in Complainant only if the contractor works in Complainant's jurisdiction eight or more days. The evidence submitted is insufficient to show Michael worked the required eight or more days.

The provisions of Article II, other than Section 2.6, do not require members of other locals of the Brotherhood to join Complainant or obtain work permits. Thus, Respondent's employment of Watterson and Mathiak did not violate Article II. It is not clear whether Urban was a member of another local. Mark is not. Mark worked one day in Complainant's jurisdiction after June 25th, while Urban worked not more than four. 12/ Complainant has failed to establish by a clear and satisfactory preponderance of the evidence that Respondent violated Article II.

Stewards Clause

Section 11.11 states in relevant part: ". . . The union shall have the right to appoint its own steward without interference from the employers . . . ." The foregoing does not require an employer to participate in, or insist upon, the selection of a steward. Complainant has failed to establish that it attempted to appoint a steward or that Respondent interfered in any way with any other person attempting to appoint a steward.

Subsection 11.11(c) states:

> "To be eligible to be a steward a member must be in good standing in Local 836 for a period of six (6) months."

Neither this provision, nor any other in the agreement, expressly provides who, if anyone, is eligible to be a steward when no employe at the work site has been a member in good standing of Complainant for at least six months. While Complainant contends Respondent must hire employes eligible to be stewards and assign at least one of each to each of Respondent's project sites in Complainant's jurisdiction, when work is being performed, its construction is inconsistent with the purpose of the subsection. As found above and as is implicit in Stadler's testimony, selection of stewards takes place without direct employer involvement. As Stadler indicated selection of a steward may be nothing more than an informal vote of unit employes present at a work site, without Complainant's direct involvement. 13/ Under the circumstances, the provision's purpose is to protect Complainant's interest in having a more experienced or more loyal union member be steward over a more popular, but less experienced or loyal one.

Construing Section 11.11 as a whole, Subsection (a) ordinarily contemplates selection of stewards from employes regularly assigned

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11/ Tr. 290-1.

12/ While Keith acted as Respondent's foreman for apparently a substantial period, there is no evidence he worked as merely an employe. By the terms of the oral agreement with respect to foremen, Keith is exempt from the terms of Article II, even though he is a "contractor".

13/ Tr. pp. 28-29.

by the Employer to the work site; nothing suggests any obligation to hire or originally assign any employe. While stewards are given substantial protection from layoff or reassignment over other employes, they are required to be qualified to perform the available work and are subject to discharge for essentially the same reasons as other employes.

Subsection (B) indicates foremen are not to be stewards, apparently because of possible conflict of interest between their responsibilities to the Employer and Complainant. However, it makes an express exception when the foreman is the only employe on the work site. While the possibility of conflict is lessened in the latter circumstances, it is not entirely eliminated. Apparently, the drafters contemplated the risks of conflict were of less importance than the expense of hiring an additional unnecessary employe to be steward or forbidding an employer from designating its sole employe on site as foreman. Taken with the whole, Section 11.11(c) is better construed as not requiring Respondent to hire or assign a qualified employe merely because none of its employes assigned to a work site have been members of Complainant in good standing for six or more months.

Foreman Clause

Keith and Mathiak acted as Respondent's foremen for work done, after June 1. The record does not establish whether Keith and Mathiak both acted as foreman at the same time on work in Complainant's jurisdiction. Although Complainant asserts Respondent violated Article VI, by having foremen who were not members of Complainant working in its jurisdiction, 14/ Jack's notes indicate a supervening oral agreement during the June 25 meeting: "one man in area can be our foreman." There is no evidence Respondent ever employed two people acting at one time as foreman in Complainant's jurisdiction after June 25, 1975.

Violation of Articles VII, VIII and IX

The record reveals an oral agreement of June 23rd, reaffirmed June 25th, by which Respondent was permitted to continue its practice of sending "fringe benefits" for its Milwaukee based employes to the home local funds. The term "fringe benefits" was never defined, although the parties agree Article VII funds are "fringe benefits" and Article IX funds are not. Complainant denies vacation funds under Article VIII are "fringe benefits".

