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-B

Appearances:

Thomas, Parsons, Schaefer & Bauman, Attorneys at Law, by Ms. Susan Bauman and Mr. Steven Schaefer, 7 North Pinckney Street, Madison, Wisconsin 53703, appearing on behalf of the Complainant.

Egan, Laird & Nellen, S.C., Attorneys at Law, by Mr. James W. Nellen II, 2050 Riverside Drive, P. O. Box 1323, Green Bay, Wisconsin 54305-1323, appearing on behalf of the Respondent.

ORDER REVISING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

Examiner Mary Jo Schiavoni having, on June 29, 1982, issued Findings of Fact, Conclusions of Law and Order, with Accompanying Memorandum, in the above-entitled matter, wherein said Examiner concluded that the Complainants named above had failed to establish that any of the Respondent's employes had performed work which required the Respondent to make payments to various funds, as required in a collective bargaining agreement existing between the parties, and that, as a result of said conclusion, the Examiner dismissed the complaint filed herein; and the Complainants having, pursuant to Sec. 111.07(5), Wis. Stats., timely filed a petition requesting the Wisconsin Employment Relations Commission to review the Examiner's decision; and briefs having been filed in support of, and in opposition to said petition for review by September 27, 1982; and the Commission having reviewed the entire record, the briefs filed in support of and in opposition thereto, and being fully advised in the premises, and being satisfied that the Examiner's Findings of Fact and Conclusions of Law should be revised, but that the Examiner's Order should be affirmed;

NOW, THEREFORE, the Commission makes and issues the following:

REVISED FINDINGS OF FACT

1. That Complainant Ronald Kopp is the Business Manager of the Complainant Fox River Valley District Council of Carpenters, a labor organization representing employes for purposes of collective bargaining; and that said Complainants, hereinafter jointly referred to as the Union, unless otherwise noted, having their offices at 1818 North Ballard Road, Appleton, Wisconsin.

2. That the Respondent R & R Drywall Co., Inc., hereinafter referred to as the Employer, is owned and operated by Roger Van De Hey and Richard Wendricks; that the Employer is engaged in the building and construction of commercial and residential buildings, and in said operation employs various employes performing carpentry, lathing and painting work; and that the Employer maintains its offices and principle place of business at 2032 Deckner Avenue, Green Bay, Wisconsin.

3. That the Wisconsin Chapter of the Associated General Contractors of America, Inc., which has its offices at 4814 East Broadway, Madison, Wisconsin, hereinafter referred to as AGCA, is an association consisting of contractors in the State of Wisconsin, who employ, among others, employe carpenters; that AGCA,

on behalf of its employer members, negotiates collective bargaining agreements, covering wages, hours and conditions of employment of the carpenter employes in the employ of member employers, with various local union and District Councils affiliated with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, specifically, Local Unions 1074, 1143, and the Central Wisconsin, Fox River Valley and Wisconsin River Valley District Councils and their affiliated Locals; and that said various labor organizations have been combined in what has been known as the Greater Wisconsin Carpenters Bargaining Unit, hereinafter referred to as the GWCBU.

4. That on May 1, 1975 representatives of the GWCBU and the AGCA affixed their signatures to a collective bargaining agreement, entitled "Working Agreement" covering wages, hours and conditions of employment of carpenters, apprentices and trainees in the employ of members of AGCA, or by non-members who separately adopted same and became a signatory thereto, for the term commencing on May 1, 1975 and continuing to at least April 30, 1979; that said agreement covered work performed on "commercial" type construction; that said agreement contained, among its provisions, Articles VI through X, requiring employers covered thereby to make payments to a Central Depository, on behalf of carpenter employes working on "commercial" construction, into Health and Welfare, Pension, Vacation, and Apprentice and Training funds; and that Article II of said agreement provided, in part, as follows:

> 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.

5. That on or about June 15, 1977, James Moore, a Union Business Representative, whose duties include contacts with employers employing carpenters performing work within the geographical jurisdiction of the Union, upon learning that the Employer had obtained a subcontract to perform certain carpenter work on a project known as the Port Plaza Mall, Green Bay, Wisconsin, contacted the Employer, who was at no time material herein a member of AGCA, for the purpose of seeking the Employer's consent to be bound by the "commercial" agreement then existing between AGCA and the GWCBU; that in said regard Moore met Roger Van De Hey on said date and advised the latter that the Mall project was a "union" job and that if the Employer did not become a signatory to said collective bargaining agreements the Employer would be unable to complete the work on the site; and that thereafter, and on June 20, 1977, Van De Hey executed a copy of the 1975-1979 "Working Agreement".

6. That on January 12, 1979, the Union sent the following notice to the Employer:

> Notice is hereby given, pursuant to Article 1, 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.

. . .

7. That thereafter on March 29, 1979, the Union sent the following notice to the Employer:

> 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.

. . .

8. That at no time following the receipt of the notices referred to in Findings of Fact 6 and 7, did the Employer respond to such notices; and that, in fact, the Employer, at least to the date on which the complaint was filed herein, has continued to make payments to the various funds on behalf of employes who performed carpenter work on "commercial" building projects.

9. That on May 1, 1979, representatives of the GWCBU and AGCA executed a "Working Agreement", effective from May 1, 1979 through at least April 30, 1982, which agreement contained among its provisions, the following material herein:

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."

. . .

ARTICLE II

. . .

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.

. . .

EXHIBIT B

TRADE AUTONOMY

. . .

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.

10. 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 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

. . .

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.

. . .

11. That Articles VIII, IX, X, XI, XII and XIV 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; that the employer's liability for liquidated damages may be ten percent 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.

12. That said Statewide Residential Working Agreement, in Article IV, contained a provision for final and binding arbitration of grievances arising thereunder; and that, however, said Article contained the following exception:

Section 4.5 The Trustees of the Wisconsin State

ployer had failed to make contributions to the various funds for numerous hours of residential work performed by various employes of the Employer; that Cagle billed the Employer 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."

14. That the Employer, as a result of further audit conducted by Cagle, was requested on August 27, 1981, to make payments to the various funds for residential work that employes had performed by the following letter from Cagle:

> RE: Adjusted Amounts - Carpenters Fringe Benefits
>
> In accordance with the meeting held 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.

and that the Employer did not respond.

15. That on July 18, 1981 the Union filed a grievance with the Employer with respect to the latter's failure to make payments to the various funds, as claimed due and owing under the Statewide Residential Working Agreement for carpenter work performed by employes of the Employer; that the Employer, at no time material herein, responded to said grievance, and subsequently, and on August 19, 1981, the Union filed the complaint initiating the instant proceeding.

16. That the Union failed to prove that the residential work in question came within the work jurisdiction of the Complainant as established by the applicable Statewide Residential Working Agreement.

Upon the basis of the above and foregoing Revised Findings of Fact, the Commission makes and issues the following

REVISED CONCLUSIONS OF LAW

1. That, since the 1979-1981 Statewide Residential Working Agreement which existed between the Complainant Fox River Valley District Council of Carpenters and the Respondent R & R Drywall Co., Inc., did not require the utilization of the grievance and arbitration procedure set forth therein, in seeking compliance with the provisions relating to payments due and owing to welfare, pension, vacation and education funds for hours of work performed by employes of said Respondent on residential construction, the Wisconsin Employment Relations Commission has jurisdiction to determine whether said Respondent violated the collective bargaining agreement by failing to make payments to said funds thereby committing an unfair labor practice within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

2. That as the residential work in question did not fall within the work jurisdiction of the Complainant Fox River Valley District Council of Carpenters as established by the applicable Statewide Residential Working Agreement,

Respondent R & R Drywall Co., Inc., did not violate the parties' collective bargaining agreements by failing to make certain contributions to various fringe benefit funds and, therefore, did not commit an unfair labor practice under Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Revised Findings of Fact and Conclusions of Law, the Commission makes and issues the following

ORDER 1/

That the Examiner's Order dismissing the instant complaint is hereby affirmed.

Given under our hands and seal at the City of Madison, Wisconsin this 14th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner

1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

MEMORANDUM ACCOMPANYING ORDER REVISING EXAMINER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AND AFFIRMING EXAMINER'S ORDER

The Pleadings:

In its complaint initiating the instant proceeding, filed on August 19, 1981, the Union alleged that the Employer committed unfair labor practices, within the meaning of Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act, by violating certain provisions of a collective bargaining agreement existing between the parties when it failed to make payments to various fringe benefit funds on behalf of its employes.

The Positions of the Parties:

Counsel for the parties, in arguments before the Examiner during the course of the hearing, and in briefs filed subsequent thereto with the Examiner, set forth their positions which were succinctly summarized by the Examiner as follows:

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 preempt 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, coowner 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 Respondent'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.

The Decision of the Examiner:

The Examiner found that the Complainant and Respondent were parties to valid collective bargaining agreements from at least 1977 to June 30, 1982. The Examiner also found that the Respondent made no payments during the effective terms of said agreements, to the various fringe benefit funds on behalf of the employes in question for residential work. The Examiner concluded that the Commission would not require the Complainant to proceed to arbitration on the grievance filed with the Respondent which contended that such failure to pay into the funds was in violation of said agreements, because Respondent did not respond to said grievance and further, since the Respondent attacked the validity of the collective bargaining agreements. As a result the Examiner exercised jurisdiction to determine the merits of the grievance. However, the Examiner concluded that the Complainant did not establish that employes of the Respondent performed residential carpenter work and did not establish that the work was in the geographical jurisdiction of the Complainant, and dismissed the complaint.

The Petition for Review:

Complainant timely filed a petition requesting the Commission to review the Examiner's decision, taking exception to numerous Findings of Fact, as well as to the Conclusion of Law and Order dismissing the complaint. Briefs were filed in support of and in opposition to the petition for review.

Discussion:

The Commission has revised the Examiner's Findings of Fact to add findings deemed material to the issues and to delete certain findings deemed immaterial thereto.

The Examiner exercised the Commission's jurisdiction to determine whether the Respondent violated any agreement because she found that the Respondent "ignored" the grievance and arbitration procedure by not responding to the grievance and because Respondent attacked the validity of the agreements. A closer examination of the provisions involved, in all the agreements, would have revealed that actions seeking the collection of monies due and owing the funds involved need not proceed to arbitration.

The Examiner also found, and we affirm, as follows:

> 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.

Further, in reconciling the August 7, 1981, revised audit and the testimony of auditor Cagel and Van De Hey regarding same, we agree with Complainant that Van De Hey understood the revised audit to only include the names of carpenters who worked on residential projects. From this, Complainant argues that since carpenters, admittedly, performed work on residential projects as alleged, all of the work performed was within the jurisdiction of carpenters. In support of its position, Complainant relies on Article I and Article IV of the Statewide Residential Working Agreement which provides as follows:

ARTICLE I - COVERAGE

> This Agreement covers residential construction . . .
>
> Residential construction is herein defined as all work in connection with: construction, alteration or repair of all residential units . . .

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.

We note, however, that Article I defines what constitutes residential work not, as alleged by complaint, that all residential work falls within the jurisdiction of carpenters. Thus only work under the jurisdiction of carpenters performed in residential construction is covered by the Residential Construction Agreement.

Van De Hey testified that while carpenters indeed performed residential construction work, the work they performed was not carpenter's work but, rather was limited to lathing, plastering and painting. As concluded by Examiner, there is no record evidence, in the final analysis, establishing otherwise. Thus, we affirm the Examiner's conclusion that the company did not breach the Collective Bargaining Agreement in this regard.

Having so concluded, the issue of whether the work in question was performed within the territorial residential area of Complainant becomes moot and thus need not be decided.

Dated at Madison, Wisconsin this 14th day of March, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Herman Torosian, Chairman

_____
Gary L. Covelli, Commissioner