

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD KOPP, BUSINESS MANAGER,
FOX RIVER VALLEY DISTRICT
COUNCIL OF CARPENTERS,

Complainant,

vs.

MODERN POURED WALLS, INC.

Respondent.

Case I
No. 28516 Ce-1925
Decision No. 19102-A

Appearances:

Thomas, Parsons, Anderson, Schaefer & Bauman, Attorneys at Law, by Ms. Susan Bauman and Mr. Steven Schaefer, 7 North Pinckney Street, Madison, Wisconsin, appearing on behalf of the Complainant.

Lubinski, Rottier & Lubinski, Attorneys at Law, by Mr. Robert Lubinski, 200 East Wisconsin Street, Seymour, Wisconsin, appearing on behalf of the Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission on August 19, 1981 in the above entitled matter; and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as an Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and notice of hearing on such complaint having been mailed to the parties; and a hearing on said complaint having been held at the Outagamie County Courthouse, Appleton, Wisconsin, on January 12, 1982, before the Examiner; and the Examiner having considered the evidence and oral arguments of the parties and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Fox River Valley District Council of Carpenters, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization having its offices at 1818 North Ballard Road, Appleton, Wisconsin; that Ronald Kopp is the business manager of Complainant.

2. That Modern Poured Walls, Inc., hereinafter referred to as Respondent, is engaged in the construction industry, with offices located at Route 5, County Trunk C, Appleton, Wisconsin; that the record shows that at least one (1) employee, D. Vandenberg, worked for the Respondent during the time period in question; and that, as a result, Respondent is an "employer" under Section 111.02(2) of the Wisconsin Employment Peace Act.

3. That the Wisconsin Chapter, The Associated General Contractors of America, Inc., hereinafter referred to as AGCA, is a multi-employer association which represents contractors employing carpenters in the Appleton area for the purpose of collective bargaining with regard to wages, hours and working conditions; that its principal place of business is 4814 East Broadway, Madison, Wisconsin; and that in its capacity as bargaining representative, AGCA has negotiated with Complainant two series of collective bargaining agreements known as "Working Agreement" and the "Statewide Residential Working Agreement" respectively, binding carpentry contractors who indicate their assent to be so bound.

No. 19102-A

4. That AGCA and Complainant negotiated the most recent "Working Agreement" covering the period from May 1, 1979 through April 30, 1982; and that the most recent "Statewide Residential Working Agreement" covers the period of July 1, 1979 through June 30, 1981, and from year to year thereafter unless terminated by written notice given by either party to the other not less than ninety days prior to such expiration date or anniversary thereof.

5. That on September 26, 1980, Respondent executed both of the above referred-to agreements recognizing Complainant as the exclusive collective bargaining representative of certain of Respondent's employees.

6. That the "Working Agreement" provides in pertinent part, as follows:

PREAMBLE

This Agreement is made and entered into this first day of May, 1979, by and between the Wisconsin Chapter, The Associated General Contractors of America, Inc., herein called the "Association" for and on behalf of those persons, firms or corporations who have submitted written authorization to the Association to negotiate and conclude a Labor Agreement, herein called the "Contractor" or "Employer," and the Greater Wisconsin Carpenters Bargaining Unit, comprised of local unions and District Councils affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, as follows: Local Unions 1074 and 1143 and the Central Wisconsin, Fox River Valley and Wisconsin River Valley District Councils and their affiliated locals with geographic jurisdiction as set forth in Exhibit A, herein called "Union" or "Unions."

NEGOTIATING AGENT LIABILITIES: It is understood and agreed that the Associated General Contractors of America, Inc., Wisconsin Chapter and the Greater Wisconsin Carpenters Bargaining Unit are parties to this agreement only as negotiating agents and shall not be held liable in any way for any violation of its terms by any contractor or any affiliated Local Union or District Council or its affiliated Local Unions.

ARTICLE I

DURATION OF AGREEMENT

Section 1.1. This agreement shall be binding upon the parties, their successors and assigns, and shall become effective as of May 1, 1979, and shall continue in full force and effect through April 30, 1982, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than ninety (90) days prior to such expiration date, or anniversary thereof.