Respondent's witness' testimony assumed it had a practice of sending vacation funds of its Milwaukee based employes working in other jurisdictions to the relevant Milwaukee based repository which assumption Complainant has not controverted. Vacation pay is money deducted from an employe's wages and paid into a savings or similar account under the employe's control. The only different result Complainant's interpretation could have from Respondent's is that a Milwaukee based employe could have vacation deduction for work done in other areas paid into a Milwaukee area account and vacation deduction for work in Complainant's jurisdiction paid into an account in Complainant's area. Complainant has offered no reason to offset this result's inconsistency with the general purpose of the overall oral agreement; to avoid unnecessary duplications by which employes might "lose" benefits. Therefore, vacation deductions are "fringe benefits" within the meaning of the oral agreement. On the basis of the foregoing the Examiner concludes Respondent was not obligated to pay funds to the repositories designated in Article VII and VIII for its Milwaukee based employes.

14/ Exhibit 10 is the only allegation raised.

Complainant was unable to establish by a clear and satisfactory preponderance of the evidence whether Respondent failed to contribute the proper amounts for both its Milwaukee based employes and non-Milwaukee based employes, if any, for time worked in Complainant's jurisdiction. On October 1, Respondent declined to have its payroll records audited by the auditors for the above funds. Since the foregoing constitutes a breach of Respondent's obligations under Section 3.5 of the area agreement, Respondent is today directed to submit to such an audit for its operations in Complainant's jurisdiction upon request of fund administrators. Further, since the foregoing violation materially affected Complainant's performance of its supervision and collection responsibilities the Exmainer has today entered an appropriate make whole remedy to insure Complainant is left in the position it would have been in had Respondent complied with Section 3.5.

Respondent never made any payments under Article XI although its employes have worked a substantial number of hours in Complainant's jurisdiction. Therefore, Respondent has violated Article IX of the agreement.

Manning

Section 11.14 states in relevant part:

> "The maximum number of Union Carpenters not members of Local 836 on any project or job shall be determined by the pre-job conference or agreement between the Contractor and Business Manager or Business Representative of the Union. At no time shall the number of non-836 members exceed the number of 836 members on the Contractor's payroll on that project or job."

Forrest agreed during the June 25th meeting to allow Respondent to assign a non-local 836 employe as the first employe at a project site while the next and fifty percent of all succeeding employes assigned would be members of Complainant. The above provision is itself clear and unambiguous with respect to the use of Complainant's members as opposed to members of other locals. Further, the purpose of the foregoing clause as evidenced by the parties' discussions and entire course of conduct is to obtain available work for members of Complainant by having Respondent discriminate with respect to hire and assignment of employes solely on the basis of whether they are a member of Complainant or not.

Section 8(a)3 of the LMRA makes it an unfair labor practice for an employer:

> "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

While exception is made for circumstances falling within the meaning of Section 8(f), none of the same are applicable. Specifically membership in Complainant is available to other members of the Brotherhood without regard to their residence. Thus, membership is not related to training or experience or measure of length of service with Respondent, in the industry or in any geographical area. The foregoing conduct if undertaken by Respondent would clearly be unlawful. 15/

15/ J. Willis & Sons Masonry 191 N.L.R.B. No. 128, 77 L.R.R.M. 1963 (1971); Norman Fromme d/b/a Norman Fromme Masonry Contractor 183 N.L.R.B. No. 83, 74 L.R.R.M. 1380 (1970).

The Examiner is satisfied that the provisions contained in the second paragraph of Article XI, Section 11.14 as defined by the parties' oral agreement of June 25th are unlawful under Section 8(a)3 and 8(b)2 of the LMRA. Section 17.1 states in relevant part: "All provisions of this contract shall be complied with unless they are held to be invalid by a . . . administrative agency." Pursuant thereto and under Section 111.07(7), Stats., enforcement thereof is denied.

