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-C

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.

ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Examiner Coleen A. Burns issued her findings, conclusions and order in the above matter on March 18, 1988, wherein she dismissed the complaint based on her conclusions that the Respondent's repudiation of what the Examiner found to have been a pre-hire agreement did not violate Sec. 111.06(1)(f), Stats., and that Complainant had abandoned its complaint claims that Respondent had violated Secs. 111.06(1)(a), (c) and (d), Stats. Complainant filed a timely petition for review on April 5, 1988. Briefing to the Commission was completed on May 3, 1988. The Commission has considered the Examiner's decision, the record, and the written arguments and is fully advised in the premises and satisfied that the Examiner's findings, conclusions and order should be affirmed.

NOW, THEREFORE, it is hereby

ORDERED 1/

The Findings of Fact, Conclusions of Law and Order issued by Examiner Coleen A. Burns on March 18, 1988 in the above matter are hereby affirmed and adopted as the Commission's.

Given under our hands and seal at the City of Madison, Wisconsin this 21st day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

Footnote 1 found on page 2.

1/ Pursuant to Sec. 227.48(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.49 and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.53, Stats.

227.49 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025(3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefore personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.49, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.48. If a rehearing is requested under s. 227.49, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 77.59(6)(b), 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.57 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

JOHN H. GASSMAN

MEMORANDUM ACCOMPANYING ORDER AFFIRMING EXAMINER'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The Complainant initiated this proceeding by filing a complaint alleging that Respondent: entered into a collective bargaining agreement with Complainant on November 5, 1986, "extending from June 1, 1984 to and including May 31, 1987"; repudiated his obligations under that agreement on November 10, 1986; refused to comply with the agreement in any respect thereafter; discriminatorily refused to hire employes who are members and referred through Respondent in violation of the agreement; refused on or about June 3, 1987 to provide information requested by Complainant on May 30, 1987 which information was necessary to carry out its duties as collective bargaining representative; thereby committed unfair labor practices violative of Secs. 111.06(1)(a), (c), (d) and (f) of the Wisconsin Employment Peace Act; and should be ordered to recognize and comply with the agreement, to make the Complainant and employes represented by the Complainant and fringe benefits funds provided for under the agreement whole for all losses as a result of Respondent's unfair labor practices, and to provide the Union with the information requested in the Union's letter of May 30, 1987.

In his answer to the complaint, Respondent: alleged that he entered and later expressly repudiated a pre-hire agreement with the Union but that he was not an employer and had no employes at those times; alleged that since he repudiated the agreement before it became a collective bargaining agreement he has no obligations under it; denied that he discriminatorily refused to hire members of Complainant referred by Complainant; admitted that the Respondent refused, upon request, to provide the information requested by Complainant on May 30, 1987; denied that Respondent committed the alleged unfair labor practices; and requested that the Commission dismiss the complaint and award Respondent "his taxable costs and attorneys' fees. In addition, Respondent filed a motion to dismiss for lack of jurisdiction, stating that Respondent had no employes at or before the time he entered a pre-hire agreement with Complainant on November 5, 1986 nor at the time he repudiated that agreement in writing on November 10, 1986, nor at any time in between such that he was not an employer within the meaning of Sec. 111.02(7), Stats., at any time relevant to the complaint.

On November 4, 1987, the Examiner denied Respondent's motion on the grounds that it was premature, that the complaint presents a contested case requiring a full hearing on the pleadings, and noting that Respondent was free to reassert the motion at the hearing.

THE EXAMINER'S DECISION

In her subsequent March 18, 1988 decision, the Examiner reached the merits of the complaint and dismissed it in its entirety. She decided only the Complainant's Sec. 111.06(1)(f), Stats., violation of collective bargaining agreement allegation, because she found that the Union had at hearing and in its brief abandoned its allegations that Respondent had violated additional sections of WEPA. She rejected Respondent's lack of jurisdiction claim that Respondent was not an "Employer", reasoning that Respondent was a Sec. 111.02(7) "Employer" since at a minimum he had engaged the services of an employe (Sean Stanton Jones) to perform tile work in February and March of 1987, which is a time period addressed by the complaint. She noted that the Commission's contract enforcement jurisdiction is concurrent with that of the federal courts under LMRA Sec. 301(a), though claims subject to that law must be decided in accordance with federal substantive law. Thus, the Examiner found that the Commission has contract enforcement jurisdiction whether or not federal substantive law is applicable.

The Examiner rejected Respondent's contention that he was induced to execute the agreement by a misrepresentation of fact. In that regard the Examiner found Respondent's testimony equivocal on the point and insufficient to establish misrepresentation.

On the merits, the Examiner concluded that Respondent did not violate the terms of a collective bargaining agreement. She found the agreement in question to be a pre-hire agreement recognized by Sec. 8(f) of the National Labor Relations Act because she was satisfied that Jack Kruchten's relationship with Respondent

(whether employe or independent contractor) had terminated prior to the time that Respondent executed the agreement on November 5, 1986. The Examiner then reviewed the development and status of federal law and Commission case law concerning repudiation, (the former consisting both of NLRB jurisdiction cases involving NLRA Sec. 8(a)5 and 8(b)(3) contract repudiation disputes and of contract enforcement cases adjudicated under LMRA Sec. 301). She found the latest Commission case on the subject to be Don Cvetan Plumbing, Dec. No. 12356-A (3/74), aff'd-B (WERC, 5/74) (employer may not unilaterally abrogate a validly executed pre-hire agreement even though the union involved has never achieved majority status). She noted, however, that Don Cvetan Plumbing applied a Federal Court of Appeals reversal of an NLRB decision which reversal became sui generis and contrary to U.S. Supreme Court-approved NLRB case law and to U.S. 7th Circuit and Supreme Court case law under LMRA, Sec. 301 as it developed for several years thereafter. Thus, at the time the instant agreement was entered into and expressly repudiated, NLRA and Sec. 301 law permitted unilateral abrogation (repudiation) by either party of an NLRA Sec. 8(f) pre-hire agreement at any time prior to the time the union involved attains majority status. The Examiner found those Federal law principles to have changed--after the instant agreement was entered into and repudiated--when the NLRB issued John Deklewa & Sons, 282 NLRB No. 184, 124 LRRM 1185 (2/20/87), 2/ reversing its position. The Examiner noted that in Deklewa the NLRB stated that its new rulings would be applicable retroactively to all pending cases, whatever their stage. The Examiner further noted, however, that since Deklewa, no U.S. Supreme Court or Federal Circuit decision had as yet addressed or adopted Deklewa in the context of a Sec. 301 claim, and that the handful of Federal District Courts considering Deklewa in Sec. 301 cases are split as regards the propriety of giving retroactive effect to those principles in Sec. 301 cases involving pre-Deklewa repudiations.

Applying the decisional criteria outlined in one of those cases, Welfare Fund of Rockford v. Jones, ___ F.Supp ____, 127 LRRM 2190 (N.D. Ill., 1987), the Examiner concluded that Deklewa ought not be retroactively applied in the instant case. Specifically, she found that retroactive application would result in a manifest injustice because: existing federal law clearly had allowed either party to repudiate a pre-hire agreement at any time prior to the Union's attainment of majority status in the relevant bargaining unit; Respondent's written repudiation showed that he was undoubtedly relying on the federal law right; Complainant's nonresponse to the November, 1986 repudiation until May 30, 1987 after Deklewa was issued coupled with the Complainant's express reliance on Deklewa when it finally did respond show that Complainant had also been conducting itself prior to Deklewa's issuance upon pre-Deklewa Federal law; and it is uncertain that retroactive application would effectuate the policies of holding parties to their voluntarily assumed obligations and of fostering employe free choice and stability of labor relations that underlie the Deklewa decision.

The Examiner therefore concluded that "Given the federal labor law in effect at the time of Respondent's repudiation, the decision on Don Cvetan Plumbing is not controlling herein, and that Respondent's repudiation 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. She further concluded that no contract violation had been committed during the brief period that agreement was in effect since Respondent neither had any employes nor performed any work during that period of time.

Accordingly, the Examiner concluded that no Sec. 111.07(1)(f), Stats., violation had been proven and dismissed the complaint in its entirety on that basis.

THE PETITION FOR REVIEW AND THE ARGUMENTS ADVANCED IN SUPPORT THEREOF

In its petition for review, Complainant asserts the following:

2/ After the Examiner issued her decision, the Third Circuit Court of Appeals affirmed Deklewa in all respects in Iron Workers Local 3 v. NLRB, __ F.2d ____, 128 LRRM 2033 (CA 3, 4/12/88).

This petition is brought on the grounds that, as is more fully set forth below and in the supporting brief attached hereto and incorporated hereby: (a) findings of material facts are clearly erroneous and (b) a substantial question of law is raised by conclusions of law in the decision and order.

More particularly, the examiner erred by:

1. Failing to find that the Employer was in business since at least July, 1986;

2. By finding that employee Kruchten's employment relationship "terminated" prior to November 5, 1986 and by failing to find that Kruchten was an employee of Respondent;

3. By finding that Respondent did not have any employees during the period November 5 through November 12, 1986;

4. By concluding that the agreement between Complainant and Respondent was legally no longer in existence after November 12, 1986, by finding that the agreement between Respondent and Complainant was binding only until November 12, 1986; and

5. By failing to find that the Complainant was majority representative at the time the collective bargaining agreement was entered into.

WHEREFORE, Complainant requests that the Commission reverse the decision of the examiner and find:

1. The Employer had violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act; and

2. Order the Respondent to:

a. comply with the agreement with Complainant until it is properly terminated.

b. require the Employer to make whole the Union, the fringe benefit funds provided for in the labor agreement and the affected employees for all losses resulting from the Employer's violation of the labor agreement.

c. provide the Complainant with the information requested in its letter of May 30, 1987.

In support of those contentions, Complainant argues that Sec. 111.06(1)(f) prohibits employers from violating all collective bargaining agreements, without exceptions. Sections 111.06(c)(2) and (e), Stats., show "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 Don Cvetan Plumbing decision--wherein the employer had entered into an agreement with the Union at a time when the Union was not the majority representative and in fact never became the majority representative--establishes that such agreements are permitted in the construction industry and may not be repudiated by the employer. That decision on its face shows that it was issued with knowledge that there was NLRB case law to the contrary, so that the Examiner's reliance on post-Don Cvetan Plumbing NLRB decisions is misplaced. Moreover, the Don Cvetan Plumbing result is the only one that makes any sense given the nature of the construction industry in which an employer needs to have pre-established labor costs and labor supply before he can bid on projects and in which elections are often impractical because of the short duration of the projects. Thus, Respondent violated Sec. 111.06(1)(f), Stats., when he unilaterally repudiated the agreement he signed with the Complainant.

Complainant argues that there is no justification for the Examiner's refusal to apply Don Cvetan Plumbing and Deklewa herein. The Commission has never held that an employer had the right to repudiate a pre-hire agreement. Don

Cvetan Plumbing holds just the contrary. Respondent could not have been relying on existing Wisconsin law to justify its repudiation. The Respondent's reliance on pre-Deklewa federal law is also not reasonable. The NLRB noted in Deklewa, 124 LRRM at 1197, that its decision therein is consistent with prior U.S. Supreme Court decisions in NLRB v. Iron Workers Local 183, 434 U.S. 335, 97 LRRM 233 (1978) and Jim McNeff, Inc. v. Todd, 461 U.S. 260, 113 LRRM 2113 (1983) and that pre-Deklewa Board law was unclear. The Examiner incorrectly cited McNeff as holding that a pre-hire agreement is subject to repudiation until the Union establishes majority status, whereas the statement to that effect was only dicta since the case presented only the issue of whether the agreement could be enforced prior to repudiation. Indeed, the NLRB majority in Deklewa held that that decision would be given retroactive and not merely prospective effect, rejecting the notion that it represents too sharp a break with prior federal case law to permit a retroactive application. The validity of retroactive application is further supported by the fact that none of the three criteria necessary for non-retroactivity specified in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) are present here. Deklewa does not establish a new principle of law given Don Cvetan Plumbing and the unclear status of federal law note in Deklewa. Retroactive application will not retard the underlying stability of labor relations, the purpose underlying Deklewa. And it is entirely equitable that Deklewa be applied retroactively, since Respondent is required to do no more than it agreed to do when it signed the agreement.

In the alternative, Complainant argues that the agreement herein is not a pre-hire agreement at all, such that it is enforceable regardless of the status of State and Federal law at any material point in time. In support of that argument, Complainant asserts that Respondent employed Kruchten as an employe, knew Kruchten was a member of the Complainant, and hence knew that the Complainant had majority support in his entire work force. Kruchten worked as late as the weekend prior to November 5, and there is no evidence that he was terminated prior to November 5. That would not have come up until the following weekend at the earliest because of the part-time nature of Kruchten's employment. At most, then, Kruchten was on layoff when the agreement was signed, and as such he would remain an employe of the Respondent for representation purposes. Citing, Allstate Manufacturing, 236 NLRB 155 (1978).

For the foregoing reasons, the Commission should reverse the Examiner's conclusion that Respondent was not bound by the agreement after Complainant's November 16, 1986 receipt of the purported repudiation. The Commission should order Respondent to comply with the agreement until it is properly terminated, to make the Complainant whole as requested in the complaint, and to provide the Complainant with the information requested by it.

RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR REVIEW

The Commission should affirm the Examiner's decision in all respects. Respondent repudiated a pre-hire agreement in reliance upon then-existing federal law less than a week after it was signed and before Respondent had any employes. The Union now seeks monetary relief covering the remaining seven month term of that agreement and apparently further contends that the agreement is still in effect. Complainant did not contact Respondent for many months after the repudiation, and based its claim that Respondent's repudiation was ineffective on the NLRB's reversal of clear and longstanding federal case law issued by the NLRB four months after the agreement at issue was repudiated. The Examiner properly rejected the Union's contentions, held that Respondent's repudiation was legally effective under then-prevailing federal law, and refused to retroactively invalidate that action.

The agreement was pre-hire in nature both because Kruchten was an independent contractor and because Kruchten completed his discrete portion of the Plastic Ingenuity project before Respondent signed the agreement and has not been offered work by Respondent since. Thus, Respondent had no employes on November 5, 1986 when he signed the agreement and did not work himself from that date until he received notice that the Complainant had received his repudiation latter.

The Commission's holding in Don Cvetan Plumbing should not control herein since it was decided in 1974 when federal law was unsettled. The conflict was put to rest thereafter by the U.S. Supreme Court in Ironworkers Local 103, supra. "Merely because the Commission has not addressed the issue since Don Cvetan Plumbing was decided does not mean that it would have continued to apply the rationale adopted in that case in the face of overwhelming contrary federal precedent." Respondent's Brief at 9.

It would result in a manifest injustice to retroactively apply Deklewa to Respondent herein. Notwithstanding the Deklewa Board's characterization of pre-Deklewa federal law as "unsettled and confusing precedent", that law as applied by the courts clearly recognized the right of an employer to repudiate a pre-hire agreement before the Union attained majority support. Citing, McNeff, supra, 461 U.S. at 279 and general discussion in Deklewa, supra, 124 LRRM at 1197. In such circumstances, retroactive application would punish Respondent for doing an act which was legally sanctioned at the time it was committed. Welfare Fund of Rockford, supra, 127 LRRM at 2192. Even the NLRB would not apply Deklewa to this case if it were before the Board since the Board limited the retroactivity of its new ruling to cases pending at the time Deklewa decided, whereas the Complainant made no response to the repudiation herein until three months after Deklewa was decided. It would undermine rather than promote stability of labor relations to impose monetary obligations and a bargaining relationship upon Respondent at this late date since the Respondent promptly repudiated the agreement and later hired several employes who understood that he was a non-union contractor, all before the Complainant expressed its long-delayed claim that it believed the agreement was enforceable despite the repudiation. Moreover, since Respondent neither used the pre-hire agreement to work on Union projects nor sought any other advantage under that agreement, enforcement would impose the burdens of the agreement without any of the benefits.

For those reasons, Respondent argues that the Commission should affirm the Examiner's decision in all respects.

DISCUSSION

The first basic question presented in this case is whether the agreement signed on November 5, 1986 was a pre-hire agreement. The Union, contrary to the Examiner, asserts that it was a pre-hire agreement, on the grounds that Jack Kruchten (whom Respondent knew to be a Union member) was an employe of the Respondent when the agreement was signed. The Union, contrary to the Examiner's decision, asserts that since there is no evidence that Kruchten was ever told that he was terminated, he was at most on layoff status when the agreement was signed.

It appears from the record that the Complainant considered the agreement to be a pre-hire agreement. When its representative approached Respondent on November 5, he referred only to the nature of the work Respondent was performing and made no claim that Respondent employed anyone or that the Union represented any such employes. In addition, the Union did not respond to the Respondent's repudiation letter until after a federal law development regarding validity of repudiations of pre-hire agreements and it referred specifically to that development in its May 30 response.

The balance of the record evidence does not establish that Kruchten, if he was an employe as opposed to an independent contractor, had a reasonable expectation of continued employment by Respondent. Respondent testified that he contracted to perform tile work on the Plastics Ingenuity factory construction project in Cross Plains and began work there on October 27, 1986. Respondent states that Kruchten was a member of Complainant who had some free time and needed some work. Respondent stated that he paid Kruchten in cash on an hourly basis and that Kruchten was free to decide which hours he would work based on when his other work committments left him free to do so. While Respondent did not keep records of the hours or dates Kruchten worked, he guessed that Kruchten's last work for Respondent was performed on the weekend preceding November 5, 1986, i.e.,

November 1 and 2, 1986. Respondent testified that he did not call Kruchten for any work on or after November 5, 1986, because "I didn't have that much work, and I could pretty much handle everything by myself." (tr.39). Kruchten did not testify.

On the basis of the foregoing, we share the Examiner's view that Kruchten was not an employe of Respondent on November 5, 1986, such that the agreement was a pre-hire agreement. 3/

A pre-hire agreement is distinctive in that it is agreed to by an employer and a union before the workers to be covered by it have been hired. Iron Workers Local 3, supra, citing, Roberts' Dictionary of Industrial Relations, 3 ed. 562 (1986). On its face, WEPA would appear to outlaw such agreements. For, WEPA Secs. 111.02(2) and 111.06(4)(d), respectively, define collective bargaining in terms of a negotiation between an employer and a representative of a majority of the employes in a collective bargaining unit and prohibit an employer from bargaining with the representatives of less than a majority of his employes in a collective bargaining unit. However, the Commission has held that construction and building industry pre-hire agreements are enforceable in proceedings initiated under Sec. 111.06(1)(f), Stats., 4/ where the relationship is in interstate commerce so as to be subject to the National Labor Relations Act. Don Cvetan Plumbing, supra. Also see, Overhead Door Co., 9055-B (WERC, 9/70) (dicta). As its basis for doing so, the Commission has relied on and applied Sec. 8(f) of the NLRA, 29 U.S.C. 158(f), which provides, as follows:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction industry employees are members . . . because (1) the majority status of such labor organizations has not been established under the provisions of Section 9 of the Act prior to the making of such agreement . . . Provided . . . that any (such) agreement shall not be a bar to a petition (for a representation election) filed pursuant to Section 9(c) . . . .

Other subsections of Sec. 8(f) allow construction industry pre-hire agreements to contain union security clauses, exclusive hiring hall provisions and job referral requirements.

By comparison, WEPA contains no such provisions except for Sec. 111.06(2) which provides as follows:

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

Contrary to the Complainant's contention herein, that provision does not validate pre-hire agreements generally. It only removes the referendum vote as a precondition to an employer's lawful entry into an all-union agreement in the building and construction industry.

3/ While not critical to the outcome herein, we agree with the Complainant that Respondent had been operating as a tile contractor, albeit on a part-time basis, at least from and after October 27, 1986, rather than only beginning on November 5, 1986. While Respondent's recordkeeping became more formalized as regards his activities after November 5, 1986, he was nonetheless in the business as a tile contractor to at least some extent prior to that date.

4/ Section 111.06(1)(f), Stats., makes it an unfair labor practice under WEPA for an employer "to violate the terms of a collective bargaining agreement . . . "

Thus, it is only by an application of NLRA Sec. 8(f) that the instant agreement could be enforceable herein. 5/ The Commission's jurisdiction to apply federal law to disputes and relationships in interstate commerce derives from the fact that Sec. 111.06(1)(f), Stats., proceedings before the Commission have been held to be competent state tribunal proceedings for the adjudication of violation of collective bargaining agreement disputes arising under Sec. 301 of the Labor Management Relations Act. 6/ Indeed, in such cases, the Commission is required to apply the federal Sec. 301 case law as it has been developed by the federal courts. 7/

Accordingly, the potential lawfulness and enforceability of the pre-hire agreement entered into herein turns initially on whether the parties' relationship was one in commerce within the meaning of LMRA Sec. 301 and hence within the meaning of the National Labor Relations Act generally. 8/ The NLRA, which was amended by the LMRA, has been interpreted as having been intended to exercise the Congress' Commerce power to the fullest possible extent permitted by the U.S. Constitution. E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 1 LRRM 703 (1937). The U.S. Supreme Court has stated that there is "no basis for inferring any intention of congress to make the operation of the act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis." NLRB v. Fainblatt, 306 U.S. 601, 607, 4 LRRM 1425 (1939). "'De minimis' in the law has always been taken to mean trifles--matters of a few dollars or less." Hehl V. Chippewa & Red Cedar Valley Carpenters' District Council, 4 Wis.2d 629 (1958), citing NLRB v. Suburban Lumber Co., 121 F.2d 829, 1 LRRM 703 (CA 3, 1941), cert. den. 314 U.S. 693 (1941).

The parties did not litigate the question of whether theirs was a commerce relationship. Rather, both parties tried the case to the Examiner as if it was, in that they both relied heavily on federal substantive case law in their arguments to the Examiner. Prior to the filing of the complaint, the parties also conducted themselves in relation to one another as if they understood themselves to be governed by federal law. Specifically, Respondent relied on a federal law right in its letter of repudiation, and the Union relied on a federal law development in its May 30, 1987 response thereto. On that basis alone, we assume arguendo, without deciding, that Respondent's business was sufficient to meet the de minimis test and come within the broad sweep of Congress power to regulate interstate commerce.

5/ cf. NLRB v. Irvin, 475 F.2d 1265, 1267, 82 LRRM 3015 (CA 3, 1973) and Daniel Hamm Drayage Co., Inc., 84 NLRB 458, 460, 23 LRRM 1268 (1949) enf'd 185 F.2d 1020, 27 LRRM 2273 (CA 5, 1951) (in cases prior to 1959 enactment of Sec. 8(f), Board holds construction industry pre-hire agreements are illegal just as they were in any other industry and suggests that the industry petition Congress for an exception). See, generally, Ironworkers Local 3, supra, 128 LRRM at 2023.

6/ Research Products Corp., Dec. No. 10223-A (12/71) aff'd -B (WERC, 1/72) citing, Tecumseh Products Co., 23 Wis.2d 118 (3/64), Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 40 LRRM 2113 (1957) and Local 174, Teamsters v. Lucas Flour, 369 U.S. 95, 49 LRRM 2717 (1962). LMRA Section 301, 29 USC Sec. 185, reads as follows:

> (a) 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.

7/ Research Products, supra and Local 174, Teamsters v. Lucas Flour, supra.

8/ That is a separate question from whether the National Labor Relations Board would consider the relationship sufficient to meet that agency's less inclusive jurisdictional guidelines. See, e.g., C & L Erectors, Dec. No. 9718 at 8 (WERC, 6/70).

Treating the instant dispute as a Sec. 301 case means that it is governed by substantive federal court case law developed under LMRA Sec. 301. The federal courts have long recognized the authorization in NLRA Sec. 8(f) as rendering pre-hire collective bargaining agreements enforceable in actions brought under Sec. 301. 9/

That brings us to the question of whether the repudiation of the instant pre-hire agreement relieved Respondent of his obligation to comply with its terms following the repudiation. That is also an issue of substantive law which must be resolved by a federal court or competent state tribunal in accordance with federal case law developed under Sec. 301. The federal case law applied in Don Cvetan Plumbing, supra, was the law as it existed at the time that case was decided in 1970. Our task in this matter, however, is to apply the current Sec. 301 case law. Thus, regarding Complainant's rhetorical inquiry as to when Wisconsin law on the subject changed from that set forth in Don Cvetan Plumbing, the answer is that the law applicable to a case of this kind in Wisconsin changed if, when, and to the extent that the federal courts' Sec. 301 case law changed from that referred to in Don Cvetan Plumbing, to wit, Local No. 150, supra.

The Examiner reviewed the case law developments on pre-hire agreement repudiations and determined that under current Sec. 301 case law Respondent's repudiation was lawful under Sec. 301 law in effect at the time of the repudiation and that in the instant circumstances a Sec. 301 forum need not and ought not hold such a repudiation retroactively unlawful by reason of the NLRB's Deklewa decision.

Federal court standards for determinations in civil cases as to retroactivity of decisions are based on three factors outlined in Chevron Oil Co. v. Huson, supra. To be applied nonretroactively, a decision must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed. The merits and demerits of nonretroactivity must then be weighed by looking to the prior history of the rule in question, its purpose and effect. And third, the inequity imposed by retroactive application must be weighed to determine whether nonretroactivity is needed to avoid a substantial hardship or injustice. The Seventh Circuit Court of Appeals has recognized that it is appropriate to allow the administrative agency to decide in the first instance whether giving the change retroactive effect will best effectuate the policies underlying the agency's governing act, but that the federal courts are not bound by the agency's views on retroactive application. NLRB v. Chicago Marine Containers, Inc., 745 F.2d 493, 117 LRRM 2642, 2642 (CA 7, 1984). Other federal circuits have stated that "while we are of course not bound by the Board's views on retroactive application, we should defer to them absent some mainfest injustice." Ironworkers Local 3, supra, 120 LRRM at 2029, citing with approval, NLRB v. Semco Printing Center, Inc., 721 F.2d 886, 892, 114 LRRM 3527 (CA 2, 1983).

Without repeating in detail the Examiner's rationale and citations, we agree with the Examiner and Respondent that at the time of the repudiation, Respondent had a well-established right under existing Sec. 301 law to free itself from the agreement by unilaterally repudiating it as it did herein. Welfare Fund of Rockford, supra, and cases cited therein at 127 LRRM 2191-2. 10/ We also agree with the Examiner and the District Judge in Welfare Fund of Rockford, supra, 127 LRRM at 2191, that the NLRB's February 20, 1987 Deklewa decision represented an abrupt departure from existing law. Among other changes in existing law, the Deklewa Board changed its policy regarding the circumstances in which a Sec. 8(f) pre-hire agreement would be enforceable through Board complaint procedures as a refusal to bargain unfair labor practice. In pertinent part, the Deklewa Board expressly overruled its prior line of cases following its decison

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9/ E.g., International Association v. Higdon Construction Co., 739 F.2d 280, 116 LRRM 3265 (CA 7, 1984) and Washington Area Carpenters' Welfare Fund v. Overhead Door Co., 681 F.2d 1, 8, 110 LRRM 2752 (CA DC, 1982), cert. den., 461 U.S. 926, 113 LRRM 2448 (1983).

10/ Our conclusion in that regard is not altered by Complainant's correction of the Examiner's characterization of her quotation from the McNeff case.

in R.J. Smith 11/ whereunder unilateral repudiations of pre-hire agreements were valid until the Union established majority status in an election or by proof in one of a number of ways in litigation. The Deklewa Board established a new rule whereby pre-hire agreements are no longer subject to unilateral repudiation but rather are binding for their term unless an intervening representation election establishes that the Union lacks majority support.

There is no evidence regarding whether Respondent knew of or relied upon his right under existing law to repudiate a pre-hire agreement when he signed the agreement on November 5, 1986. However, it is clear, as noted by the Examiner, that Respondent relied on that right under existing law when he repudiated the agreement a few days later. Respondent's reliance on pre-Deklewa law is therefore clearly established.

It also seems clear to us that, contrary to Respondent's contentions, the Deklewa Board intends the Deklewa principles be applied to all cases pending before the Board as well as all cases which are thereafter filed with the Board. In its recent affirmance of Deklewa, the Third Circuit read Deklewa that way, stating, "The Board also held that its decision would apply to Deklewa's case and to all cases then pending as well as all cases in the future." Ironworkers Local 3, supra, 128 LRRM at 2022. Thus, had the instant matter been filed with the Board as a refusal to bargain unfair labor practice charge, and had the Board found the matter to meet its jurisdictional standards, it seems clear from the retroactivity discussion in Deklewa that the Board would apply Deklewa retroactively rather than applying the pre-Deklewa law. The Board reasoned that by doing so it would not only free itself from continued future application of the complex and problematic web of rulings on a variety of issues bearing on Sec. 8(f) agreements that had developed out of R. J. Smith but that it would also further the fundamental statutory policies of employe free choice and labor relations stability. The Third Circuit has affirmed the Board's decision to apply Deklewa retroactively. Iron Workers Local 3, supra, 128 LRRM at 2029-30.

Of course, the Board and the Third Circuit did not have occasion in those cases to (and hence did not) squarely address the question of whether a Sec. 301 forum should apply the Deklewa principles retroactively. As the Examiner noted, the federal courts that have reached that question in Sec. 301 cases have split on the propriety of retroactive applicability of Deklewa to pre-Deklewa repudiations. 12/

We share the Examiner's conclusions that the underlying purposes of the Deklewa decision will not be significantly advanced by a willingness on our part to apply Deklewa retroactively in the Sec. 301 case before us herein. The fundamental interest in employe free choice does not come into play in this case since Respondent had no employes at any time between his signing the agreement and his repudiating it. There cannot, therefore, be an election conducted now that would resolve whether the Union enjoyed majority status at any time during the life of the pre-hire agreement and prior to the repudiation. Stated another way,

11/ R.J. Smith Construction Co., 191 NLRB 693, 77 LRRM 1493 (1971) enf. denied sub nom., Local No. 150, International Union of Operating Engineers v. NLRB, 480 F. 2d 1186, 83 LRRM 2706 (CA DC, 1973). The NLRB continued to apply the R. J. Smith rule in subsequent cases despite its setback in Local No. 150, supra, and it ultimately obtained a Supreme Court reversal of a subsequent DC Circuit decision parallelling Local No. 150, supra in NLRB v. Ironworkers Local Union 103, 434 U.S. 335, 341, 97 LRRM 2333 (1978) (Higdon Construction Co.).

