STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, LOCAL UNION NO. 383, Complainant, vs. AMERICAN STRUCTURAL SYSTEMS, INC., Respondent.	Case I No. 20063 Ce-1656 Decision No. 14286-B

Appearances:
Kelly and Haus, Attorneys at Law, by Mr. Robert C. Kelly, appearing on behalf of the Complainant.
Mr. B. E. Thorson, Manager, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 383, having on January 21, 1976, filed a complaint with the Wisconsin Employment Relations Commission alleging that American Structural Systems, Inc. committed unfair labor practices within the meaning of Sections 111.06(1)(f) and 111.06(1)(a) of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes, and a hearing on said complaint having been held in Wausau, Wisconsin on March 23, 1976, before the Examiner; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 383, hereinafter referred to as the Complainant, is a labor organization having its principal office at 1602 South Park Street, Madison, Wisconsin.

2. That American Structural Systems, Inc., hereinafter referred to as the Respondent, is an employer operating a construction firm with its principal office at 4001 Dixie Drive, Wausau, Wisconsin.

3. That at all times material herein, Complainant and Respondent were parties to a collective bargaining agreement which provided for final and binding arbitration of disputes as to the proper interpretation of said agreement and contained the following material provisions:

"UNION SECURITY

Section 2. All employees who are members of the International Association of Bridge, Structural and Ornamental Iron Workers on the effective date of this Agreement shall be required to remain members of the Association in good standing as a condition of employment during the term of this Agreement. All employees may be required to become and remain members of the Association in good

standing as a condition of employment from and after the thirty-first day following the dates of their employment, or the effective date of this Agreement, whichever is later.

REFERRAL CLAUSE

Section 3. In order to maintain an efficient system of production in the industry, to provide for an orderly procedure of referral of applicants for employment and to preserve the legitimate interests of employees in their employment, the Employer and Union agree to the following plan of referral of applicants to employment.

(1) The Employer shall have the right to employ directly a minimum number of key employees who may consist of a superintendent, general foreman and foreman.

(2) The Employer shall request the Union to refer applicants as required and shall not recruit applicants directly or hire persons not referred by the Union, and shall not in any manner circumvent the union in recruiting applicants.

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WAGE AND BENEFIT RATES

Section 15. Effective May 1, 1975 through April 30, 1977, the hourly wage rates and benefits for structural, ornamental, reinforcing, machinery movers riggers, machinery erectors, welders, fence erectors, sheeters, stone derrickmen, bucker-up, pre-cast erectors-curtain wall and metal sash iron workers shall be as follows:

	Gross Wages	Health & Welfare	Pension	*Vacation	Apprentice Training Fund
May 1, 1975	$9.72	.40	.25	.25	.03
June 1, 1975	9.62	.50	.25	.50	.03
May 1, 1976 thru April 30, 1977	10.22	.50	.25	.50	.03

The Agreement will be reopened after 2nd year to negotiate economics for 3rd and 4th years

The minimum scale for foremen in the above classifications shall be as follows:
Foreman (2 men on job) $ .30 above journeyman's scale
Foreman (3 men on job) $ .60 above journeyman's scale
General Foreman (3 or more foremen) $1.00 over and above journeyman's rate

*The Vacation Fund is included in gross wages as this is tax deductible.

Health and Welfare, Pension and Apprentice Training Funds are fringe benefits, thus they are not tax deductible.

APPRENTICES:	1st 1000 hrs	2nd 1000 hrs	3rd 1000 hrs	4th 1000 hrs	5th 1000 hrs	6th 1000 hrs
May 1, 1975	$5.95	$6.90	$7.35	$7.85	$8.30	$8.80
June 1, 1975	6.00	6.90	7.35	7.80	8.25	8.70
May 1, 1976	6.35	7.30	7.80	8.30	8.75	9.25

The same Health and Welfare, Pension, Vacation and Apprenticeship Training Fund Payments as received by the journeymen, shall be paid for apprentices.

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SUBCONTRACTORS

Section 45(a). The Employer agrees not to subcontract or sublet any work covered by this Agreement to any person, firm or corporation which is not in contractual relationship with the International Association of Bridge, Structural and Ornamental Iron Workers or any of its affiliate local unions.

. . ."