REMEDY

Essentially Respondent has sought to have the Examiner deny enforcement of this agreement on the basis of Complainant's conduct which it asserts to be unlawful and/or in violation of the agreement. Respondent's performance of the terms of the agreement has not been materially affected by any of Complainant's actions, nor would Respondent be entitled to a money remedy if its arguments were correct. In essence then, Respondent's argument reduces to a "clean hands" defense, which the Commission should no more honor than it does with respect to other unfair labor practices. 16/ Pursuant to Complainant's request therefor, the Examiner has entered an appropriate general order to cease violating the lawful terms of the agreement.

Dated at Milwaukee, Wisconsin this 2nd day of May , 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II
Stanely H. Michelstetter II, Examiner

16/ Wis. E.R.B. v. United Automobile, Aircraft and Agricultural Implement Workers of America, 269 Wis. 478, at pp. 589-590 (1954); Milwaukee Cheese Co. (5792) 861; My's Restaurant (3822-B,C) 8/69.

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, LOCAL 836,	:	
Complainant,	:	Case II No. 19524 Ce-1627 Decision No. 13934-A
vs.	:	
M-K HARTMANN SONS, INC.,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS AND RESCHEDULING HEARING

United Brotherhood of Carpenters and Joiners of America, AFL-CIO Local No. 836, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission on September 2, 1975 attached to which was a purported collective bargaining agreement, but which attachment was ommitted from the filed copies of the complaint cited, and the Commission having by Order dated September 5, 1975 appointed Stanley H. Michelstetter II, a member of its staff, as an Examiner pursuant to Section 111.07, Wisconsin Statutes; and Respondent having filed a Motion to Dismiss the instant complaint on the basis that in the absence of said alleged agreement the complaint fails to state a cause of action and that Respondent has no basis for stating or preparing a defense and having moved that any hearing be held in Madison, Wisconsin; and Complainant having filed additional copies of the collective bargaining agreement to be attached to the copies of the complaint (a copy of which is to be provided); and the Complainant having agreed to the holding of a hearing in Madison, Wisconsin; and the Examiner having considered Respondent's motions and being satisfied that the Motion to Dismiss be denied and that hearing herein should be rescheduled and held in Madison, Wisconsin

NOW THEREFORE, it is

ORDERED

1. That Respondent's motion to dismiss be, and the same hereby is, denied.

WISCONSIN SPORTSERVICE, INC., III, Decision No. 13911

MEMORANDUM ACCOMPANYING DIRECTION OF REFERENDUM

The Stipulation for Referendum filed herein did not include an agreed-upon list of the names of eligible employes. Instead, it contained agreed-upon eligibility criteria and a provision that an eligibility list would be drawn by the Employer utilizing the date of Direction herein as the eligibility date, which list would be subject to addition or deletion by challenge on the date of the balloting. The Commission finds such a procedure unsatisfactory since thereunder the number of eligibles could not be approximated reliably for the purposes of tallying of results. Therefore the following procedure shall be followed herein:

1. Within ten days of the date of this Direction the Employer shall serve the Commission, the Union and the Petitioner with copies of a proposed eligibility list drawn in accordance with the criteria set forth in the Stipulation.

2. Within twenty days from the date of this Direction, each of the parties shall submit in writing to the Commission and to the other parties any additions or deletions which they propose with respect to such list and the basis for each such addition or deletion.

3. Upon receipt of such proposed additions or deletions, the Commission shall, if necessary, determine whether a further hearing is necessary to take evidence with regard to the eligibility of employes to vote in the referendum, or whether the individuals in dispute will be permitted to vote by challenged ballot.

Dated at Madison, Wisconsin this 29th day of August, 1975.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Morris Slavney
Morris Slavney, Chairman

Howard S. Bellman
Howard S. Bellman, Commissioner

Herman Torosian
Herman Torosian, Commissioner