12/ Compare, Welfare Fund of Rockford, supra, and Trustees of the National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection, ___ F.Supp ____, 127 LRRM 2419 (DC Maryland, 1-26-88) (refusing to apply Deklewa retroactively) with, National Elevator Industry Welfare Plan v. Viola Industries, Inc., No. 84-2286-S (DC Kan, 1987 (Lexis, Genfed Library, Dist. file) (applying Deklewa retroactively). As the Examiner noted, in Mesa Verde Construction Co. v. California Council of Laborers, 820 F. 2d 1006 (CA 9, 1987), a 3-judge panel refused to apply Deklewa retroactively on the grounds that such an outcome would overrule various Sec. 301 decisions of the courts. However, that opinion was subsequently withdrawn and a rehearing en banc was granted, 832 F.2d 1164, 107 LC Par. 10,232 (CA 9, 1987).

no employe is deprived of an opportunity to choose whether to be represented by the Union by a decision not to apply Deklewa retroactively herein.

The fundamental interest in stability of construction industry labor relations involves both the notion that it is reasonable to hold parties to agreements that they enter into voluntarily and the importance of freeing the parties from the uncertainties and vagaries of prolonged litigation as to whether and how long their agreement is binding upon them and as to what the Union's status is during and after the stated term of the agreement. In the instant case, it is true that Respondent seeks to be relieved of an agreement which we find that he voluntarily entered. 13/ However, in the instant circumstances, pre-Deklewa law involved none of the lingering uncertainties as to the status of the agreement or of the parties' relationship that the Deklewa Board felt compelled to immediately and retroactively avoid. Both parties appeared to know precisely where they stood at all times until Deklewa was issued. Only thereafter did the Complainant raise questions and uncertainties as to the status of the agreement and of the parties' relationship. Prior to Deklewa, as noted above, both parties acted as if they understood that the repudiation was effective and that the agreement and the parties' relationship was at an end.

Finally, we agree with the Examiner that applying Deklewa retroactively herein would do a manifest injustice in the circumstances. Respondent partook of none of the benefits of a union contract prior to the repudiation (such as working on projects exclusively available to union contractors and utilizing union-referred workers). Indeed, he employed no one during the few days from the time he signed the agreement until the time he repudiated the agreement. (tr. 41-42). Respondent gave up those benefits by repudiating the agreement and hence would in no way be unjustly enriched by a determination of nonretroactivity. On the other hand, the Complainant seeks to bind Respondent to the agreement from at least November 5, 1986 through May 30, 1987 and for at least an additional year thereafter given Respondent's failure to give notice of termination during the contractually established 90 day window period for doing so. Thus, to apply Deklewa retroactively herein would punish Repondent for an act which was lawful when he engaged in it by imposing all of the costs of the agreement on Respondent, whereas Respondent partook of none of the benefits. It can also be noted that Complainant did not mail its response to the November 10, 1986 repudiation until May 30, 1987, some three months after Deklewa was issued, and only one day before the end of the contractual 90 day window period for terminating the contract by certified mail notice. That delay and timing further contributes to our conclusion that it would do a manifest injustice to impose post-repudiation obligations on Respondent under an agreement from which he had every right to believe he had lawfully freed himself under existing federal law in mid-November, 1986.

For the foregoing reasons, we agree with the Examiner that Respondent's repudiation received by the Union on November 12, 1986 effectively and lawfully repudiated and terminated the agreement signed on November 5, 1986. We also agree with the Examiner that Respondent has not been shown to have violated the agreement during the short pre-repudiation time that it was in effect. We have therefore affirmed the Examiner's dismissal of the complaint in its entirety. 14/

Dated at Madison, Wisconsin this 21st day of July, 1988.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld
Stephen Schoenfeld, Chairman

Herman Torosian, Commissioner

A. Henry Hempe, Commissioner

Footnotes 13 and 14 found on page 13.

13/ We agree with the Examiner that the evidence does not establish that the Union obtained Respondent's agreement by means of a misrepresentation, innocent or otherwise.

14/ In its Petition for Review, Complainant did not take issue with the Examiner's assertions that Complainant had abandoned all of its complaint allegations except its Sec. 111.06(1)(f) violation of contract allegation. However, in both its brief to the Examiner and its brief to the Commission, Complainant did include a request for an order that Respondent provide certain information that had previously been requested by Complainant and not supplied by Respondent. It is arguable, therefore, that those relief requests are inconsistent with the notion that Respondent has abandoned its allegations that Respondent committed a Sec. 111.06(1)(d), Stats., refusal to bargain by its failure to provide the information which Respondent had requested. If that claim has not been abandoned, and if the parties' relationship does not fall within the NLRB's jurisdictional standards so as to oust the Commission of subject matter jurisdiction of that claim, then we would dismiss that claim on its merits. For, the Respondent had no WEPA obligation to provide Respondent information upon request at any time after Complainant's status as representative was ended by the lawful repudiation of the agreement.