

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE DISTRICT COUNCIL OF CARPENTERS,  
Complainant,  
vs.  
KITCHEN CREATIONS, INC.,  
Respondent.  
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Case 1  
No. 34198 Ce-2014  
Decision No. 22415-A

Appearances:

Goldberg, Previant, Uelmen, Gratz, Miller and Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Larry Steffes, appearing on behalf of the Complainant.  
Mr. Dennis J. Weden, Attorney and Counselor at Law, 1216 North Prospect Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent.

FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

COLEEN A. BURNS, Hearing Examiner: Milwaukee District Council of Carpenters, herein the Complainant, filed a complaint with the Wisconsin Employment Relations Commission on November 30, 1984, wherein the Complainant alleged that Kitchen Creations, Inc., herein the Respondent, had committed unfair labor practices within the meaning of Sec. 111.06(1)(d) of the Wisconsin Employment Peace Act, by unilaterally terminating wages and fringe benefits of the employe in the bargaining unit represented by Complainant and by refusing to meet with Complainant's representative. On March 8, 1985, the Commission appointed Coleen A. Burns, a member of the Commission's staff, as Examiner to conduct the hearing on the complaint and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Stats. The hearing, after one postponement, was held in Milwaukee, Wisconsin, on May 8, 1985, and the parties, thereafter, filed briefs which were received by June 14, 1985.

Having considered the arguments and the record, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Complainant, Milwaukee District Council of Carpenters, is a labor organization within the meaning of Sec. 111.02, Stats.; that Complainant represents a bargaining unit consisting of one employe of the Respondent; and that Complainant's offices are located at 3020 West Vliet Street, Milwaukee, Wisconsin 53208; and that at all times material herein Gregory Shaw, Michael Balen and Clifford Buth have acted as agents of, and on behalf of, Complainant.  
of Sec. 111.02, Stats. with offices located at 13575 West National Avenue

hour to the Milwaukee Area Carpenters and Cabinet Makers Joint Apprenticeship and Training Fund, for the purpose of providing apprenticeship training (Article IX); and \$2.05 per hour to the Milwaukee Carpenters' District Council Welfare Fund, for the purpose of providing health and welfare benefits (Article VII).

4. Article XXIV of the parties' 1982-84 collective bargaining agreement states:

#### ARTICLE XXIV

##### DURATION OF AGREEMENT

**Section 1.** This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect until May 31, 1984 provided, however, that written notice of the proposed termination or modification of the contract, by the party desiring to terminate or modify the contract, shall be served upon the other party, on or before February 28th prior to the expiration date, thus insuring a ninety (90) day notice prior to May 31st. Such notice shall be accepted by both parties as being in full compliance with the notice requirements of the Labor-Management Relations Act of 1947, as amended, and no further notice prior to strike or lockout shall be expected or required.

**Section 2.** Upon failure to meet with the other party for the purpose of collective bargaining upon service of the written notice referred to in Section 1 of this Article, the party so failing to meet is to be deemed to have conceded the changes desired by the party present with respect to wage rates and conditions of employment for the new contract year.

**Section 3.** In the event a notice, as referred to in Section 1 of this Article, has been duly served, it shall be optional with the members of the Union to work after May 31, 1984, unless a satisfactory agreement is reached by May 20th. Nothing herein shall be construed to prohibit or restrict the right of the Employer to lockout, or the right of the employees to strike, after the termination date of this Agreement.

5. Respondent mailed to the Complainant a letter dated February 18, 1984 and addressed to Mr. Gregory Shaw which states as follows:

Persuant (sic) to the collective bargaining agreement currently in effect, Kitchen Creations, Inc., will hereby terminate the said contract at the end of the current contract perior (sic), May 31, 1984.

This letter therefore is to be used as my formal notification to the Milwaukee District Carpenters Union and all of the respective funds thereto.

6. Complainant sent Respondent a letter dated February 22, 1984 which was signed by Mr. Clifford Buth and states, inter alia, as follows:

#### TO ALL INDEPENDENT CARPENTER CONTRACTORS

Gentlemen:

Pursuant to the provisions of the 1982-1984 Carpenters' Agreement, the Carpenters' District Council of Milwaukee County and Vicinity hereby gives notice of its intention to negotiate modifications to our present Agreement and incorporate these modifications into a new Agreement effective June 1, 1984.

Representatives of the District Council will meet and confer with you on mutually convenient dates.

Preparations are being made to negotiate with the representatives of the Allied Construction Employers' Association, Inc. It is our expectation to go forward with those negotiations before dealing with your Company.

7. Complainant sent Respondent a letter dated June 8, 1984, which contains, inter alia, the following:

TO ALL INDEPENDENT CARPENTER CONTRACTORS

Gentlemen:

You are hereby officially notified that this District Council has completed negotiations with the Allied Construction Employers' Association, Inc. for a new three-year Carpenter Agreement effective June 1, 1984 and expiring May 31, 1987. You will find the changes agreed to in the enclosed "Summary of the 1984-1987 Carpenter Employers' Offer".

Listed below are further explanations of contract provisions that will appear in the new 1984-1987 Carpenters' Agreement. They are listed in numerical order as they appear in the "Summary".

. . .

This year we are enclosing two copies of a Letter of Assent. Please sign and return one copy to this office within ten (10) days. When the printed agreements are available they will be forwarded to you for signature. If you have any questions please contact the undersigned.

8. That the Letter of Assent enclosed with Complainant's letter of June 8, 1984 states, inter alia, as follows:

LETTER OF ASSENT

The undersigned hereby adopt the 1984-1987 Carpenters' Agreement between the Allied Construction Employers' Association, Inc. and the Carpenters' District Council of Milwaukee County and Vicinity and agrees to be bound by all the terms and conditions of said Agreement as if it were set forth herein.

This Agreement and all conditions contained herein shall become effective June 1, 1984.

It is agreed to between the parties that at such time as a printed copy of the above mentioned Labor Agreement is available, the undersigned shall sign said Agreement.

9. In June, 1984, following the receipt of Complainant's letter of June 8, 1984, Respondent sent Complainant a letter addressed to the attention of Michael Balen which states as follows:

I enclose your letter of assent for the 1984 - 1987 Carpenter's agreement between the Allied Construction Employer's Association, Inc and the Carpenters' District Council of Milwaukee. The letter is unsigned and will not be signed as it is the intent of this organization to in the future rely only on subcontract labor for all the construction work and mechanical construction (sic).

No further wages or benefits will be paid by this company to the Carpenters or other mechanical trades other than through a bonified (sic) subcontractor.

Our relationship as a direct employer is terminated.

that across the Letter of Assent the Respondent had written, in capital letters, the word VOID; and that at the bottom of the Letter of Assent the Respondent had written in the following: We will not be renewing our contract.

10. Complainant sent Respondent a letter dated July 23, 1984, which was signed by Clifford Buth and Michael Balen which states, inter alia, as follows:

TO ALL INDEPENDENT CARPENTER CONTRACTORS

Gentlemen:

On June 8, 1984, you were mailed an Official Notice setting forth the changes in the CARPENTER AGREEMENT commencing June 1, 1984 and expiring May 31, 1987. We informed you at that time that the Collective Bargaining Agreements were being prepared and would be mailed to you as soon as possible for your signature. Accordingly, we are enclosing two copies of the 1984-1987 Carpenters' Agreement which was negotiated between the Allied Construction Employers' Association, Inc. and this District Council.

. . .

Also, it is essential that Corporation Officers be listed in the space furnished on the inside front cover. Please be sure to include Social Security numbers and titles. Return one copy of the Agreement to our office no later than August 3, 1984 in order that your employees and their families continue to receive credit towards coverage of Health and Welfare Insurance and Pension Benefits. Your failure to do so shall, of course, jeopardize the progress of your work and our members shall be directed to withdraw from your employment until such time as your firm subscribes to an Agreement.

Please understand, that if you wish to continue to employ our members, WE DO REQUIRE THAT YOU SIGN THE AGREEMENTS AND RETURN ONE COPY TO OUR OFFICE NO LATER THAN AUGUST 3, 1984.

11. Complainant sent Respondent a letter dated August 7, 1984, signed by Clifford Buth, which states as follows:

On July 23, 1984, we mailed to you two (2) copies of the 1984-1987 Carpenter Agreement and requested that an official of your firm date and sign both copies, one of which was to be returned to this office and the other to be kept for your records. We requested that you return same by August 3, 1984. As of this date, you have not complied with our request.

We also informed you that your employees and their families could not receive credit towards coverage of Health and Welfare and Pension Benefits because of Federal Court decisions having ruled that "Contributions to Trust Funds, made by an Employer on behalf of his employees cannot be used as a credit towards coverage for benefits until the Employer signs a Collective Bargaining Agreement with the Union".

This is to advise you that we cannot permit our members to continue to work without a signed Agreement protecting them.

If you have any questions regarding the Agreement, please contact the undersigned.

We are hopeful that your not signing the Agreement was an oversight and that your compliance with the requirement will result in the continuance of our friendly relationship.

12. Complainant sent Respondent a letter dated September 6, 1984, signed by Gregory Shaw, which states as follows:

Please be advised that the Carpenters' District Council of Milwaukee County and Vicinity has completed negotiations on a Multi-Craft - Multi-Employer basis. We are now prepared to negotiate with your firm on Friday, September 14, 1984 at 10:00 A.M. at the Carpenters' District Council office, 3020 West Vliet Street, Milwaukee, Wisconsin.

13. Complainant sent Respondent a letter dated October 8, 1984, signed by Gregory Shaw, which states as follows:

We are requesting that you attend a meeting for the purpose of negotiating a new agreement. As we advised you in a previous communication we were prepared to negotiate with your firm on Friday, September 14, 1984 at 10:00 a.m. at which time you failed to attend or for that matter, you did not notify us that you would be unable to be present at the negotiating session. Since that time we have tried to contact you by phone on numerous occasions and have left messages for you to return our calls but to no avail, you have not done so. Your continuance of evading correspondence with us either by phone or mail leaves us with no alternative but to schedule another meeting to be held on Monday, October 15, 1984 at 10:00 a.m. to be held at the Carpenters' District Council office, 3020 West Vliet Street, Milwaukee.

Furthermore, if you fail to attend this bargaining session you leave us with no recourse other than to file for an unfair labor practice. We would also like to notify you that you are obligated by law to continue to make fringe benefit contributions to all of the trust funds as long as we are in a bargaining posture.

14. Complainant and Respondent had one face-to-face meeting on October 17, 1984, at which time the parties did attempt to negotiate and bargain a successor agreement.

15. After the expiration of the collective bargaining agreement on May 31, 1984, Jablonski continued to work for Respondent through October 19, 1984, a period covering 792 hours of work, and was paid at the wage rate provided for in the expired agreement; that Respondent has not made the fringe benefit payments set forth in Finding of Fact 3, supra, since the expiration of the collective bargaining agreement; and that Respondent does not owe any payments to the Industry Advancement Program of the Allied Construction Employer's Association.

16. On November 20, 1984, the Respondent filed for bankruptcy, Chapter 11; thereafter, the Chapter 11 bankruptcy was converted to a Chapter 7 bankruptcy, effective May 7, 1984; and that Respondent ceased its business operations effective December 27, 1984.

#### CONCLUSION OF LAW

1. Respondent, Kitchen Creations, Inc., violated Section 111.06(1)(d) of WEPA when it terminated payment into fringe benefit funds, without first discharging its duty to bargain, thereby unilaterally altering the mandatory terms and conditions of employment of its employe, Ralph S. Jablonski, which existed after the termination of the 1982-84 collective bargaining agreement.

Upon the basis of the foregoing Findings of Fact and Conclusion of Law, the

1. Cease and desist from refusing to adhere to the mandatory terms and conditions of employment which continued to exist after the termination of the 1982-84 collective bargaining agreement.

2. Take the following affirmative action which the Examiner finds will return the parties to the status quo ante which existed before Respondent's unfair labor practices and which serve to effectuate the purposes of the Wisconsin Employment Peace Act:

- a. Bargain upon request of Complainant as required by WEPA.
- b. Immediately restore the mandatory terms and conditions of employment provided for in the 1982-84 contract, which upon the contract's termination, continued as mandatory terms and conditions of employment.
- c. Immediately make whole Respondent's employe, Ralph S. Jablonski, by paying, on his behalf, the fund payments set forth in Articles VI, VII, VIII and IX of the parties' 1982-84 collective bargaining agreement, i.e., \$.51 per hour to the Milwaukee Carpenters' District Council Vacation Fund, \$2.05 per hour to the Milwaukee Carpenters' District Council Welfare Fund, \$1.35 per hour to the Building Trades United Pension Trust Fund-Milwaukee and Vicinity, and \$.12 per hour to the Milwaukee Area Carpenters and Cabinet Makers Joint Apprenticeship and Training Fund, for each of the 792 hours Jablonski worked for Respondent in June, July, August, September and October, 1984.
- d. Pay to the appropriate funds interest at the rate of 12% per year on the monetary amounts due and owing under paragraph 2.c. of the Order, from the date of

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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.

Respondent's wrongful failure to pay these monies to the date of Respondent's compliance with this Order. 2/

- e. Notify the Wisconsin Employment Relations Commission in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 22nd day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By *Coleen A. Burns*  
Coleen A. Burns, Examiner

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2/ The applicable interest rate is the Sec. 814.04(4), Stats., rate in effect at the time the complaint was initially filed with the Commission. See generally, Wilmot Union High School District, Dec. No. 18820-B (WERC, 12/83), citing *Anderson v. LIRC*, 111 Wis.2d 245, 258-59 (1983) and *Madison Teachers Inc. v. WERC*, 115 Wis.2d 623 (CtApp IV, No. 82-579, 10/83).

KITCHEN CREATIONS, INC.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

Pleadings

The complaint alleges that Respondent violated Sec. 111.06(1)(d), Wis. Stats., when, upon expiration of the parties' 1982-84 collective bargaining agreement, Respondent refused to meet with Complainant's representative and unilaterally terminated wages and fringe benefits owed its employe, Ralph S. Jablonski.

At hearing, Complainant acknowledged that, contrary to the allegations contained in the complaint, Respondent did not owe Jablonski any wages and, further, did not owe any money to the Industry Advancement Program of the Allied Construction Employers Association (ACEA). Complainant, however, maintains its allegation that Respondent unilaterally terminated payments into fringe benefits funds, in violation of Sec. 111.06(1)(d) of WEPA.

Respondent denies that it has committed any unfair labor practices within the meaning of WEPA. Respondent asserts that the 1982-84 collective bargaining agreement terminated on May 21, 1984, and, therefore, Respondent had no obligation to pay contractual wage or benefits.

Background

Virtually all of the facts are undisputed and were received into the record as a stipulation of the parties. At all times material herein, Complainant represented Ralph Jablonski, an employe of Respondent. Respondent and Complainant were signatories to a 1982-84 collective bargaining agreement which was in effect from June 1, 1982 through May 31, 1984. Pursuant to the terms of the agreement, Respondent made contributions to various "Fringe Benefit Funds" 3/ on behalf of Jablonski, the sole employe covered by the agreement. Upon termination of the agreement, on May 31, 1984, Respondent ceased contributing to the "Fringe Benefit Funds". Jablonski continued to be employed by Respondent through October 19, 1984. On November 20, 1984, Respondent filed for bankruptcy, Chapter 11, which was subsequently converted to a Chapter 7 bankruptcy, effective May 7, 1984. Effective December 27, 1984, Respondent ceased its business operations.

Complainant, in a series of correspondence beginning with a letter dated February 22, 1984, and ending with a letter dated October 8, 1984, attempted to negotiate a successor agreement with Respondent. Respondent and Complainant had one face-to-face meeting on October 17, 1984, at which time the parties attempted, without success, to negotiate a successor agreement. 4/ Prior to the October meeting, Respondent mailed two sets of correspondence to Complainant; 5/ the first being a letter dated February 22, 1984, which gave Complainant notice that Respondent would terminate the contract on May 31, 1984, the end of the contract period; and the second being an undated letter 6/ in which Respondent informed

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- 3/ Article VIII required Respondent to pay \$1.35/hour to the Building Trades United Pension Trust Fund-Milwaukee and Vicinity; Article VI required Respondent to pay \$.51/hour to the Milwaukee Carpenters' District Council Vacation Fund; Article IX required Respondent to pay \$.12/hour to the Milwaukee Area Carpenters and Cabinet Makers Joint Apprenticeship and Training Fund; and Article VII required Respondent to pay \$2.05/hour to the Milwaukee Carpenter's District Council Welfare Fund
- 4/ The record fails to establish that the parties reached impasse at that time.
- 5/ At hearing, James Konet, President, of Respondent Kitchen Creations, Inc., stated that he had mailed both sets of correspondence. Complainant, however, does not admit to receiving either set.
- 6/ Complainant agrees that if the letter were sent, it would have been sent after June 8, 1984.



Complainant that Respondent intended to terminate its relationship as a direct employer and rely solely on subcontract labor. Respondent further informed Complainant that it would not sign the Letter of Assent to be bound by the 1984-87 contract negotiated between Complainant and the Allied Construction Employer's Association. Respondent enclosed a copy of the Letter of Assent upon which it had written the word "VOID" and the statement "WE WILL NOT BE RENEWING OUR CONTRACT".

#### Discussion

The issue to be determined herein is whether Complainant is correct in its assertion that Respondent unilaterally terminated fringe benefit contributions on behalf of Mr. Jablonski in violation of Sec. 111.06(1)(d) of WEPA. Respondent's sole argument in support of its position is that the collective bargaining agreement terminated on May 31, 1984 and, therefore, Respondent had no obligation to pay contract wages or benefits. An employer, however, has a continuing duty to recognize and bargain with the existing bargaining unit representative after a contract has terminated unless there is a good faith doubt, based upon objective considerations, that a majority of the bargaining unit no longer desires the union to represent them. 7/ The Commission, citing NLRB v. Katz, 369 U.S. 736, 50 LRRM 2177 (1962), has held that, pending discharge of its duty to bargain, the employer must maintain those terms of the expired agreement which concern mandatory subjects of bargaining. 8/ Not because the Commission sua sponte extends contractual terms, but as a result of the employer's duty to maintain the status quo on mandatory subjects of bargaining until such time as the parties have either negotiated a change or bargained to impasse. 9/

Upon expiration of the 1982-84 contract, Complainant retained its status as the bargaining representative of Respondent's employe Jablonski. 10/ As a result,

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7/ Oconomowoc Plumbing, Inc. and Oconomowoc Plumbing Systems, Inc., Dec. No. 20214-B (WERC, 3/84).

8/ Greenfield School District, Dec. No. 14026-B (WERC, 11/77). The Commission, however, recognized an exception for arbitration provisions as follows:

Although the issue whether to agree to an arbitration provision is a mandatory subject of bargaining, the duty to arbitrate is wholly contractual. 7/ Recognizing that the case law from the private sector has limited applicability to the extent it is based on the coterminous right of employes to strike, a right not enjoyed by public sector employes, nevertheless the power of an arbitrator is solely dependent on the terms of an agreement, 8/ and the arbitrator's responsibility is to construe a contract. 9/ If the contract has expired, the arbitrator has no powers and nothing to construe in respect to post-expiration contractual obligations. 10/ (Footnotes omitted)

See also: Oconomowoc Plumbing Inc. and Plumbing Systems, Inc., supra; and Typography Unlimited and Kenosha Typographers, Inc., Dec. No. 19218-A (11/82).

9/ As Complainant argues in its brief, exceptions to an employer's duty to bargain have been recognized where the employer's unilateral change was governed by necessity, or there has been waiver or acquiescence on behalf of the Union. (See A.V. Corporation, 209 NLRB 451, 86 LRRM 1057 (1974) Cited in Greenfield School District, Dec. No. 14026-A (10/76) at footnote 13). Respondent, however, has not argued (nor presented any evidence to support such an argument) that any of the exceptions are present in the instant case.

10/ Respondent does not dispute Complainant's status as the bargaining representative of its employe Jablonski. However, assuming arguendo, that Complainant received the correspondence from Respondent discussed supra, such correspondence does not serve to sever the bargaining relationship between Complainant and Respondent.

Respondent was under a continuing obligation to recognize and bargain with Complainant after the contract terminated on May 31, 1984. Applying the principles enunciated supra, Respondent had a duty to maintain those terms of the expired agreement which concern mandatory subjects of bargaining until such time as the parties had negotiated a change or bargained to impasse.

The provisions of the 1982-84 contract requiring contributions to the "Fringe Benefit Funds" concern mandatory subjects of bargaining. Upon expiration of the 1982-84 contract, Respondent unilaterally terminated the contributions prior to the point that the parties had reached an impasse in negotiations. 11/ Respondent, therefore, has refused to bargain within the meaning of Sec. 111.06(1)(d). 12/ To rectify the foregoing unlawful conduct, Respondent is required to restore the status quo which existed before that conduct. To that end, Respondent is ordered to make Jablonski whole by contributing to the "Fringe Benefit Funds" the sum of money, together with interest, that has been due and owing since the expiration of the 1982-84 contract. Further, upon request of Complainant, Respondent is ordered to bargain as required by WEPA. 13/ Since Respondent is no longer in business, the Examiner does not believe that it is appropriate to order Respondent to post a notice stating that it will cease and desist from committing unfair labor practices, as requested by Complainant.

Dated at Madison this 22nd day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A. Burns  
Coleen A. Burns, Examiner

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- 11/ Respondent ceased the contributions upon expiration of the 1982-84 contract on May 31, 1984. In a series of correspondence beginning with a letter dated February 22, 1984 and ending with a letter on October 8, 1984, Complainant attempted to negotiate a successor agreement with Respondent. The parties had one face-to-face meeting on October 17, 1984, at which time the parties did attempted to bargain a successor agreement. The record fails to establish that the parties ever reached impasse.
- 12/ See generally: Oconomowoc Plumbing, Inc. and Oconomowoc Plumbing Systems, Inc., Dec. No. 20214-A (6/3/83) and Typography Unlimited and Kenosha Typographers, Inc., Dec. No. 19218-A (11/8/82).
- 13/ The fact that Respondent went into bankruptcy and eventually terminated its business operations does not relieve Respondent of a duty to bargain. See generally: Libby, McNeill & Libby v. WERC, 48 Wis.2d 272 (1970); Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. 98-353, 98 Stat. 333, Subtitle J, Sec. 541, and In re American Provision Co., 118 LRRM 2059 (1984).