It is further agreed that the Union may have the option of applying any part of the newly-negotiated wage rate to increase the contributions to the Health and Welfare and Pension Funds or to increase the dues check off and Vacation fund deductions.

7. That Article VI of the "Working Agreement" provides that the Employer will pay wage rates and fringe benefit contributions as specifically set forth in Section 6.1, attached hereto as Appendix A; that Articles VII, VIII, IX, and X concerning Health and Welfare, Pension, Vacation and Apprentice and Training Funds, respectively, substantively require that during the life of the agreement, the Employer shall pay a designated sum per hour for each hour worked by all employees covered by the agreement as specified in Article VI to each of the respective funds; that said payment be made no later than the 15th day of the following month for which the payment is due; that the Employer agrees to be bound by the trust agreements for each fund and grants authority to the trustees of said funds; and that the trustees are authorized to establish a schedule of liquidated damages to be assessed against and paid by the Employer who fails to make timely payments to the respective funds.

8. That said "Working Agreement" further states:

AGREEMENT

This Agreement made this 1st Day of May, 1979, by and between the Greater Wisconsin Carpenters Bargaining Unit of the U. B. of C. and J. of A. and Wisconsin Chapter, The Associated General Contractors of America, Inc., an employer of Carpenters, members of said Greater Wisconsin Carpenters Bargaining Unit, and

WHEREAS: Those persons, firms or corporations which separately adopt and become signatory to this agreement, herein individually called the "contractor" or "Employer" and has received a copy and is familiar with the provisions of a collective bargaining agreement as entered into for the period May 1, 1979 through April 30, 1982 by the Wisconsin Chapter, The Associated General Contractors of America, Inc. and the Greater Wisconsin Carpenters Bargaining Unit and shall be binding upon the parties, their successors and assigns, and shall become effective as of May 1, 1979 and shall continue in full force and effect through April 30, 1982, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than ninety (90) days prior to such expiration date, or anniversary date thereof, and

WHEREAS: The undersigned Employer wishes to employ carpenters affiliated with said Greater Wisconsin Carpenters Bargaining Unit.

. . .

He further agrees to accept as an obligation for and on behalf of this firm, to oversee the payment of established rate of wages and payment of contributions to the Greater Wisconsin Carpenters Vacation Fund and The Wisconsin State Carpenters Health and Welfare Fund and The Wisconsin State Carpenters Pension Fund and The Greater Wisconsin Carpenters Apprenticeship & Training Fund as is provided by the above described collective bargaining agreement, and accepts the trust agreements and trustees of said Trust Funds. The undersigned Employer further agrees that he will remain in compliance with the provisions hereof and as they may be amended or extended until the date of expiration of the aforementioned collective bargaining agreement and thereafter until such time as this Agreement is cancelled or suspended by another agreement.

ARTICLE XIV

GENERAL AND MISCELLANEOUS PROVISIONS

. . .

Section 14.2 Employer Restrictions No officer or partner of a contracting firm or an individual doing business as a contractor shall be permitted to do bargaining unit work on a job unless journeymen are employed and in no case more than one (1) such member be permitted to perform bargaining unit work. Such individuals shall be required to work under the provisions of Article XIII.

. . .

Section 14.8 No Contracting by Employees (a) It is agreed that employees represented by the Union shall not contract or subcontract any work and shall not accept employment for any construction contractor under any lesser conditions than those contained herein. This shall not prevent any employee represented by the Union from legitimately entering business as a Contractor providing he has been so recorded with the Unions and the Contractor has

been so notified. It is the responsibility and duty of the Union to notify the Contractor of all Carpenters doing contract work.

(b) In the event any employee represented by the Union violates this section of the Agreement and upon notice to the Unions by the Contractor, the Unions agree that individually and collectively they will use their best efforts to discourage such violation. The Contractor may refuse employment to any employee represented by the Unions who violates this "No Contracting" provision. Exceptions to this provision can be made in individual cases by mutual consent.

