STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RONALD KOPP, BUSINESS MANAGER, FOX RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS, Complainant, vs. R & R DRYWALL CO., INC., Respondent.	Case I No. 28515 Ce-1924 Decision No. 19109-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.

Egan, Laird & Nellen, S.C., Attorneys at Law, by Mr. James W. Nellen II, P.O. Box 1323, 2050 Riverside Drive, Green Bay, 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, and an amended complaint having been filed on December 16, 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 parties having submitted post hearing briefs, the last of which was received March 12, 1982, and the Examiner having considered the evidence and arguments contained in the briefs 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; and that Ronald Kopp and James Moore are business managers of Complainant.

2. That R & R Drywall Co., Inc., hereinafter referred to as Respondent, is an employer engaged in the construction industry, with offices located at 2032 Deckner Avenue, Green Bay, Wisconsin; and that Roger Van De Hey and Richard Wendricks are co-owners and officers of Respondent.

3. That the Wisconsin Chapter, The Associated General Contractors of America, Inc., hereinafter referred to as AGCA, is a multi-employer bargaining association representing 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.

4. That AGCA and Complainant negotiated a "Working Agreement" for the period from May 1, 1975 through April 30, 1979, 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 June 20, 1977, Respondent voluntarily, without coercion or inducement by threats, executed the "Working Agreement" referred to in Finding of Fact 4 above; that said "Working Agreement", at the date of execution, was a lawful pre-hire agreement; and that at no time did Respondent inform Complainant that it wished to terminate or modify said Agreement.

6. That said Working Agreement contained the following pertinent provisions:

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, 1975, and shall continue in full force and effect until April 30, 1979, 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 April 30, 1979, open this Agreement for negotiating a change for the duration of the Agreement, as per memorandum of agreement.
>
> 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 State-wide Health and Welfare and Pension or Vacation Funds.

ARTICLE II
UNION SECURITY

. . .

> Section 2.4 Residential Working Agreement. The employers recognize the Union as the sole and exclusive bargaining agent for all carpenters, apprentices and trainees for all carpenter work as defined in the Statewide Residential Working Agreement and are automatically bound by the provisions therein when performing residential work within the "Normal Construction Labor Market" of this Agreement. (See Exhibit A). The Union shall furnish a copy of the Statewide Residential Working Agreement to all employers.

7. That said Agreement also provided that the Respondent will pay wage rates and fringe benefit contributions as specifically set forth in Article VI Section 6.1 and Articles VII, VIII, IX and X concerning Health and Welfare, Pension, Vacation and Apprentice and Training Funds, respectively.

8. That on January 12, 1979, Complainant sent the following notice to Respondent:

> Notice is hereby given, pursuant to Article I, Section 1.1 of the current Working Agreement between the Greater Wisconsin Carpenters Bargaining Unit and the Wisconsin Chapter, Associated General Contractors of America, Inc., that it is the desire of the former to reopen such contract for the purpose of negotiating as concerns proposed modifications to such contract to become effective May 1, 1979.

. . .

9. That thereafter on March 29, 1979, Complainant sent the following notice to Respondent:

> We, by letter dated January 12, 1979, gave written notice to all contractors who are signatory to a Letter of Assent with the Wisconsin

Chapter, Associated General Contractors of America, Inc., as well as all independent contractors signatory to a Working Agreement between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., of our desire to reopen such Working Agreement for the purpose of negotiating as concerns proposed modifications to such Working Agreement to become effective May 1, 1979. In addition, we offered to meet and confer with all such contractors at their earliest convenience for the purpose of negotiating such agreement. Despite such written notice and request for bargaining we have heard nothing from your firm.

Previously you have signed and accepted the Agreement negotiated between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., without requesting to, or engaging in separate negotiations with this organization. Secondly, as heretofore noted, despite our offer to meet and confer with your firm individually for the purpose of negotiating a successor Agreement to the existing Working Agreement, we have heard nothing from you. We, under these circumstances, can only assume you have selected the Wisconsin Chapter, Associated General Contractors of America, Inc. as your bargaining agent and that you intend to accept and be bound by any successor Working Agreement arrived at between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., for the period commencing May 1, 1979. If this is not the case, please so inform us in writing by return mail so that negotiations between this organization and your firm can be scheduled on a very timely basis. Absent the receipt of such written notice by April 5, 1979, of your desire to negotiate separately with this organization as concerns a successor Agreement, we will assume in fact that you are being represented in current negotiations by the Wisconsin Chapter, Associated General Contractors of America, Inc., and that you will execute and be bound by the successor Working Agreement negotiated by and between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., which Agreement is to become effective May 1, 1979.

. . .

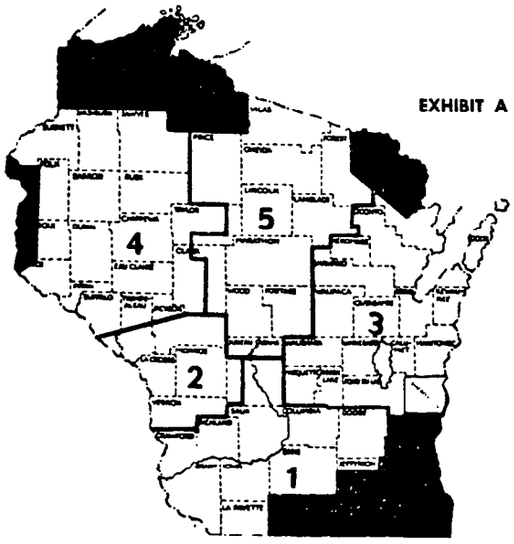
10. That AGCA and Complainant negotiated the most recent "Working Agreement" covering the period from May 1, 1979 through April 30, 1982; and that said agreement contains the following pertinent provisions:

Working Agreement

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 coporations 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."

That Exhibit A referred to above is the following map of the jurisdictional zones.



JURISDICTIONAL ZONES

1. Central Wisconsin District Council . .. Ph. 608-257-2448
   1602 S. Park, Madison, Wisconsin 53701
2. Local Union 1143, LaCrosse . . . . . Ph. 608-785-0038
   423 King St., LaCrosse, Wisconsin 54601
3. Fox River Valley District Council ...Ph. 414-739-5551
   2828 N. Ballard Rd., Appleton, Wisconsin 54911
4. Local Union 1074, Eau Claire .... Ph. 715-835-8892
   2233 Birch St., Eau Claire, Wisconsin 54701
5. Wisconsin River Valley District Council . Ph. 715-845-4415
   318 S. 3rd Ave., Wausau, Wisconsin 54401

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 until 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.

ARTICLE II
UNION SECURITY

. . .

Section 2.4 Residential Working Agreement. The employers recognize the Union as the sole and exclusive bargaining agent for all carpenters and apprentices for all carpenter work as defined in the Statewide Residential Working Agreement and are automatically bound by the provisions therein when performing residential work within the "Normal Construction Labor Market" of this Agreement. (See Exhibit A). The Union shall furnish a copy of the Statewide Residential Working Agreement to all employers.

. . .

ARTICLE XVI

JURISDICTION AND JURISDICTIONAL DISPUTES

Section 16.1 Jurisdiction. This Agreement covers all job classifications that have been assigned to the Carpenters by the United Brotherhood of Carpenters and Joiners of America, the Building and Construction Trades Department of the AFL-CIO (Exhibit B attached hereto) and as assigned to the Carpenters as found in Agreements and Decisions Rendered Affecting the Building and Construction Trades Department, AFL-CIO dated June 1, 1973 ("Green Book") and as assigned to the Carpenters by National Jurisdictional Agreements (not printed in Green Book) Revised June, 1974 as compiled by the Associated General Contractors of America, Inc.

EXHIBIT B

TRADE AUTONOMY

A. The trade autonomy of the United Brotherhood of Carpenters and Joiners of America consists of the milling, fashioning, joining, assembling, erection, fastening or dismantling of all material of wood, plastic, metal, fiber, cork and composition, and all other substitute materials. The handling, cleaning, erecting, installing and dismantling of machinery, equipment and all materials used by members of the United Brotherhood.

B. Our claim of jurisdiction, therefore, extends over the following divisions and subdivisions of the trade:

> Carpenters and Joiners; Millwrights; Piledrivers, Dock and Wharf Carpenters, Divers, Underpinners, Timbermen and Core Driller; Shipwrights, Boat Builders, Ship Carpenters, Joiners and Caulkers; Cabinet Makers, Bench Hands, Stair Builders, Millmen; Wood and Resilient Floor Layers, and Finishers; Carpet Layers; Shinglers; Siders; Insulators; Acoustic and Dry Wall Applicators; Shorers and House Movers; Loggers, Lumber and Sawmill Workers; Furniture Workers, Reed and Rattan Workers; Shingle Weavers; Casket and Coffin Makers; Box Makers, Railroad Carpenters and Car Builders, regardless of material used; and all those engaged in the operation of wood working or other machinery required in the fashioning, milling or manufacturing of products used in the trade, or engaged as helpers to any of the above divisions or subdivisions, and the handling, erecting and installing material on any of the above divisions or subdivisions, burning, welding, and rigging and the use of any instrument or tool for layout work incidental to the trade. When the term "carpenter and joiner" is used, it shall mean all the subdivisions of the trade.

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: 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.

11. That Article VI of the most recent "Working Agreement" provides that the Respondent will pay wage rates and fringe benefit contributions as specifically set forth in Section 6.1 and Articles VII, VIII, IX, and X concerning Health and Welfare, Pension, Vacation and Apprentice and Training Funds, respectively.

12. That the companion Statewide Residential Working Agreement, covering 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, provides in pertinent part as follows:

ARTICLE I - COVERAGE

This Agreement covers residential construction and is effective throughout the State of Wisconsin, except the excluded zones as set forth in Exhibit A, Page 32. (Zones 3 and 13)

Residential construction is herein defined as all work in connection with construction, alteration or repair of all residential units such as single dwellings, duplexes, row houses, town houses and apartments and related buildings. For the purpose of this Agreement, residential construction does not include those housing units constructed of reinforced concrete and/or steel framed units normally referred to as "High Rise," which are normally in excess of three stories in height.

. . .

ARTICLE IV - JURISDICTION

This Agreement covers all employees performing work coming under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, as set forth in its Constitution and Laws.

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. . . .

SECTION 26.2 Upon failure to meet with the other party for

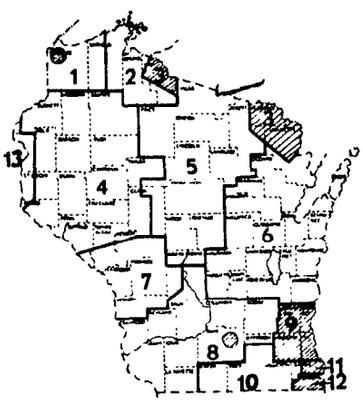
the purpose of collective bargaining upon service of the written notice the party so failing to meet is to be deemed to have conceded the changes desired by the party present with respect to the wages and conditions of employment for the new contract year.

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
ZONES



1. L.U. 755 Superior
2. L.U. 1709 Ashland
★ 3. Cloverland D.C. (Michigan)
4. L.U. 1074 Eau Claire
5. Wisconsin River Valley D.C.
6. Fox River Valley D.C.
7. L.U. 1143 La Crosse
8. Central Wisconsin D.C.
9. Milwaukee Carpenters D.C.
10. L.U. 836 Janesville
11. L.U. 91 Racine
12. L.U. 161 Kenosha
★ 13. Twin City D.C. (Minnesota)

★ Zones 3 and 13 not covered by this Agreement.

. . .

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 & Welfare.	.60	.60
Pension	.40	.50
Apprenticeship and Training . . .	.05	.05
Gross	$7.77	$8.82

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

. . .

13. That Article VIII, IX, X, XI, XII and XIV concerning Health and Welfare, Pension, Vacation, Appreenticeship and Training Funds, Central Depository and Delinquency and Bonding provisions substantially require that Respondent 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 Respondent 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; that the

Respondent's liability for liquidated damages may be ten per cent of the overdue payments or for greater amounts after the expiration of thirty days following the date the payments are due; and that Articles VIII and IX specifically state that the parties to this agreement and all employes covered thereby, agree to be bound by the terms of the trust agreement.

14. That both of the most recent agreements contain grievance arbitration procedure provisions providing for final and binding arbitration.

15. That at no time did Respondent execute the most recent "Working Agreement" or any "Statewide Residential Working Agreement"; and that at no time did Respondent reply to the Notices sent by Complainant outlined in Findings of Fact 8 and 9 above.

16. That from June 20, 1977, to August of 1981, the time of the instant dispute, Respondent made payments to the various "fringe benefit" funds referred to in Findings of Fact 7 and 11 for covered employes for commercial projects upon which it worked during this period in compliance with the 1975 "Working Agreement" and its successor the most recent 1979-1982 "Working Agreement."

17. That Respondent at no time made contributions to the various "fringe benefit" funds for residential work that it performed.

18. That on March 20, 1981, Complainant sent the following Notice to Respondent:

> PLEASE TAKE NOTICE that all of the organizations affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO who are parties to the "State-wide Residential Working Agreement between Local Unions and District Councils of the Wisconsin State Council of Carpenters and the Signatory Builders" (1979-1981) hereby open the agreement for negotiating a change in hourly wage rates for the one year period subsequent to July 1, 1981.
>
> The unions, party to the agreement, are ready and willing to meet for the purpose of discussing proposed changes in the hourly wage rates. We propose that the first meeting be held on Wednesday, the 15th day of April, 1981 at the C.H.O.P. Office, 120 East Stewart Avenue, Wausau, Wisconsin at 10:00 A.M. If these arrangements are inconvenient for you, please contact Mr. Dave Achterberg at area code 715-842-1359 so mutally convenient dates can be arranged.
>
> Previously you have signed and accepted the Agreement negotiated between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., without requesting to, or engaging in separate negotiations with this organization. Therefore, under these circumstances, for the purpose of negotiating a change in hourly wage rates for the one year period, we assume you have selected the Wisconsin Chapter, Associated General Contractors of America, Inc. as your bargaining agent, and that you intend to accept and be bound by any successor working agreement arrived at between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., for the period commencing July 1, 1981. If this is not the case, please so inform us in writing by return mail so that negotiations between this organization and your firm can be scheduled on a very timely basis. Absent the receipt of such written notice by March 31, 1981, of your desire to negotiate separately with this organization as concerns a successor agreement, we will assume in fact that you are being represented in current negotiations by the Wisconsin Chapter, Associated General Contractors of America, Inc., and that you will execute and be bound by the successor working agreement negotiated by and between this organization and the Wisconsin Chapter, Associated General Contractors of America, Inc., which Agreement is to become effective July 1, 1981.

19. On March 25, 1981, Respondent, by Roger Van De Hey, replied with the following letter:

> This letter is to advise you that effective immediately R & R Drywall Company, Inc. of Green Bay, Wisconsin, terminates whatever authority it has given the Fox River Valley Contractors Association and the Wisconsin Chapter, Associated General Contractors of America, Inc. to negotiate with any labor organization on its behalf with respect to

either the Statewide Residential Working Agreement or the Statewide Working Agreement. These labor organizations include, but are not limited to, the Fox River Valley District Council, Local Union No. 1146, affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the Greater Wisconsin Carpenters Bargaining Unit. More particularly, R & R Drywall Company, Inc. rescinds any and all collective bargaining authorizations, assumption agreements, and/or letters of assent which may have been executed by any officers or other agents of the Company at any time prior to the date of this letter.

R & R Drywall Company, Inc. does not intend to be bound by the terms and conditions of any labor agreement entered into between any labor organization and any employer association representing a multi-employer bargaining unit that are executed subsequent to this date. R & R Drywall Company, Inc. intends to negotiate independently of any multi-employer bargaining unit with regard to future collective bargaining agreements covering wages, hours and other terms and conditions of employment affecting its employees represented by any labor organizations affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

20. That on May 22, 1981, Respondent sent the following letter to Complainant:

R & R Drywall Company, Inc. of Green Bay, Wisconsin, informed you by letter dated March 25, 1981, that it desired to negotiate a successor agreement to the Collective Bargaining Agreement expiring May 31, 1981. We have not received any response to that letter. Consequently, we are renewing our request to discuss any changes either party proposes to the existing Collective Bargaining Agreement. I would appreciate your contacting me at your earliest convenience to establish a mutually agreeable time and place to initiate bargaining.

21. That on March 13, 1981, an auditor, Cline Cagle, hired by the trustees of the respective trust funds, conducted an audit of Respondent's payroll records; that as a result of said audit, Cagle determined that Respondent had failed to make contributions to the various funds for numerous hours of residential work performed by various employes of Respondent; that Cagle billed Respondent for monies he believed owing on April 22, 1981; and that a meeting was held on August 7, 1981, wherein Cagle, Ronald Kopp and Roger Van De Hey discussed the amounts owed and numerous employes were reclassified as performing work which would fall under the Lathers or Painters jurisdiction rather than work which would fall within the Carpenters jurisdiction as provided by the "Working" and "Statewide Residential Working Agreements."

22. That Respondent, as a result of further investigation made by Cagle, was requested on August 27, 1981, to make payments to the various funds for residential work that Complainant believed various covered employes had performed by the following letter from Cagle:

RE: Adjusted Amounts - Carpenters Fringe Benefits

In accordance with the meeting held on August 7, 1981 at your office, non-jurisdictional employees were deleted from the audit amounts. The adjusted net amounts due are as follows:

Wisconsin State Carpenters Welfare Fund	$2,613.06
Wisconsin State Carpenters Pension Fund	3,082.21
Wisconsin State Carpenters Vacation Fund	2,607.33
Wisconsin State Carpenters Education Fund	228.22

As a result of the adjustments, almost all the amounts due concern your employee Tom Moore. The hours for Moore are considered residential.

The Carpenters position on this audit is now clearly defined. Your firm either accepts liability for the above amounts or it does not.

I would appreciate your position on this matter within ten (10) days to enable the Trustees to proceed accordingly.

Thank you for your cooperation. A copy of the revised reports are attached for your files.

23. That on July 18, 1981, Complainant filed a grievance regarding the Respondent's failure to make the additional payments to the various 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.

24. That Complainant has failed to prove that the residential work performed by Respondent occurred within Complainant's geographical jurisdictional area as defined by either the Working Agreement or Statewide Residential Agreement, or that such work came under the jurisdiction of the United Brotherhood of Carpenters and Joiners as defined in either of the above agreements.

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

CONCLUSIONS OF LAW

1. That inasmuch as Respondent has failed and refused to process a July 18, 1981, grievance filed by Complainant to arbitration concerning Respondent's failure to make required fringe benefit contributions, the Examiner will assert the Commission's jurisdiction to decide Complainant's allegations that Respondent violated Section 111.06(1)(f) of the Wiconsin Employment Peace Act.

2. That inasmuch as there is no evidence establishing that Respondent performed the residential work within Complainant's territorial jurisdiction or work jurisdiction, Respondent, by not making the additional contributions to the fringe benefit funds for said residential work, has not breached the collective bargaining agreements and therefore, has not and is not committing a violation of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

ORDER 1/

It is hereby ordered that the complaint be and hereby is dismissed in its entirety.

Dated at Madison, Wisconsin this 29th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BY Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

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 make contributions to the various "fringe benefit funds" as required by the parties' collective bargaining agreements. Respondent filed a motion to dismiss said complaint and raised a number of affirmative defenses with respect thereto.

Complainant's Position

Complainant contends that the Wisconsin Employment Relations Commission possesses jurisdiction to decide this matter. It maintains that the National Labor Relations Board, hereafter referred to as the NLRB, does not possess jurisdiction to hear this case, that the Commission possesses concurrent jurisdiction with the federal courts to decide this matter, and that the characterization of the parties' collective bargaining agreement as a "pre-hire" agreement does not pre-empt the Commission from adjudicating the matter. In response to Respondent's Motion to Dismiss, Complainant asserts that the action is not barred by laches or any statute of limitations, or alternatively that Section 111.07(14), Wis. Stats. does not apply to the instant action. The Complainant maintains that the Respondent is and was bound by all terms of both the initial and successor Working Agreements and Statewide Residential Working Agreements because its agent, co-owner Roger Van De Hey, voluntarily executed the initial agreement without threats or coercion from Complainant. Moreover, it argues that even if the initial collective bargaining agreements is a pre-hire agreement, it and its successor agreement are enforceable. Complainant asserts that the amounts owed by Respondent for each employe to the various funds were appropriately calculated and that only employes performing work covered by the collective bargaining agreements were included in the audit.

Respondent's Position

Respondent argues that the Commission is pre-empted by the National Labor Relations Act, as amended, hereafter the NLRA, from exercising jurisdiction in this matter. It asserts that the initial collective bargaining agreement executed by Respondent was a "pre-hire agreement" which, although lawful, is unenforceable unless Complainant has affirmatively demonstrated its majority status. Respondent contends Complainant, in the instant case, has failed to affirmatively demonstrate majority status at any time. Moreover, Respondent urges the Examiner to reject any estoppel argument made by Complainant as to Respondent's being "estopped" from escaping its contributions obligations as set forth in the pre-hire agreement. Although Respondent previously submitted monies to the various fringe benefit funds and indicated it wanted to negotiate apart from the AGCA with respect to the Statewide Residential Working Agreement, it argues that estoppel should not apply because frustration of a federal policy would be the end result. Respondent claims that enforcement of the pre-hire agreement in this case would defeat or delay procedures proscribed by the NLRA as federal labor policy. It also maintains that Respondent's signature to the initial working agreement was coerced by Complainant's threat to picket the jobsite upon which Respondent was working, thus making Repondent's initial assent to the pre-hire agreement involuntary.

Respondent alleges that the initial Statewide Residential Working Agreement and its successor are not binding upon Respondent and that Complainant has failed to establish a prima facie case against Respondent in four respects. First, it argues that the Complainant failed to establish that Respondent performed the disputed residential work within the territorial jurisdictional area of Complainant as defined by either the Working or Statewide Residential Working Agreements. Secondly, it argues that Complainant has not established that any of the residential work performed by Respondent was work performed coming under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America as set forth by either agreement. Third, it claims the Union relied on the wrong agreement to compute the fringe contributions because it computed residential work rates while using the Working Agreement rates for fringe benefit contributions. Finally, Respondent stresses that the Complainant has failed to establish an adequate proof of damages. Based on all of the above arguments, Respondent requests that the matter be dismissed in its entirety.

Jurisdiction

Respondent admits that Complainant brings this action as a breach of contract suit pursuant to Section 111.06(1)(f) Wis. Stats. However, Respondent claims that the parties' agreement is a pre-hire agreement and unenforceable. It argues that the Commission does not possess jurisdiction to decide the enforceability of this agreement because this jurisdiction is exclusively vested with the NLRB by the NLRA, as a means of developing and effectuating a uniform national labor policy. Evaluation, however, of this argument in light of previous rulings of the courts and Commission, establishes that it must be rejected. Both the Commission and the courts have held that violations of collective bargaining agreements are unfair labor practices under the Wisconsin Employment Peace Act and therefore are not regulated by the NLRA. Thus the Commission has jurisdiction to determine whether such violations occurred. This is so even though the employer involved is otherwise subject to the jurisdiction of the NLRB. 2/

Where the alleged conduct of an employer is possibly an unfair labor practice within the jurisdiction of the NLRB, and where such alleged conduct violates a collective bargaining agreement, the Commission will exercise its jurisdiction with respect to the alleged contract violation. 3/ The Commission's jurisdiction to determine alleged contract violations as unfair labor practices under WEPA is, however, concurrent with that of federal courts to determine actions commenced under Section 301 of the National Labor Relations Act. 4/ Inasmuch as Complainant opted to bring the instant action to the Commission, the Examiner concludes that the Commission possesses jurisdiction to hear the alleged violation of the parties' collective bargaining agreement.

At hearing, Respondent attempted to adduce testimony through Van De Hey that Complainant never filed a grievance regarding this matter. Complainant, however, did file a grievance on July 18, 1981 and requested Respondent to reply. It is undisputed that Respondent did not reply to the grievance. Moreover, this failure to reply, when coupled with Respondent's contention that the agreement is an unenforceable pre-hire agreement, clearly demonstrate Respondent's unwillingness to submit the matter to the final and binding grievance procedure contained in the disputed agreement. 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 contending that the agreement is unenforceable. 5/ Under these circumstances, it is appropriate for the Commission to assert jurisdiction and consider the alleged contract violation. 6/

Merits

In support of its claim of coercion in the execution of the initial working agreement, Respondent necessarily relies heavily on the testimony of Van De Hey, the signator of the agreement. Van De Hey initally testified that on the first day of the Hunzinger Mall project in June of 1977, the Complainant's Business Agent James Moore approached him and his partner Richard Wendrick and inquired as to whether they had a union contract. According to Van De Hey, upon being advised that they were not a signatory, Moore told them "we would not be allowed to work on the job unless we were signatory to a union contract"; "that we wouldn't get

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2/ Tecumseh Products Co., 23 Wis. 2d 118, 3/64; American Motors Corp. (7079) 3/65 (aff. 32 Wis. 2d 327, 10/76); Ladish Co. (7686-A) 2/67; C & K Erectors, Inc. (9718) 6/70; UOP Norplex Division (13214-A,B) 1/76; Gateway Foods, Inc. (13188-A,B) 4/76.

3/ Stolper Industries, Inc. (7948) 3/67.

4/ Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 49 LRRM 2619 (1962); Rodman Industries, Inc. (9650-A,B) 11/70 (aff. Brown Co. Cir. Ct. 2/72); Oscar Mayer & Co., Inc. (11591-B,C) 10/74; G & H Products, Inc. (13225-A,B) 6/75.

5/ Inasmuch as the complaint contains no allegation alleging a refusal to arbitrate, it is unnecessary to make a finding regarding this issue.

6/ Bob Harrison Trucking (9051-A,B) 4/70; Levi Mews d/b/a News Redi Mix Corp., (6683) 3/64 (Milwaukee Co. Cir. Ct., 5/64 - Judgement enforcing Commission's Order).

the job done." Van De Hey stated that he would sign the agreement but wanted a copy to review before signing. Several days passed before Van De Hey executed the agreement and returned it to Moore.

Upon cross-examination, Van De Hey strengthened and embellished his original testimony. He testified that Moore threatened to picket Respondent and shut the job down. At another point, he stated that he only signed the agreement because Complainant "was picketing the job." Still later in his testimony Van De Hey stated that he felt threatened upon arriving at the Mall entrance on the first day because his ex-employer was present at the entrance along with three or four business agents from the different trades, including Moore. Van De Hey maintained that he felt threatened because he had heard from gossip that his ex-employer, whom he claimed had previously threatened to burn his house down, was "going to get me when I walked in the job."

Moore testified in rebuttal denying that he made any threats to Respondent such as threatening to picket Respondent or to pull men off the job if Respondent did not sign the agreement. According to Moore, he met Van De Hey on the jobsite on June 15, 1977. He inquired as to whether Van De Hey would be interested in signing an agreement, and upon receiving an answer that Van De Hey might possibly be interested, gave him a copy of the Working Agreement. Moore told him he might be able to help Respondent secure more commercial work. Moore claimed that he explained a few of the provisions of the agreement and left indicating that he would contact Van De Hey later. Moore stated that he phoned Van De Hey a few days after this conversation and Van De Hey indicated that he would sign the agreement; thereafter, Moore met with Van De Hey again on June 20, 1977, at the job site where Van De Hey then executed the agreement.

Upon review of the record, the Examiner credits the testimony of Moore over that of Van De Hey. While the testimony of both witnesses is, in a sense self-serving, the Examiner is convinced that Moore's version is more reliable. There is no doubt that Van De Hey felt threatened upon entering the jobsite. However, by his own admission, his feelings were the result of the presence of his ex-employer, a man whom he thought was going to physically assault him at the time. Particularly troubling is Van De Hey's embellishment of Complainant's alleged threat with each reiteration. Upon direct examination, he claimed the threat to be a vague one, i.e. "that we would not be allowed to work on the job unless we were signatory to a union contract"; "that we wouldn't get the job done." Upon cross-examination his testimony became much more detailed. On one hand, he stated that the only reason he signed was because the Complainant was actually picketing the job. On the other hand, he testified thaat Moore came over to him and threatened to picket and shut the job down. Even later, he stated he felt intimidated by the mere presence of the three or four business agents at the door entrance to the project along with his ex-employer. In addition to Van De Hey's embellishment and contradictory testimony with regard to the picket threat, the circumstances surrounding the execution of the agreement and subsequent events do not support Van De Hey's testimony. Rather, they comport more closely with Moore's version of the events. Van De Hey did not hastily execute the agreement on June 15, 1977, that initial day at the jobsite. He signed some five days later after having had an opportunity to review the document and consider whether or not it was prudent to sign. Moreover, upon completion of the Hunzinger Mall project, Van De Hey made no attempt to revoke his signature or terminate the agreement but continued to abide by the agreement and its successor with regard to making contributions for at least three other commercial projects after the Hunzinger Mall project. For these reasons, Moore's testimony is more persuasive than Van De Hey's and Van De Hey's testimony concerning the alleged coercion surrounding the execution of the original Working Agreement is not credited.

Assuming arguendo that the initial agreement which Respondent executed is an enforceable pre-hire agreement and that Respondent is bound by the terms and conditions of both the successor Working and Statewide Residential Working Agreements, 7/ Complainant must prove that the residential work performed by

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7/ In light of the ultimate findings in this matter, it is unnecessary to determine whether or not Complainant attained majority status on the Hunzinger project, whether or not the pre-hire agreement is enforceable, whether or not Respondent is bound by the successor agreements, and whether or not laches or the statute of limitations applies with regard to Complainant's requested remedy.

Respondent for which the fringe contributions are claimed was performed within the geographical territorial jurisdiction covered by the parties' agreement. The Preamble and Exhibit A of the Working Agreement specifically provide that the work performed must fall within the geographic jurisdiction of Complainant. Moreover, Article I and Exhibit A, Zone 6 of the Statewide Residential Agreement clearly establish the territorial jurisdiction for residential work covered under the Agreement. The record, however, does not contain any evidence to establish that Respondent performed the disputed work within the territorial jurisdiction of Complainant.

No witnesses testified as to where the approximately six (600) hundred residential units upon which Respondent worked were located. Although Respondent did not raise the contention that these units were outside of Complainant's territorial jurisdiction at an August 7, 1981 meeting of the parties, there is no evidence that Respondent ever agreed that the work performed did fall within Complainant's territorial jurisdiction at that meeting or at any time thereafter. Moreover, Complainant was put on notice, at the onset of the hearing, of this contention by Respondent's specific denial of paragraph one of the complaint which alleges that Respondent did do business in the jurisdictional area of the Fox River Valley District Council of Carpenters, Wisconsin. For this reason, it was incumbent upon Complainant to specifically prove that the disputed work was performed within Complainant's territorial jurisdiction. Complainant, however, failed to sustain this burden of proof.

Nor has Complainant established that the residential work performed by Respondent was work performed under Article XVI, Section 16.1 and Exhibit B of the Working Agreement and Articles I and IV of the Statewide Residential Working Agreement. Van De Hey's unrebutted testimony is that Respondent's employes, for whom fringe contributions are claimed, were performing residential work limited to lathing, plastering, and painting. Cline Cagle, Complainant's auditor, merely reviewed individual earnings sheets for Respondent's employes. He at no time observed the actual work performed by the Respondent's employes to determine whether it was covered within the Carpenters' work jurisdiction. Moreover, no other agent of Complainant made such observations. Furthermore, there is evidence to suggest that as early as the August 7, 1981 meeting, Respondent contended that its employes were performing lathing work which did not fall within the Complainant's work jurisdiction.

Inasmuch as the record contains no evidence to establish that the disputed work was work performed within the traditional work jurisdiction or within the geographical territorial jurisdiction as provided by the two agreements, it must be concluded that Complainant has failed to meet its burden in proving that Respondent breached the collective bargaining agreements by failing to make fringe benefit contributions for the disputed residential work. The complaint in this matter is therefore dismissed.

Dated at Madison, Wisconsin this 29th day of June, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni
Mary Jo Schiavoni, Examiner