4. That at all times material herein, the Complainant and Respondent were parties to a supplemental oral agreement which specified that if the Respondent had work which fell within the coverage of the parties' collective bargaining agreement, the Respondent's employes would apply for and receive weekly work permits from the Complainant until such time as Respondent's employes made application to become members of Complainant.

5. That on December 15, 1975, the Respondent entered into a contract with general contractor H. E. Martell for the erection and insulation of a steel span building in LaCrosse, Wisconsin; and that said project involved a substantial amount of work which was covered by the parties' collective bargaining agreement.

6. That on January 15, 1976, Respondent began work on the Martell project; that work continued on January 16, 1976 and January 17, 1976; that on January 17, 1976, Complainant's Business Manager, Homer Ingram received a call from Complainant's Union Steward, Roy Van Riper, which indicated that the Respondent was not using individuals represented by the Complainant to perform certain work on the Martell project, and that on January 19, 1976 the Complainant placed a picket on the Martell job site.

7. That on January 19, 1976, Respondent suspended work on the project until February 3, 1976 and February 4, 1976 when some work was performed; that on February 3, 1976, the Respondent subcontracted the remaining work on the Martell project to Richard J. Urntel who was not party to a collective bargaining agreement with the Complainant; and that Urntel finished the Martell project.

8. That the work performed by the employes of Respondent and Urntel on the Martell project included 600 hours of work which fell within the coverage of the parties' collective bargaining agreement; that Respondent's employes did not receive the wages and fringe benefits which said bargaining agreement specifies; and that none of Respondent's employes applied for a weekly work permit before or during the performance of work on the Martell project.

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

CONCLUSIONS OF LAW

1. That the Respondent violated the parties' 1975-1979 collective bargaining agreement by failing to employ individuals represented by the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 383, to perform certain work on the Martell project and by failing to pay the contractually required wage and fringe benefits to those individuals actually employed by the Respondent to perform said work and therefore committed an unfair labor practice within the meaning of Section 111.07(1)(f) of the Wisconsin Employment Peace Act.

2. That the Respondent violated the parties' 1975-1979 collective bargaining agreement by subcontracting certain Martell project work covered by said agreement to an individual who did not have a contractual relationship with the International Association of Bridge, Structural and Ornamental Iron Workers, Local Union No. 383, and thereby committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

IT IS ORDERED that Respondent, American Structural Systems, Inc., shall immediately:

1. Cease and desist from violating the terms of the parties' 1975-1979 collective bargaining agreement.

2. Take the following affirmative action which the undersigned finds will effectuate the purposes of the Wisconsin Employment Peace Act:

(a) In accordance with the attached memorandum, make whole those individuals on the referral list maintained by the International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 383, who would have performed a total of 600 hours of work on the Martell project.

(b) Make payments in accordance with the terms of the parties' 1975-1979 collective bargaining agreement to the Health and Welfare Pension, Vacation and Apprentice Training Funds on behalf of those individuals who would have performed a total of 600 hours of work on the Martell project under the terms of the collective bargaining agreement.

(c) Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days following the date of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 26th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint filed January 21, 1976, the Complainant alleged that the Respondent had committed unfair labor practices in violation of Sections 111.06(1)(a) and (f) of the Wisconsin Employment Peace Act (WEPA). More specifically, the Complainant alleged that the Respondent violated the parties' collective bargaining agreement by failing to employ individuals represented by the Complainant when performing certain work covered by said agreement and by failing to grant the contractually required wage and fringe benefits to those individuals actually employed. At the hearing, the Complainant orally amended its complaint to include an alleged violation of the collective bargaining agreement's subcontracting clause. The Complainant requested that the Respondent be ordered to cease and desist from committing said violations and that certain affirmative relief, including back pay, also be granted.

At the hearing, the Respondent orally answered the complaint by admitting the alleged violations but asserted by way of defense that said violations occurred because Complainant violated an oral agreement which supplemented the bargaining agreement. 1/

ALLEGED CONTRACTUAL VIOLATIONS

Initially, it must be noted that the Complainant has the burden of proving by a clear and satisfactory preponderance of the evidence that the Respondent committed the alleged unfair labor practices. In its complaint and its opening statement, Complainant alleged that certain work performed on the Martell project was covered by the parties' collective bargaining agreement and that said agreement required that the Respondent employ individuals represented by the Complainant at specified wage rates and restricted Respondent's right to subcontract. Complainant further alleged that the Respondent violated the bargaining agreement by failing to employ such individuals at the designated wage rates and by subcontracting work covered by the agreement to an individual who did not have a contractual relationship with the Complainant. Given the alleged contractual violations, the Complainant asserted that the Respondent thus had committed unfair labor practices within the meaning of Section 111.06(1)(a) and (f) of WEPA.

