STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Complainant, vs. GIRAFFE ELECTRIC, INC., Respondent.	Case I No. 23418 Ce-1791 Decision No. 16513-A

Appearances:
Goldberg, Previant & Uelmen, S.C., by Mr. Gerry M. Miller and Mr. Scott D. Soldon, for Complainant.
Von Briesen & Redmond, S.C., by Mr. Douglas A. Cairns and Mr. Donald J. Cairns, for Respondent.
Michael, Best & Friedrich, by Mr. Thomas W. Scrivner, for National Electrical Contractors Association-Milwaukee Chapter.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO, herein referred to as Complainant, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission, herein referred to as the Commission, alleging that Giraffe Electric, Inc., herein referred to as Respondent, had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Stuart S. Mukamal, a member of its staff, as Examiner to make and issue findings of fact, conclusions of law and orders as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held on October 19, November 10 and November 15, 1978 in Milwaukee, Wisconsin, after which the parties having filed briefs, the last of which was received on January 17, 1979; and the Examiner having considered the evidence and arguments of counsel makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant, Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO, is a labor organization with its principal offices located at 2121 West Wisconsin Avenue, Milwaukee, Wisconsin. At all relevant times, James Kruse and John Schwab were agents of Complainant.

2. Respondent, Giraffe Electric, Inc., is a corporation engaged in the business of electrical contracting, with its principal office located at 12775 West Cold Spring Road, New Berlin, Wisconsin 53151. At all relevant times, Frank Jrolf acted as President and Treasurer of Respondent, and Marion Jrolf acted as Vice President and Secretary of Respondent.

3. The Electrical Contractors Association-Milwaukee Chapter, N.E.C.A., Inc., hereinafter referred to as NECA, is a multi-employer

association performing the function of representative for electrical contractors in the Milwaukee area for the purpose of collective bargaining with regard to wages, hours and working conditions; and the purpose of adjustment of grievances. Its principal office is located at 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203. In its capacity as bargaining representative, NECA has negotiated with Complainant a series of collective bargaining agreements known as "Inside Wiremen Agreements," hereinafter called Agreements, binding upon electrical contracting firms who indicate their assent to be so bound.

4. NECA and Complainant have negotiated Agreements covering the periods from September 1, 1972 through May 31, 1974; from June 1, 1974 through May 31, 1975; from June 1, 1975 through May 31, 1976; from June 1, 1976 through May 31, 1978 and from June 1, 1978 through May 31, 1980.

5. NECA and Complainant have instituted a practice whereby an electrical contracting firm consenting to be bound by the aforementioned Agreements evidences such consent by executing a standard-form "Letter of Assent." which Letter sets forth the requisite authorization on the part of the signatory firm for NECA to act as its collective bargaining representative for all matters contained in or pertaining to such Agreements. Said Letter also sets forth specific procedures required to be followed by a firm should it wish to terminate its consent to be bound by the terms and conditions of such Agreements.

6. On or about August 22, 1973, Frank Jrolf, in his capacity as President of Respondent, and Kruse, in his capacity as Business Manager of Complainant, executed a "Letter of Assent-A" which read as follows:

> In signing this letter of assent, the undersigned firm does hereby authorize National Electrical Contractors Association, Milwaukee Chapter as its collective bargaining representative for all matters contained in or pertaining to the current approved inside labor agreement between the National Electrical Contractors Association, Milwaukee Chapter and Local Union 494, IBEW. This authorization, in compliance with the current approved labor agreement, shall become effective on the 22 [sic] day of August, 1973. It shall remain in effect until terminated by the undersigned employer giving written notice to the National Electrical Contractors Association, Milwaukee Chapter and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned labor agreement.
>
> SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

7. On or about September 4, 1973, the execution of said "Letter of Assent-A" was approved by the International Office, I.B.E.W. and Respondent became bound to the terms and conditions of the then current Agreement as of that date.

8. NECA and Complainant subsequently entered into a collective bargaining agreement effective for the period from June 1, 1976 through May 31, 1978 which provided in pertinent part as follows:

AGREEMENT

> Agreement by and between the Electrical Contractors Association-Milwuakee Chapter, N.E.C.A., Inc. and Local

Union 494, I.B.E.W. It shall apply to all firms who sign a letter of assent to be bound by the agreement. As used hereinafter in this agreement the term "Association" shall mean the Electrical Contractors Association-Milwaukee Chapter, N.E.C.A., Inc., and the term "Union" shall mean Local Union 494, I.B.E.W. The term "Employer" shall mean an individual firm who has been recognized by an assent to this agreement. This agreement shall be effective on all inside electrical construction work in Milwaukee, Waukesha, Washington, and Ozaukee Counties in the State of Wisconsin.

. . .

ARTICLE I

RECOGNITION

Section 1.01 The Association, on behalf of its member Employers and other employers who have assented to this agreement, recognizes the Union as the sole and exclusive representative of all their Employees performing work within the jurisdiction of the Union for the purposes of collective bargaining, in respect to rates of pay, hours of employment and other conditions of employment.

. . .

ARTICLE IV

REFERRAL PROCEDURES

In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment:

1. The Union shall be the sole and exclusive source of referrals of applicants for employment.

2. The Employer shall have the right to reject any applicant for employment.

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ARTICLE XIII

ARBITRATION

. . .

Section 13.03 Grievances--Disputes During the term of this agreement, there shall be no stoppage of work either by strike or lockout because of any proposed changes in this agreement or dispute over matters relating to this agreement. All such matters must be handled as stated herein.

A. There shall be a Labor Management Committee of three (3) representing the union and three (3) re-

presenting the employer. It shall meet regularly at such stated times as it may decide. However, it shall also meet within forty-eight (48) hours when notice is given by either party. It shall select its own chairman and secretary.

B. All grievances or questions in dispute shall be adjusted by the duly authorized representative of each of the parties to this Agreement In the event that these two are unable to adjust any matter within forty-eight (48) hours they shall refer the same to the Labor Management Committee. A grievance must be presented in writing to the Association and the Union within thirty (30) days of the event giving rise to the grievance, or within thirty (30) days from the date the grievant reasonably should have been aware of the event. Otherwise, the grievance shall be waived.

C. All matters coming before the Labor Management Committee shall be decided by majority vote. Four (4) members of the committee, two (2) from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall have the right to cast the full vote of its membership and it shall be counted as though all were present and voting.

D. Should the Labor Management Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions shall be final and binding on both parties hereto.

. . .

ARTICLE XIV

DURATION OF AGREEMENT

Section 14.01 Effective Date This amended agreement is to take effect June 1, 1976, and is to remain in effect through May 31, 1978. It shall continue in effect from year to year thereafter, from June 1 through May 31 of each year unless changed or terminated in a way provided herein.

. . .

ARTICLE XV

ENFORCEMENT OF PAYMENTS TO FRINGE BENEFIT FUNDS

Section 15.01 "Fringe Benefit Fund", as that term is used in this Article, is any Trust Fund to which the Employer is obligated to make contributions under this Agreement i.e., [sic] the Milwaukee Electrical Construction Industry Health and Welfare Trust Fund, the Milwaukee Electrical Construction Industry Vacation Trust Fund, the National Electrical Benefit fund, the Milwaukee Electrical Construction Industry Pension Trust Fund, the Milwaukee Electrical Joint Apprenticeship and Training Trust Fund, and the National Industry Fund.

Section 15.02 The Employer's obligation, under this Agreement, to make payments and contributions to fringe

benefit funds for all employees covered by this Agreement, applies to all employees regardless of membership or non-membership in the Union.

. . .

Section 15.03 All payments to the fringe benefit funds for employees covered by this Agreement, and while the same is in effect, are deemed to be paid pursuant to this Agreement.

. . .

Section 15.05 The Trustees of any fringe benefit fund may, for the purpose of collecting any payments required to be made to such funds, including damages and costs and for the purpose of enforcing rules of the Trustees 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 the grievance or arbitration procedure otherwise provided for in this Agreement. . . .

Section 15.06 1/ All employers subject to this agreement shall remit weekly, not later than the eighth day following the close of the payroll week specified in Article V, Section 5.05 - B to the Electrical Construction Industry Board on forms provided by Trustees of said Board, all amounts due the following listed trust funds. The trustees of the Electrical Construction Industry Board shall weekly credit each of these below listed trust funds the total amount received in accordance with the terms of this agreement.

Article VII, Section 7.02 A	Supplementary Pension Trust Fund
Article VIII, Section 8.01-B	Vacation & Holiday Trust Fund
Article IX, Section 9.01-B	Health & Welfare Trust Fund
Article X, Section 10.09	Joint Apprenticeship & Training Trust Fund
Article XI, Section 11.14	Union Dues Checkoff
Article XII, Section 12.01	National Industry Fund

9. During the latter party of 1973 and the earlier part of 1974, Respondent utilized the referral procedures then operated by Complainant as set forth in the then current Agreement and Respondent obtained several of its employes in accordance with said referral procedures. Respondent ceased its use of these referral procedures in 1974 and has not employed any person obtained by said procedures at any time subsequent to August 23, 1974.

10. Respondent made payments to the various "fringe benefit funds" for all employes obtained through the referral procedure, in compliance with the Agreements then in effect. Respondent has

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1/ Effective July 1, 1977, per National Agreement.

not made any such payments for employes not obtained through the aforementioned referral procedures.

11. On July 13, 1977, Complainant filed a grievance, hereinafter referred to as the "Tsobanglou grievance," with NECA on behalf of Paris Tsobanglou, herein referred to as Grievant, wherein it alleged that Respondent has violated the 1976-1978 Agreement by having employed Grievant from May 1977 until June 1977 without resort to the referral procedure as set forth in Article IV of said Agreement. Complainant demanded that Respondent pay certain sums as back wages to Grievant and that it pay additional sums into the various "fringe benefit funds" as set forth in said Agreement.

12. Pursuant to Article XIII of the 1976-1978 Agreement, the Labor Management Committee for the Electrical Construction Industry of Milwaukee, herein referred to as the Committee, consisting of three representatives of Complainant and three representatives of NECA, conducted a hearing on November 10, 1977 concerning the Tsobanglou grievance, during which Frank Jrolf was present. Jrolf did not object to the composition or jurisdiction of the Committee during said hearing. At the conclusion of the hearing, the Committee determined that said grievance was meritorious and that the extent of Respondent's liability to Grievant and to the various "fringe benefit funds" would be determined at a subsequent meeting.

13. During the hearing referred to in paragraph 12 above, the Committee addressed questions to Frank Jrolf and to Grievant, through an interpreter, and during said hearing, Jrolf was not prevented from recounting his version of the events underlying the matters at issue. Frank Jrolf was not asked to be present during the testimony of Grievant and was not given the opportunity to cross-examine Grievant or to direct questions to members of the Committee, nor was he invited to make argument or present evidence to the Committee except in response to questions asked of him.

14. On March 7, 1978, the Committee met for the purpose of determining the extent of Respondent's liability and on that date, it ordered Respondent to pay Grievant the sum of $2771.42 and to pay into the Milwaukee Electrical Industry Board for various "fringe benefit funds" the sum of $818.88. Frank Jrolf was not notified that such meeting would take place and was not present during the meeting. Schwab was present and assisted the Committee in the computation of said amounts. Respondent has failed and refused to comply with the order of the Committee.

15. During the March 7, 1978 meeting of the Committee referred to in paragraph 14 above, Schwab's input on behalf of Complainant was influential in determining the extent of Respondent's liability to Grievant and to the "fringe benefit funds." Respondent was effectively denied the opportunity to be present during the detemination of and to present evidence concerning said issue.

16. Frank Jrolf, on behalf of Respondent, voluntarily executed the "letter of Assent-A" referred to in Finding 6, above, and was not compelled to do so by Complainant or any of its agents; nor did Respondent file with any competent tribunal within the requisite time period any complaint alleging that its execution of said "letter of Assent-A" should be set aside on the ground that it was obtained under duress.

17. Respondent affirmed its intention to be bound by the then current Agreement by utilizing the referral procedures operated by Complainant during the months following its execution of

the "letter of Assent-A" referred to hereinabove and did not at any time prior to the commencement of the instant proceedings assert that it was not so bound.

18. Respondent did not, at any time prior to or during the period of May 1977 through July 1977 within which it employed Grievant, terminate or revoke in a timely and effective manner its execution of the "letter of Assent-A" referred to hereinabove.

19. Complainant did not commit any material breach of any of the various Agreements of such a nature as to relieve Respondent of its obligation to abide by the terms and conditions of said Agreements.

20. The Committee was established pursuant to, and derived its authority from, the 1976-1978 Agreement to hear and adjust all grievances arising thereunder and to issue final and binding orders with respect thereto, and such authority was properly extended to the Tsobanglou grievance.

21. The members of the Committee were not arrayed in common interest against Respondent, nor did the Committee or its members share any economic or other direct interest in the adjustment of the Tsobanglou grievance, nor did the Committee inherently or in fact harbor evident bias or prejudice against Respondent.

22. The proceedings conducted by the Committee involving the Tsobanglou grievance as hereinabove described, were sufficiently fraught with procedural irregularities such as to indicate that Respondent was not provided due process of law and that the order of the Committee with regard thereto was issued in the absence of a fair hearing.

Upon the basis of the above and foregoing, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Since the instant complaint alleges that Respondent violated the terms of a collective bargaining agreement and that Respondent has refused and/or failed to recognize as conclusive the determination as to an issue in controversy involving employment relations issued by a tribunal whose jurisdiction accepted, within the meaning of Section 111.06(1)(f) and (g) Wis. Stats., and since Respondent has not availed itself of any rights of appeal which it may have had pursuant to the terms of the aforesaid collective bargaining agreement, the Wisconsin Employment relations Commission has jurisdiction to decide the merits of said complaint.

2. The "Letter of Assent-A" executed by Frank Jrolf on behalf of Respondent and referred to in paragraph 6 of the Findings of Fact was binding upon Respondent, has been ratified by the subsequent conduct of Respondent any may not be set aside at this time by Respondent on the grounds that it was obtained under duress.

3. Respondent was bound by the terms and conditions of the 1976-1978 Agreement during the period within which it employed Paris Tsobanglou.

4. The Labor Management Committee was a tribunal which, by virtue of the 1976-1978 Agreement, was competent to hear and adjust the grievance of Paris Tsobanglou and one whose jurisdiction was accepted by Respondent. Respondent has not exercised any rights of appeal from the determination of the Labor Management Committee that may have been available to it, whether to the Council on

Industrial Relations for the Electrical Contracting Industry, to the courts or to any other entity.

5. The order issued by the Labor Management Committee on March 7, 1978 relating to the grievance filed by Complainant, Local Union 494, against Respondent on behalf of Paris Tsobanglou was issued in the absence of a fair and regular hearing, and therefore said order is null and void, and therefore Respondent did not commit and has not committed any unfair labor practices within the meaning of the Wisconsin Employment Peace Act in failing to comply with said order.

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

ORDER

1. The order of the Labor Management Committee for the Electrical Construction Industry of Milwaukee issued on March 7, 1978 with respect to the Paris Tsobanglou grievance is hereby set aside.

2. The Paris Tsobanglou grievance shall be resubmitted by Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO for hearing and final disposition ot the Labor Management Committee for the Electrical Construction Industry of Milwaukee within thirty (30) days from receipt of a copy of this order, and in the course of such hearing, said Committee shall provide Giraffe Electric, Inc. with the opportunity to present evidence, to examine witnesses, and to make arguments concerning all issues relating to the merits of said grievance, including, but not limited to, the extent, if any, of the liability of Giraffe Electric, Inc. to Paris Tsobanglou and to the various "fringe benefit funds" as set forth in the 1976-1978 Inside Wiremen Agreement.

3. Both Local 494, International Brotherhood of Electrical Workers, AFL-CIO and Giraffe Electric, Inc. shall, within twenty (20) days from the date thereto, notify the Wisconsin Employment Relations Commission in writing as to the steps that they have taken to comply with this Order.

Dated at Milwaukee, Wisconsin this 16th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S Mukamal
Stuart S. Mukamal, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The complaint filed in the instant matter alleges Respondent committed an unfair labor practice within the meaning of Section 111.06(1)(f) and (g), Wis. Stats., when it failed to comply with an order of the Labor Management Committee for the Electrical Construction Industry of Milwaukee (the "Committee") dated March 7, 1978 directing the payment of $2771.42 in back wages to Paris Tsobanglou ("Tsobanglou") and $818.88 to the Milwaukee Electrical Industry Board for the various "fringe benefit funds" for fringe benefits attributable to Tsobanglou. In its answer, Respondent admitted failure to comply with the above order, and raised a number of affirmative defenses with respect thereto.

Many of the underlying facts are in dispute, which will be more fully elaborated below.

Positions of the Parties

Complainant alleges that Respondent freely and voluntarily executed a form "Letter of Assent-A" on August 22, 1973 which letter authorized the National Electrical Contractors Association, Milwaukee Chapter ("NECA") to represent Respondent for the purposes of collective bargaining with Complainant regarding wages, hours and working conditions. It also alleges that NECA and Complainant have entered into a series of collective bargaining agreements known as Inside Wiremen Agreements ("Agreements") which are binding on Respondent by virtue of Respondent's execution of the aforementioned Letter of Assent. The Agreement pertainint to this matter (hereinafter, the "1976-1978 Agreement") was effective for the period June 1, 1976 through May 31, 1978.

Complainant further alleges that on July 13, 1977, it filed a grievance on behalf of Tsobanglou claiming that the terms and conditions of Tsobanglou's employment by Respondent violated certain provisions of the 1976-1978 Agreement, and demanding that Respondent pay back wages to Tsobanglou and certain sums representing unpaid fringe benefit contributions to the Milwaukee Electrical Industry Board. The Committee held a hearing on said grievance on November 10, 1977 pursuant to its authority as set forth in Section 13.03 of the 1976-1978 Agreement, determined that the grievance was valid, and deferred the question of the extent of Respondent's liability until a subsequent meeting. On March 7, 1978, the Committee met concerning the grievance and issued the order previously referred to. The gravament of the instant complaint is Respondent's failure to comply with this order.

Complainant denies that Respondent executed the form Letter of Assent under duress and, alternatively, that Respondent is barred from raising the issue both by lapse of time and by subsequent conduct evidencing ratification of its status as a signatory to the Letter of Assent. It further denies that Respondent at any time terminated or revoked its execution of the Letter of Assent as set forth in the text of that Letter, and states that no past practice existed that permitted signatories of Letters of Assent to terminate their status as such by any method other than that as set forth by those Letters. Complainant further denies that it committed any material breach of any of the series of Agreements such as to excuse Respondent from its obligations thereunder.

Complainant alleges that the Committee should properly be accorded the status of an arbitration panel whose authority derives from the 1976-1978 Agreement, that the Committee was not arrayed in

common interest against Respondent and did not exhibit any bias against Respondent, and that in its disposition of the Tsobanglou grievance, the Committee afforded Respondent all necessary procedural and substantive rights. It therefore argues that the Committee's Order should be enforced.

Respondent does not dispute that it executed the aforementioned Letter of Assent on August 22, 1973, that it employed Tsobanglou from May through July, 1977, that a grievance was filed on Tsobanglou's behalf, that said grievance was heard by the Committee, that the Committee ordered it to pay the aforementioned sums to Tsobanglou and to the Milwaukee Electrical Industry Board, and that it has not complied with that order. It did assert a number of affirmative defenses to the complaint as follows:

(1) Respondent claims that the Wisconsin Employment Relations Commission lacks jurisdiction over the instant dispute as such is preempted by that of the National Labor Relations Board.

(2) Respondent contends that its execution of the letter of Assent was obtained under duress, solely as a result of threats and coercion stemming from a series of incidents involving employes and officers of Respondent that occurred in Racine County during the summer of 1973, and that the Letter of Assent was not binding on Respondent and was voidable at will.

(3) Respondent argues that its obligation to abide by the terms and conditions of the various Agreements was vitiated by the alleged material breach of said Agreements by Complainant.

(4) Respondent claims that it effectively revoked its execution of the Letter of Assent by virtue of two letters purportedly mailed by its President, Frank Jrolf, to Complainant in which Respondent stated that it wished to cancel its contract with Complainant. These letters were allegedly mailed in February 1974 and in November 1975, prior to the period of Tsobanglou's employment.

(5) Respondent contends that the Committee did not possess the authority to issue a final and binding order warranting enforcement by the Commission, that the Committee was not a "neutral" decision-maker in that its members were arrayed in common interest against Respondent and in that their economic interests were directly affected by the outcome of the proceedings before it, and that the two meetings of the Committee regarding the Tsobanglou grievance were conducted in such a manner so as to have denied Respondent a fair and impartial hearing.

