STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL 2062, AFSCME, AFL-CIO: MENOMINEE COUNTY HIGHWAY EMPLOYEES; MENOMINEE COUNTY SHERIFF'S DEPARTMENT EMPLOYEES; MENOMINEE COUNTY COURTHOUSE and TOWN EMPLOYEES; WISCONSIN COUNCIL 40, AFSCME, AFL-CIO,	Case 30 No. 35449 MP-1747 Decision No. 22872-B
Complainants,	
vs.	
MENOMINEE COUNTY,	
Respondent,	
LABOR ASSOCIATION OF WISCONSIN, INC.,	
Party in Interest.	

Appearances:

Lawton & Cates, by Mr. Richard V. Graylow, 110 East Main Street, Madison, Wisconsin 53703, appearing on behalf of the Complainants.

Lindner & Marsack, S.C., by Mr. Eugene J. Hayman, 700 North Water Street, Milwaukee, Wisconsin 53202, appearing on behalf of Respondent.

Mr. Patrick J. Coraggio, Labor Consultant, 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222, appearing on behalf of Labor Association of Wisconsin, Inc.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants filed a complaint with the Wisconsin Employment Relations Commission on August 7, 1985, alleging that Menominee County had violated Sec. 111.70(3)(a)1, 2, 3 and 4, Wis. Stats., by refusing to bargain successor labor agreements to the parties' 1984 collective bargaining agreements, by offering inducements to officials of Complainants to execute an incorrect version of the 1984 collective bargaining agreements, and by threatening to terminate payroll deduction of dues at the end of December, 1984. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.70(5), Wis. Stats. A hearing was held in Keshena, Wisconsin, on September 25, 1985, at which time the complaint was amended to add allegations similar to those already stated but relating to the Menominee County Department of Human Services. All parties were given full opportunity to present their evidence and arguments; all parties filed briefs, and the record was closed on November 5, 1985. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Menominee County Sheriff's Department Employees, Menominee County Highway Employees, and Menominee County Courthouse Employees and the Town of Menominee Employees, Local 2062, AFSCME, AFL-CIO are labor organizations within the meaning of Sec. 111.70(1)(h) Wis. Stats., and have their principal offices c/o Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719.

2. Labor Association of Wisconsin, Inc. is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats., and has its principal office at 2825 North Mayfair Road, Wauwatosa, Wisconsin 53222.

3. Menominee County is a municipal employer and has its principal offices at the Menominee County Courthouse, Keshena, Wisconsin.

4. Complainants are the exclusive representatives for collective bargaining purposes of three bargaining units of Respondent's employes, described respectively as follows:

> Menominee County Highway Employees: all employes of the Highway Department except the Highway Commissioner, General Foreman, and part-time employes that are paid only from subsidies provided by state or federal government for specific jobs created to ease the relief rolls.
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> Menominee County Sheriff's Department Employees: all employes of the Sheriff's Department, excluding the Sheriff and Chief Deputy.
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> Menominee County Courthouse and Town Employees: all employees of the Courthouse and Town Sewer and Water Department, except the elected officials.

5. Complainants Sheriff's, Highway and Courthouse Employees and Respondent were parties to 1983-84 collective bargaining agreements, each of which provided as follows in its duration clause:

> Article XXII Duration
>
> A. This Agreement shall be effective as of January 1, 1983, and remain in full force and effect until December 31, 1984 and shall automatically renew itself from year to year unless either party notifies the other party in writing by August 1 of the year of contract expiration of its intent to inaugurate changes.

6. Menominee County Public Employees Local 2062, AFSCME, AFL-CIO is a labor organization within the meaning of Sec. 111.70(1)(h), Wis. Stats. Public Employees has been exclusive bargaining representative for purposes of collective bargaining of a bargaining unit of all employes in the Social Services Department of Menominee County except the Director. The most recent collective bargaining agreement between Public Employees Local 2062 and Respondent was in effect from January 1, 1983 to December 31, 1983. The record shows that at the end of 1983 the County Social Services Department was merged into the larger Human Services Department, and that officials of Complainants took no action to negotiate a collective bargaining agreement in the Human Services Department for 1984.

7. The record shows that Respondent was notified of Complainants' intent to inaugurate changes in the Highway, Sheriff's, and Courthouse and Town contracts by receipt of a letter on August 6, 1984 from Complainants' District Representative Georgia Johnson. On the same day, Respondent's counsel Hayman wrote to Johnson stating in pertinent part that "Since you have failed to reopen the contract in a timely fashion, all Menominee County contracts have been automatically renewed for a period of one year to expire December 31, 1985. In view of the above, Menominee County, will of course, not meet with you and other representatives of Local 2062 for the purpose of contract negotiations." The record shows that Hayman's letter was received by Johnson on August 7, 1984. On August 9, 1984, Johnson wrote to Hayman arguing that the Notice of Reopening of contracts had been mailed on July 30, 1984 and that the date of delivery of the notices was not the controlling date under the contracts' terms. The record does not show any further attempt to negotiate with Respondent prior to Johnson's July, 1985 notices to reopen contracts for purposes of successor agreements for 1986. The record does not clearly establish that Johnson in fact mailed the notice of reopening on or before August 1, 1984.

8. During 1984 Lorene Pocan was President of Local 2062, but the record shows no evidence that Respondent offered Pocan or other Local 2062 officers any kind of inducement to execute an incorrect version of the 1984 collective bargaining agreement or to disavow attempts to bargain successor agreements.

9. The record shows that Respondent admitted at the hearing the complaint allegation that Respondent notified Pocan in mid-December, 1984 that it intended to cease payroll deduction of union dues "when the contracts expire at the end of

December", but also shows that union dues, in fact, continued to be deducted and forwarded to officials of Complainants.

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

CONCLUSIONS OF LAW

1. Respondent's refusal to negotiate changed terms of employment for 1985 was predicated on Complainants' failure to reopen the parties' collective bargaining agreements timely, and was consistent with the terms of the 1983-84 collective bargaining agreements. Respondent therefore did not violate Sec. 111.70(3)(a)1 or 4 by refusing to bargain changed terms, since it had already discharged its obligation to bargain.

2. Respondent has not been shown to have violated Sec. 111.70(1)(2) or (3) by attempting to induce officials of Complainants to execute incorrect versions of collective bargaining agreements or to disavow bargaining of successor agreements.

3. Respondent's statement noted above in Finding of Fact 9 that it would cease payroll deduction of union dues did not interfere with, restrain or coerce municipal employes in the excercise of their rights, and did not violate Sec. 111.70(3)(a)1, Wis. Stats.

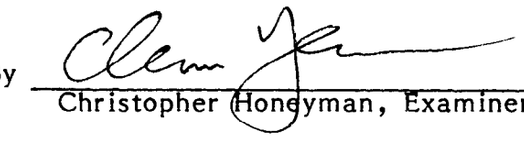
Upon the basis of the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and renders the following

ORDER 1/

IT IS ORDERED that the complaint filed in this matter be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 2nd day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, 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.

MENOMINEE COUNTY

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

The complaint alleges that the County violated Sec. 111.70(3)(a)1, 2, 3 and 4, Stats., by refusing to negotiate changed terms of employment for 1985, offering inducements to officials of the Local Union in an attempt to persuade them to execute an incorrect version of a 1984 collective bargaining agreements and to disavow attempts to bargain a successor, and by announcing that it intended to cease payroll deduction of union dues.

No evidence was adduced to support the allegation in the complaint that Respondent improperly attempted to induce local union officers to execute an incorrect version of the 1984 agreements or to disavow bargaining over a successor; this allegation is therefore dismissed. The record concerning the allegation that Respondent notified Complainants' Local President Pocan that it intended to cease payroll deduction of union dues "when the contracts expire at the end of December" consists solely of Respondent's admission that such a statement was made and the parties' stipulation of fact that, in the event, payroll deductions were in fact continued in 1985, and the monies properly forwarded to the Union. Under some circumstances, a statement of the kind admitted here could constitute a threat against the Union related to Union activity or bargaining conduct, and could constitute interference. But Complainants must prove such a contention by a clear and satisfactory preponderance of the evidence. Here, the evidence indicates only that such a statement was made, and there is nothing in the record to lend an improper aura to the statement. It is possible, therefore, to interpret the statement on this record either as a mistaken reference to Respondent's legal obligations in the event of expiration of a contract; or as advance notice of an ordinary contract violation; or even as a reference to the expiration of the 1985 contracts if Respondent's interpretation of its bargaining obligation is upheld. In the absence of explanatory testimony or other evidence, there is no clear reason to prefer that interpretation of the statement which would make it illegal, particularly as Respondent did not, in fact, cease making payroll deductions. That count of the complaint is therefore dismissed.

At the hearing, Complainants amended the complaint to add an allegation that the County violated the same sections of the statute by refusing to negotiate changed terms of employment for 1985 for a bargaining unit which had previously been identified as Social Services Department employes. But the record shows that about the end of December, 1983 the Social Services Department was merged into the larger Human Services Department, and that union officials then entered into discussions among themselves as to the degree of support they enjoyed in the larger department. District Representative Johnson testified that she made no attempt to bargain a collective bargaining agreement covering the former Social Services Department employes by themselves, or the amalgamated Human Services Department, after December, 1983. The allegation that Respondent improperly refused to bargain in 1984 concerning this unit is therefore without merit, and it is dismissed.

The focus of this proceeding is on the timing of District Representative Johnson's notice of intent to reopen negotiations in or about July, 1984. Respondent argues that it did not receive such notice timely and therefore that it acted within its contractual rights in "rolling over" terms and conditions of employment, and the contracts themselves, from 1984 through 1985. Complainants argue that the duty to bargain was triggered by the mailing date of the notice of reopening and not by the date of receipt; and it is plain that an interpretation of the contractual language is at the center of this dispute. 2/

2/ Neither party argued that this matter should be deferred to the contractual grievance and arbitration procedure.

The circumstances are complicated by the history of the disputed language immediately prior to the reopening date. There is no dispute that Respondent's attorney Hayman prepared the 1984 typed version of the contracts and sent them to Johnson on or about July 3, 1984. A letter of that date from Hayman to Johnson indicates that Hayman's position at that time was that it had been Johnson's responsibility to prepare the documents, but that he had undertaken to do so because of delays. As typed, the duration clause contained in Article XXII of each of the three relevant agreements was identically worded, and read as follows:

> A. This agreement shall be effective as of January 1, 1983, and remain in full force and effect until December 31, 1984 and shall automatically renew itself from year to year unless either party notifies the other party at least thirty (30) days prior to the anniversary date (such notice shall be in writing). Notice of contract changes shall be made in writing by August 1 of the year of contract expiration.
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> B. It is further agreed that requests for wage increases and fringe benefits which substantially affect the employer's budgeting shall be made by September 1 of any year. Such change agreed to shall not be effective prior to the beginning of the next contract year.

Johnson testified that she received Hayman's contracts in about "the middle" of July. But a date stamp, identifying Johnson, is stamped on the July 3 Hayman letter, and reads July 6, 1984. That letter also contains on its face a handwritten notation, apparently by Johnson, to the effect that she called Hayman's office on July 9 and advised that the contract language concerning reopening did not conform to the agreement reached. At the hearing, the parties stipulated that the correct version of the duration clause was:

> A. This agreement shall be effective as of January 1, 1983 and remain in full force and effect until December 31, 1984 and shall automatically renew itself from year to year unless either party notifies the other party in writing by August 1 of the year of contract expiration of its intent to inaugurate changes. (Paragraph B is repeated as shown above). 3/

This is essentially the version of the agreements for which Johnson was arguing in July, 1984. Nothing in the record indicates that the dispute over the correct version of this language was still continuing by the end of July of that year: and Johnson's inked note on Hayman's July 3 letter notes in pertinent part that "U. believes 8-1 correct (not 9-1 or anniv. date) plus will use 8/1 unless advised diff. . . ". This, together with Johnson's testimony, leaves no doubt that by the time Johnson sent her notices of reopening, the parties were in agreement that the correct contract language was that stipulated to by the parties and noted above. 4/

The parties have loosely used various words to describe the obligation attendant on a party who wishes to reopen negotiations, and have equated words such as "Serves notice" 5/ and "Notice. . . to be given" 6/, but despite these somewhat varying terms used to describe the agreement (all of which were included

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3/ Transcript pgs. 58-59.

4/ The 1983-84 contracts were never signed; but it is clear that they were agreed on. The actual signing has often been referred to as a "ministerial act", and no party here argues that the 1983-84 agreements were not in effect and binding at the time the dispute over reopening arose.

5/ Letter, Hayman to Johnson, August 6, 1984.

6/ Resolutions of Town Board and County Board, July 26, 1984.

in the complaint and admitted as accurate by Respondent) it is clear that the language of the agreements themselves, as stipulated to by the parties, controls the mutual obligations of the parties.

The key phrase is ". . . notifies the other party in writing by August 1 . . .". There is nothing in the record to indicate that the parties by practice or bargaining history had ever defined for themselves the meaning of this phrase. Complainants' argument is essentially that Johnson mailed the notices on July 30, 1984, and that this constituted service on Respondent. Respondent, while disputing Johnson's testimony that she mailed the notices on July 30 (discussed below) also contends that the date of receipt is what is meant by "notifies".

Several interpretations are possible if the notice of reopening is regarded as a legal document; and its status in that respect is tenable, because the statute provides in Sec. 111.70(4)(cm)(1):

> Notice of commencement of contract negotiations. For the purpose of advising the Commission of the commencement of contract negotiations, whenever either party requests the other to reopen negotiations under a binding collective bargaining agreement, or the parties otherwise commence negotiations if no such agreement exists, the party requesting negotiations shall immediately notify the Commission in writing. Upon failure of the requesting party to provide such notice, the other party may so notify the Commission. The notice shall specify the expiration date of the existing collective bargaining agreement, if any, and shall set forth any additional information the Commission may require on a form provided by the Commission.

If the Notice of Reopening of Negotiations to the other party is contemplated by statute, it could fall under one or another of the Commission's rules regarding service of "process" or the time for "filing papers other than letters". Two rules of the Commission could arguably be applied here, and these are:

> ERB 10.08 Time for filing papers other than letters. (1) COMPUTATION OF TIME. In computing any period of time prescribed by or allowed by these rules or by order of the commission or individual conducting the proceeding, the day of the act, event, or default after which the designated period of time begins to run, shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a legal holiday. When the period of time prescribed or allowed in less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.
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> (2) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party has a right or is required to do some act within an initially prescribed period after service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the

mail and proof of service established by return post office receipt. In case a party or person is located outside the state, service shall be as provided in s. 111.70(2)(a), Stats. Service of papers or process by parties or persons and proof thereof may be made in the same manner as provided above.

(2) COMPLETION OF SERVICE. Service of any paper or process shall be regarded as completed when (1) delivered in person, (b) left at the principal office or place of business of the person served, (c) addressed to the last known address of the person served and deposited in the United States mail, 7/ (d) addressed to the last known address of the person served and deposited with a telegraph company, or (e) with regard to persons or parties located outside the state in the manner and at the time as provided in s. 111.07(2) (a), Stats.

(3) UPON WHOM SERVED. All papers, except complaints, petitions for election and papers relating to subpoenas, shall be served upon all counsel or record and upon parties not represented by counsel or upon their agents designated by them or by law, and upon the commission, if not filed with it, or upon the fact finder, where appropriate, if not filed with either of them. Service upon such counsel or representative shall constitute service upon the party, but a copy shall also be transmitted to the party.

(4) STATEMENT OF SERVICE. The party or person serving the papers or process shall immediately submit to the commission or the individual conducting the proceeding a written statement of such service, setting forth the names of the parties or persons served and the date and manner of service. Proof of service shall not be required unless a timely question is raised with respect to proper service. Failure to file a statement of service shall not affect the validity of the service.

On its face it appears that ERB 10.08 relates to papers directed to or from the Commission, and that the three-day extension of a "prescribed period" has no application here. This is because the party referred to in Subsection 2 of the rule is clearly, if the rule be applicable in this instance, the employer; and the employer was not required to bargain "within an initially prescribed period". ERB 10.10, however, may be applicable on its face. Subsection 1 of that rule shows that not only papers "issued by the Commission" but also papers "required to be served thereby" fall under the rule. Service of papers by "parties or persons" "may" be made in the same manner, according to the rule itself. This would imply, in turn, that Subsection 2's definition of completion of service could control the date of "notifying" the other party that reopening was desired in this matter. Section C of Subsection 2 of the rule states that depositing a correctly-addressed paper in the U.S. mail is sufficient to constitute completion of "service". Without specifically saying so, Complainants appear to be relying on this interpretation.

Assuming for purposes of argument that the contractual requirement to notify the other party of a desire to reopen amounts to a "paper" required to be served pursuant to rule ERB 10.10 (because of that particular notice's statutory connection), proof of service is clearly required in this case. Subsection 4 of the rule states that "proof of service shall not be required unless a timely question is raised with respect to proper service" but there is no dispute that

Johnson testified that she mailed the notices on July 30, 1984, and as might be expected Respondent did not offer any direct testimony to the contrary. Respondent relies instead for its rebuttal on circumstantial evidence.

Attached to the complaint and admitted by Respondent is a series of letters shortly after the reopening date of the agreements, between Hayman and Johnson. Hayman's letter of August 6 is one of this series, and has been quoted above. That letter alleges that the envelope in which the notice was mailed was postmarked August 4, 1984. The envelope itself was not offered as an exhibit at the hearing. Part of the same series of appendices to the complaint, however, is a receipt for certified mail for the notice, which shows on it in pen and ink the date of July 30, 1984. All of the other certified receipts which have been entered in this record show post office date stamps; Johnson's explanation for the self-certification of this particular document was that the post office was not open at the time she mailed the notice, and that therefore she certified the receipt herself. Respondent argues that Johnson's testimony and her entry of the July 30 date in pen and ink are not credible.

July 30, 1984 was a Monday. If in fact the letter lay at the post office until August 4 without being stamped it would have sat there for the entire working week. 8/ While the vagaries of the postal service are a matter of national amusement, this pattern is inconsistent with the times taken for mailing of all other documents which passed between the parties and are in the record: they all took no more than one to three days to traverse the same or longer routes. Johnson's subsequent actions lend credence to Respondent's contention that she was dilatory in sending the notices and later attempted to "cover her tracks." After requesting to negotiate in a second letter to Hayman on August 9, Johnson took no further action to press the Union's case for an extended period. Johnson testified that she filed the complaint in this matter originally by mail to the Commission on December 29, 1984, but conceded that she took no action when the complaint failed to produce any telephone call from the Commission or other evidence that it had been received. The administrative records of the Commission show no indication of receipt of such a complaint, and Johnson admitted in testimony that she had no evidence of any kind or description that the complaint had in fact been received by the Commission. Johnson was unable to point to any further action to prosecute her complaint or demand to bargain up to the filing of the instant complaint, which as I have previously noted 9/ occurred on the very last day of a one-year statutory period for filing complaints. Respondent's argument that this constitutes a pattern fully consistent with failure to submit the notice on time, and that the unexplained disappearance of the December 29 complaint lends an aura of deception consistent with lack of credibility on Johnson's part with respect to the date on her notice, cannot be dismissed lightly.

But Respondent's failure to introduce the envelope into evidence is also curious. Hayman's letter of August 6 clearly identified the envelope as a potential item of evidence, but Respondent did not call witnesses at the hearing or otherwise explain the absence of the envelope. In sum and substance, therefore, the record consists of a less-than-convincing assertion by Johnson countered by a less-than-convincing denial by the County. The record, taken as a whole, does not establish that Johnson lied in her testimony and falsified the date in the reopening letter. But it also does not establish that she told the truth and was merely ill-treated by the U.S. Postal Service. Under these circumstances the inquiry must turn to the question of what degree of proof is required, and of whom.

Complainants argue that the applicable concept here is one of waiver, because the County is alleging that the Union waived the right to negotiate changed conditions of employment by inaction. I am not persuaded that this is the case. The contract imposed a duty to "notify" the other party. This is an affirmative duty on the Union, in practice. The rule discussed above, if in fact it is applicable, speaks in terms of "proof of service". Such proof is required to be

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8/ Assuming for purposes of argument that Respondent's failure to introduce the envelope should not be held against it.

9/ Dec. No. 22872-A.

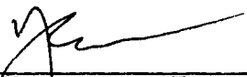
made by the party that wishes the benefit of the document, for reasons long understood in law. And the statute requires that complaints be proven by a clear and satisfactory preponderance of the evidence. Under these circumstances I conclude that the waiver argued here would be inherent in failure to comply with the requirements of the duration clause of the contracts, and that Complainants are required to present a clear and satisfactory preponderance of the evidence concerning compliance or the lack of it. It is unquestionable that the proof in this matter is less than satisfactory from all sides. But to find that Respondent's failure to introduce the envelope outweighs the series of improbable beliefs required of me by Complainants' case would stand the burden of proof on its head: it is first and foremost for Complainants to make a credible case that the document was mailed on July 30, 1984, and for all of the reasons advanced by Respondent and detailed above, I am unable to find this assertion proven by a clear and satisfactory preponderance of the evidence. 10/

It is also possible that rule ERB 10.10 does not apply to the form of "paper" represented by a notice of reopening. In that event, it is significant also that the record contains nothing to rebut the evidence of the certification stamp showing that the notice was received by Respondent on August 6, 1984. If in fact the contract language is to be interpreted according to the ordinary and reasonable usage of the words 11/ rather than a specific statutory interpretation, I must find that the term "notifies" implies the completion of communication with the other party, and not merely the attempt. This construction of the language is shown to be required most clearly by considering the converse: ordinary and reasonable usage does not permit a person to "be notified" of a fact unless the communication of that fact to him has been completed.

For these reasons, I find that whether or not the notice of reopening of a contract properly constitutes a "paper" within the meaning of the Commission's rule, Complainants have failed to demonstrate by a clear and satisfactory preponderance of the evidence that notice was timely made. Respondent must therefore be held to have acted within its rights in refusing to reopen negotiations and in its insistence on continuing the terms and conditions of employment unchanged for 1985. Accordingly, the complaint is dismissed.

Dated at Madison, Wisconsin this 2nd day of January, 1986.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Christopher Honeyman, Examiner