9. That the "Statewide Residential Working Agreement" provides in pertinent part as follows:

ARTICLE XXVI - DURATION

SECTION 26.1 This agreement shall be binding upon the parties, their successors and assigns, and shall become effective as of July 1, 1979 and shall continue in full force and effect until June 30, 1981, and from year to year thereafter unless terminated by written notice given by either party to the other not less than ninety (90) days prior to such expiration date, or anniversary thereof except that either party may upon written notice at least ninety (90) days prior to July 1, 1982, open this agreement for negotiating a change in hourly wage rates for the one year period subsequent to that anniversary date.

In the event the parties are unable to agree upon the proposed changes at the expiration of the ninety (90) days written notice, the parties reserve the right to resort to economic or legal action in support of such proposed changes. Any part of wage scales needed for existing fringe benefits or plans can be used when members vote on same and Local gives thirty (30) days notice to Contractors.

It is further agreed that the Union may have the option of applying any part of the newly-negotiated wage rate to increase the contributions to the trusteed funds and the dues check-off.

SECTION 26.2 Upon failure to meet with the other party for the purpose of collective bargaining upon service of the written notice the party so failing to meet is to be deemed to have conceded the changes desired by the party present with respect to the wages and conditions of employment for the new contract year.

SECTION 26.3 The undersigned EMPLOYER hereby subscribes to and agrees to be bound by the provisions, articles, terms and conditions of the said collective bargaining agreement and accepts all of it the same as if it were herein contained . . .

ARTICLE VII - WAGES AND FRINGES

SECTION 7.1. The wage scales and fringe benefit contributions for residential construction shall be at the rates set out in Exhibit A, according to the Zone in which the work is performed. NO EMPLOYEE RECEIVING MORE THAN THE WAGE SET OUT IN EXHIBIT A SHALL TAKE A WAGE CUT AS A RESULT OF THIS AGREEMENT.

SECTION 7.2. The EMPLOYER agrees, in respect to the various fringe benefit contributions, to be bound by and observe the terms of the Trust Agreements governing the several Funds administering the fringe benefits described in Exhibit A.

EXHIBIT A

. . .

ZONE 6 - FOX RIVER VALLEY D.C.

All of Oconto, Shawno (sic), Waupaca, Outagamie, Brown, Kewaunee, Door, Waushara, Winnebago, Calumet, Manitowoc, Sheboygan, Marquette, Menomonee, Green Lake, Fond du Lac (except the City of Waupun), and Marinette Counties (except shaded area 3) and the City of Menomonee, Michigan and vicinity.

JOURNEYMAN CARPENTER--	7-1-79	7-1-80
Base Rate	\$6.72	\$7.67
Vacation	(.40)	(.40)
Health & Welfare60	.60
Pension40	.50
Apprenticeship and Training05	.05
Gross	<u>\$7.77</u>	<u>\$8.82</u>

All foremen to receive 10% per hour above the journeyman base rate.

APPRENTICE RATES

- 1st Six months - 60% of Journeyman Base Rate
- 2nd Six months - 65% of Journeyman Base Rate
- 3rd Six months - 70% of Journeyman Base Rate
- 4th Six months - 75% of Journeyman Base Rate
- 5th Six months - 80% of Journeyman Base Rate
- 6th Six months - 85% of Journeyman Base Rate
- 7th Six months - 90% of Journeyman Base Rate
- 8th Six months - 95% of Journeyman Base Rate

Same Fringe Benefits as Journeyman.

NO EMPLOYEE RECEIVING MORE THAN THE GROSS WAGE SET OUT IN THIS EXHIBIT SHALL RECEIVE A REDUCTION IN WAGES AS A RESULT OF THIS AGREEMENT.

10. That Articles VIII, IX, X, XI, XII, and XIV of the "Statewide Residential Working Agreement" concerning Health and Welfare, Pension, Vacation, Apprenticeship and Training Funds, Central Depository and Delinquency and Bonding provisions substantially require that the Employer pay the designated sums contained in Article VII - Exhibit A to the designated funds no later than the 15th day of the month for which the payment is due; that the Employer agrees to be bound by trust agreements and grants authority to the trustees of each fund; that the trustees are empowered to assess liquidated damages against an Employer who fails to make timely payments; and that the Employer's liability for liquidated damages may be ten (10) per cent of the overdue payments or for greater amounts after the expiration of thirty days following the date the payments are due; that Articles VIII and IX specifically state that the parties to this agreement and all employees covered thereby agree to be bound by the terms of the trust agreement.

11. That both agreements contain grievance process provisions providing for final and binding arbitration.

12. That during the latter part of 1980 and the early part of 1981, Respondent made payments to the various "fringe benefit" funds referred to in Findings of Fact 6, 7, 8, 9 and 10 above for all of its covered employees in compliance with the Agreements then in effect; that Respondent also made voluntary contributions to said funds on behalf of Gary Schadrie and Ted Verkuilen, the employer-owners of Respondent, who are not "covered employees" within the meaning of the Agreements because the Preamble and Sections 14.2 and 14.8 of the "Working Agreement", as well as Articles VIII and IX, Sections 8.1 and 9.2 of the "Statewide Residential Working Agreement", clearly express the intent of the parties that owners, officers, or partners be considered "Employers" and excluded from the definition of employee within the meaning of the Agreements.

13. That from April 1, 1981 through May 31, 1981, Respondent ceased contributing to the requisite "fringe benefit" funds.

14. That Respondent was requested to resume payments to the various funds and informed that attorneys' fees as well as liquid damages would be demanded by conversations with and the following letter from Mr. Cline Cagle, an auditor employed by the trustees of the funds:

June 12, 1981

Gary Schadrie, President
Modern Poured Walls
Route #5, Cty Trk C
Appleton, Wisconsin 54911

RE: Field Auditor's Examination
Period of Audit: September 1, 1980 thru May 31, 1981

Dear Mr. Schadrie:

The Field Auditor examined payroll records of your firm recently to determine if contributions were consistently correct within the provisions of the Trust Agreement governing the various Funds in behalf of Carpenters performing work within the jurisdiction of such Funds.

The audit, including a review of the payroll records; answers to questions presented by the auditor and records of contributions paid to the Funds, indicates a deficiency between hours worked and hours reported to the Funds. The total amount found due and owing to the Funds is \$2,818.71, of which \$344.01 represented Liquidated Damages.

We are enclosing for your file, copies of the remittance report forms prepared for you by the audit staff. Kindly remit separate checks payable to the Funds for the indicated amounts:

Wisconsin State Carpenters Welfare Fund	\$ 754.20
Wisconsin State Carpenters Pension Fund	\$1,063.68
Greater Wisconsin Carpenter Vacation Fund	\$ 937.98
Greater Wisconsin Carpenter Education Fund	62.85

Payment in full to the funds is required within fourteen (14) days from the date of this letter.

Please be advised the Trust Agreement of the Wisconsin State Carpenter's Welfare and Pension Funds now provides that reasonable attorney fees incurred by the Trustees in collection of employer payments, in addition to liquidated damages, shall be paid by employers in addition to the contribution payment. In the event payment is not made and the Trustees must take appropriate legal action to enforce collection, all reasonable attorney fees and costs shall be borne by your firm. The Trustees urge you to make the payment specified above within the allocated time to save you additional expense. For your convenience, and for control purposes, please use the enclosed self-addressed envelope for your remittance.

15. That on April 14, 1981, Respondent by its agent, Carole Schadrie, attempted to inform Complainant of Respondent's decision to terminate the parties' two collective bargaining agreements by writing "NOT UNION" on a monthly remittance report to the Wisconsin State Carpenters Welfare and Pension Funds; that said document was insufficient notice to Complainant of Respondent's intent to terminate the agreements because it was not sent to the Complainant and did not comport with Article I, Section 1.1 and page 43 of the Agreement section of the "Working Agreement" or Article XXVI, Section 26.1, 26.2, and 26.3.

16. That on July 20, 1981, Complainant filed a grievance regarding the cessation of payments to the fringe benefit funds alleging specific violations of Article XII of the "Working Agreement"; and that Respondent has failed and refused to respond to or process said grievance.

17. That Respondent did not, at any time prior to April 1, 1981 or thereafter terminate or revoke in a timely and effective manner its two agreements with Complainant.

18. That Respondent has failed and refused to make certain amounts of the requisite contributions to the "fringe benefit" funds as required by the parties' current collective bargaining agreements for "covered employees" for the period from September 26, 1980 through May 31, 1981, the greatest delinquency occurring for the period from April 1, 1981 through May 31, 1981.

19. That there is no evidence that Respondent failed and refused to pay its employees the wage rates required by the agreements for the periods referred to in Finding of Fact 18 above.

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

CONCLUSIONS OF LAW

1. That during the period of September 26, 1980 through May 31, 1981, the Complainant and Respondent were parties to two collective bargaining agreements which contained provisions requiring Respondent to make contributions for covered employees to fringe benefit funds designated in the agreement and required the parties to submit any grievances arising under the agreements to final and binding arbitration; that inasmuch as Respondent has failed and refused to agree to process the July 20, 1981 grievance filed by Complainant to arbitration concerning Respondent's failure to make the required fringe benefit contributions, the Commission has jurisdiction to decide Complainant's allegations that Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That Respondent by failing and refusing to pay the agreed-upon fringe benefit contributions required by the parties' agreements has violated and continues to violate a collective bargaining agreement within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That Respondent has not failed and refused to pay the agreed-upon wage rates to its employees as required by the collective bargaining agreements and has not violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act with regard to payment of wages.

ORDER

IT IS ORDERED that that portion of the complaint which alleges that Respondent failed and refused to pay agreed-upon wage rates to its employees as required by the collective bargaining agreement be and hereby is dismissed.

IT IS FURTHER ORDERED that Respondent Modern Poured Walls, Inc., take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

- (a) Immediately pay to the person(s) designated by Complainant on behalf of the fringe benefit funds all sums owing for covered employees for at least the period from September 26, 1980 through May 31, 1981, in compliance with the collective bargaining agreements.
- (b) Immediately comply with all sections of the collective bargaining agreements.
- (c) Post in its offices and all places where notices to its employees are customarily posted, copies of the notice attached hereto and marked Appendix "B". The notice shall be posted by Respondent's owners and it shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by other material.
- (d) 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 2nd day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner
-7- No. 19102-A

APPENDIX A

ARTICLE VI
WAGE RATES

Section 6.1 Hourly Wage Rates The minimum hourly wage rates (plus fringe benefit fund contributions) shall be as follows:

SCHEDULE OF WAGE RATES AND FRINGES FOR 1979, 1980 and 1981

Area	Year	Normal Hourly Wage	Shift Hourly Wage	*Deducted Vacation	H & W	Pension	Ed. & Appr.	Normal Hourly Total	Normal Shift Work Hourly Total
Madison and Eau Claire Carpenter	5/1/79	\$10.92	\$12.48	-.60	.60	.70	.05	\$12.27	\$13.83
	5/1/80	11.72	13.40	-.70	.60	.80	.05	13.17	14.85
	5/1/81	12.37 12.27	14.14	-.80	.60	.90 1.00	.05	13.92	15.69
Millwright and Piledriver	5/1/79	11.32	12.94	-.60	.60	.70	.05	12.67	14.29
	5/1/80	12.12	13.85	-.70	.60	.80	.05	13.57	15.30
	5/1/81	12.77 12.67	14.60 14.48	-.80	.60	.90 1.00	.05	14.32	16.15
W.R.V.-F.R.V. and LaCrosse Carpenter	5/1/79	10.72	12.25	-.60	.60	.70	.05	12.07	13.60
	5/1/80	11.67	13.34	-.70	.60	.80	.05	13.12	14.79
	5/1/81	12.37	14.14	-.80	.60	.90	.05	13.92	15.69
Millwright and Piledriver	5/1/79	11.12	12.71	-.60	.60	.70	.05	12.47	14.06
	5/1/80	12.07	13.80	-.70	.60	.80	.05	13.52	15.25
	5/1/81	12.77	14.60	-.80	.60	.90	.05	14.32	16.15

*The vacation fund is included in wages as this is tax deductible. Health and Welfare, Pension and Education and Apprenticeship Funds are fringe benefits, thus they are not tax deductible.

APPENDIX B

NOTICE TO ALL EMPLOYEES OF MODERN POURED WALLS, INC.

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify all employees that:

We will immediately pay to the person(s) designated by Complainant on behalf of the fringe benefit funds all sums owing for covered employees for at least the period from September 26, 1980 through May 31, 1981 in compliance with the collective bargaining agreements.

By _____
Modern Poured Walls, Inc.

Dated this _____ day of _____, 1982.

THIS NOTICE MUST BE POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

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), Wis. Stats. when it failed and refused to pay the wages and make contributions to the various "fringe benefit funds" as required by the parties' collective bargaining agreements. In an oral answer, Respondent denied all of the allegations and in its written answer raised a number of affirmative defenses with respect thereto.

Position of the Parties

Complainant in the instant complaint seeks to compel the Respondent to pay the required wages and make the requisite contributions to the various fringe benefit funds as required by the two (2) agreements to which it is a signatory. Complainant alleges that Respondent voluntarily executed the "Working Agreement" and "Statewide Residential Working Agreement" negotiated by the Wisconsin Chapter, Associated General Contractors of America, Inc. and that the Respondent voluntarily and knowingly agreed to be bound by the above-referred to agreements and did in fact substantially comply with the terms and conditions of said agreements until April 1, 1981.

Complainant further alleges that when its auditors discovered Respondent's failure to make the required contributions to its various fringe benefit funds, it filed a grievance on July 20, 1981 regarding said matter and that Respondent has failed and refused to respond to said grievance.

Complainant denies that Respondent executed the agreements under duress or that it fraudulently induced the Respondent to execute the agreements by representing that Respondent could withdraw at any time. Complainant further denies that Respondent at any time terminated or revoked its agreement to be bound by the above-referred to agreements.

Respondent does not dispute that it executed the aforementioned two (2) collective bargaining agreements on September 26, 1980. Rather, Respondent contends that prior to signing said agreements, it was advised that it could terminate its agreements with Complainant at any time after the completion of work on the Wisconsin Employers Group building. Respondent claims that after completion of the work on said building, it effectively revoked its consent to the two (2) agreements by mailing a monthly remittance report with the words "not union" printed on it to the Wisconsin State Carpenters Welfare and Pension Funds. Respondent argues that it should not be bound by any of the terms and conditions of the collective bargaining agreement after April 1, 1981 because of the misunderstanding of Respondent and the alleged misrepresentations made to Respondent.

Discussion

The uncontroverted evidence establishes that Complainant prior to filing the instant complaint filed a written grievance concerning the matter and requested the Respondent to reply to said grievance. Respondent at no time responded to said request. It is well established that ordinarily the Commission will not assert its jurisdiction to consider alleged violations of labor agreements under Section 111.06(1)(f) where parties have a provision providing for final and binding arbitration. Here, however, Respondent has failed and refused to process the grievance filed by Complainant. Under the circumstances, it is appropriate for the Commission to assert jurisdiction and consider the alleged contract violation. Bob Harrison Trucking Dec. No. 9051-A, B, 4/70; Levi Mews d/b/a Mews Redi Mix Corp., Dec. No. 6683, 3/64 (Milwaukee County Circuit Court, 5/64 - Judgment enforcing Commission's Order)

Turning to Respondent's claim that it was fraudulently induced to sign the agreements by false promises of its right to withdraw from said agreements at any time after completion of the Wisconsin Employers Group job, one of Respondent's owners, Gary Schadrie, testified that James Calmas, the primary contractor on the Wisconsin Employers Group building, and Paul Gehring, a business agent of the Masons, represented to him that the Respondent could terminate its agreements with Complainant. Schadrie's testimony also revealed confusion on his part as to Respondent's commitment to honor the collective bargaining agreements to which it is a signatory as an employer in contrast to any rights or responsibilities that he and his partner, Ted Verkuilen, might possess as individual union members.

No evidence was presented at hearing which would even suggest that Calmas or Gehring were agents of Complainant. Nor was there any evidence that any of Complainant's agents made any misrepresentations to Respondent. Moreover, there is no indication that Respondent either orally or in writing sought to confirm the alleged misrepresentations of Calmas and Gehring with Complainant. Based on the above, Respondent is not entitled to rely upon any alleged assertions by Calmas or Gehring.

Respondent knew or should have known that it would be expected to comply with the explicit language of the collective bargaining agreements to which it voluntarily became a signatory. 1/ There is, however, clear contractual language specifically stating the duration of the agreements. Article I, Section 1.1 of the "Working Agreement" explicitly states:

This agreement shall be binding upon the parties . . . , and shall become effective as of May 1, 1979, and shall continue in full force and effect through April 30, 1982, and from year to year thereafter, unless terminated by written notice given by either party to the other not less than ninety (90) days prior to such expiration date, or anniversary date thereof.

The "Statewide Residential Working Agreement" contains similarly explicit language in Article XXVI, Sections 26.1 and 26.2.

Respondent's contention that it effectively terminated its agreements with Complainant must also be rejected. When a respondent has chosen to allege termination of a collective bargaining agreement as an affirmative defense to its contractual obligations, it bears the burden of proving the fact of termination by a clear and satisfactory preponderance of the evidence. Giraffe Electric, Inc. Dec. No. 16513-A, E, 5/16/79, 12/8/80. See also 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). The Respondent's actions in writing "not union" on the monthly remittance report which it then mailed to the Wisconsin State Carpenters Welfare and Pension Funds was not effective "notice" sufficient to terminate the agreements currently in effect between the parties. The alleged "notification" was not sent to Complainant. The words "not union" are too vague to suggest an intent to terminate the two (2) agreements. This "notice" also failed to meet the specific requirements of Article I of the "Working Agreement" and Article XXVI of the "Statewide Residential Working Agreement."

The evidence at hearing revealed that Respondent, with the possible exception of mathematical errors, did make contributions to the various funds for the period of September 26, 1980 to April 1, 1981. Respondent, while not being obligated to do so, also made contributions on behalf of Respondent's owners, Ted Verkuilen and Gary Schadrie. Complainant's audit report and record testimony strongly suggests that Complainant is demanding contributions based upon hours worked by Verkuilen and Schadrie. After a review of the two (2) agreements, specifically the Preamble to the "Working Agreement" and Sections 14.2 and 14.8 of Article XIV, it must be concluded that partners or officers of a corporation are "Employers" and not "covered employees" within the meaning of that agreement. The Preamble defines the term "Employer" as being those persons, firms or corporations who submitted authorization to the AGCA to negotiate the agreement. Section 14.2 provides specific Employer Restrictions listing officers and partners of a contracting firm or an individual doing business as a contractor or "Employer", who are barred from performing certain bargaining unit work under certain circumstances. Section 14.8 bars "covered employees" from competing against construction contractors unless the Complainant is notified and the change to construction contractor is recorded. These provisions establish that Schadrie and Verkuilen as officers and owners of Respondent are not "covered employees" within the meaning of the collective bargaining agreements and that, as a result, Respondent was under no obligation to make continuing contributions on their behalf. Respondent is, however, obligated to make contributions to the various fringe benefit funds on

1/ Compare: J. E. Herro Dec. No. 516, 10/43, where the employer, who could neither read nor write, was induced to enter into a collective bargaining agreement through the misrepresentation of representatives of the union.

behalf of all other employees covered by the agreements. By its failure to do so from April 1, 1981, Respondent has committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Complainant in its complaint also alleged that Respondent failed to comply with the wage provisions of the collective bargaining agreement. At hearing on this matter, however, Complainant failed to produce any evidence that Respondent was not complying with the wage provisions of the agreements. Accordingly, I find that Complainant did not meet its burden of proof with regard to that allegation and dismiss said allegation.

Dated at Madison, Wisconsin this 2nd day of April, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner