STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TILE, MARBLE, TERRAZZO, FINISHERS, SHOPWORKERS & GRANITE CUTTERS LOCAL UNION NO. 47, Complainant, vs. JOHN H. GASSMAN, Respondent.	Case 1 No. 39200 Ce-2064 Decision No. 24893-B

Appearances:

LaFollette & Sinykin, Attorneys at Law, Suite 300, 222 West Washington Avenue, Madison, Wisconsin 53701-2719, by Mr. Robert J. Dreps, appearing on behalf of the Respondent.

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P. O. Box 92099, Milwaukee, Wisconsin 53202, by Mr. Matthew R. Robbins, appearing on behalf of the Complainant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On August 3, 1987, the Tile, Marble, Terrazzo, Finishers, Shopworkers & Granite Cutters Local Union No. 47, hereinafter Union or Complainant, filed a complaint with the Wisconsin Employment Relations Commission alleging that John H. Gassman, hereinafter Respondent, had committed prohibited practices within the meaning of Sec. 111.06, Stats. On October 19, 1987, the Commission appointed Coleen A. Burns, 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. 111.07(5), Stats. A hearing was held in Madison, Wisconsin, on November 16, 1987, at which time the parties were given full opportunity to present their evidence and arguments. Both parties filed briefs and the record was closed on January 6, 1988. The Examiner having considered the evidence and arguments of counsel and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Tile, Marble, Terrazzo, Finishers, Shopworkers & Granite Cutters Local Union 47, hereinafter Union or Complainant, is a labor organization, representing employes in the construction industry, with offices located at 6667 North 89 Street, Milwaukee, Wisconsin 53224; and that at all times material hereto, James P. Judziewicz has acted as an agent of the Union.

2. John H. Gassman, hereinafter Respondent, owns and operates the John Gassman Tile Company, a sole proprietorship, in the business of laying ceramic tile in the construction industry, with offices located at Route 2, Box 178,

authorize Kruchten to bring an assistant, nor did Kruchten seek such authorization from Respondent; Respondent did not pay Chandler to perform any work; Kruchten, who was a tile finisher and a member of the Union, performed the Plastic Ingenuty work sometime during the weekend immediately preceding November 5, 1986, i.e., on either November 1 or November 2, 1986; that Kruchten's employment relationship with Respondent terminated prior to November 5, 1986; and that Chandler has never been an employe of Respondent.

5. On Wednesday, November 5, 1986, Respondent worked alone at the Plastic Ingenuity worksite; as Respondent was laying tile, the Union Business Agent, James P. Judziewicz, and the Bricklayer's Business Agent, Glen Sheerer, approached Respondent and asked what he was doing; in the ensuing discussion, both business agents suggested "that Respondent sign a contract stating that Respondent was subcontracting Union work"; Respondent voluntarily signed the 1984-87 labor contract between the Union and the Madison Area Ceramic Tile Contractor Association; Respondent signed the labor contract as an independent employer and not as a member of the Madison Area Ceramic Tile Contractors Association; and, by its terms, the labor contract was "in full force and effect until May 31, 1987, and from year to year thereafter, unless terminated by written notice (by certified mail) given by either party to the other not less than ninety (90) days prior to said expiration date, or any anniversary thereof."

6. During the evening of November 5, 1986, Union Business Agent Judziewicz telephoned Respondent and asked Respondent to hire a Union tile finisher for the Plastic Ingenuity Project; Respondent refused Judziewicz's request and informed Judziewicz's that he (Respondent) could not afford to hire a tile finisher; on November 12, 1986, Judziewicz received the following letter from Respondent:

> This is to notify you that I am repudiating the collective bargaining agreement which I signed with Local 47 on November 5, 1986. The agreement was signed in error and I will not abide by its terms.
>
> I have not subcontracted with a union contractor on any project. When the agreement was signed, I was working under an agreement with Nonn's Flooring, which contracted directly with the owner at the Plastic Ingenuity project in Cross Plains, Wisconsin.
>
> I do not currently have or intend to hire any employees. Federal law permits an employer to repudiate a Section 8(f) pre-hire agreement, such as the agreement at issue, at any time before the union demonstrates majority status within the relevant unit. Accordingly, the agreement dated November 5, 1986 between the Tile, Marble, Terrazzo Finishers and Shopworkers Union Local No. 47 and John Gassman is hereby repudiated and rescinded in its entirety.

the letter was dated November 10, 1986; Complainant did not respond to Respondent's letter of November 10, 1986 until on or about May 30, 1987, when the Union Business Agent, Judziewicz, sent Respondent the following letter:

> This letter serves as the Union's request that your Company make available for our review the following information to cover the time period of June 1, 1984 to present.
>
> 1) Complete payroll records for this period of time, including Tax forms 941, 1099, W-2, and W-3, and travel expense information.
>
> 2) Time cards of 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 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.

The reasons for this request emanates from the NLRB's recent decision in JOHN DEKLEWA & SONS, 282 NLRB NO. 184, Case 6-CA-16819. This decision relates to the employer's duty to comply with the terms and conditions of a prehire agreement.

The Union, acting on behalf of the bargaining unit, needs to examine these records to ascertain contract compliance. We ask that these records be turned over to the Union by the close of business Friday, July 3, 1987.

On or about June 3, 1987, Respondent's Attorney Robert J. Dreps, sent Judziewicz the following letter:

This is to notify you that Mr. John Gassman will not provide the information you requested in your May 30, 1987 letter. You were notified in writing on November 10, 1986 that Mr. Gassman was repudiating the pre-hire agreement he was coerced into signing on November 5, 1986. That repudiation was and remains valid under federal law.

Mr. Gassman has never been a member of the Madison Area Ceramic Tile Contractors Association and had no employees at the time he signed the pre-hire agreement. Your union made no attempt to test the validity of Mr. Gassman's repudiation of the pre-hire agreement prior to its expiration on May 31, 1987. Nor can the union demonstrate that it ever had majority status since Mr. Gassman never subcontracted with a union contractor, employed a union member or accepted a referral from a union hiring hall.

Nothing in the NLRB's recent decision in John Deklewa & Sons changes this result. The principles adopted in that decision are applied retroactively only to pending cases, and there is no pending case involving Mr. Gassman. Moreover, the above facts would prevent any union from demonstrating majority status even if the decision were applied retroactively to Mr. Gassman.

7. On August 3, 1987, Complainant filed a complaint with the Wisconsin Employment Relations Commission wherein Complainant alleged that Respondent had violated Sec. 111.06(1)(a)(c)(d) and (f) of the Wisconsin Employment Peace Act; and that, thereafter, Complainant abandoned all claims save that in which Complainant alleges that Respondent has violated Sec. 111.06(1)(f), Stats.

8. At all times material hereto, Respondent has maintained that his letter of November 10, 1986 was legally effective to repudiate the agreement which he signed on November 5, 1986 and, therefore, he is not bound by the terms and conditions of the agreement; and that Respondent refuses to submit the question of the alleged contract violation to the final and binding arbitration provision contained in Article XIII of the agreement.

9. Respondent did not have any employes from the time that Respondent entered into the agreement of November 5, 1986 through the time that the Complainant received Respondent's letter of November 10, 1986; Respondent did not perform any work from the time that Respondent entered into the agreement on November 5, 1986 through the time that Complainant received Respondent's November 10, 1986 letter of repudiation; from November 5, 1986 to the day of hearing, Respondent has had four employes; in December, 1986, Respondent hired his wife, Lois Gassman, as an accountant; from February 23, 1987 through March 27, 1987, Respondent employed Sean Stanton Jones; on May 27, 1987, Respondent employed Kenneth C. Taylor; and that on August 1, 1987, Respondent employed Timothy Joe Werner; and that the work of Jones, Taylor and Werner involved the laying of tile.

CONCLUSIONS OF LAW

1. The Respondent John H. Gassman is an employer within the meaning of Sec. 111.02(7), Stats.

2. Complainant Union is a labor organization and represents employes in the construction industry for the purposes of collective bargaining.

3. The Commission has jurisdiction to determine the Sec. 111.06(1)(f) violation alleged by Complainant.

4. The record fails to demonstrate that Complainant induced Respondent into signing the agreement of November 5, 1986 by making a misrepresentation of fact.

5. On November 5, 1986, Respondent John H. Gassman and Complainant Union voluntarily entered into a valid pre-hire agreement.

6. Respondent's letter of November 10, 1986 was legally effective to repudiate the agreement which Respondent and Complainant entered into on November 5, 1986.

7. The agreement entered into on November 5, 1986 was binding on Respondent from the time that Respondent entered into the agreement until the time of Complainant's receipt of the letter of repudiation on November 12, 1986.

8. Respondent has not violated Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act by violating the terms of the pre-hire agreement entered into on November 5, 1986.

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A Burns
Coleen A. Burns, 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.

JOHN H. GASSMAN

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

On August 3, 1987, Complainant filed the instant complaint alleging that Respondent has violated Sec. 111.06(1)(a)(c)(d) and (f) of the Wisconsin Employment Peace Act. At hearing and in post-hearing brief, Complainant abandoned all claims save the allegation that Respondent has violated Sec. 111.06(1)(f).

Respondent contends that it lawfully repudiated the agreement in dispute and denies that it has violated Sec. 111.06)(1)(f), or any other provision of the Wisconsin Employment Peace Act.

POSITIONS OF THE PARTIES

Complainant

John H. Gassman has been in business since July of 1986. In late October of 1986, Gassman first employed an employe, i.e., Jack Kruchten. Kruchten was paid a specific hourly wage and was supervised at the worksite by Gassman. Gassman testified that he never subcontracted work and there is no evidence that Kruchten engaged in work as an independent contractor. Kruchten acted as an employe under Gassman's control. On a regular basis since October of 1986, Gassman has used the services of one or more employes to perform the work of a tile finisher, which is bargaining unit work. Clearly, Gassman is an Employer within the meaning of Sec. 111.02(7).

On November 5, 1986, Gassman entered into a collective bargaining agreement with the Union, which agreement provides that the Union is to have the first opportunity to refer employes for work with the employer (Article IV, Section 4). The agreement also provides that there will be a tile finisher on all projects except patch jobs (Article XII, Section 6). Each of the jobs which Gassman obtained in 1986 and 1987 involved bargaining unit work. Gassman used employes to perform bargaining unit work. None of these employes were referred pursuant to Article II, Section 4. Gassman has refused to comply with the terms of the collective bargaining agreement signed with the Union and, thus, has violated Sec. 111.06(1)(f), Stats.

Contrary to the assertion of the Respondent, the letter of November 10, 1986 is not an effective repudiation of the labor agreement. The fact that Grossman did not have anyone actively working for him at the time of the attempted repudiation does not mean that Gassman was not an employer within the meaning of Sec. 111.02(7), Stats. An employer does not cease to be an employer merely because its work force may fluctuate and involve seasons layoffs. Section 111.06(1)(f) does not limit itself to violations of collective bargaining agreements occurring only when the employer is employing employes. Having once entered into a labor agreement, the employer is bound by it and any violations are continuing. In the construction industry, it is common for there to be seasonal lay-offs of the entire workforce. Acceptance of Respondent's argument would permit an employer to lay-off his employes, repudiate the existing collective bargaining agreement, and then having relieved itself of its collective bargaining obligation, rehire the same or other employes.

Prior to signing the agreement of November 5, 1986, Gassman had one employe, Kruchten. As Gassman was aware, Kruchten was a member of the Union. Thus, Gassman was aware that the Union had majority support in his workforce. Nothing

Since the Union was the majority representative of the employer at the time the contract was entered into, this is not a "pre-hire" agreement. Rather, this is an agreement covering, at that time, a one person unit. The Union had majority status at the time the labor agreement was entered into and, under any construction of the law, the agreement was binding upon Gassman.

Assuming arguendo, that the agreement signed on November 5, 1986 was a pre-hire agreement, it was binding on the employer for its duration. Section 111.06(c)(2) provides that:

> "It is not a violation of this subchapter for an employer engaged primarily in the building and construction industry where the employees of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce in all union agreement with the labor organization which has not been subjected to a referendum vote as provided in this subchapter."

The provisions of paragraph (c) are thereafter incorporated in paragraph (e). Thus, it is clear that the legislature intended that, in the construction industry, agreements can be entered into between an employer and a union at a time when the union may not have majority status. The Wisconsin Employment Peace Act clearly permits pre-hire agreements in the construction industry and does not exclude prehire agreements from the coverage of Sec. 111.06(1)(f).

The claim that an employer could repudiate a pre-hire agreement was recently addressed in John Deklewa & Sons, 282 NLRB No. 184, 124 LRRM 1185 (1987). The NLRB held that pre-hire agreements should be considered binding for their term, although the employer may not have a duty to bargain after the termination of the agreement.

The decision in John Deklewa & Sons was reached after painstaking review of the history of collective bargaining in the construction industry and recognition that an employer's desire to repudiate a labor contract may be based on economic considerations, without reference to or concern for the employe's free choice. Indeed, it is clear that Gassman was not concerned with employe free choice, but rather, was motivated by his own economic interests. Should the examiner conclude that construction industry collective bargaining agreements should be treated differently than other collective bargaining agreements under the Peace Act, then the examiner should adopt the holding in John Deklewa & Sons.

While the employer's decision to repudiate the labor contract was made prior to the issuance of the John Deklewa decision, it is not unfair to apply the decision retroactively. The NLRB specifically held that the decision would be given retroactive effect. The NLRB recognized that the confusing state of existing law made it unlikely that a party "could knowingly have acted in reliance on that law in order to avoid liability." Clearly, the WERC has not previously made a distinction between pre-hire agreements and other collective bargaining agreements. Nor was the NLRB and court law in this area so settled that one could with confidence rely on it.

The employer has engaged in continuous violations of a valid collective bargaining agreement in violation of Sec. 111.06(1)(f), Stats. The examiner should order the employer to comply with the agreement until it is properly terminated, and make whole the Union, the fringe benefit funds provided for in the labor agreement and the affected employes for all losses resulting from the employer's violation of the labor agreement. Finally, the Examiner should order the employer to provide the Union with the information requested by the Union.

Respondent

The WERC lacks jurisdiction to hear and decide the allegations contained in the complaint because Respondent was not an employer within the meaning of WEPA when he signed the pre-hire agreement on November 5, 1986, nor when he repudiated that agreement five days later. In Tompa Woodwork, Inc., Dec. No. 18498-A, B, the Commission found that the intent of the parties is a critical factor in determining an employer's status under Sec. 111.02(7), Stats. As the record demonstrates, Respondent did not intend to hire Jack Kruchten as an employe.

Kruchten was performing work as an independent contractor and not as Respondent's employe. At the time of the Plastic Ingenuity project, both Respondent and Kruchten were Union members. The distinction between employe and independent contractor is well established and based upon common law agency principles. Consideration is given to such items as the right to hire and discharge; the method of payment; who furnishes the tools and materials used; who designates the time and place for the work to done; and the intention of the parties. Usually, no one of these categories is decisive. The conclusion must be based on the "total situation" looking at all of the facts in the particular case. United Insurance Co. v. NLRB, 304 F.2d 86, 89-90 (7th Cir. 1962). Wisconsin applies the same common law agency principles. See, e.g., Bond v. Harrel, 13 Wis. 2d 369, 108 N.W. 2d 552 (1961).

Kruchten performed a discrete portion of the Plastic Ingenuity tile work under an oral agreement with Respondent, was paid in cash, controlled his own hours, and worked at the job site when Respondent was not present. Kruchten, without seeking the permission of Respondent, hired Sasha Chandler as an assistant. Respondent did not pay Chandler for her work. Respondent did not consider either Kruchten or Chandler to be employes. Applying common law agency princples herein, Kruchten was an independent contractor and not an employe.

Assuming arguendo, that Kruchten was an employe, his employment ended before the pre-hire agreement was signed. Respondent did not have any employes on November 5, 1986 and didn't hire anyone until February 28, 1987. The period between the signing and repudiation of the pre-hire agreement is the only period relevant to this action. Respondent had no employes during the relevant period. During the relevant period, Respondent was not an employer within the meaning of Sec. 111.02(7), Stats., and, therefore, the Commission lacks jurisdiction over the Union's complaint.

The pre-hire agreement is not enforceable because the Union induced the Respondent to sign by misrepresentation of fact. Respondent signed the pre-hire agreement in reliance on the Union's representation that Respondent had improperly subcontracted Union work at the Plastic Ingenuity Project. As Respondent later discovered, his Plastic Ingenuity work was not Union work, since it was based upon a contract between the tile seller, Nonn's Flooring, and the project owner. The Union has not disputed that the work in question was not Union work.

A contract induced by even an innocent misrepresenttion may be rescinded by a party who relied upon that misrepresenttion in entering into the contract. Schnuth v. Harrison, 44 Wis. 2d 326, 337-38, 171 N.W. 2d 370 (1969). Respondent promptly notified the Union that he was repudiating the agreement because it had been signed in reliance on the Union's misrepresentation. Applying basic contract law herein, the pre-hire agreement is not enforceable.

Federal and State law permit construction industry employers and unions to enter into pre-hire agreements. Although the issue has not been decided under the Wisconsin Employment Peace Act, at the time that Respondent repudiated the pre-hire ageement, such agreements were voidable "until and unless the Union attains majority support in the relevant unit." Jim McNeff, Inc. v. Todd, 461 U.S. at 269. Indeed, for over fifteen yers, the NLRB treated construction industry pre-hire agreements as freely voidable by either party. R. J. Smith Construction Co., 191 NLRB 693 (1971); see Deklewa at 9-14. The U.S. Supreme Court affirmed the NLRB's view that congress intended pre-hire agreements to be voidable prior to the Union's demonstration of majority support. NLRB v. Ironworkers, 434 U.S. 335 (1978); Jim McNeff, Inc. v. Todd, 461 U.S. 260 (1983).

Four months after Respondent repudiated the pre-hire agreement, the NLRB held that its prior interpretation did not provide sufficient protection to the employes right to freely choose their bargaining representatives. Deklewa at 26-27. Accordingly, the NLRB overruled the R. J. Smith line of cases and held that in the future, and in pending cases, voluntary pre-hire agreements would be enforceable until a decertification election was held. The NLRB's subsequent reversal is not relevant in this case because it expressly held that the Deklewa rule would apply retroactively only to pending cases. The Union had not commenced any action and, indeed, had not even responded to Respondent's repudiation notice when Deklewa was decided. By its own terms, Deklewa does not govern this case and its scope should not be retroactively broadened under state law.

Respondent expressly relied upon existing Federal law when he repudiated the pre-hire agreement. Under the preemption doctrine, clear federal labor policy cannot be contravened under state law. Since the NLRB limited the Deklewa standard to pending cases, application of that standard herein would violate the preemption doctrine.

A state court is free to give only prospective effect to its decisions. Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971). If the Commission adopts the Deklewa standard, it should be given prospective effect.

Retroactive application of the Deklwa rule in this case would not further the intent of the rule, i.e., employe free choice, because the employer did not have any employes at the time he signed the pre-hire agreement. Accordingly, a decertification election could not have been held.

Application of the Deklewa rule herein would create injustice and hardship for the Respondent, who is struggling to establish himself as a tile contractor. Respondent decided to become a tile contractor after repudiating the pre-hire agreement. The Union did nothing to test Respondent's repudiation of the agreement until after the agreement had expired by its own terms. Unlike the employer in McNeff, respondent never used the pre-hire agreement to work on a union project, nor did he accept any benefits of the agreement. Enforcement of the pre-hire agreement would impose the burden of the agreement on the respondent long after it is too late for him to obtain any of the benefits.

Prior to Deklewa, a union could overcome an employer's unilateral repudiation of a pre-hire agreement only by demonstrating that it enjoyed majority support among an appropriate bargaining unit. In the present case, the Union has never demonstrated majority status. Enforcement of the pre-hire agreement would deny Respondent's current employes their right to freely choose their bargaining representative. The Union was and remains free to organize Respondent's current employes. The Union should not be permitted to establish a bargaining relationship through this proceeding when it apparently cannot achieve that result in the workplace. The Union's complaint should be dismissed in its entirety.

DISCUSSION

Jurisdiction

Complainant alleges that Respondent has committed an unfair labor practice by violating Sec. 111.06(1)(f), Stats. 2/ Section 111.06(1)(f), provides that it is an unfair labor practice for an employer individually or in concert with others to violate the terms of a collective bargaining agreement. The Commission will assert jurisdiction under Sec. 111.06(1)(f) to enforce a pre-hire agreement. 3/

Section 111.07, Stats., provides the Commission with jurisdiction to hear and decide controversies concerning unfair labor practices. Where the Sec. 111.06(1)(f) claim may be brought as a civil action under Sec. 301 of the Labor Management Relations Act, 4/ the Commission's jurisdiction to determine the

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2/ The complaint, as originally filed, alleges that Respondent has violated Sec. 111.06(1)(a), (c), (d) and (f). However, at hearing and in post-hearing brief, Complainant addresses only the alleged violation of Sec. 111.06(1)(f). Accordingly, the Examiner concludes that Complainant has abandoned all claims save that involving the alleged violation of Sec. 111.06(1)(f).

3/ Don Cvetan Plumbing, Dec. No. 12356-A (Greco, 3/74); affirmed Dec. No. 12356-B (WERC, 5/84).

4/ Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Sec. 111.06(1)(f) claim is concurrent with that of the federal courts. 5/ Where there is such concurrent jurisdiction, the Sec. 111.06(1)(f) claim must be decided in accordance with the federal law developed in actions under Sec. 301 of the Labor Management Reltions Act. 6/

Where, as here, the agreement alleged to have been violated contains a provision which provides for the final and binding arbitration of disputes arising under the agreement, the Commission generally does not assert its jurisdiction to decide the breach of contract claim, but rather defers the dispute to the contractual arbitration procedure. 7/ However, where, as here, Respondent refuses to submit the dispute to arbitration on the basis that the agreement is unenforceable and, further, Complainant does not seek an order to arbitrate, it is appropriate for the Commission to assert its jurisdiction to hear the Sec. 111.06(1)(f) claim. 8/

As Respondent argues, Respondent did not have any employes from the time that he signed the agreement on November 5, 1986 through the time that the Union received the letter repudiating the agreement on November 12, 1986. This fact, however, does not require a finding that the Commission lacks jurisdiction on the basis that Respondent is not an employer. Complainant's breach of contract claim is not limited to the interval between the signing of the agreement and Respondent's act of repudiation. Rather, Complainant alleges that the agreement remained in full force and effect until at least May 31, 1987. Complainant further alleges that Respondent's conduct resulted in continuous violations throughout the period that the agreement was in effect. During the period in which Complainant alleges that the agreement was in effect, Respondent employed at least one individual. 9/ For the purpose of asserting jurisdiction to determine the violation of Sec. 111.06(1)(f) alleged herein, Respondent is an employer within the meaning of Sec. 111.02(7), Stats.

Misrepresentation

Respondent argues that the agreement is not enforceable because the Union induced the Respondent to sign the agreement by making a misrepresentation of fact. Specifically, Respondent argues that the Union misrepresented that Respondent had improperly subcontracted union work at the Plastic Ingenuity project.

The only evidence of statements made to Respondent by a Union agent, prior to Respondent's signing the agreement, is contained in the following testimony of Respondent:

> I was working when Skip Sheerer, Glen Sheerer and Mr. Judziewicz, a business agent for both Bricklayer 13 and for the Tile Finishers, showed up and wanted to know what I was doing. Well, it was pretty evident I was laying tile.
>
> They both suggested that I sign a contract stating that I was subcontracting union work, which I come to find out later

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5/ Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 49 LRRM 2619 (1962); Northland College, Dec. No. 22094-B (WERC, 5/86), R & R Drywall Co., Inc., Dec. No. 19109-A (Schiavoni, 6/82).

6/ Local 174, Teamsters v. Lucas Flour Co, 369 US 95, 49 LRRM 2717 (1962); Metcalfe, Inc. d/b/a Sentry Foods, Dec. No. 17660-A (McGilligan, 12/80).

7/ Bay Shipbuilding Corporation, Dec. No. 19957-B 19958-B (Shaw, 4/83); Metcalfe, Inc. d/b/a Sentry Foods, Dec. No. 17660-B (WERC, 2/82).

8/ R. & R. Drywall, Dec. No. 19109-A (Schiavoni, 6/82); Equipment Installers, Dec. No. 18372-A (Shaw, 8/81).

9/ For example, Sean Stanton Jones was employed to perform tile work in February and March of 1987.

I wasn't because I was subcontracting it through Nonn's Flooring, who was subcontracting or doing the work for Plastic Ingenuity. There was no work at all with the builder who was a union contractor.

So they went out and got the agreements and brought them in and asked me to sign them. 10/

Although Respondent's testimony on this point is somewhat confusing, the Examiner is satisfied that Skip is the nickname of Glenn Sheerer and, that Sheerer is not an agent of the Union, but rather, represents the Bricklayer's Union. Other record evidence demonstrates that Judziewicz is an agent of the Union.

According to Respondent, Judziewicz and Sheerer "both suggested that I sign a contract stating that I was subcontracting union work." 11/ It is unclear whether Respondent intended the phrase "stating that I was subcontracting union work" to be a descriptive phrase modifying the word "contract," or whether Respondent intended to indicate that Judziewicz and Sheerer made a representation that Respondent was "subcontracting union work." Assuming arguendo, that Respondent was indicating that Judziewicz and Sheerer represented that Respondent was "subcontracting union work," such a construction does not require a finding that the Union's agent made a misrepresentation of fact.

The phrase "union work" is ambiguous. While Respondent apparently construed the phrase to mean work which was required to be performed by a union subcontractor, the Examiner is persuaded that the phrase "union work" may also reasonably be construed to mean work of the type normally performed by members of the Union. Since there is no doubt that the work being performed by Respondent at the Plastic Ingenuity Worksite was the type of work performed by Union members, it is possible to construe the statement attributed to Judziewicz and Sheerer in such a manner that there would not be any misrepresentation of fact. Under this construction, the Business Agents are suggesting that Respondent sign the contract because the work should be performed by Union members, rather than, as Respondent argues, representing that the work is required to be performed by a union subcontractor.

As Respondent argues, the Wisconsin State Supreme Court has recognized that an innocent misrepresentation of a material fact may serve as a basis for the rescission of a contract. 12/ However, given the ambiguity of the testimony concerning the remarks made by the Union's agent, Judziewicz, the record does not support a finding that the Union misrepresented any fact.

Merits

Prior to signing the agreement of November 5, 1986, Respondent engaged the services of Jack Kruchten, a member of the Union, to perform work at the Plastic Ingenuity worksite. Regardless of whether Kruchten performed this work as an independent contractor, or as an employe within the meaning of Sec. 111.02(7), Kruchten's relationship with the Respondent had terminated prior to the time that Respondent executed the agreement on November 5, 1986. Respondent did not have any employes at the time that he executed the agreement and, thus, the agreement

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10/ Tr. p. 40.

11/ Neither Sheerer nor Judziewicz testified at hearing. Having no evidence to the contrary, Respondent's testimony concerning this statement of Judziewicz and Sheerer is credited.

12/ Merton v. Nathan, 108 Wis. 2d 205 (1982); Schnuth v. Harrison, 44 Wis.2d 326 (1969); Whipp v. Iverson, 43 Wis. 2d 166 (1969).

is a "pre-hire agreement" of the kind recognized by Sec. 8(f) of the National Labor Relations Act. 13/

The Commission has previously addressed the issue of the enforceability of a Sec. 8(f) pre-hire agreement. In Don Cvetan Plumbing, 14/ the Employer argued that the pre-hire agreement was unenforceable because there had not been a representation election. In rejecting the Employer's argument, the Examiner relied upon Operating Engineers, Local 150 v NLRB, 480 F.2d 1186, 83 LRRM 2706 (1973), wherein the Circuit Court of Appeals, Fifth Circuit, in construing Sec. 8(f), held that an employer committed an unfair labor practice when it refused to honor the terms of a pre-hire agreement. The Examiner stated: 15/

> the Court ruled that since an employer can file a representation petition at any time pursuant to Section 8, it, the Court could:
>
> "find no sanction in the language, history, or policy of (section) 8(f) for permitting an employer to abrogate unilaterally a validly executed pre-hire agreement, or for permitting the employer to commit what is otherwise an unfair labor practice even though at the time of either the Union has not achieved majority status. See Irving and McKelvy, supra, at 11-12, 82 LRRM 3019." (footnote citation omitted)

The case relied upon by the Examiner in Don Cvetan Plumbing, reversed the ruling of the NLRB in R. J. Smith Construction Co., 191 NLRB 693, 77 LRRM 1493 (1971). On remand the NLRB stated as follows: 16/

> The Board, for reasons it deems sufficient, has not filed a petition for certriorari to review the court's decision and will here apply the court's view respectfully reserving for future cases its position that an employer may not be found guilty of a refusal to bargain with respect to a union with which it has executed a valid 8(f) prehire contract but which has failed to achieve majority status. 3/ Accordingly, the Board will for the purposes of this decision only and in accordance with the court's decision, find that Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally altering the terms of the collective bargaining agreement and refusing to bargain collectively with the Union.

The Board continued to follow the principles enunciated in R. J. Smith and developed a line of cases, involving the enforcement of a Sec. 8(f) pre-hire agreement under Sec. 8(a)(5) and 8(b)(3) of the NLRA, which adopted the principle that a Sec. 8(f) pre-hire agreement is subject to unilateral repudiation at

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13/ Sec. 8(f) allows construction industry employers and unions to enter into collective brgaining agreements without the union's majority status having been established in the manner provided in Section 9 of the NLRA. While the Wisconsin Statutes do not contain an equivalent provision, Sec. 111.06(1)(c)(2) does provide as follows:

> "It is not a violation of this subchapter for an employer engaged primarily in the building and construction industry where the employees of such employer in a collective bargaining unit usually perform their duties on building and construction sites, to negotiate, execute and enforce all union agreement with a labor organization which has not been subjected to a referendum vote as provided in this subchapter."

14/ Decision No. 12356-A (Greco, 3/74), aff'd. Dec. No. 12356-B (WERC, 5/74).

15/ Id. at p. 4-5.

16/ R. J. Smith Construction Co., 208 NLRB 615, 85 LRRM 1187 (1974).

anytime prior to the point in time that the union attains majority status in the relevant collective bargaining agreement, 17/ which principle was approved by the United States Supreme Court in NLRB v Iron Workers, Local 103, (Higdon Contracting Company), 434 US 335, 97 LRRM 2333 (1978). The Board followed this principle until February 20, 1987, when the Bord issued John Deklewa & Sons, 282 NLRB No. 184, 124 LRRM 1185 (1987).

In Deklewa, the Board overruled its decision in R. J. Smith and decided that Sec. 8(f) pre-hire agreements were no longer subject to unilateral repudiation during the term of the agreement. While recognizing that, upon expiration of the agreement, either party may unilaterally repudiate the agreement, the Deklewa Board held that, during the term of the agreement, a Sec. 8(f) pre-hire agreement is valid and binding until such time as the employer's unit employes vote to reject or change their bargaining representative. The Board, while recognizing that "some may contend that the new law announced today represents a sharp departure from past precedent," 18/ determined that the new law would be applied retroactively to all pending cases, whatever their stage. Thus, after thirteen years of rejection, the NLRB embraced the principles enunciated by the Fifth Circuit in Operating Engineers Local 150, the decision relied upon by the Examiner in Don Cvetan Plumbing.

In arguing their respective positions, both parties rely upon federal law. Respondent argues that the appropriate law is that which was in effect at the time of Respondent's repudiation. Complainant, however maintains that the appropriate law is that enunciated in Deklewa.

At the time Respondent entered into the pre-hire agreement on November 5, 1986, NLRB law permitted Respondent to unilaterally repudiate a Sec. 8(f) pre-hire agreement at anytime prior to the point in time that the union attained majority status in the relevant collective brgaining unit. This was also the status of the NLRB law at the time that Complainant received notice that Respondent had repudiated the agreement, on November 12, 1986.

From the time that Respondent entered into the agreement, though the time that Complainant received notice of Respondent's repudiation of the agreement, Respondent did not have any employes. It follows, therefore, that the repudiation occurred prior to the time that the Union attained majority status in the relevant collective bargianing unit. Thus, applying the NLRB law in effect at the time of Respondent's repudiation, Respondent's act of repudiation was legally effective. However, if one applies Deklewa, which embraces the principles relied upon by the Examiner in Don Cvetan Plumbing, then Respondent's act of repudiation is without legal effect.

As discussed supra, the issue to be decided herein is an alleged violation of Sec. 111.06(1)(f), i.e., a breach of contract claim. The NLRB does not have jurisdiction to hear and decide such a claim. 19/ Rather, if Respondent meets the federal jurisdictional requirements, the breach of contract claim is actionable in a civil suit brought in federal district court under Sec. 301 of the LMRA.

In Jim McNeff Inc. v Todd, 461 US 260, 113 LRRM 2113 (1983), in an action brought under Sec. 301 of the LMRA, the United States Supreme Court held that a "Sec. 8(f) pre-hire agreement is subject to repudiation until the union establishes majority status." 20/ While the Court did not decide "what specific acts would effect the repudiation of a pre-hire agreement," 21/ lower federal

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17/ See, Higdon Contracting Co., 216 NLRB No. 5, 88 LRRM 1067 (1975); Dee Cee Flooring, 232 NLRB 421, 97 LRRM 1072 (1977); Hageman Underground Construction, et al 253 NLRB No. 7, 105 LRRM 1385 (1980); Construction Erectors, Inc., 256 NLRB 786, 112 LRRM 1046 (1982).

18/ 124 LRRM at 1198.

19/ In R. J. Smith and Deklewa, the NLRB was addressing the enforceability of a pre-hire agreement through the mechanisms of Sections 8(a)(5) and 8(b)(3) of the NLRA.

20/ 113 LRRM at 2117.

21/ Id. at Footnote 11.

courts, in subsequent Sec. 301 decisions, have found acts other than a decertification election to be effective to repudiate a pre-hire agreement. Of particular import herein, the U.S. Court of Appeals, Seventh Circuit, has upheld a magistrate's determination that mere noncompliance was not sufficient to effectuate the repudiation of a pre-hire agreement, but that repudiation was effected when the employer informed the union that the employer would no longer be bound by the agreement. 22/

To date, neither the U.S. Supreme Court, nor the U.S. Court of Appeals, Seventh Circuit, have addressed or adopted the Deklewa decision in the context of a Sec. 301 claim. However, since the issuance of Deklewa, other federal courts have been asked to apply Deklewa in the context of a Sec. 301 claim. Two of these Courts, while not disagreeing with the principles enunciated in Deklewa, declined to apply Deklewa retroactively. 23/ One court applied Deklewa retroactively 24/ and, a fourth, sitting as a three member panel, found that it was without authority to apply a decision which had the effect of overruling prior decisions of the Court. 25/ Thus, the federal courts are divided on the question of whether Deklewa is to be applied retroactively in a Sec. 301 suit. The Examiner, however, is persuaded that it is appropriate to follow the decision of the U.S. District Court, Northern District of Illinois and decline to give Deklewa retroactive application herein.

In Welfare Fund of Rockford v. Jones, the District Court, Northern District of Illinois, held that: 26/

> This court may, nevertheless, apply the Deklewa rule to the present case if application would do no manifest injustice. NLRB v. Chicago Marine Containers Inc., 745 F.2d 473, 449, 117 LRRM 2638 (7th Cir. 1984). In determining whether manifest injustice would result, the court considers the reliance of the parties on pre-existing law and the effect of retroactivity on accomplishing the purpose of the law. Chicago Marine, 745 F.2d at 499.

The Examiner will first consider the parties reliance on the pre-Deklewa law.

At the time of Respondent's repudiation, the existing law clearly allowed either party to unilaterally repudiate a pre-hire agreement at anytime prior to the union's attainment of majority status in the relevant bargaining unit. 27/ There is no doubt that Respondent relied upon this law when he repudiated the pre-hire agreement. 28/ Moreover, Complainant's reliance on this law can be inferred

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22/ Iron Workers Local 103 v Higdon Construction Co., 116 LRRM 3265, 739 F2d 280 (1984).

23/ Pension Fund v American Fire Protection, 127 LRRM 2419 (D. Maryland 1988) and Welfare Fund of Rockford v Jones, 127 LRRM 2190 (N.D. Ill. 1987).

24/ National Elevator Industry Welfare Plan v Viola Industries, Inc., No. 84-2286-S (D. Kan, 1987) (Lexis, Genfed Library, Dist. file)

25/ Mesa Verde Construction Co. v. Laborers, 125 LRRM 2849 (1987).

26/ 127 LRRM at 2191.

27/ In concluding that the principles enunciated in Deklewa should be applied retroactively to pending cases, the Board stated "that the infirmities and uncertainties in current law also make it less likely that a party such as the Respondent here could knowingly have acted in reliance on that law in order to avoid liability." 124 LRRM at 1198. However, a reading of Deklewa reveals that the "infirmities and uncertainties" arose when the parties, and the Board, were required to determine whether the Union had ever attained majority status prior to the act of repudiation. Inasmuch as Respondent had no employes from the time that he signed the pre-hire agreement until the time he repudiated the agreement, the "infirmities and uncertainties" are not present in the instant case.

28/ Sec. Jt. Ex. 2.

from the fact that Complainant made no response to Respondent's act of repudiation until May 30, 1987, at which time Complainant cited Deklewa as the reason for its request for information to ascertain Respondent's compliance with the agreement. Thus, the Examiner is satisfied that there has been reliance on the pre-Deklewa law. The Examiner next considers the effect of retroactivity on accomplishing the underlying purposes of Deklewa.

As the Court in Welfare Fund of Rockford found: 29/

> In its decision, the Board offers as support for its new rule two "countervailing interests": (1) to hold parties to the terms and conditions of 8(f) contracts which are voluntarily entered into"; and (2) to "serve better the fundamental statutory policies of employee free choice and labor relations stability." 282 NLRB 184, 124 LRRM 1185.

With respect to the "first countervailing interest", the Examiner concludes that retroactive application would not further the policy of holding parties to contracts which are voluntarily entered into. As the Court held in Welfare Fund of Rockford: 30/

> Advancement of these purposes through retroactive application in the present case is questionable at best. For instance, rather than holding the parties to their voluntarily assumed obligations, retroactive application of the new rule in the present case could, instead, undermine the prior contract between the parties. The right to repudiate a section 8(f) agreement is surely a key factor upon which parties rely in entering new contracts and in modifying existing ones.

Nor is it evident that retroactive application would effectuate the "second countervailing interest." Respondent did not have any employes from the time that he entered into the pre-hire agreement through the time that he repudiated the agreement. Given this lack of employes, the Examiner is not persuaded that retroactive application would "serve better the fundamental statutory policies of employee free choice and labor relations stability."

Given Respondent's reliance on pre-existing law and the uncertainty that retroactive application would effectuate the policies underlying the Deklewa decision, the Examiner concludes that, to apply Deklewa retroactively would do manifest injustice. Applying the principles encunciated in Welfare Fund of Rockford, the Examiner declines to apply Deklewa herein. Given the federal labor law in effect at the time of Respondent's repudiation, the decision in Don Cvetan Plumbing is not controlling herein.

In conclusion, the Examiner finds that Respondent's letter of November 10, 1986, received by Complainant on November 12, 1986, was legally sufficient to repudiate the pre-hire agreement of November 5, 1986. Thereafter, the pre-hire agreement was not binding upon Respondent.

To be sure, the pre-hire agreement was in effect from the time of execution until Complainant received the letter of repudiation 31/ During the period that

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29/ 127 LRRM at 2192.

30/ Id.

31/ Damages incurred prior to the repudiation of the contract may be recovered in a suit brought under Sec. 301 of the Labor Management Relations Act. Jim McNeff Inc. v. Todd.

the agreement was in effect, Respondent neither had any employes nor performed any work. The record fails to demonstrate that Respondent violated any provision of the pre-hire agreement during the period in which the agreement was in effect.

Respondent has not violated Sec. 111.06(1)(f), Stats., and, therefore, the complaint has been dismissed.

Dated at Madison, Wisconsin this 18th day of March, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Coleen A Burns
Coleen A. Burns, Examiner