The Complainant submitted the collective bargaining agreement as its proof with respect to both said agreement's coverage and its requirements. Testimony was introduced to support Complainant's contentions with respect to the alleged contractual violations. With respect to the issue of whether the work in question was covered by the bargaining agreement, the Examiner finds that, in the face of a denial of said coverage, the bargaining agreement on its face might not have been sufficient to meet Complainant's burden of proof. However, the Respondent did not deny that the work in question was covered by the bargaining agreement. Furthermore, the Respondent did not deny that it had committed any of the alleged contractual violations. Therefore, on the basis of the Com-

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1/ The Respondent, by its express statement on the record, and the Complainant, by filing the instant complaint, have indicated no desire to have the controversy resolved through the arbitration process. On this basis, the Examiner finds that the parties have waived their conceivable right to proceed to arbitration. As the matter was fully litigated, the Examiner will assert the Commission's jurisdiction and resolve the merits of the dispute.

plainant's affirmative allegations, the absence of any denial by the Respondent, and the lack of evidence in the record which would contradict Complainant's allegations, the Examiner concludes that but for the Respondent's affirmative defense, the Complainant has met its burden of proof with respect to the Respondent's commission of the contractual violations and thus of the alleged unfair labor practices. Accordingly, the Examiner turns to an examination of Respondent's affirmative defense.

The Respondent asserted that the contractual violations occurred as a result of the Complainant's refusal to grant work permits to its employes in violation of an oral agreement between the parties. The record indicates that Respondent's Manager, B. E. Thorson and Local 383's Business Agent, Thomas Powers, did agree that with respect to work covered by the bargaining agreement, the Respondent's employes would apply for and receive weekly permits from the Complainant which would allow them to work until they applied for membership in the Complainant. As Respondent is asserting the Complainant's alleged failure to grant permits as an affirmative defense, it has the burden of proving by a clear preponderance of the evidence that applications for permits were in fact made to and subsequently denied by the Complainant in violation of the oral agreement. Respondent must then prove that Complainant's violation of the oral agreement excuses Respondent's subsequent commission of contractual violations.. Respondent's assertion that the Complainant violated said agreement is premised upon Thorson's testimony that several of Respondent's employes applied for permits on February 2, 1976, and that said applications were denied. However, this declaration is not supported by any testimony from the employes involved and is contradicted by that of Complainant's Business Agent. Therefore, the Examiner finds that the Respondent has failed to meet its burden of proving that applications were made and denied. It is noted, however, that application for permits several weeks after the Martell project began might not have constituted compliance with the terms of said oral agreement.

Having rejected Respondent's affirmative defense due to lack of proof and having concluded that the Complainant has satisfied its burden of proof with respect to the alleged contractual violations, the Examiner must conclude that the Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

THE REMEDY

The record indicates that the Respondent was utilizing five individuals on the Martell project to perform work covered by the collective bargaining agreement. The record also reveals that there was a total of 600 hours of work on the Martell project covered by said agreement. Five individuals working the contractually prescribed 40 hour week would take three weeks to exhaust the 600 hours of available work. The remedy fashioned herein will make whole those individuals on Complainant's referral list who would have performed said work during the three-week period if the Respondent had complied with the bargaining agreement.

It is the Examiner's intent that each of the top five individuals on the referral list as of January 15, 1976 receive a total of 120 hours of wages for the three weeks in question. However, to avoid a potential windfall, any hours worked by these individuals during the three-week period of January 15, 1976 through February 4, 1976 shall be deducted from the 120 hours specified above. Any hours so deducted shall be credited to the next individual on the referral list who would have performed the work due to the unavailability of his fellow employe. Thus, the combined total of the hours actually worked by any individual during the three-week period and the hours of wages received by said individual as a

result of this Order shall not exceed 120 hours. Utilizing this formula, the Complainant shall send the Respondent a certified list of the names, addresses, and amounts owed to those individuals who are to receive back pay and the Respondent shall send a check for the amount indicated to each listed individual.

Dated at Madison, Wisconsin this 26th day of May, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner