

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Complainant,

vs.

DAN WERGIN SONS, INC., 1/

Respondent.

Case I.
No. 28978 Ce-1940
Decision No. 19303-A

Appearances:

Thomas, Parsons, Schaefer & Bauman, Attorneys at Law, 7 North Pinckney Street, Madison, WI 53703, by Susan J. M. Bauman, for Complainant.
Nash, Spindler, Dean & Grimstad, Attorneys at Law, 201 East Waldo Boulevard, P.O. Box 1128, Manitowoc, WI 54220, by James A. Mast, for Respondent.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

Ronald Kopp, Business Manager, Fox River Valley District Council of Carpenters, having filed a complaint with the Wisconsin Employment Relations Commission on December 16, 1981, alleging that Dan Wergin Sons, Inc. had committed an unfair labor practice within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Douglas V. Knudson, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order, pursuant to Section 111.07(5) Wis. Stats.; and hearing on said complaint having been held before the Examiner in Manitowoc, Wisconsin on February 10, 1982; and the parties having filed briefs by March 2, 1982; and the Examiner, having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That the Fox River Valley District Council of the Wisconsin State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, hereinafter referred to as Complainant, is a labor organization with its offices located at 2828 North Ballard Road, Appleton, Wisconsin; and, that Ronald Kopp is Complainant's business manager and James Moore is a business representative for Complainant.

2. That Dan Wergin Sons, Inc., hereinafter referred to as Respondent, is an employer engaged in the business of carpet installation, painting and similar types of work, and, at all times material herein, had its office at 1801 Marshall Street, Manitowoc, Wisconsin.

3. That on or about January 13, 1981, Respondent entered into a contract with Soulek Interiors to lay carpet and vinyl floor coverings at certain residential construction sites in Green Bay, Wisconsin.

1/ Respondent's correct name is Dan Wergin Sons, Inc., rather than Dan Wergin & Sons, Inc., as stated on the complaint.

4. That on or about March 1, 1981, Dennis Grabowski, Glen Sauer and Jeffery Salutz, individuals employed by Respondent, commenced work on the Green Bay project, pursuant to Respondent's contract with Soulek Interiors.

5. That Respondent prior to March, 1981, had no contractual relationship with Complainant.

6. That on or about March 10, 1981, James Moore, advised a representative of Respondent, Dennis Wergin, that the Green Bay project was a union site and that Respondent had to sign a contract with Complainant if its employees were to continue working on the project; that on March 19, 1981, Dennis Wergin, on behalf of Respondent, signed the 1979-1981 Statewide Residential Working Agreement, herein agreement, negotiated by the Greater Wisconsin Carpenters Bargaining Unit, on behalf of the Local Unions and District Councils of the Wisconsin State Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, and, by the Wisconsin Chapter, The Associated General Contractors of America, Inc., on behalf of the signatory builders; that on the same date, Moore advised Dennis Wergin that Respondent's three employees working in Green Bay had to sign up as members with Complainant; and, that the agreement signed by Respondent contained the following provisions:

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.

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 various commercial agreements and are automatically bound by the provisions therein when performing commercial work within the "Normal Construction Labor Market" of each of these agreements. Upon request the Union shall furnish a copy of these agreements to the employer. This provision shall remain in effect only for the term of this Agreement.

. . .

ARTICLE III - RECOGNITION

The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for all carpenters and carpenter apprentices on work covered by this Agreement. Further, the EMPLOYER recognizes the traditional Trade Jurisdiction of the United Brotherhood and agrees to assign such work to members of the unit.

. . .

ARTICLE VIII HEALTH AND WELFARE FUND

SECTION 8.1. During the life of this Agreement, each employer covered thereby shall pay the sum per hour for each hour worked by all employees covered by the Agreement, specified under Exhibit A Wage Rates Welfare Fund, to the trustees of the Wisconsin State Carpenters Welfare Fund. These payments shall be made not later than the 15th day of each month

following the month of which payment is being made as specified in Article XII for distribution. . . .

ARTICLE IX
PENSION FUND

SECTION 9.1. Each employer covered by this Agreement shall pay to the Trustees of the Wisconsin State Carpenters Pension Fund for each hour worked by all employees covered by this Agreement the sum per hour specified under Exhibit A Wage Rates Pension Fund. These payments shall be made not later than the 15th day of each month following the month for which payment is made as specified in Article XII for distribution.

. . . .

ARTICLE X
VACATION FUND

SECTION 10.1. During the life of this Agreement, each employer covered thereby shall deduct the sum per hour for each hour worked by all employees covered by this Agreement, specified under Exhibit A Wage Rates Vacation Fund. These deductions shall be remitted not later than the 15th day of each month following the month for which payment is being made as specified in Article XII for distribution.

. . . .

ARTICLE XI
APPRENTICESHIP & TRAINING FUND

SECTION 11.1. During the life of this Agreement, each employer covered by this Agreement shall pay the sum per hour for each hour worked by all employees covered by this Agreement, specified under Exhibit A Wage Rates Apprenticeship and Journeyman Training Fund. These payments shall be made not later than the 15th day of each month following the month for which payment is being made as specified in Article XII for distribution.

. . . .

ARTICLE XII
CENTRAL DEPOSITORY

SECTION 12.1. During the life of this Agreement, each employer covered by this Agreement shall pay the sum due each fund as specified under Article VIII - Health and Welfare Fund, Article IX - Pension Fund, Article X - Vacation Fund, Article XI - Apprenticeship and Training Fund, and all deductions made pursuant to Article XIII (Dues Check-Off) of this Agreement, not later than the 15th day of each month following the month for which payment is being made to Central Depository, P.O. Box 282, Eau Claire, Wisconsin 54701, for distribution.

. . . .

ARTICLE XIV - DELINQUENCY PROVISION AND BONDING

SECTION 14.1. In the event an Employer becomes delinquent in the payment of the sum required to be paid to the several trust funds, as provided in Article VIII, IX, X and XI of this agreement, then such Employer shall become obligated for all claims that may arise during the period of delinquency. In addition, in the event the trustees of any of the several trust funds have not established a schedule of liquidated damages to be paid in the event of delinquency in making required payments, then an Employer who has become delinquent in making such payments shall become liable for the payment of

liquidated damages in the amount equal to ten per cent (10%) of the payments which are overdue and thus delinquent and, further, shall become liable for the payment of additional liquidated damages in an amount equal to five per cent (5%) of the overdue payments for each day that such Employer remains delinquent after the expiration of thirty (30) days following the 15th day of each month after the month for which payment is required to be made.

SECTION 14.2. In the event legal or administrative action becomes necessary to recover the sums due the several Trust Funds, the delinquent Employer shall be required to pay all court costs, service fees, court reporter fees and actual attorney's fees.

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 part 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.

7. That on or about April 13, 1981 Moore met with Respondent's three employees, who were working on the Green Bay project, and obtained signed union membership cards from them; that on or about April 15, 1981, said three employees ceased working on the Green Bay project for Respondent because of Respondent's loss of its contract with Soulek Interiors; that said three employees have performed no work for Respondent since April 15, 1981; and, that during the time period of March 19, 1981 through April 14, 1981, Dennis Grabowski and Glen Sauer each worked 201 hours, while Jeff Salutz worked 182.5 hours.

8. That, during the months of March through September 1981, Respondent did employ certain other individuals to perform both interior and exterior painting of houses in the Manitowoc area; that Complainant never solicited said individuals to become members and, prior to October 21, 1981 never advised Respondent that said individuals were covered by the labor agreement; that the term "residential construction" in Article I of the agreement does not specify painting to be covered by said term; that said Article I does refer to carpenter work as defined in the various commercial agreements; and, that the commercial agreement attached to the complaint does not refer to painting in defining types of work over which Complainant claims jurisdiction.

9. That, since signing the labor agreement on March 19, 1981, Respondent has not made any payments on behalf of any of its employees to the Health and Welfare, Pension, Vacation, and, Apprenticeship and Training Funds, herein Trust Funds, pursuant to the appropriate Articles of the labor agreement; that on October 21, 1981 Respondent was sent a bill in the amount of \$6,576.52, of which \$945.75 represented liquidated damages, as the amount owed to the four Trust Funds; that said bill was based on the hours worked by all of Respondent's employees, including five employees who never worked at the Green Bay project, during the months of March through September, 1981; that in a letter dated November 11, 1981 Respondent objected to the amount of Complainant's bill and offered to pay the amounts due for the three employees who had worked at Green Bay, as soon as it received payment from Soulek Interiors; that by letter dated November 30, 1981, Complainant advised Respondent that it was in violation of the labor agreement and should contact Complainant's office within 24 hours to dispose of the grievance; and, that in a letter dated December 4, 1981 Respondent offered to make payment to the Trust Funds for the three employees who had worked at the Green Bay project; that Complainant did not accept such an offer; and, that the instant complaint was filed on December 16, 1981 in which complaint, Complainant sought payment for the amount contained in its letter dated October 21, 1981.

10. That the uncontradicted testimony of Moore established that the 1979-1981 labor agreement, which Respondent signed on March 19, 1981, was replaced

by a successor agreement effective July 1, 1981; and, that Respondent has not signed said successor agreement.

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

CONCLUSIONS OF LAW

1. That the collective bargaining agreement between the parties expired on June 30, 1981; and that said agreement applied only to those employees 2/ working at the Green Bay project during the period of March 19, 1981 through April 14, 1981.

2. That Dan Wergin Sons, Inc. did violate the parties' 1979-1981 collective bargaining agreement by failing to make payments required by said agreement to the Wisconsin State Carpenters Welfare Fund, the Wisconsin State Carpenters Pension Fund, the Greater Wisconsin Carpenters Bargaining Unit Vacation Fund, and, the Greater Wisconsin Carpenters Bargaining Unit and the Southern Wisconsin Carpenters Apprenticeship and Journeyman Training Funds on behalf of Dennis Grabowski, Glen Sauer and Jeff Salutz for the hours they worked at the Green Bay project during the time period of March 19, 1981 through April 14, 1981, and thereby, Dan Wergin Sons, Inc. committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

3. That by its letter dated December 4, 1981, Dan Wergin Sons, Inc. made an offer to pay the amount it believed it owed, which was the amount found herein to be due; and, that Complainant's failure to accept said offer terminated its rights to additional interest, liquidated damages, and/or those legal fees set forth in Article XIV, Section 14.2 of the labor agreement following said date.

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

ORDER 3/

IT IS ORDERED that Dan Wergin Sons, Inc., its officials and agents, shall immediately:

2/ Said three employees were Dennis Grabowski, Glen Sauer and Jeff Salutz.

3/ 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.

1. Make a payment totaling \$997.59 to the Central Depository, P.O. Box 282, Eau Claire, WI 54701 for distribution to the funds specified in Conclusion of Law No. 2 above.
2. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order as to what action it has taken to comply herewith.

Dated at Madison, Wisconsin this 18th day of May, 1982.

BY



Douglas V. Knudson, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Complainant alleges that Respondent's failure to comply with Article XII of the collective bargaining agreement violated said agreement, which also constitutes an unfair labor practice under Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Complainant's Position:

The coverage of the agreement signed by Respondent was not limited to the Green Bay project. Such a limitation was never expressed to Respondent by any representative of Complainant. Further, Article I of the agreement specifies that the agreement covers all residential construction. Painting of houses falls within the agreement's definition of residential construction. Therefore, Respondent's employees were covered by the agreement when they were painting houses, as well as when they were laying carpet.

Since there is no evidence to show that either party gave the proper notice to terminate the 1979-1981 agreement, said agreement continued in force and was binding on all parties during the period of March through September, 1981.

Respondent has failed to make any contributions to the Trust Funds specified in Articles VII, IX, X and XI of the agreement. Accordingly, Respondent now is liable both for a sum of \$6,576.52, which includes liquidated damages, plus interest assessed at the rate of 1 1/2% per month, and, for Complainant's costs and attorney fees incurred in this matter.

Respondent's Position:

Respondent admits that it failed to make payments to the Trust Funds, as required by the agreement, for three of its employees for the period of time commencing on March 19, 1981 through April 14, 1981 during which time said three employees worked on the Green Bay project. Respondent denies it had any contractual obligation to make fund payments for other employees who were neither members of the Union covered by the agreement, nor, performing work within the jurisdiction of the agreement.

A business representative of Complainant advised Respondent that the agreement would apply only to the three carpenters on the Green Bay project. Complainant never solicited Respondent's other employees for membership. Said other employees performed painting work which is outside the jurisdiction of the agreement.

Following the termination of Respondent's contract with Soulek Interiors for the Green Bay project, the three carpenters performed no other work for Respondent. Further, the agreement expired on June 30, 1981 and Respondent did not sign the successor agreement.

Respondent believes it is liable for a sum of \$997.59, which includes contractual damages. Since at least December 4, 1981, Complainant has been aware of Respondent's offer to pay such an amount. By rejecting that payment, Complainant has waived its right to further damages and interest penalties.

Discussion:

Respondent admits that it has failed to make contributions to the Trust Funds on behalf of any of its employees, even those employees whom it concedes were covered by the agreement while working on the Green Bay project. Thus, the issues are the period of time during which Respondent was liable for payments to the Trust Funds, and, the employees for whom such payments should have been made.

Although Complainant contends in its post-hearing brief that the agreement, signed by Respondent in March 1981, remained in effect through September 1981, the uncontradicted testimony of Moore, a business representative for Complainant, was that the 1979-1981 agreement has been replaced by a successor agreement effective on July 1, 1981. There is no evidence to show that Respondent ever signed the successor agreement. Therefore, Respondent's liability for continued Trust Fund

payments ceased on June 30, 1981, since it was no longer signatory to an agreement with Complainant after said date.

Contrary to Respondent's assertion, it is clear from the record that Complainant never stated to Respondent that the agreement would apply only to either the employees on the Green Bay project and/or the Green Bay project. However, Moore did tell Dennis Wergin that the three employees at the Green Bay project would have to sign up with the Union. Subsequently, on or about April 13, 1981, Moore did meet with said three employees and enrolled them in the Union. At no time did Complainant solicit any of Respondent's other employees for membership. It does not appear that Moore considered Respondent's other employees to be performing work covered by the agreement.

Complainant contends that the definition of residential construction found in Article I of the agreement includes the painting of houses. Such an expansive interpretation would constitute a claim that all residential work, whether it be plumbing, roofing, electrical wiring, painting, or other craft work, is to be performed by carpenters. Anyone familiar with the construction industry finds such a claim to be of a dubious nature. Furthermore, Article I also refers to "carpenter work as defined in the various commercial agreements". Attached to the complaint filed on December 16, 1981, was a copy of an agreement which Ronald Kopp described, in his testimony, as "the Commercial Agreement". Said agreement contains the following provisions.

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 Crapenters, (sic) Divers, Underpinners, Timbermen and Core Driller; Shipwrights, Boat Builders, Ship Carpenters, Joiners and CAulkers; Cabinet Makers, Bench Hands, Stair Builders, Millmen; Wood and Resilent 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.

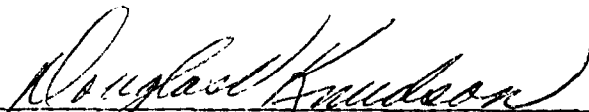
The language of the preceding provisions do not contain any reference to painting, and therefore, fail to support Complainant's claim to painting work. It is concluded that Complainant failed to meet its burden of proof to show that the painting work performed by Respondent's employees was covered by the 1979-1981 agreement. Therefore, the record establishes that Respondent's liability for payments to the various Trust Funds is limited to the hours worked by the three employees who performed work at the Green Bay project for the period of March 19, 1981 through April 14, 1981. Said three employees and their respective hours of work were: Dennis Grabowski 201 hours; Glen Sauer - 201 hours; and, Jeff Salutz - 182 1/2 hours. Respondent's failure to make Trust Fund payments on behalf of said three employees constituted a violation of the 1979-1981 collective bargaining agreement, thereby also constituting an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

In a letter dated December 4, 1981, Respondent offered to make payments to the Trust Funds on behalf of the three employees who had worked at Green Bay. However, Complainant never advised Respondent that such an offer was acceptable, but rather, continued to seek the larger payments initially requested in its letter dated October 21, 1981. Since Respondent's offer has been concluded to have been the proper amount, Complainant thereby waived its right to additional damages and/or interest penalties past December 4, 1981. Similarly, Complainant's request for attorney fees incurred in this action is denied, since said fees were incurred after Respondent's payment offer on December 4, 1981, which offer apparently would have satisfied the liabilities concluded herein to be appropriate.

Complainant did not contest the accuracy of the sum of \$997.59 which Respondent stated as the amount due to the Trust Funds on behalf of the three employees who worked at the Green Bay project during March and April 1981. Accordingly, the Examiner concludes that the payment of said amount is an appropriate remedy.

Dated at Madison, Wisconsin this 18th day of May, 1982.

BY


Douglas V. Knudson, Examiner