STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TILE, MARBLE, TERRAZZO FINISHERS, SHOPWORKERS AND GRANITE CUTTERS INTERNATIONAL UNION, LOCAL NO. 47, AFL-CIO, Complainant, vs. HEBE TILE COMPANY, Respondent.	Case 1 No. 36612 Ce-2040 Decision No. 23512-A

Appearances:

Ms. Marianne Goldstein Robbins, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of Tile, Marble, Terrazzo Finishers, Shopworkers and Granite Cutters International Union, Local No. 47, AFL-CIO.

Mr. I. Engle, Attorney at Law, 211 South Street, Waukesha, Wisconsin 53186, appearing on behalf of Hebe Tile Company.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Tile, Marble, Terrazzo Finishers, Shopworkers and Granite Cutters International Union, Local No. 47, AFL-CIO, filed a complaint of Unfair Labor Practice with the Wisconsin Employment Relations Commission on February 27, 1986, in which it alleged that Hebe Tile Company had committed Unfair Labor Practices within the meaning of the Wisconsin Employment Peace Act. The Commission, on April 8, 1986, appointed Richard B. McLaughlin, a member of its staff, to act as an Examiner to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Stats. Hearing on the complaint was originally set for May 27, 1986. The hearing was postponed, over the objection of counsel for Hebe Tile Company, on the understanding that, after due effort, counsel for the Complainant was unable to secure the presence of a necessary witness. Hearing on the complaint was rescheduled for June 20, 1986. At the conclusion of that hearing, the parties were able to reach an agreement by which the issues in the matter could, potentially, be resolved. The parties, under that agreement, asked that the matter be held in abeyance pending further developments. The parties were unable to fully resolve their differences, and counsel for the Complainant, in a letter filed with the Commission on September 26, 1986, requested that the matter proceed to decision. A transcript of the June 20, 1986, hearing was provided to the Examiner on November 19, 1986. The parties filed briefs by January 23, 1987. The parties submitted copies of various exhibits, withheld for copying, by April 29, 1987.

FINDINGS OF FACT

1. Tile, Marble, Terrazzo Finishers, Shopworkers and Granite Cutters International Union, Local No. 47, AFL-CIO, (the Union), is a labor organization which maintains its offices at 6667 North 89th Street, Milwaukee, Wisconsin 53224.

2. Hebe Tile Company (the Company) is an employer which, from 1974 at least until August of 1985, maintained its offices at 8903 West Congress Street, Milwaukee, Wisconsin 53224.

3. The Union and the Company are parties to a collective bargaining agreement which was, by its terms, "made and entered into this 1st day of June, 1984, . . ." The agreement was signed by "Helen Dzbanek Owner" on behalf of the Company and contains, among its provisions, the following:

ARTICLE II
UNION RECOGNITION

Section 1. The Employer recognizes the Union as the exclusive collective bargaining agent for the employees covered by this Agreement.

. . .

ARTICLE VII
SUBCONTRACTING

Section 1. The Employer agrees that, when subletting or contracting out work covered by this Agreement which is to be performed within the geographical coverage of this Agreement and at the site of the construction, alteration, painting or repair of a building, structure or other work, he will sublet or contract out such work only to a subcontractor who is signatory to this Agreement.

Section 2. The Employer agrees not to enter into any individual Agreement which permits his employees to perform their work on any basis of pay other than an hourly rate which shall not be less than the rate specified in this Agreement. It is further agreed that all forms of compensation related to employee productivity, such as bonus systems, quota systems, piecework systems, lumping labor systems and other incentive type arrangements will not be used.

Section 3. Employees covered by this Agreement shall not enter into an individual agreement which permits compensation by any method other than the hourly rate herein specified. Further, no form of labor-subcontracting by these employees is to be permitted unless bond requirements of this Agreement are adhered to by the employee doing work.

. . .

ARTICLE VIII
VACATIONS

. . .

Section 2. Vacation Pay.

(a) Administration. It is mutually agreed between the Employers and the Union, that a Trust Fund be established to administer the affairs and funds necessary to provide vacation benefits. It is further agreed that a Board of Trustees be appointed in accordance with the terms of the Trust Agreement, Exhibit B, attached hereto. All disbursements of funds to provide said vacation benefits shall be in accordance with the terms of said Trust Agreement.

(b) Finances.

1) Effective June 1, 1984 through November 30, 1984, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of ninety cents (90¢) per hour for vacation pay, for all hours paid.

2) Effective December 1, 1984 through May 31, 1985, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of one dollar and 15 cents ($1.15) per hour for vacation pay, for all hours paid.

3) Effective June 1, 1985 through May 31, 1986, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for vacation pay, for all hours paid.

4) Effective June 1, 1986 through November 30, 1986, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for vacation pay, for all hours paid.

5) Effective December 1, 1986 through May 31, 1987, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for vacation pay, for all hours paid.

. . .

ARTICLE IX
HEALTH AND WELFARE

Section 1. During the life of this Agreement, the Employers shall contribute to a Trust Fund for health and welfare benefits and administrative costs as outlined in the terms of the Trust Agreement, Exhibit A, attached hereto.

Section 2. Administration.

(a) It is mutually agreed between the Employers and the Union, that a Trust Fund be established to administer the affairs and funds necessary to provide health and welfare benefits. It is further agreed that a Board of Trustees be appointed in accordance with the terms of the Trust Agreement, Exhibit A, attached hereto. All disbursements of Funds to provide said health and welfare benefits shall be in accordance with the terms of said Trust Agreement.

(b) Finances.

1) Effective June 1, 1984 through May 31, 1985, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of one dollar and sixty cents ($1.60) per hour for health and welfare, for all hours paid.

2) Effective June 1, 1985 through May 31, 1986, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for health and welfare, for all hours paid.

3) Effective June 1, 1986 through November 30, 1986, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for health and welfare, for all hours paid.

4) Effective December 1, 1986 through May 31, 1987, each Employer subject to this Agreement shall contribute to the Trust Fund, with respect to each Employee covered by this Agreement, the sum of (to be announced by the Union) per hour for health and welfare, for all hours paid.

. . .

ARTICLE X
PENSION PLAN

Section 1. Employer Contributions.

(a) Effective June 1, 1984 through May 31, 1985, each Employer shall pay to the Building Trades' United Pension Trust Fund - Milwaukee and Vicinity, for each Employee covered by this Agreement, the amount of one dollar and thirty-five ($1.35) per hour for all hours paid.

(b) Effective June 1, 1985 through May 31, 1986, each Employer shall pay to the Building Trades' United Pension Trust Fund - Milwaukee and Vicinity, for each Employee covered by this Agreement, the amount of (to be announced by the Union) per hour for all hours paid.

(c) Effective June 1, 1986 through November 30, 1986, each Employer shall pay to the Building Trades' United Pension Trust Fund - Milwaukee and Vicinity, for each Employee covered by this Agreement, the amount of (to be announced by the Union) per hour for all hours paid.

(d) Effective December 1, 1986 through May 31, 1987, each Employer shall pay to the Building Trades' United Pension Trust Fund - Milwaukee and Vicinity, for each Employee covered by this Agreement, the amount of (to be announced by the Union) per hour for all hours paid.

ARTICLE XVI
SETTLEMENT OF DISPUTES

. . .

Section 2. Settlement of Disputes. Should any disputes, controversies, or grievances, under the provisions of this Agreement, arise between an Employer and the Union, or an employee represented by the Union, upon request of the Employer or the Union, the Employer and Union shall meet within ten (10) days or within such additional time as the Employer and Union mutually agree on to attempt to resolve the issues.

Section 3. Arbitration. If the matter cannot be satisfactorily settled or adjusted at such joint Employer-Union meeting, it shall be referred to arbitration in accordance with the following procedure: Upon the request of either party, the Wisconsin Employment Relations Commission shall appoint an impartial arbitrator and such appointment shall be recognized by all the parties concerned. . . .

4. The Company employed two employes, Jim Angyan and Ben Dzbanek, at all times relevant to this proceeding. Angyan was the tile layer and Ben Dzbanek was the tile finisher. A tile layer and a tile finisher work as a team. The tile finisher assists the tile layer by, among other things, mixing mortar and other necessary compounds and by cleaning the tile once it is laid. The Union represents tile finishers. Represented tile layers are within the jurisdiction of another labor organization. At all times relevant to this matter, Dzbanek was the only employe in the bargaining unit of Company employes represented by the Union and covered by the collective bargaining agreement mentioned in Finding of Fact 3. Ben Dzbanek is the husband of Helen Dzbanek.

5. Jim Judziewicz is a Business Representative for the Union. Sometime during August of 1985, Helen Dzbanek stated in a phone conversation with Judziewicz that she was considering going out of business. On October 5, 1985, Judziewicz had a conversation with Ben Dzbanek at the Union's office, which Judziewicz maintains in his home. Judziewicz understood the purpose of Dzbanek's visit to be to enroll himself in the Union's senior program for health insurance. The senior program permits Union members aged fifty-five or older to pay for health insurance coverage for themselves and their spouses at a reduced rate. The cost of the health insurance under the senior program, as of June, 1986, was

$72 per month. Outside of the senior program, the health insurance available under the collective bargaining agreement mentioned in Finding of Fact 3 requires the payment by a contributing employer of at least 160 hours per month times the contribution rate of $1.60 per hour worked. Judziewicz believed, through his conversation with Ben Dzbanek of October 5, 1985, that the Company was going to go out of business upon the completion of a few remaining jobs. Judziewicz also believed, through this conversation, that Ben Dzbanek had signed up for retirement under the pension plan mentioned in Article X, and intended to continue to work to supplement that pension. The pension plan noted in Article X permits employes receiving a pension benefit to work a certain number of hours each month for an employer which does not contribute to the fund or for themselves without losing the pension benefit. Judziewicz informed Ben Dzbanek that before he would have Ben Dzbanek sign the form to enroll in the senior program, Ben Dzbanek should have his wife submit a statement that the Company was in fact out of business. Helen Dzbanek never submitted such a statement.

6. Sometime after his October 5, 1985, conversation with Ben Dzbanek, Judziewicz conferred with two individuals who assist in the administration of the Building Trades United Pension Trust Fund (the Trust Fund). During the course of this conference, Judziewicz voiced his concern that the Dzbaneks could pay in the minimum amount to the Trust Fund while the Company was in business, and by nominally closing down the business and going onto the senior program, significantly reduce their health insurance costs and perform work in competition with employers and employes who contribute to the Trust Fund. Judziewicz understood the two individuals with whom he was conferring to believe that the normal audit procedures of the Trust Fund would not necessarily disclose if a company had paid in all the contributions due the fund. During this conference, Judziewicz recalled that the Union had previously used the procedures of the National Labor Relations Board to seek information beyond that available to the Trust Fund.

7. Judziewicz sought to invoke the jurisdiction of the Board, but the Board declined to assert its jurisdiction over this matter because the bargaining unit is composed of one employe. 1/

8. In a letter to the Company dated October 10, 1985, Judziewicz stated the following:

> In order that the Union may properly carry out its duties as the collective bargaining representative, we request that your Company provide us with the following information for the period of June 1, 1984 through September 30, 1985:
>
> 1) Complete payroll records for this period of time, including Tax Forms 941, W-2, and W-3, and travel expense information.
>
> 2) Time cards of <u>all</u> employees.
>
> 3) History of any subcontracting of work to other parties.
>
> 4) All contracts the Company entered into with others to perform hard and/or composition tile work.
>
> 5) All records pertaining to the purchase of any and all materials used by the Company to fulfill verbal or written contractual obligations with your customers.
>
> 6) Billing and receipt records for contracted work.

1/ This stipulation is set forth at page 7 of the transcript. The transcript does not accurately state the sentence forming the basis of that stipulation and should be considered amended to read thus: "It is my understanding that the parties would stipulate that the National Labor Relations Board has declined to assert its jurisdiction over this matter due to the fact that at this time the Bargaining Unit is composed of one employee."

> We ask that this information be turned over to the Union by the close of business Friday, November 1, 1985.

9. Dave Bartlein is the Payroll Audit Supervisor for the Trust Fund. The Trust Fund is a joint employer and union operated trust fund. In the normal course of administering the Trust Fund, audits are conducted regarding the amounts contributed by employers covered by the Trust Fund. Those audits are limited, by the terms of the trust agreement, to the payroll records of a covered employer. The Trust Fund has audited the payroll records of the Company. Bartlein, in a letter to "Helen Dzbanek d/b/a Hebe Tile Company" dated April 16, 1986, stated the following:

> In response to your request to the Employer Accounts Committee of the Board of Trustees of this Pension Fund, the Committee reviewed the matter and instructed us to reply as follows:
>
> > The audit revealed no additional amounts due this Pension Fund for the period January 1, 1984 through September 30, 1985.

A routine audit by the Trust Fund cannot reveal whether an employer is fully recording the hours of work performed by it. Cash payments to a subcontractor, for example, would not be revealed in such a routine audit. Bartlein does not, however, have any independent knowledge of such conduct on the part of the Company.

10. In a letter to Helen Dzbanek dated May 28, 1986, Judziewicz stated the following:

> This letter serves as the Union's request that the information requested in our October 10, 1985 letter (copy enclosed) be expanded to include the time period of June 1, 1984 to present.

Helen Dzbanek did not respond to this letter.

11. Helen Dzbanek disconnected the Company's business phone on or about August 19, 1985. In August of 1985, the Company paid the minimum contribution for Ben Dzbanek for health insurance and made no contribution for vacation or other fringe benefits. In the period from January, 1984, through August, 1985, the Company paid the minimum contribution for Ben Dzbanek for health insurance. The last Company contribution for vacation and other fringe benefits for Ben Dzbanek was made in July of 1985. A Company checking account was held open beyond August of 1985 at least until April of 1986. The Company paid certain bills following August of 1985. At least some, and perhaps all, of those bills were paid for expenses incurred prior to August of 1985. The information sought in Judziewicz's letters of October 10, 1985, and of May 28, 1986, is reasonably necessary for the Union to have in order for the Union to carry out its obligations as the exclusive collective bargaining agent under the labor agreement noted in Finding of Fact 3.

CONCLUSIONS OF LAW

1. The Company has been, at all times relevant to this matter, an "employer" within the meaning of Sec. 111.02(7), Stats.

2. Ben Dzbanek has been, at all times relevant to this matter, an "employe" within the meaning of Sec. 111.02(6), Stats., and the Union has been, at all times relevant to this matter, the exclusive collective bargaining agent for Ben Dzbanek as the sole employe of the Company covered by the collective bargaining agreement noted in Finding of Fact 3.

3. The information sought by the Union in Judziewicz's letter of October 10, 1985, as updated by Judziewicz's letter of May 28, 1986, is reasonably necessary for the Union to have in order for the Union to carry out its obligations as the exclusive collective bargaining agent under the collective bargaining agreement noted in Finding of Fact 3. The Company's refusal to supply the requested information constitutes a violation of Sec. 111.06(1)(d), Stats.

ORDER 2/

To remedy its violation of Sec. 111.06(1)(d), Stats., Hebe Tile Company, its officers and agents, shall immediately:

1. Cease and desist from refusing to supply Tile, Marble, Terrazzo Finishers, Shopworkers and Granite Cutters International Union, Local No. 47, AFL-CIO, with information reasonably necessary for the Union to have in order for the Union to carry out its obligations as the exclusive collective bargaining agent under the collective bargaining agreement between the Company and the Union.

2. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Wisconsin Employment Peace Act:

   a. Upon request, timely supply the Union with the following information for the period of time between June 1, 1984, and the present, which the Examiner finds is reasonably necessary for the Union to have in order to carry out its obligations as the exclusive collective bargaining agent for the Company's employe:

      1. Complete payroll records including tax forms 941, W-2 and W-3, and travel expense information.

      2. Time cards for all employes.

      3. History of any subcontracting work to other parties.

      4. All contracts the Company entered into with other parties to perform hard and/or composition tile work.

      5. All records pertaining to the purchase of materials used by the Company to fulfill verbal or written contractual obligations.

2/ 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.

6. Billing and receipt records for contracted work.

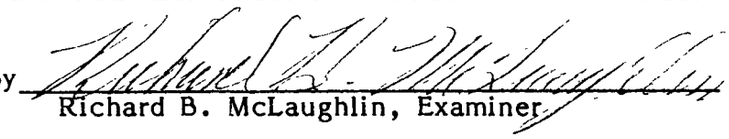
b. The Company may supply information included in the record of this proceeding by specifically noting the location of the information in the record.

c. If any information is not available, the Company shall specifically state the information is not available, and shall specifically state why the information is not available.

d. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps the Company has taken to comply with the Order.

Dated at Madison, Wisconsin this 28th day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Parties' Positions

After a review of the record, the Union argues that: "The Company violated (Sec.) 111.06(1)(d) of the Wisconsin Employment Peace Act when it refused to provide the requested information to Local 47." According to the Union "(i)ncluded within the company's obligation to bargain is the obligation to provide necessary information to its employees' bargaining representative." The Union argues that information can be necessary not just for collective bargaining, but also for administering a negotiated agreement. The Union asserts that, in the present matter, it is undisputed that the Union is the "recognized bargaining representative," and that the Union requested certain necessary information and was refused by the Company. The Union contends that established decisions of both the WERC and the NLRB demonstrate that "there is overwhelming precedent for the union's right to request, and the company's obligation to provide the requested information." It is irrelevant, according to the Union, whether certain evidence of a contract violation exists, since "(t)he fact that the union does not have certain evidence of the employer's contract violation, does not negate its request for information. . . it is the union's need for real evidence to determine whether or not there is a contract violation which supports its request." Even if the presence of a demonstrable contract violation were a relevant consideration, the Union argues that "there is certainly a basis for the union's suspicion that the contract had been violated." The Union acknowledges that the Company produced certain information at hearing but argues that while such information is "indeed helpful," it is incomplete. The Union concludes that the Company's initial denial of the information, followed by its incomplete production of the requested matter demands that:

> . . . the Examiner order that the company provide all records requested in the union's letters of October and March 1986 which have not hitherto been provided including:
>
> 1. Payroll records for Jim Angyan and Ben Dzbanek after August of 1985, tax forms 941, W-2, W-3, and travel expense information for these employees.
>
> 2. Time cards for all employees.
>
> 3. History of any subcontracting of work to other parties.
>
> 4. All contracts the company entered into with others to perform hard and/or composition work.
>
> 5. Billing and receipt records for contracted work.

The Company's position is perhaps best summarized in the "CONCLUSION" section of its brief, which, with citations to the transcript omitted, reads as follows:

> The Hebe Tile Co. has provided any and all records kept and available and has nothing further to submit since nothing has been withheld. There has been full compliance.
>
> The Union Business Agent repeatedly informed Helen Dzbanek that he would not let Ben Dzbanek get away with paying reduced retirement insurance but would make an example of him which is the object of these proceedings, even though approximately 32 years of full payments have been made. His conduct is to protect the pension and insurance funds as though it were his own instead of the property of the Pensioners.
>
> The burden of proof is with the Union to prove their allegations, none of which have been proven. Their entire case rests on false innuendo. Audit revealed no additional amounts due pension fund from Jan. 1, 1984 through Sept. 30, 1985.

The Union prayer for relief should be dismissed and since this Company has been terminated and no longer exists since August 19, 1985, with the exception of filing tax returns for 1985, as required by law, it is respectfully my opinion that the entire matter is moot, and the Union has no standing in the Hearing. In spite of our position, we have in fact submitted all available records to the Union as a result of this Hearing.

Discussion

The complaint alleges a Company violation of Sec. 111.06(1)(d), Stats., regarding the Company's refusal to submit the information requested in Judziewicz's letter of October 10, 1985. Judziewicz supplemented that letter with a letter dated May 28, 1986, which sought the same information, but updated the request. In its brief, the Union has essentially repeated the request.

The parties have stipulated that the Board has refused to assert jurisdiction over the matter because the bargaining unit involved is composed of a single employe. The Commission will assert jurisdiction over bargaining units composed of one employe. 3/

The existence of a duty on the part of the Company to supply relevant information to the Union is not in dispute. In federal law, the existence of such a duty regarding contract negotiations has been discussed by the Court in NLRB v. Truitt Manufacturing Co. 4/ The Court extended the duty to supply information to labor management relations during the term of a collective bargaining agreement in NLRB v. Acme Industrial Co. 5/ The Commission has brought such a duty to supply information during the term of an agreement into its own case law in Boynton Cab Company. 6/ Though this area of the law has not been extensively developed, the standard defining the duty was stated in Memorial Hospital Association to extend to information "reasonably necessary for the . . . Union to have . . . in order to carry out its obligations as the (exclusive bargaining) representative." 7/ The existence of a violation of Sec. 111.06(1)(d), Stats., turns on whether the requested information was reasonably necessary and if so on whether the Company has a defense for its refusal to supply the information.

A review of the circumstances existing at the time of the Union's requests for the information supports the Union's claim that the information sought is reasonably necessary to the Union to carry out its obligation to enforce the collective bargaining agreement. The Trust Fund's audit is restricted to payroll records and it is possible for those records to fail to disclose the entirety of a Company's operation. The information sought by the Union is to verify the completeness of the Company's payroll records. Beyond this, the Union did have reason to be concerned regarding the Company's compliance with the requirements of the contract regarding contributions to the Trust Fund. Helen Dzbanek, in a phone call sometime in August of 1985 to the Union, stated that the Company was considering going out of business. Nevertheless, Judziewicz understood Ben Dzbanek to be still performing work for the Company in October of 1985. Helen Dzbanek never submitted the statement sought by the Union regarding the closing of Company operations. Judziewicz was also aware that the Company had, for some time prior to August of 1985, been making minimum payments to the Trust Fund. Nothing in this establishes, in itself, any contractually improper act by the Company. It

---

3/ See Straus Printing and Publishing Company, Dec. No. 17736 (WERC, 4/80) and WERC v. Atlantic Richfield Co., 52 Wis.2d 126 (1971). See also Morgan-Wightman Supply Company, Dec. No. 21048 (WERC, 10/83).

4/ 351 US 149, 38 LRRM 2042 (1956).

5/ 385 US 432, 64 LRRM 2069 (1967).

6/ Dec. No. 5001 (WERC, 11/58).

7/ Dec. No. 10010-A, 10011-A (Fleischli, 8/71) at 27; aff'd in relevant part, Dec. No. 10010-B, 10011-B (WERC, 11/71).

does, however, indicate the Union had reason to question the Company's compliance with the contract. Nothing happened between October of 1985 and May of 1986 to significantly alter these circumstances.

There is no dispute that the contract contains provisions which, on their face, govern the amount of money required to be contributed to the Trust Fund for certain benefits. Article VIII governs contributions to the Trust Fund for vacation benefits. Article IX governs contributions to the Trust Fund for health and welfare benefits. Article X governs contributions to the Trust Fund for pension benefits. In addition to these Articles, Article VII contains limitations on the Company's right to subcontract which may impact on the Company's contributions to the Trust Funds. In Article XVI the Union is given the authority to enforce the contract on its own behalf.

Against this background, the requested information is reasonably necessary to the Union to fulfill its role as the bargaining representative required to enforce the collective bargaining agreement. Accordingly, the Company's refusal to supply that information constitutes a violation of Sec. 111.06(1)(d), Stats.

The Company has asserted a number of defenses to a finding of such a violation. Those defenses must now be addressed. The first is that the Company has fully complied with the Union's request for information. That the assertion states a complete defense to the Union's allegations, if proven, is evident. The assertion has, however, not been proven. The assertion assumes that the information supplied at hearing coupled with an assumption that no other records are available constitutes compliance. This assertion ignores that the Company's response at a minimum is untimely and in any event never completely responded to the request. At a minimum, the Union is entitled to a complete response to its request. The order entered above will constitute the basis for such a complete response. The order allows the Company to reference information entered into the record and completes the Company's response by requiring an express statement of what records are unavailable and, if unavailable, why.

The next defense asserted by the Company has been variously stated but in essence urges that the Union's request is vindictive in nature. The Company's duty to supply information to the Union extends to information reasonably necessary for the Union to have in carrying out its duty as an exclusive bargaining agent. Harassing the Company plays no role in the Union's obligations as an exclusive bargaining agent, and thus the Company's assertion, if proven, states a complete defense to the Union's allegations. The Company's assertion has, however, not been proven. The uniqueness of the present facts can be demonstrated by noting the accuracy of the Company's assertion that the Union's interest in enforcing the contractual employer contributions to the Trust Fund may run contrary to the individual interests of Ben Dzbanek as the sole bargaining unit employe. It is, however, impossible to conclude the Union violated the interests of its bargaining unit employe by acting to enforce the terms of a collective bargaining agreement negotiated on his behalf. Reaching such a conclusion here could anomalously require the Union to sanction a contractual violation which would also constitute a violation of state statutes (see Sec. 111.06(1)(f), Stats., and Sec. 111.06(2)(c), Stats.) because a bargaining unit member might benefit from such a violation. Beyond this, evidence of Union vindictiveness in seeking the information is lacking. What evidence there is centers on a conversation between Helen Dzbanek and Judziewicz in which Judziewicz made a gratuitous comment to Helen Dzbanek to the effect that Ben Dzbanek appeared well fed for a man who was having trouble finding work. The Company asserts Judziewicz evinced, in this conversation, a degree of stridency manifesting bad faith. The Company's assertion raises a troublesome point. Judziewicz acknowledged making the comment, and related it to Helen Dzbanek's statement that the Company was not finding work. While the comment is not justifiable, it offers, in itself, no persuasive reason to conclude, as the Company asserts, that Judziewicz screamed throughout the conversation and berated Helen Dzbanek. Judziewicz's demeanor throughout his testimony at hearing totally belies this assertion. Judziewicz was restrained in his testimony and openly acknowledged the gratuitous comment. Helen Dzbanek's testimony was, to the contrary, strident. The conversation between Helen Dzbanek and Judziewicz in August of 1985 does not appear to have been the shouting match Helen Dzbanek portrays it to be. Ben Dzbanek's later visit to Judziewicz in October of 1985 further undercuts the Company's assertion since the visit, as well as Judziewicz's credible recall of his perception of it, appears to have been routine in nature. In any event, the August, 1985, conversation offers no defense for the Company's refusal to submit

the information. Judziewicz did make a gratuitous comment but the request for information was made in good faith and if responded to in kind could have eliminated the source of whatever friction existed between Helen Dzbanek as spokesperson for the Company, and Judziewicz as spokesperson for the Union.

The Company's next line of defense is that it went out of business in August of 1985, and thus the complaint is moot, with the Union lacking standing to assert any unfair labor practice allegation. The Company's argument does not state a defense to the Union's request for information. The argument ignores that the cessation of business can constitute a disputed question of fact. 8/ The Company's bare assertion that the disconnection of its business phone or its avowed desire to cease operations can foreclose further inquiry is unpersuasive. The assertion ignores that the information the Union requests will simply verify the Company's cessation of operations if the business has closed. That such information is reasonably necessary to the Union to evaluate the Company's assertion that it no longer is in operation and required to make the contributions required in the labor agreement is self evident.

The Company also asserts that it is entitled to $300 in attorney fees "by reason of cancellation of a prior hearing on one business day notice over our objections." Initially, it must be noted that the Commission has a policy against granting attorney fees. 9/ Beyond this, the cancellation was granted on the understanding that after due effort, the Union was unable to secure the presence of a necessary witness. No persuasive evidence has been adduced to indicate that this understanding was erroneous. The request has, then, not been granted.

The final area of contention raised by the Company and requiring discussion is evidentiary in nature, and questions whether any unfair labor practice finding can be premised on Judziewicz's account of his conversation with Ben Dzbanek or with representatives of the Trust Fund. The Company contends this testimony is inadmissible hearsay. Fact cannot be found on hearsay evidence admitted over objection where direct testimony as to the same facts is obtainable, as stated by the court in Outagamie County v. Brooklyn. 10/ This case also, however, establishes that Judziewicz's testimony is not hearsay. The Outagamie County court analyzed the facts before it thus:

> If, however, the issue is whether the Outagamie county relief authorities acted in bad faith, or abused their discretion, then Eggert's testimony 11/ with respect to the substance of conversations had with other persons during the course of his investigation is not hearsay. This is because the truth of the statements made to Eggert by these other persons concerning the financial condition of the Stephans, and the need of Mrs. Stephan for hospital and medical care, is not required to be proved by respondent county. Rather, under this premise, the required proof centers on whether these persons interviewed by Eggert did make the statements attributed to them by him in his testimony. Eggert's testimony that these statements were made to him is no more hearsay than would be the testimony of any witness with respect to any observation personally made by him. 12/

This resolution of the facts is applicable to the present matter and establishes that Judziewicz's testimony on the statements made to him by Ben Dzbanek or by the representatives of the Trust Fund is not hearsay. It is not the accuracy of

---

8/ Certain successorship cases are illustrative of this point. See generally, Morris, The Developing Labor Law (BNA, 1983) esp. Chapter 15.

9/ United Contractors, Inc., Dec. No. 12053-A (Gratz, 12/73) aff'd by operation of law Dec. No. 12053-B (WERC, 1/74), expressly approved in Madison Metropolitan School District et. al., Dec. No. 16471-D (WERC, 5/81) with Commissioner Torosian dissenting in part.

10/ 18 Wis 2d. 303 (1962)

11/ Eggert was the sole testifying witness.

12/ Ibid., at 309.

Judziewicz's recall or the truth of the statements made to him that are in issue so much as is Judziewicz's good faith belief in the facts he drew from those conversations. Because the evidence questioned by the Company is not hearsay, its argument must be rejected.

The dispute regarding the evidentiary point provides an appropriate point to state certain limiting considerations to the conclusions noted above. The Company has in its evidentiary arguments questioned whether the Union can meritoriously challenge the Company's conduct and specifically whether Ben Dzbanek works more than thirty-nine hours a month or whether certain tile work was performed after the Company purportedly went out of business. It is important to state that this matter does not concern the existence or non-existence of Company violations of the contract. This case is one implicating only the Commission's role as overseer of the collective bargaining process. Under the Wisconsin Employment Peace Act, the bargaining table is a preferred forum for dispute resolution, and employers and labor organizations are preferred decision makers. Judziewicz brought to the bargaining table a request which the Company could have, but chose not to address at the table. The result is the present complaint. The issues in this complaint do not question, and this decision does not address, whether the Company remains in operation or whether the Company violated the contract. Rather, this decision addresses only the bargaining process and decides only that the information sought is reasonably necessary to the Union's role in the bargaining process and that the Company's refusal to provide the information constitutes a violation of its statutory duty to bargain in good faith, in violation of Sec. 111.06(1)(d), Stats.

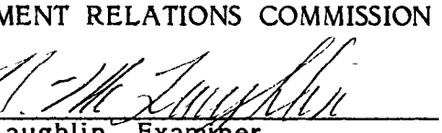
The Union has sought information from the beginning of the 1984-1987 contract to the present. The order entered above grants that request. Granting the request for the time period from August of 1985 to the present is not troublesome since such information is necessary to determine if the Company has in fact ceased operations. Granting the request regarding information predating August of 1985 is somewhat troublesome. Information prior to August of 1985 is necessary to determine whether Company contributions to the Trust Fund properly reflected the work performed. The Union has not, however, offered a specific justification for tracing the information back to the contract's inception. As the Company points out, this risks a "fishing expedition." Nevertheless, the Company has not specifically objected to the type of information requested or to the time period covered by the request. The Company has, in addition, supplied certain information from 1984 to the present. On balance, both the type of information and the time period involved are not improper, and the Union's request has been incorporated into the order entered above.

The order is designed to be the basis for the first complete and timely Company response to the Union's request. The order permits the Company to refer to information contained in the record, so long as the reference is specific. Beyond this, the order provides the basis for a complete response to the Union's request by requiring a specific statement that the information is unavailable, if it is unavailable, and, if it is unavailable, a statement of why it is unavailable.

The Union seeks in the complaint that a compliance notice be posted. Such notices are typically posted to remedy the chilling effect on bargaining unit members of improper employer acts. On the facts of this case, such notice posting would serve no useful purpose.

Dated at Madison, Wisconsin this 28th day of May, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Richard B. McLaughlin, Examiner