The Order herein will discuss the aforementioned affirmative defenses, which all address the issue of whether the Labor Management Committee had jurisdiction over the Tsobanglou grievance and whether it properly exercised its authority in resolving said grievance as it did. I shall not address the merits of the Tsobanglou grievance, i.e. the existence and extent of Respondent's liability, if any, for back wages and fringe benefits arising from Tsobanglou's employment.

Discussion

I - Jurisdiction

Section 111.06(1)(f) and (g) states that:

> It shall be an unfair labor practice for an employer, individually or in concert with others:
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> . . .

(f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

(g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

Section 301 of the National Labor Relations Act confers jurisdiction upon Federal district courts over suits for violation of collective bargaining agreements. The U.S. Supreme Court has ruled Complainant has alleged a violation of Section 111.06(1)(f) and (g) sufficiently in order to bring the instant matter properly within the Commission's jurisdiction that state courts possess concurrent jurisdiction over cases involving alleged breach of collective bargaining agreements, including those involving provisions respecting compliance with arbitration awards, on the grounds that Section 301 was not designed to displace state courts from their pre-existing jurisdiction regarding these matters. 2/ The Wisconsin Supreme Court has in turn held that state administrative agencies, and in particular, the Commission, are authorized to adjudicate disputes involving alleged violations of collective bargaining agreements, stating that a state is free to allocate judicial power within its own boundaries as it sees fit, 3/ and the Commission has repeatedly held that it possesses jurisdiction over Section 301 actions, regardless of whether the employer involved is otherwise subject to the jurisdiction of the National Labor Relations Board. 4/ The Commission's authority over Section 301 actions extends to actions for enforcement of arbitral awards. 5/

Respondent contends that the jurisdiction of the Commission is preempted since certain of the allegations raised by it in its Affirmative Defenses involve conduct arguably protected or prohibited by the National Labor Relations Act. I find this argument to be without merit inasmuch as this preemption doctrine, announced in San Diego Building Trades Council v. Garmon 6/ has repeatedly been held to have no applicability to Section 301 actions to enforce collective bargaining agreements. 7/

2/ Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967), Smith v. Evening News Assn. 371 U.S. 195, 51 LRRM 2646 (1962), Charles Dowd Box Co. v. Courtney 368 U.S. 502, 49 LRRM 2619 (1962).

3/ American Motors Corp. v. WERB 32 Wis. 2d 237 (1966), Tecomseh Products Corp. v. WERB 23 Wis. 2d 118 (1964).

4/ See, e.g., UOP Norplex Div. (13214-A, B) 1/76, G & H Products Inc. (13225-A, B) 6/75; Oscar Mayer & Co. Inc. (11591-B, C) 10/74, Halquist Lannon Stone Co. (4732) 4/58.

5/ General Drivers v. Riss & Co. 372 U.S. 517, 52 LRRM 2623 (1963), Electrical Contractors v. Local 103 IBEW 77 LRRM 2911 (D. Mass., 1971).

6/ 359 U.S. 236, LRRM 2838 (1959).

7/ See, e.g., Arnold Co. v. Carpenters District Council 417 U.S. 12, 86 LRRM 2212 (1974), Vaca v. Sipes supra, Smith v. Evening News Assn. supra, Local 174 Teamsters v. Lucas Flour Co. 369 U.S. 95, 49 LRRM 2717 (1962).

II - Duress and Effectiveness of Respondent's Execution of the Letter of Assent

Respondent's contention is that its signature to the Letter of Assent by which it designated NECA as its collective bargaining representative and agreed to become bound to the series of Agreements was procured by violence and threats of violence and therefore not binding. It bases this view upon a series of incidents that took place in the Racine area in August of 1973. 8/

It is apparent that Frank Jrolf's execution of the Letter of Assent in August 1973 was at least in part motivated by a desire to avoid further obstructions to the completion of his work in that area. However, even assuming arguendo that: (1) the actions of the Racine local constituted illegal means rather than the use of legitimate economic sanctions 9/ and that (2) the allegedly illegal means employed by the Racine local could somehow be imputed to Complainant (no evidence adduced in the record sufficiently establishes such a connection), Respondent cannot at this time contend that its execution of the Letter of Assent was not binding and effective. The defense of duress was never raised in any proceeding involving Respondent's relationship with Complainant until the commencement of this proceeding, more than five years following the actions of which it complains. Respondent did not refer to any such duress in any of its later correspondence with Complainant or with NECA. Respondent filed no actions with the Commission, the National Labor Relations Board or the courts seeking to rescind its execution of the Letter of Assent. Instead, Respondent chose to observe

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8/ Very briefly, the alleged events were as follows: Salvus and Meyer were working at a residential project site when they were approached by a business agent of the Racine local of the IBEW (a local not related to Complainant) who ordered them off the jobsite. They informed Frank Jrolf of such, and indicated they would not return to the jobsite. Frank Jrolf thereupon went to the jobsite himself to complete his work, whereupon two representatives of the Racine local approached him and ordered him off the job. When Jrolf refused, an altercation ensued and the two union representatives knocked out some of Jrolf's work. Jrolf returned and completed his work the next day. Later that week, Jrolf was working at another jobsite in the same area when he was again approached by representatives of the Racine local and ordered off the jobsite. Jrolf, who was then engaged in several projects in the Racine area, inquired as to what he would be required to do in order to be permitted to proceed with his work, and Jerry Hedding, one of the union representatives, replied that he would be required to join the Racine local. Jrolf was further informed that membership in the Milwaukee local, i.e., Complainant, was required as a precondition of membership in the Racine local. Jrolf agreed to join both locals. Hedding thereupon telephoned James Kruse, Complainant's Business Representative, and informed him of Jrolf's decision. Jrolf visited Complainant's office two days later and he and Kruse executed the Letter of Assent. Jrolf joined the Racine local within a few days by executing a second Letter of Assent with that local.

9/ An employer may not repudiate a collective bargaining agreement on the ground of duress unless illegal means are used to compel its assent. Sabella v. Litchfoeld 71 LRRM 3001 (Cal. App., 1969), McKay v. Retail Auto Salesmen's Local Union No. 1067 16 Cal. 2d 311, 7 LRRM 702 (1940).

its contractual obligations for a period of about one year following its execution of the Letter of Assent, even going so far as to employ a number of persons referred to it by Complainant, and to pay wages and fringe benefits respecting those persons as set forth in the then current Agreement. In Lewis v. Kerns 10/ involving somewhat similar facts to those at hand, it was held that:

> The defendants further contend that the contracts are invalid in that they were executed by reason of duress, namely the concerted activity and threats of the United Mine Workers of America and in order to avoid strikes, work stoppages, etc. . . .
>
> Assuming . . . that the duress alleged here by the defendants was unlawful the contracts are not void but only voidable and may be ratified and affirmed by the party upon whom the alleged duress was practiced . . . . In addition, to render a contract voidable by reason of duress an election to rescind and challenge the validity must be made within a reasonable time . . . . Defendants here admit that during the period January 1, 1955, through December, 1957, they operated under the terms of the contracts in question . . . . At no time during the three year period involved in this action did the defendants by an affirmative act attempt to rescind the contracts and the question of the validity of the contracts by reason of duress is raised here for the first time. It must be held, therefor, that the defendants having ratified the contracts by their actions and failing to rescind over a period of three years are now estopped to deny the validity of the contracts . . . . [citations omitted] 11/.

The courts have also repeatedly held that an employer who has made contributions to a trust fund established under the terms of a collective bargaining agreement over a substantial period of time may not, when later sued by a union to enforce such an agreement, contend at that time that the agreement is unenforceable by reason of duress. 12/

Respondent's conduct during the period following its execution of the Letter of Assent clearly amounted to an affirmative ratification of its contractual status, and Complainant consistently and reasonably relied on the fact that Respondent had acted in this manner for several years in its dealings with Respondent. Respondent must, under the circumstances, be estopped at this juncture from claiming duress surrounding the execution of the Letter of Assent as a defense to the performance of obligaions assumed thereby.

10/ 175 F. Supp. 115, 45 LRRM 2055 (S.D. Ind., 1959).

11/ Id., 45 LRRM at 2057. See also the following cases to the same effect: Pio v. Kelly 93 LRRM 2168 (Ore., 1976), Lewis v. Mill Ridge Coals Inc. 47 LRRM 2028 (E.D. Ky., 1960), Boyle v. North Atlantic Coal Corp. 331 F. Supp. 1107, 78 LRRM 2411 (W.D. Pa., 1971).

12/ See, e.g., Pio V. Kelly, supra, n. 10, Boyle v. North Atlantic Coal Corp. supra, n. 10, Lewis v. Young & Perkins Coal Co. 190 F. Supp. 838, 47 LRRM 2478 (W.D. Ky., 1960), Lewis v. Coleman 257 F. Supp. 38 (S.D. W. Va., 1966), Lewis v. Harcliff Coal Co. 237 F. Supp. 6 (W.D. Pa., 1965).

III - Material Breach

Respondent has claimed that Complainant committed a material breach of the then current Agreement in that it referred an applicant to Respondent late in 1973 who was unqualified to perform electrical work.

Material breach occurs when a party to a contract who is ready and willing to perform his obligations thereunder is prevented from doing so by the breach of contractual obligations by another contracting party when the performance of the former party was dependent on the performance of the latter party. A party to a contract will therefore be relieved of liability for non performance of its obligations when another contracting party, by its conduct, hindered or prevented the first party from performing. 13/ This doctrine has been interpreted rather narrowly in the case of collective bargaining agreements, 14/ and there is no basis for applying it to this dispute. In no way did Complainant's referral of an unqualified applicant hinder or prevent Respondent from performing its obligations under the then current Agreement. Indeed, Respondent wrote a letter to Complainant within a few days of the referral in question in which it rejected the applicant, setting forth its reasons thereof. Respondent's right to reject applicants (set forth in Article IV, par. 2 of the 1976-1978 Agreement) apparently existed precisely with this purpose in mind, i.e., to give it the right to screen out unqualified applicants. Respondnet's claim that Complainant committed a material breach of the then current Agreement in 1973 must therefore be denied.

IV - Termination or Revocation of the Letter of Assent

Respondent claims that, as of the period during which it employed Tsobanglou, it was no longer bound by the then current (1976-1978) Agreement since its President, Frank Jrolf, had sent two letters to Complainant, terminating Respondent's execution of the Letter of Assent. These letters were allegedly mailed in February 1974 and November 1975, and Respondent claims that such action satisfies the procedural requirements for termination as set forth by the text of the Letter of Assent. Complainant asserts it never received either of these letters, and that a search of its files revealed no copies of these letters. Kruse and Schwab testified that they had no recollection of ever having seen or been made aware of those letters.

Respondent's execution of the Letter of Assent on August 22, 1973 constitutes a rebuttable presumption of the fact that Complainant and Respondent did enter into a collective bargaining relationship. Given that Respondent has chosen to allege termination of said status as an affirmative defense to its contractual obligations,

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13/ See People's Trust & Sav. Banks v. Wasserstein 226 Wis. 249 (1937), Case v. Beyer 142 Wis. 496 (1910), 17 Am. Jur. 3d "Contracts" §§ 425-426 at 880-882.

14/ For example, it has been held that breach by a union of a contractual no-strike clause does not relieve the employer from its obligation to arbitrate disputes arising from the union's breach when such disputes are covered by the contractual arbitration clause. See Local 721 Packinghouse Workers v. Needham Packing Co. 376 U.S. 247, 55 LRRM 2580 (1964), Drake Bakeries v. Local 50, Bakery Workers 370 U.S. 254, 50 LRRM 2440 (1962).

it bears the burden of proving the fact of termination by a clear and satisfactory preponderance of the evidence. 15/

The Letter of Assent executed by Respondent provided that "[i]t shall remain in effect until terminated by the undersigned employer giving written notice to the National Electrical Contractors Association, Milwaukee Chapter and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement." This language indicates that a Letter of Assent, once executed, is effective until terminated and therefore in the absence of such termination its binding effect is applicable to successor Agreements as well as to the Agreement in effect at the time of its execution. 16/ It also

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15/ Section 111.07(3) Stats. states that:

> A full and complete record shall be kept of all proceedings had before the commission, and all testimony and proceedings shall be taken down by the reporter appointed by the commission. Any such proceedings shall be governed by the rules of evidence prevailing in courts of equity and the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.

Section 903.01 Stats. provides that:

> Except as provided by statute, a presumption recognized at common law or created by statute, including statutory provisions that certain basic facts are prima facie evidence of other facts, imposes on the party relying on the presumption the burden of proving the basic facts, but once the basic facts are found to exist the presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence." [Emphasis added.]

See also NLRB v. Mueller Brass Co. 88 LRRM 3236 (5 cir., 1975) (statute of limitations is an affirmative defense to be proved by party raising said defense). American Case & Register Co. v. Wetzler 148 Wis. 168 (1912), Felt & Tarrant Mfg. Co. v. Northwestern Egg & Poultry Co. 178 Wis. 552 (1922) (burden of proof regarding cancellation of contract rests upon party alleging same).

16/ Further support for this view is found in the uncontradicted testimony of John Schwab, who stated that this portion of the Letter of Assent indicated that its duration is indefinite--i.e., it remains in effect until terminated. Schwab termed this an "evergreen clause." In addition, in a letter dated November 28, 1972 and addressed to its Vice Presidents, International Representatives and locals concerning revisions of the language of Letters of Assent, the International office of the IBEW stated that:

> The new letter of Assent "A" need not be renewed or replaced each time a new agreement is negotiated. The Assent A, therefore, should be used in all cases except where the individual employer and the Local Union wish to limit the duration of the Assent. In such cases, the Assent B must be used as it will automatically expire on on its termination date. [Emphasis theirs.]

Nothing in the record contradicts the view of Complainant the the duration of the "Letter of Assent-A" was indefinite. New Letters of Assent were not mailed when new Agreements were negotiated.

sets forth the procedural requisites necessary to effect a termination, i.e., the mailing of two notices, one to Complainant and one to NECA, within a specified time period. The phrase "the then current anniversary date of the aforementioned approved labor agreement" is ambiguous. However, testimony indicated that this term was meant to denote the expiration date of the Agreement in effect at the time a signatory seeks termination. This is a reasonable contruction of the phrase, affording a liberal period of time for termination. 17/

Clearly, the letter allegedly mailed in February 1974 could not have resulted in an effective termination of Respondent's status as signatory to the Letter of Assent. No copy of such a letter was produced at the hearing and testimony indicated that no copy of this letter was ever made. John Mechanic, Respondent's Accountant, who held periodic disucssions with Frank Jrolf regarding his status vis-a-vis Complainant heginning in early 1974, stated that he had not even seen a copy of this letter. Thus there is substantial doubt as to the very existence of this letter. Even if it was mailed as alleged, it would not constitute an effective termination. The contract then in effect expired May 31, 1974, and a letter mailed in February 1974 would have been untimely, since it would have been mailed within 150 days of the expiration date. Given that no evidence exists indicating that the 150-day requirement has been waived in the past, the February 1974 letter, even if mailed, must be considered untimely. 18/

Respondent produced a "file copy" (tissue copy) of a letter addressed to Complainant (and directed to Kruse's attention) dated November 23, 1975 and purportedly written by Frank Jrolf which reads: "As of this date November 23, 1975, I am canceling [sic] my contract with your Union 494 International Brotherhood of Electrical Workers, 2121 W. Wisconsin Ave." This letter, if sent, would have been timely under the revocation requirements set forth by the Letter of Assent.

Marion Jrolf testified that Frank Jrolf dictated the letter to her in November 1975, that she typed it, and that Frank Jrolf signed it. Frank Jrolf stated that he dictated the letter, signed it and mailed it from the downtown Milwaukee Post Office on the evening of November 23, 1975 along with a number of other pieces of mail. Mechanic testified that Jrolf showed him the file copy of the letter late in 1975 or early in 1976, although he was somewhat uncer-

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17/ The phrase might also be taken to mean at least 150 days prior to the expiration date or any anniversary thereof--in this case, at least 150 days prior to May 31 of every year since each of the Agreements in effect during the relevant period expired on that date. This interpretation narrows further the period during which termination may be effectuated, but does not affect the result in the case at hand, inasmuch as either interpretation of the phrase would result in the identical allowable termination period with reference fo the 1972-1974, the 1974-1975 or the 1975-1976 Agreements.

18/ The record, in fact, indicates that Complainant has been quite insistent on adhering to the 150-day requirement. In the only other instance recalled by Complainant where the timeliness of an attempted termination of a Letter of Assent was at issue, a contractor attempted on three separate occasions, in 1975, 1976 and 1977, to terminate its signatory status, and on all three occasions, Complainant rejected the attempt as untimely.

tain as to the time that this letter was shown to him. However, there are certain facts present in the record that cast some doubt on the existence and mailing of this letter. First, Kruse, to whom the letter was supposedly addressed, testified that he had not received or seen the letter or any other communication from Repondent indicating a desire to sever its connection with Complainant and that a search of Complainant's files failed to turn up any such letter. Second, there was no physical evidence of the mailing of this letter, or of its receipt by Complainant. According to Frank Jrolf, and to Mechanic, severing Respondent's ties with Complainant was of considerable importance from the point of view of Respondent's finances. If such were the case, it would seem that Respondent would have taken better care to document the withdrawal of its collective bargaining relationship, such as sending the letter by certified or registered mail. Third, the testimony of Mechanic is not determinative of the issue. He had no personal knowledge of whether this letter was in fact ever sent, having merely been shown the file copy. He was also less than totally certain as to the dates on which he performed work for Respondent or on which conversations with Frank Jrolf took place, indicating that Frank Jrolf may have shown him the letter at a much later date than that testified to. Mechanic also stated that he had had regular diccussions with Frank Jrolf concerning his relationship with Complainant every year through and including 1978, which would have been curious had Respondent indeed withdrawn from its relationship with Complainant in 1975. 19/ Fourth, Respondent apparently did not at any time or in any communication prior to the pendence of the instant proceeding late in 1978 ever mention that it had sent the letter in question or taken any other action to sever its ties with Complainant. The period of time that elapsed between the alleged mailing date of the letter in question and the date on which Respondent first asserted in any proceeding that it had "withdrawn from the Union" was close to three years, and included the period during which the Tsobanglou grievance was processed and determined. Given that the termination of its collective bargaining relationship with Complainant in 1975 would have served as a complete defense to that grievance, Respondent's failure to raise such a defense during the November 10, 1977 hearing before the Committee or in any prior or subsequent communication with the Committee is particularly puzzling. 20/ Although Respondent claims it was precluded from raising the issue during that hearing, the record indicates that the members of the Committee did not prevent Respondent from recounting

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19/ Frank Jrolf as an individual was a member of Complainant until October 1977 on an intermittent basis. However, nothing in the record suggests that his conversations with Mechanic dealt with matters that may have arisen regarding his individual membership as opposed to his dealings with Complainant in his capacity as Respondent's President.

20/ Note, however, that while the failure of Respondent to raise this issue before the Committee is probative as to its credibility, such cannot be construed as a waiver of such defense in the instate proceeding or of its ability to attack the Committee's jurisdiction over the Tsobanglou grievance at this point. See e.g., Local 1115 v. Hialeah Convalescent Home 81 LRRM 2132 (S.D. Fla., 1972), Humble Oil & Refining Co. v. Local 866, Teamsters 65 LRRM 3016 (S.D.N.Y., 1967). In re Consolidated Carting Corp. 65 LRRM 3060 (A.D., 1967).

its version of the events at issue or indeed from saying anything it wished to say. 21/

Finally, Respondent did not mail a copy of this letter, or provide any other written notice to NECA concerning its desire to terminate its execution of the Letter of Assent, as specifically required by the terms of the Letter of Assent. Respondent would term this requirement a mere technicality, largely on the basis of the relatively minor role occupied by NECA in the execution or approval of Letters of Assent. I find this contention to be without merit, particularly under the circumstances herein. The requirement that NECA be provided written notice served two very significant purposes. First, given that NECA acts as representative for a large number of employers scattered over an extensive geographic area and that it provides numerous services for its membership concerning collective bargaining and contract administration, it certainly would be expected to take interest in keeping track of the roster of its membership. Conversely, an employer-member of NECA would certainly be expected to keep NECA informed as to the status of its membership. Second, and more important, the requirement that NECA be provided with written notice of termination serves as a check in situations where the existence or effectiveness of a member's attempt at termination is in doubt. As this case clearly illustrates, disputes of this nature can easily arise due to the divergent interests that Complainant and an individual employer may have over the issue of whether such an employer is or is not bound by a Letter of Assent. One excellent method of resolving such disputes is to require that notice of termination also be sent to NECA. Certainly, had Respondent mailed a copy of its November 23, 1975 letter to NECA, and had NECA received that letter, the evidence in favor of Respondent's having effectuated a termination would have been overwhelming. However, by its failure to follow the contractually mandated procedure in this instance, Respondent has frustrated the purposes for which it was instituted and as a result created much doubt as to whether it ever effectively terminated its connection with Complainant. 22/

The record is at best uncertain with regard to Respondent's alleged termination of the Letter of Assent. I conclude therefore

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21/ See Brief of Respondent, p. 41, Tr. Vol. II, pp. 188, 197. Respondent relies on the minutes of the November 10, 1977 meeting (Exhibit C to the complaint filed in the instant proceeding) to the effect that ". . . the authority of the Union and Management was defined for Mr. Jrolf, by Mr. Neesley as agreed upon by the committee" for its view indicating an unwillingness on the part of the Committee to consider any challenge to its authority to hear and adjust the Tsobanglou grievance. This statement, however, does not indicate that the Committee would have cut Frank Jrolf off had he raised the jurisdictional issue at that time. The statement instead reflects that the Committee was rather careful to outline the nature of the hearing and source of its authority and that Jrolf should thereby have been alerted to take issue with the Committee's view at that point.

22/ There is no basis for Respondent's argument that its failure to follow these procedures was justified by "special circumstances." The procedures were clearly stated and not difficult or costly to observe. There were no circumstances occurring at about the period of time at issue (November 1975) that would appear to justify Respondent's omission.

that Respondent has not met its burden of proof concerning said issue and must be held to have still been bound by the Letter of Assent during the period within which Tsobanglou was employed. 23/

Respondent's view that the mailing by Complainant to it of a second, blank "Letter of Assent-A" form in 1975 indicated that Complainant regarded the Letter of Assent executed by Respondent in 1973 as no longer effective must be rejected. The language of the Letter of Assent clearly indicates that the Letter of Assent continues in force until terminated by its terms (or pursuant to Agreements negotiated thereunder). 24/ As noted, Respondent had not effectuated such a termination. Furthermore, the record indicates that the blank form letter was mailed as part of a general mailing of "new form" Letters of Assent by Complainant to all signatories of Letters of Assent within its geographical area in an effort to update "old form" Letters of Assent rather than as a selective mailing to employers who may have terminated their Letters of Assent, aimed at "returning them to the fold." The fact that Respondent had already executed a "new form" Letter of Assent and that it was mailed a blank form because Complainant had inadvertently failed to cull out those signatories who had already executed "new form" Letters from its general mailing list is immaterial. It did not affect the continuing binding effect on the Letter of Assent that had been executed by Respondent in 1973.

V - The Proceedings Before the Committee

Respondent has claimed that the March 7, 1978 order of the Committee should not be enforced inasmuch as the Committee lacked the authority to issue such an order, and that Respondent was denied the opportunity for a fair and impartial hearing before the Committee.

The Committee was formed pursuant to the arbitration sections of the various Agreements (more particularly, Section 13.03 of the 1976-1978 Agreement). It was composed of three members representing Complainant and three representing employers who are bound by the various Agreements (and who are apparently members of NECA) as required by that Section. It is empowered to adjust all disputes arising out of the Agreement, and must decide all matters by majority vote. The 1976-1978 Agreement also provides for an appeal to the Council on Industrial Relations for the Electrical Contracting Industry (hereinafter, the "Council") if the Committee is deadlocked or otherwise is unable to adjust a dispute.

Absent a showing of facts compelling a contrary result the determination of the Committee in this particular case must be accorded the identical status as that of an award of an arbitration panel given that it was established pursuant to a collective bargaining agreement providing for its establishment as the proper tribunal

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23/ See Green v. Donner 198 Wis. 122 (1929), in which it was held that although the testimony of an addressee that a letter alleged to have been mailed was not received should be regarded with caution when a finding of non-receipt would be of benefit to the addressee, such a principle is equally applicable to the testimony of the addressor where the mailing of the letter would be of benefit to him.

24/ See discussion and n. 15, supra.

to hear and adjust disputes arising thereunder. 25/ As earlier noted, it is possible to interpret the 1976-1978 Agreement to imply a right of appeal from the Committee to the Council on Industrial Relations for the Electrical Contracting Industry, but the existence of such right is by no means clear and in any event no attempt to make such an appeal was ever made. Therefore, review of the decision of the Committee as with other arbitration awards may be had according to the standards set forth by Wis. Stats. 298.10, 26/ which reads as follows:

> (1) 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:
>
> (a) Where the award was procured by corruption, fraud or undue means;
>
> (b) Where there was evident partiality or corruption on the part of the arbitrators, or either of them;
>
> (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.

The 1976-1978 Agreement specifically states in Section 13.03 D. that "[t]he Council's decisions shall be final and binding on both

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25/ The Commission has on numerous occasions enforced decisions of joint committees, according them the same finality as those of traditionally "neutral" arbitrators. See, e.g., Bi-State Trucking Corp. (9924-A) 2/71, Swensen Brothers Inc. (8983-A) 10/69, H. Froebel & Son Inc. (7804) 11/66, WRAC Inc. (5648) 1/61, (aff'd Racine Co. Cir. Ct., 4/61), see also Universal Foundry Co. (Winnebago Co. Cir. Ct.) 10/51. The courts have accorded joint committees a similar status. See Riss & Co. v. General Drivers Local 89 372 U.S. 517, 52 LRRM 2623 (1963), Walters v. Roadway Express 91 LRRM 2184 (S.D. Miss., 1975), aff'd 96 LRRM 2006 (5 Cir., 1977), Williams v. Pacific Motor Trucking Co. 76 LRRM 2534 (N.D. Cal., 1971), Local Freight Drivers Local 208 v. Braswell Motor Freight Lines Inc. 73 LRRM 2543 (9 Cir., 1970).

26/ Respondent's contention that the standards set forth in Ch. 298, Wis. Stats. are inapplicable because the arbitrators involved herein were not appointed by the Commission must be rejected. The Commission has held that it will apply Ch. 298 standards to instances in which it did not participate in the selection of the arbitrator. H. Froebel & Son, Inc. (7804) 11/66, Harker Heating & Sheet Metal Inc. (6704) 4/64, Wm. O'Donnell Inc. (5736-A) 12/62. The Wisconsin Supreme Court has also held that "the standard of review of an award under both Ch. 298 and common law are substantially the same." Jt. School Dist. No. 10, City of Jefferson v. Jefferson Education Assn. 78 Wis. 2d 94 1977).

parties thereto," while it does not contain a similar clause respecting the decisions of the Committee. However, the Council'a power only extends to matters not adjusted by the Committee and, conversely, does not extend to matters such as that presented here that are adjusted by the Committee. Although not specifically defined, the term to "adjust" a matter, as used in Section 13.03D of the 1976-1978 Agreement is clearly meant to include all matters on which the Committee is able to reach a decision, and to reserve to the Council only those matters on which it is unable to do so. 27/ Therefore, the Agreement must be construed so as to permit the Committee to issue "final and binding decisions" on matters upon which it is able to decide. Otherwise, the Committee would be left without function and a decision on matters arising under the Agreement could only be reached in the event of the failure of the Committee to act. Such would be an absurd construction of the Agreement.

Respondent has failed to establish its contention that the Committee was arrayed in common interest against it and therefore that it exhibited "evident partiality." 28/ The Committee was called upon to determine a question of Tsobanglou's entitlement to wages and of the various "fringe benefit funds" to benefit payments attributable to Tsobanglou. This question was resolved by the application of provisions of the 1976-1978 Agreement to a certain set of facts presented to it regarding Tsobanglou's employment history. In so doing, the Committee was merely discharging its duty to enforce the 1976-1978 Agreement, and nothing in the record suggests that it harbored any other motive or that it had reason to rule against Respondent regardless of the merits. The members of the Committee had no financial stake in the outcome of the Tsobanglou grievance, inasmuch as Tsobanglou himself would be the beneficiary of any monies paid by Respondent pursuant to any order of the Committee--immediately, in the case of back wages and at a subsequent time in the case of back benefit contributions. 29/ Respondent did not challenge the composition of the Committee during the November 10, 1977 hearing. Nor were the issues determined by the Committee at that hearing of such a nature as to raise an inference of bias against Respondent. Respondent did not even raise the issue of its membership within NECA, or of its alleged termina-

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27/ With the possible exception of any right to appeal decisions of the committee to the Council that may exist under that Agreements, as previously discussed in this Memorandum.

28/ Arbitration awards will not set aside the partiality on the part of the arbitrator unless such is "clearly established." See Yonkers Fed. of Teachers v. Bd. of Ed. 95 LRRM 2171 (Sup. Ct., Westchester Co., 1977), In re Isbrandtsen Tankers Inc. 52 LRRM 2098 (Sup. Ct. Kings County, 1962).

29/ This alone is sufficient to distinguish this case from Harker Heating & Sheet Metal Inc., supra, n. 25, where the award of a Joint Adjustment Board was vacated due to the fact that the members of that Board had a direct financial interest in the outcome of their determination. That matter involved the issue of whether certain sheet metal contractors were required to pay into an "Industry Fund" instituted for the betterment of the sheet metal contracting industry. Since the employer-members of that Board were members of the industry to be benefited by contributions to the Fund as well as contributors themselves, and since the union representatives on the Board were employed by such employers, the W.E.R.B. concluded that the Board exhibited "evident partiality" within the meaning of Section 298.10(1)(b), Wis. Stats.

tion of its status as a signatory of a Letter of Assent before the Committee. The Committee could not have been prejudiced against Respondent as an alleged non-member of NECA, since it had not reason to believe that Respondent was not a member of NECA, and thus its determination cannot be construed as an attempt to return a "renegade" employer "to the fold." 30/ The Tsobanglou grievance was a rather routine wage and benefit claim involving an employer whom the Committee had every reason to believe was subject to the 1976-1978 Agreement. 31/

The methods employed by the Committee in its determination of the Tsobanglou grievance were, however, such as to deny Respondent a full opportunity to present its case and that degree of due process to which it was entitled. 32/ The Committee did notify Respondent of the time and place of the November 10, 1977 hearing which was confined to the issue of Tsobanglou's employment status with Respondent, permitted Frank Jrolf to appear before it, and permitted Jrolf to state his version of the facts underlying the grievance by way of response to questions asked of him. The Committee did not prevent Jrolf from saying that he wished to say. 33/ On the other hand, Jrolf did not cross-examine Tsobanglou, who appeared through an interpreter as a witness, and in fact was not present in the hearing room during Tsobanglou's testimony although it was not made clear as to whether the Committee refused Jrolf the opportunity to exercise those rights or whether Jrolf merely failed to exercise them. Jrolf was also not asked to present witnesses or argument to the Committee but was instead directed merely to answer questions directed at him by members of the Committee. Finally, and most significantly, Respondent was not even invited to or notified of the March 7, 1978 meeting of the Committee during which it finally

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30/ This again distinguishes this case from the Harker situation in which the employers from whom contributions to the Industry Fund were sought had had a long history of disputes with the employer association reqpresented on the Joint Adjustment Board on the issue of Industry Fund payment and had formed a rival "independent" association.

31/ There is additionally no basis for inferring bias against Respondent from the fact that the Milwaukee Electrical Industry Board was not set up until 1977, given that the Letter of Assent executed by Respondent is effective until terminated according to its terms and is therefore applicable to successor Agreements such as the 1976-1978 Agreement. The Letter of Assent, by empowering NECA to act as the collective bargaining representative of the signatory employer, authorizes NECA to negotiate modifications of the various Agreements binding on its members.

32/ Although the procedural standards applicable to arbitration hearings are not as strict as those applicable to formal proceedings, such as unfair labor practice hearings, arbitration hearings must still be fair and regular, affording all parties a "full and fair opportunity to present its case to the tribunal making the determination" if the award rendered by the arbitrator(s) is to be confirmed. Wm. O'Donell Inc. (5736-A) 12/62. See also the N.L.R.B. Standards for deferral to arbitration awards in International Harvester Co. 138 N.L.R.B. 923, 51 LRRM 1155 (1962), enforced sub nom Ramsey v. NLRB 55 LRRM 2441 (7 Cir., 1964) and Spielberg Mfg. Co. 112 NLRB 1080, 36 LRRM 1152 (1955).

33/ Respondent apparently was not prevented from raising jurisdictional arguments at the hearing but rather chose not do so. See n. 20 supra.

determined the Tsobanglou grievance and decided upon the monetary extent of Respondent's liability. Schwab, representing Complainant, was present at that meeting, did answer questions relating to the grievance ans assisted in the computation of the dollar figures that Respondent was thereupon ordered to pay--a litigable issue of considerable importance to Respondent. Thus, it is likely that Schwab was able to exert influence upon the determination of the Committee in an ex parte fashion, without the participation of Respondent. On the basis of the foregoing, I conclude that the Committee's procedures did not meet the standards as set forth by Ch. 298 Stats. and more particularly by Section 298.10(1)(c). Therefore, its order of March 7, 1978 concerning the Tsobanglou grievance shall not be enforced.

Remedy

The complaint addresses only the failure of Respondent to accept as conclusive and to comply with the March 7, 1978 order of the Committee, and my determination is confined to the issues raised by the complaint and by Respondent's answer.

The order rendered herein does not address the real controversy involved herein, i.e., whether Tsobanglou and the Milwaukee Electrical Industry Board were entitled to the payment of, respectively, wages and fringe benefit contributions from Respondent. The public and the parties to this matter are entitled to a final determination of this issue. I conclude that the policy of the Wisconsin Employment Peace Act would best be served by the resubmission of this issue to the tribunal whose jurisdiction over the issue has been contractually accepted by the parties rather than by my proceeding to determine the merits of the Tsobanglou grievance. 34/ The instant Order has been issued with the dual purposes of assuring a speedy determination of the underlying controversy and a fair and impartial hearing to all parties involved herewith.

Dated at Milwaukee, Wisconsin this 16th day of May, 1979.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner

34/ See Wm. O'Donell Inc. (5736-A) 12/62, (6567) 12/62 aff'd sub nom Wm. O'Donell Inc. v. W.E.R.B. 26 Wis. 2d 1 (1964) in which resubmission of a grievance to a joint committee under circumstances quite similar to those present herein was sanctioned. See also School Dist. of West Allis-West Milwaukee (15504-B) 8/78.