STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEROME L. SCHWARTZ, Complainant, vs. CONSTRUCTION AND GENERAL LABORERS' UNION, LOCAL 464, AND CONSOLIDATED PAVING COMPANY, INC., Respondent.	Case 7 No. 40526 Ce-2069 Decision No. 26026-B

Appearances:
Mr. Jerome L. Schwartz, W10557 County Trunk "S", Columbus, Wisconsin 53925, on his own behalf.
Mr. Gordon Kraut and Mr. Robert C. Neibuhr, Secretary-Treasurer and Business Manager, respectively, of Local 464, 2025 Atwood Avenue, Madison, Wisconsin 53704, on behalf of the Respondent Union.
Mr. Richard B. Jacobson, Borns, Macaulay & Jacobson, 222 South Bedford Street, Madison, Wisconsin 53703, on behalf of Respondent Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Jerome L. Schwartz, (hereafter Schwartz or Complainant), filed a complaint with the Wisconsin Employment Relations Commission on April 29, 1988 in which he alleged that the Construction and General Laborers' Union, Local No. 464 (hereafter the Union), had failed to fairly represent Schwartz regarding complaints that he had lodged with the Union concerning Schwartz's belief that Consolidated Paving Company, Inc., (hereafter the Employer) had failed to pay Schwartz proper wages and fringe benefits while Schwartz was employed by the Employer as a pipe layer on a job in the City of Middleton, during the period April 29 to November 16, 1987, in violation of Sec. 111.06(2) and (3), Stats. Schwartz also alleged in his complaint that the Employer had violated Sec. 111.06(1)(f) and (3) by the manner in which it treated Schwartz regarding his pay and benefits while he was employed on the above-referenced City of Middleton job. Scheduling of the complaint was held in abeyance pending the outcome of settlement efforts. The Commission thereafter appointed Sharon Gallagher Dobish, a member of the Commission's staff to act as Examiner in this case and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07, Stats. Hearing on the matter was initially conducted in Madison, Wisconsin on August 3, 1989. In a letter received on July 31, 1989 Respondent Employer, by its Attorney Jacobson, asserted that the unfair labor practices proceeding against the Employer should be stayed pending the outcome of the Employer's Chapter 11 Bankruptcy proceeding. Given the timing of the Employer's Motion to Stay proceedings, the Examiner proceeded to hear Schwartz's allegations against the Union at the scheduled August 3, 1989 hearing, adjourning that proceeding to consider and decide whether the Employer's Motion to Stay proceedings should be granted. On September 15, 1989, the Examiner issued her Order Granting a Stay of these proceedings relating to alleged unfair labor practices committed by the Employer, but on grounds different from those asserted by the Employer. Hearing regarding Schwartz's allegations against the Respondent Union was completed on September 20, 1989. A transcript of the entire proceeding was provided to the Examiner by October 10, 1989 and the parties filed all briefs and arguments herein by November 12, 1989. The Examiner has considered all of the evidence and arguments relating to the allegations against the Union and being fully advised in the premises, makes and files the following

FINDINGS OF FACT

1. Complainant Schwartz was at all times material herein a pipe layer by trade and a member in good standing of Construction and General Laborers' Union, Local 464 (hereafter Union) entitled to receive wages and health and welfare and pension benefits when employed under a Union contract, and entitled to enjoy Union referrals to jobs arising under the various agreements which the Union has historically maintained with signatory construction contractors around the State of Wisconsin. These contracts include the Building Agreement (brown book), the Heavy and Highway agreement (grey book) and the Sewer and Water agreement (yellow book). Also, Schwartz was at all times material herein employed as a pipe layer by Respondent Employer, Consolidated Paving Company, Inc., on a job in the City of Middleton located on Graber Road at which the Employer performed sewer and water work during the period April 29 through November 16, 1987. Schwartz is an experienced pipe layer whose services have been frequently in demand over the years. He has never filed a grievance, run for or held Union office and, until the instant case, Schwartz had never lodged a complaint with the Union.

2. Respondent Union is a labor organization having offices at 2025 Atwood Avenue, Madison, Wisconsin. Robert Niebuhr is currently Business Manager of the Union and has been in the position since 1984. Gordon Kraut is Secretary-Treasurer of the Union currently. The Union regularly negotiates and executes various labor agreements with signatory contractors. Under what is known as the Union's Building AGreement, Union employers may engage in general building, excavation and paving construction which includes public sector sewer and water work as well as private sewer and water work inside the property line. Under what is known as the Union's Heavy and Highway Agreement, union employers may engage in paving work, among other things.

3. At all times material herein, the Employer has been owned and operated by Dean and Barbara Evert (husband and wife). For many years, the Employer has been primarily engaged in the business of paving and road construction. Since at least 1984, the Employer has been secondarily engaged in sewer and water construction work but never on a year-round basis. For these many hears, the Employer has had a collective bargaining relationship with the Union during which the Employer has regularly executed both the Building Agreement and the Heavy and Highway Agreement. Most recently, the Employer signed the 1988-90 Building Agreement as well as the 1988-91 Heavy and Highway Agreement, pertinent portions of which read as follows:

BUILDING AGREEMENT

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ARTICLE III -- GRIEVANCE PROCEDURE

> **Section 1.** The settlement of contractual disputes and grievances for the duration of this Agreement between the parties of this Agreement shall be settled as follows:
>
> a. The parties of this Agreement shall attempt to settle the matter between themselves immediately on the job site by the Business Manager and/or Field Representative of the Union and a representative of the Employer.
> b. If, after twenty-four (24) hours from the time of the incident or discovery of the incident a settlement is not reached, the matter will be referred to the W.E.R.C., whose decision will be final and binding.
> c. It is expressly understood and agreed that disputes involving work jurisdiction (Jurisdictional disputes) shall not be resolved under this Article.

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ARTICLE VI. -- HEALTH, PENSION, TRAINING & VACATION and/or WORKING DUTIES FUNDS

Section 1. It is hereby agreed that, as of June 1, 1988, the Contractors signatory to this Agreement with Construction and General Laborers' Union, Local No. 464, Madison, Wisconsin shall contribute a specified amount of monies per hour (on all hours worked at straight time the hourly rate of pay), out of the negotiated wage increase for each employee into the Wisconsin State Laborers' Health, Pension & Training Funds and Laborers' Local No. 464 Vacation and/or Working Dues Fund.

a. Separate checks shall accompany each fund contribution and are due not later than the 15th of the following month worked.
b. During the life of this Agreement, upon written notification from the Union thirty (30) days prior to any of the increases negotiated, any or all of the monies may be applied to Health, Pension, Training and Vacation and/or Working Dues Funds.

Section 2. Fringe Benefits

a. The Employer agrees to submit fringe benefit reports on all Union and Non-Union Employees covered by this Agreement.
b. All payments to the Fringe Benefit Funds during the term of this Collective Bargaining Agreement are deemed to be paid pursuant to this Collective Bargaining Agreement.
c. The Employer shall promptly furnish to the Trustees of any Fringe Benefit Fund of their authorized agents, on demand, all necessary employment, personnel or payroll records relating to its former and present employees covered by this Agreement, including any relevant information that may be required in connection with the administration of the Trust Fund.
d. The Employer agrees that the Union may apply the increase in monies bargained for during these negotiations as the Union sees fit for wages, pensions, health and welfare funds, vacation and/or working dues funds, training funds (educational) and any other funds existing under present Collective Bargaining Agreements of the Union. It is agreed that during the term of this Contract, Management and Union will work for the goal of consolidating all existing craft funds for the purpose of reducing administrative expenses and improving benefits.
e. Should any fringe benefit fund provided for under this Agreement be terminated for any reason whatsoever, contributions made by the Employer to said funds shall be added to the employee's wages.

Section 3. Training Fund

a. The Union will not discriminate against any Union member of applicant for an apprenticeship or training program because of race, color, religion, sex, national origin, handicap, age or martial status, unless sex is a bona fide occupational qualification necessary to the normal operation of a particular business or enterprise. The Employer and the Union further agree that each will cooperate with the other in taking such affirmative action by either or both as are proper and necessary to insure equality of opportunity in all aspects of employment.
b. Each of these respective funds shall be jointly administered by a equal number of Trustees appointed by the Union and the Employer.
c. The Association and the Union, and all Employers covered by this Agreement, agree to be bound by all the terms of the Trust Agreements creating the Wisconsin Laborers' Health, Pension and Training Funds and Laborers' Local No. 464 Vacation and/or Working Dues Fund, and by all the actions and rules of the Trustees administering such Health, Pension, Training and Vacation and/or Working Dues Funds in accordance with the Trust Agreement and regulations of the Trustees, provided that such Trust Agreements, actions, regulations and rules shall not be inconsistent with this Agreement. Each Employer covered by this

Agreement hereby accepts all succeeding Trustees as will be appointed under and in accordance with the Trust Agreement. Such Employer hereby ratifies all actions already taken, or to be taken, by such Trustees within the scope of their authority.

Section 4. Penalties

a. The Trustees of the Wisconsin State Laborers' Health, Pension, Training and Vacation and/or Working Dues Funds, may for the purpose of collecting and payments required by made to such Trust Funds, including damages and costs, and for the purpose of enforcing rules of the Trustees concerning the inspection and audit of payroll records, seek any appropriate legal, equitable and administrative relief and they shall not be required to invoke or resort to any.

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ARTICLE X. -- WAGE RATES FOR CONSTRUCTION LABORERS

Listed below are the classifications of work (including the new wage increase, plus the fringes to be paid **over and above** the hourly wage scale), effective August 1, 1988:

	(PER HOUR ALL HOURS WORKED) HourlyPlus			
Plus	Wage Rate	HealthPlus Ins.	Pension	Training Fund
CLASSIFICATIONS:				
1. General Labor. The work to be performed under this classification is described under Laborer Jurisdictional Work, Article IV.....	$12.80	1.15	.70	.05

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Heavy and Highway Agreement

Coverage

This agreement shall cover all highway and heavy construction work included in contracts awarded by the State of Wisconsin Department of Transportation, all work performed for any authority supervised by said Department of Transportation, airport work (exclusive of buildings).

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ARTICLE V
Grievance

1. A grievance must be filed in writing by either the Employer or the Union within thirty (30) days of the date of the occurrence of the grievance.
2. (a) All grievances, disputes or complaints of violations of any provisions of this agreement shall be submitted to final and binding arbitration by an arbitrator appointed by the Wisconsin Employment Relations Commission. Notice of the grievance dispute shall be given to the Employer or as applicable to the Local Union involved, at least two days before serving of the demand of the arbitration in order to permit efforts to adjust the matter without litigation. The arbitrator shall be a member or staff member of the Wisconsin Employment Relations Commission. The arbitrator shall have sole and exclusive jurisdiction to determine the arbitrability of such dispute as well as the merits thereof. Written notice by certified return receipt of a demand for arbitration shall be given to the Contractor and Employer or as applicable to the Local Union involved. The Contractor and Employer as the case may be, shall agree in writing within seven (7) days to arbitrate the dispute.

(b) Both parties shall cooperate to have the case heard by an arbitrator within seven (7) calendar days of the written agreement to arbitrate, provided an arbitrator is available. The arbitrator shall have the authority to give a bench decision at the close of the hearing, unless he shall deem the issues to be unusually complex and thereafter he shall reduce the award to writing. Grievances over discharge or suspension shall be filed not later than ten (10) calendar days after the matter is brought to the attention of the Business Rep-resentative of the Union.
3. In the event the arbitrator finds a violation of the agreement he shall have the authority to award back pay to the grievant in addition to whatever other or further remedy may be appropriate.
4. In the event a Contractor or the Union does not agree to arbitrate the dispute within seven (7) days or does not cooperate to have the case heard within seven (7) days after the written agreement to arbitrate or does not comply with the award of the arbitrator, the other party shall have the right to use legal and economic recourse.
5. All expenses of the arbitrator shall be shared equally by the Union and the Contractor involved.

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ARTICLE XI
Classifications and Wage Rates

1. The rates of pay on airport construction shall be the prevailing rates as determined by applicable laws.
2. The following straight-time rate of pay and job classifications shall apply to all work and every laborers (sic) covered by this agreement, except as stated in Section 1 above.
3. This agreement applies to the entire state of Wisconsin which for the purpose of this agreement is divided into various geographical areas as stated below.

Area I is defined as Milwaukee and Waukesha Counties
Area II is defined as Racine County
Area III is defined as Kenosha County
Area IV is defined as Dane County
Area V is defined as Ozaukee and Washington Counties
Area VI is defined as including all counties of Wisconsin except: Milwaukee, Waukesha, Ozaukee, Washington, Dane, Kenosha and Racine.

4. It is the optional decision of the union to determine contributions out of the negotiated wage increase, for Health and Welfare, Pension, Vacation, or Skill Improvement programs, upon notice to contractor. This notice must be prior to the certification date of each year of the contract.

Classifications and Straight Time Rates

Dane County AREA IV

LABORERS Classifications	Effective 6-1-88
. . .	
Pipelayer Crew (sewer, water) Pipe Layer	13.48
Pipelayer Crew (sewer, water) Bottom Man	13.28
Pipelayer Crew (sewer, water) Topman	13.13
. . .	

AREA I -- MILWAUKEE AND WAUKESHA COUNTIES
AREA II -- RACINE COUNTY
AREA III -- KENOSHA COUNTY
AREA IV -- DANE COUNTY
AREA V -- OZAUKEE AND WASHINGTON COUNTIES
AREA VI -- BALANCE OF STATE

Effective June, 1, 1988	Health & Welfare	Pension	Vacation and/or Working dues	Skill Improve-ment

. . .

Areas 4 & 6	1.15	.80	-.15	.05

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FRINGES TO BE PAID ON ALL HOURS WORKED

. . .

Transportation Education Fund 05

ARTICLE XIII
Health and Welfare

1. (a) Effective June 1, 1988, the contractor shall pay monthly the sum of $1.70 per hour for all hours worked, for work performed in Milwaukee, Ozaukee, Washington and Waukesha counties to the Health and Welfare Fund established by the Allied Construction Employers Association of Milwaukee and the appropriate labor unions for all laborers employed by the contractor in the job classifications listed in **ARTICLE XI.**

(b) Effective June 1, 1988, the contractor shall pay monthly the sum of $1.55 per hour for all hours worked, for work performed in Kenosha county to the Kenosha Building and Construction Trades Welfare Fund for all laborers employed by the contractor in job classifications listed in **ARTICLE XI.**

(c) Effective June 1, 1988, the contractor shall pay monthly the sum of $1.40 per hour for all hours worked, for work performed in Racine county to the Racine Building and Construction Trades Welfare Fund for all laborers employed b y the contractor in the job classifications listed in **ARTICLE XI.**

(d) Effective June 1, 1988, the contractor shall pay monthly the sum of $1.15 per hour for all hours worked, for work performed in all counties of Wisconsin, except the counties of Racine, Kenosha, Milwaukee, Ozaukee, Washington and Waukesha to the Wisconsin Laborers' Welfare fund, 621 North Sherman Avenue, Madison, WI 53704.

2. Payments made to the fund are to be made at the end of each month, but not later than the 15th day of the following month, after which the payments will be considered to be delinquent. In the event an employer becomes delinquent in his payments to the Fund, he shall be assessed as liquidated damages $2.00 per laborer for each thirty (30) days prior to exercise of this section the employer shall be notified in writing of the delinquency of the contractor number.

4. All hourly allocations under this article are subject to **ARTICLE XI**, Section 4.

ARTICLE XIV
Pensions

1. (a) Effective June 1, 1988, the contractor shall contribute monthly to the Building Trades United Pension Fund, Milwaukee and vicinity $1.45 per hour for all hours worked, for worked performed in Milwaukee, Ozaukee, Washington, and Waukesha counties for each laborer employed by the contractor in the job classifications listed in **ARTICLE XI**.

(b) Effective June 1, 1988, the contractor shall contribute monthly to the Racine Building and Construction Trades Pension Fund $1.25 per hour for all hours worked, for worked (sic) performed in Racine county for each laborer employed by the contractor in the job classifications listed in **ARTICLE XI**.

(c) Effective June 1, 1988, the contractor shall contribute monthly to the Kenosha Laborers Local No. 237 Pension Fund, $1.25 per hour for all hours worked, for worked (sic) performed in Kenosha county for each laborer employed by the contractor in the job classifi-cations listed in **ARTICLE XI**.

(d) Effective June 1, 1988, the contractor shall contribute monthly to the Wisconsin Laborers' Pension Fund, 621 North Sherman Avenue, Madison, WI 53704 $.80 per hour for all hours worked, for worked (sic) performed in all counties of Wisconsin except the counties of Milwaukee, Ozaukee, Waukesha, Washington, Racine and Kenosha.

2. Payments made to the fund are to be made at the end of each month, but not later than the 15th of the following month, after which the payments will be considered to be delinquent. In the event that an employer becomes delinquent in his payments to the fund, he shall be assessed as liquidated damages $2.00 per laborer for each thirty (30) day period or fraction thereof that he is delinquent.
3. If the employees are removed from the job by the union to enforce such delinquent payments including liquidated damages, the employees shall be paid by the delinquent employer for all lost time at the straight-time hourly rate. Thirty (30) days prior to exercise of this section the employer shall be notified in writing of the delinquency of the contractor member.
4. All hourly allocations under this article are subject to **ARTICLE XI**, Section 4.

4. As a general rule, the Union does not require every contractor who is signatory to one of its agreements to sign all of the contracts under which members perform union work. Rather, the union has a practice of having a contractor sign the agreement or agreements which apply to the major part of the work that that employer generally engages in. Since the Respondent Employer has been primarily a paving/road construction contractor for many years, the Union has required the Employer to sign its Building and Heavy and Highway Agreements. With regard to sewer and water work, since most of that kind of work is contracted for with a municipality with the involvement of governmental funding, the municipality "white sheets" the job, meaning that it requires all union and nonunion contractors on these jobs to pay their employes the prevailing wage rate (PWR), which is equal to the Union's contractual rates for sewer and water work. As a general rule, it is also true that contractors who are signatory to one or more of the Union's contracts have voluntarily paid the proper union contractual rates in effect on non-contract or non-white sheeted jobs despite the fact that they may not be executory to the particular agreement which applies to the work being done. Also, it is generally true that the Union does not send its Union members out or refer them to jobs for private individuals who are not signatory to one of the Union's contracts. However, if a private individual calls the Union hall seeking someone to do work for them, the Union agents will ask if anyone present would like to perform the non-union work. If a member wishes to do so, he/she is told the job does not pay union scale and fringe benefits and that the member is expected to work out payment for their services with the individual.

5. Since at least 1984 through 1988, the Union has performed regular audits of the Employer's books, (at least annually and recently, every quarter) which found the Employer to be in arrears in paying its Union employes' contractually required wages and health, welfare and pension payments, in the total amount of approximately $25,000. The amounts due on two hundred eighty-six (286) of the work hours claimed by the Union to date were claimed on behalf of Schwartz for the period June through August, 1987 (when he worked for the Employer). The Local Union followed normal channels in pursuing the Employer's payments for these arrearages. Those normal channels include requesting periodic audits, and then after the audits have been done, requesting that the Fund Trustees attempt to collect on the arrearages found. The Fund would then bill the Employer for liquidated damages plus interest. Only the Fund Trustees have the authority to collect on arrearages to their funds and only the Trustees may file lawsuits regarding arrearages. Such lawsuits may only be initiated after the employer has had an opportunity to pay or appeal to the Trustees. The Trustees may then assign the Funds' collections attorney to pursue a contractor in arrears, they may contact general contractors on jobs where the contractor in arrears is working to convince the general contractor to withhold the amount of the arrearage from the amount due on the subcontract or the Trustees may sue the contractor in arrears for the arrearages. In the case of the instant Employer, before the Fund Trustees filed a lawsuit against the Employer, the Employer, on June 5, 1989, filed for Bankruptcy under Chapter 11 of the Federal Bankruptcy laws. On July 11, 1989, Union Business Manager Robert Niebuhr sought to be appointed to the creditors committee which would deal with the Employer's financial status and on July 18, 1989 the Bankruptcy Court granted Niebuhrs request and appointed him to that committee.

6. On or about April 29, 1987, Barbara Evert telephoned Union Business Manager Robert Niebuhr and requested that the Union refer a pipe layer for a sewer and water job that the Employer had contracted to do in the City of Middleton on Graber Road. Niebuhr did not inquire of Evert whether the job was "white sheeted" and he did not ask whether Evert intended to pay the PWR. Niebuhr simply assumed that due to the location of the job and the type of work, that the job would be a white sheet job. Thereafter, on April 29, 1987, Niebuhr called Schwartz who was then available for work and Niebuhr referred Schwartz to work for the Employer as a pipe layer on the City of Middleton job. Schwartz did not ask Niebuhr whether the job would pay Union wage rates and benefits, since Schwartz also assumed that the Employer would be required to pay Union scale on such a job based upon the Employer's request for a Union referral. Pursuant to Niebuhr's referral, Schwartz began work for the Employer that day, April 29, 1987.

7. Shortly after Schwartz began work for the Employer, Niebuhr visited the job site. Schwartz asked Niebuhr if it was all right for him (Schwartz) to be there and Niebuhr replied, "Sure, Jerry, you can work anywhere." In July, 1987, Schwartz turned in a claim to the Employer/Union insurance carrier. The insurance carrier denied the claim (apparently in writing) stating that Schwartz was not then covered by their insurance. Schwartz called the insurance company and they explained that there had been no work hours turned in for Schwartz for April through June, 1987. Schwartz then called Niebuhr who said he would take care of the problem. Later, Schwartz received reimbursement for the claim in question. In or about October, 1987, Schwartz received statements from the Union's Fringe Benefit Funds showing no insurance or pension payments had been made on behalf of Schwartz by the Employer for the hours Schwartz had previously worked for the Employer. Schwartz called Niebuhr on several occasions about this discrepancy as well as to complain about the fact that Schwartz should have received a $.20 per hour wage increase effective June 1, 1987. (Schwartz later received this pay increase beginning approximately September 18, 1987.) Niebuhr contacted Employer representative Barbara Evert. She took the position that the Union had no jurisdiction to make and pursue Schwartz's claims for pay and fringe benefits because the Employer had not signed a Sewer and Water Contract with the Union. Niebuhr argued that the Employer was signatory to the Heavy and Highway Agreement and the Building contract and it employed Union members thereunder and the Employer should pay the rate. Niebuhr also argued that since the Employer had called the Union to get a referral for a pipe layer on the City of Middleton job, the Employer was under a "contract" to pay Union rates. Finally, Niebuhr took the position that if Evert believed the job was non-union, she should have informed Niebuhr of this so that he and his members could have made up their own minds about whether to take the work. Ms. Evert told Niebuhr that the Employer had needed Schwartz for the job because he was an experienced pipe layer and that if she had told Niebuhr and/or Schwartz that the Employer considered the City of Middleton job a non-union job, Schwartz would have quit the job. Niebuhr told Evert that he had never had a problem like this before. Niebuhr filed a grievance with the Employer regarding Schwartz's claim for pay and benefits and, settlement talks having failed, Niebuhr requested arbitration of the WERC on October 30, 1987. That grievance arbitration case was ultimately assigned to Raleigh E. Jones of the Commission's staff. Jones scheduled the case for hearing on December 22, 1987. Present at the hearing, were Dean Evert and Robert Niebuhr. (Complainant was not present.) During the course of settlement discussions regarding the grievance prior to commencement of the hearing, Niebuhr decided the Union should drop the grievance based upon the fact that the Union did not have a signed contract with the Employer which would have covered Schwartz's work on the City of Middleton job and therefore, the grievance could not be won. Mr. Niebuhr stated at the instant hearing that he believed this opinion was expressed and/or shared by Mr. Jones on December 22, 1987. On that same date, Jones closed his WERC file on the case.

8. As a direct result of Niebuhr's unsuccessful attempts to settle Schwartz's pay and fringe benefit claims against the Employer and due to the Union's concern that a problem like Schwartz's should not reoccur, Niebuhr negotiated an Amendment to the Union's Building Contract which required the Employer to pay Union fringe benefits on employes employed on all "private work." Private work was therein defined as "any work that is not subject to white sheet rates, and/or any work not subcontracted by a union contractor." The Amendment took effect as of the date of execution, March 23, 1988. The effect of this Amendment has been that the problem which Schwartz experienced with the Employer has never again occurred.

9. On March 28, 1988 after having made phone calls to Niebuhr between mid-July 1987 and March, 1988 inquiring regarding the status of Schwartz's charges against the Employer, Schwartz filed a written complaint with the Union regarding the Employer's failure to pay Schwartz union scale and benefits on the City of Middleton job in question as well as the Union's handling of Schwartz's requests for those wages and benefits, and seeking a hearing before the Union's Executive Board. In his written complaint, Schwartz asserted that the Employer owed him proper pay and benefit fund payments for 682.5 working hours; that the Union had failed to fairly represent Schwartz because Schwartz was not notified before starting to work for the Employer that he would not be paid full Union scale and benefits on the job; and that the Union should pay Schwartz for his health insurance and wage claims against the Employer as well as pay the pension fund for the hours Schwartz worked on the City of Middleton job. By letter dated March 31, 1988 Schwartz was advised that the Executive Board would hold a special meeting to hear Schwartz's complaints on April 5, 1988 at which Schwartz was invited to present his claims/case to the Board. On April 5th, Schwartz presented and explained his complaint to the Union's Executive Board and Niebuhr gave a history of the problem as well as his explanation of the events. The Union auditors were also called in for an audit of the Employer's payroll records. During this April 5th meeting, Niebuhr stated that he had been unaware of the fact that the City of Middleton job was not a "white sheet" job at the time he referred Schwartz to work on that job and that it was not until December 22, 1987, the day that the WERC arbitrator was scheduled to hear the Union's grievance on behalf of Schwartz, that Niebuhr had become privy to all of the facts and arguments the Employer was asserting.

At the April 5th meeting, the Executive Board explained to Schwartz that the Union had no contract it could enforce covering the work in question. The Board then went into closed session to discuss Schwartz's complaints. The Board determined that it could not force an audit on the Employer for the job in question as it was not covered by any Union contract and the Union's regular audits of the Employer would not pick up all of the hours worked by Schwartz -- only those covered by a signed agreement between the Union and the Employer (described above in Finding No. 3). The Board also considered the reasons why Niebuhr had decided (on December 22, 1987) to drop the grievance regarding Schwartz's claims. The Board decided that it would set a bad precedent and felt it might possibly jeopardize the Union, were the Union to pay Schwartz's claims against the Employer and that to further pursue the Employer on Schwartz's behalf would only waste the Union's time, effort and resources. On April 6, 1988 the Executive Board issued written minutes of the April 5th special meeting which essentially recounted the above. The Board sent a copy of these minutes to Schwartz (by separate letter dated May 13, 1988). By his letter dated April 12, 1988, Union Secretary-Treasurer Kraut informed Schwartz that the Executive Board had denied his claim for wages and fringe benefits, stating in part as follows:

> The Executive Board of the Construction and General Laborers' Union, Local No. 464, in reviewing your testimony against Consolidated Paving Company in reference to back wages and fringe benefits felt that you had a valid complaint.
>
> In an attempt to obtain back wages and fringes for you, the Local filed a complaint on your behalf with our auditing firm and the W.E.R.C. They both ruled in favor of Consolidated and, based on the premise that there is no Agreement, held the Union harmless.
>
> The Executive Board maintains that, while the decision was unjust, the Union should not be held responsible for settlements arising out of contractors' unfair practices. In doing so, it would set a precedent, with the Union being made to settle wage and fringe disputes on work that is not even covered under our Collective Bargaining Agreements.
>
> If you have any questions regarding the decision, feel free in contacting our office.

10. On April 29, 1988, Schwartz filed the instant complaint with the Wisconsin Employment Relations Commission.

11. Sometime during the Summer of 1988, Niebuhr negotiated and succeeded in getting the Employer to sign a Sewer and Water Contract (otherwise known as the "yellow book"). This was done after March 28, 1988 and pursuant to several conversations that Niebuhr had had with Employer representative Barb Evert regarding Schwartz's problems with the Employer. In August, 1988 Barb Evert again confirmed that the Employer had essentially set out to defraud the Union and Schwartz by remaining silent concerning the Employer's opinion that the City of Middleton job was a non-union job because she believed that Schwartz would have quit the Employer had he known all of the facts and the Employer could not afford to lose him. The Sewer and Water Contract signed by the Employer became effective on June 1, 1988, to expire on May 31, 1991. This contract insured that the problem Schwartz had run into regarding pay and benefits on a non-white sheeted job would not occur again during the term of this contract. The pertinent provisions of the Sewer and Water Contract are as follows:

The Sewer and Water Agreement

AGREEMENT

> AGREEMENT made by and between the MUNICIPAL/ UTILITIES DIVISION, WISCONSIN CHAPTER, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC., and contractors who have executed a letter of assent in the form of attached Exhibit I, hereinafter referred to as the employer and the WISCONSIN LABORERS' DISTRICT COUNCIL, hereinafter called the UNION.
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> . . .
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> **ARTICLE 1**
> **COVERAGE**
>
> **A.** This agreement shall apply to and cover all public works construction (sic) including construction, excavation, installation, maintenance or repair of sewer and water mains, laterals, systems, and curb and gutters, sidewalks, streets and appurtenances and

related work, as well as excavating coming within the jurisdiction of the Union and contracted for or performed by the Employer within the State of Wisconsin, except for work in Milwaukee, Waukesha, Ozaukee and Washington Counties and except for work contracted for by the State of Wisconsin Department of Transportation.

B. By mutual agreement between the parties, all of the work covered by this Agreement shall be done under and in accordance with the terms and conditions of this Agreement.

ARTICLE XX

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B. Madison Local No. 464 -- **DANE COUNTY ONLY**

CLASSIFICATIONS	**6/1/88**
Foreman	$14.72
Pipelayer, Miner, and Laser Operator . . .	14.27

. . .

12. On or about March 23, 1988, the date on which the Employer signed the Amendment to the Building Contract covering private work, Employer representative Dean Evert contacted Niebuhr and in the course of their conversation, Evert offered to pay all of Schwartz's wages and fringe benefits for 1987 and 1988, if Schwartz would work for the Employer again as a pipe layer starting the next day. Niebuhr called Schwartz and relayed the message that Evert had called and wanted Schwartz to work for the Employer again. Schwartz told Niebuhr that he would call Evert himself and discuss the matter. Niebuhr testified that he told Schwartz of all of the terms of Evert's offer, including Evert's offer to pay in all of the past due 1987 wages and fringes for Schwartz. Niebuhr stated that Schwartz told him at this time that he could never work for the Employer again after what had happened. Niebuhr told Schwartz that the Union would not count a refusal to work for the Employer against Schwartz for Unemployment Compensation purposes, given the circumstances. Schwartz later spoke to Evert. Schwartz said he had just paid for his own health insurance in the amount of $170.00. Evert stated he would pay that amount for Schwartz. Schwartz then asked whether Evert would pay his benefits in 1988. Evert agreed. Schwartz then asked Evert whether the Employer would also pay for the benefits/wages still due from 1987. Evert stated he could not pay those. Schwartz replied that in that case, he could not work for the Employer.

13. In the late 1970's or early 1980's, before Niebuhr became Business Manager of the Local Union, a situation occurred similar to that involved in the instant case. In that case Payne and Dolan had a DOT Contract (now known as the Heavy and Highway Contract) with the Union but performed a contract for private work not covered by that contract. The Union sued Payne and Dolan for the wages and benefits lost by Union members employed on the job but the Union lost its case due to a lack of a contract or addendum covering the work done.

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

CONCLUSIONS OF LAW

1. Complainant Schwartz is an employe within the meaning of Sec. 111.02(6), Stats.

2. Respondent Consolidated Paving Company, Inc., is an employer within the meaning of Sec. 111.02(7), Stats.

3. Respondent Union is a labor organization and represents employes in the construction industry for purposes of collective bargaining, within the meaning of Sec. 111.02(11), Stats.

4. Respondent Union Local 464 of the Construction and General Laborers' Union, did not breach its duty of fair representation by failing or neglecting to require that the Employer sign a Sewer and Water Contract prior to referring Schwartz to the above-described City of Middleton job, or by failing to collect from the Employer, or to pay on its own behalf, wages and fringe benefits for hours Schwartz worked as a pipe layer on the City of Middleton job during the period April 29, 1987 through November 16, 1987.

5. Respondent Union did not coerce or intimidate Schwartz in the enjoyment of his legal rights under the Act and the Union did not coerce, intimidate or induce Respondent Employer or any person to interfere with Schwartz's enjoyment of his legal rights, or to engage in any unfair labor practices against Schwartz, within the meaning of Sec. 111.06(2), Stats.

6. Respondent Union did not attempt to influence the outcome of any controversy as to employment relations prohibited by Sec. 111.06(1) or (2), Stats.

7. The Commission will not exercise its jurisdiction to review the merits of the Respondent Employer's alleged breach of the collective bargaining agreement in violation of Sec. 111.06(1)(f), Stats.

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

ORDER 1/

IT IS ORDERED that the instant complaint be and the same is hereby dismissed in its entirety.

Dated at Madison, Wisconsin this 16th day of January, 1990.

By _____

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 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

(Footnote 1/ continued on page 13)

1/ 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.

CONSOLIDATED PAVING COMPANY, INC.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Positions of the Parties:

Complainant

Complainant Schwartz asserted that the Union should have known or inquired whether the Employer believed that the City of Middleton job was covered by a Union contract before if referred Schwartz to that job. In this regard, Schwartz argued that the fact that the Employer had been constantly in arrears (since 1984) in paying into the Union's benefit funds for its employes, should have tipped off the Union to be more careful with respect to the Employer. Beyond this, Schwartz asserted that the Union should have struck the Employer to force it to sign a Sewer and Water Contract. Schwartz also contended that the Union did not do enough for him to get the Employer to pay him Union wages and benefits on the City of Middleton job. Schwartz pointed out that the Union failed to get a private works addendum with the Employer until March, 1988 and the Union did not get a signed Sewer and Water Contract with the Employer until the Summer of 1988.

Schwartz seeks a finding that the Union failed to fairly represent him and an Order requiring the Union to pay the wages and fringe benefits due him on the City of Middleton job in question.

Union

The Union contended that after it became aware of the full extent of the problem, it did everything possible to remedy Schwartz's situation. The Union noted that it had been defrauded by the Employer along with Schwartz and that the Union would not have referred Schwartz to the City of Middleton job had it known that the Employer believed the job was non-union. In this regard, the Union presented evidence to indicate that most of its signatory contractors did not sign all of the various Union agreements, and that they nonetheless pay Union scale and benefits even when they perform work not covered by any agreement they have executed. In addition, most Sewer and Water jobs are white sheeted, which automatically requires all contractors thereon to pay their employes the PWR (which is equal to contractual wages and benefits).

The Union noted that it had filed a grievance on behalf of Schwartz which it dropped only after it determined that there was no likelihood of the Union's succeeding on the case due to the lack of a contract to cover the work in question. The Union then negotiated an Addendum to the Building Contract which would (in the future) require the Employer to pay Union fringe benefits on private jobs. Further, upon Schwartz's filing it, the Union noted that it promptly processed Schwartz's complaint to the Executive Board (including holding a full hearing on the matter). The Board denied Schwartz's claim only upon reasonable grounds, the Union contended, as confirmed in the minutes of the Board meeting (a copy of which Schwartz received) and as stated in a letter to Schwartz from Secretary-Treasurer Kraut. Thereafter, the Union convinced the Employer to sign a Sewer and Water Contract. In sum, based upon the facts herein, the Union asserted that the complaint should be dismissed.

Employer

Neither the Employer nor its counsel appeared at the September 20, 1989 continuation of the hearing herein. Employer's counsel was served with a copy of my September 15, 1989 Order Granting Stay.

DISCUSSION:

Complainant has generally alleged and argued that the Union failed to fairly represent him regarding pay and benefit claims for the period April 29 through November 16, 1987 in connection with the Employer's City of Middleton job, in violation of Sec. 111.06(1) and (2), Stats. I note that Complainant has not offered any evidence to prove that any officer or agent of the Union coerced or intimidated Complainant or that the Union coerced intimidated or induced the Employer or any other person to interfere with Complainant's legal rights within the meaning of Sec. 111.06(2)(a) or (b), Stats. Nor has Complainant offered one shred of evidence to prove that the Union, its officers or agents has attempted to influence the outcome of any controversy concerning employment relations prohibited by Sec. 111.06(1) or (2), Stats., as provided in Sec. 111.06(3), Stats.

The overriding issue, here, whether the Union failed to fairly represent Schwartz by the manner in which it handled the problems which arose surrounding the Employer's City of Middleton job, must be decided within the framework of the law and legal precedent regarding the extent of a labor organization's duty to fairly represent the in individuals who are members of its bargaining unit. In Humphrey v. Moore, 375 U.S. 335; 55 LRRM 2031 (1964), the United States Supreme Court confirmed its prior holding in Ford Motor Co. v. Huffman,

2/, and stated that "a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." Also, the United States Supreme Court in Vaca v. Sipes 3/ stated:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.

In Mahnke v. WERC, 66 Wis.2d 524 (1975), the Wisconsin Supreme Court imposed specific duties upon unions when they made decisions whether to arbitrate a grievance. There, the court stated that the Union must consider the following "relevant factors" in determining whether to proceed further with a grievance: (1) the monetary value of the employe's claim; (2) the effect of a breach of the contract on the employe; and (3) the likelihood of success on the merits at arbitration. The Court further stated:

> . . . this is not to suggest that every grievance must go to arbitration, but at least that the union must in good faith weigh the relevant factors before making such determination. Id. at 534.

So long as a union exercises its discretion in good faith and with honesty of purpose, the union will be granted broad discretion in the performance of its duties for the bargaining unit it represents, and mere negligence, poor judgment or ineptitude in grievance handling will be insufficient to establish a breach of the duty of fair representation. 4/

Thus, Complainant here has the burden of proving, by a clear and satisfactory preponderance of the evidence, that the Union failed to fulfill its duty of fair representation as alleged. Complainant essentially alleged that the Union was negligent in referring him to the City of Middleton job, without checking to make sure the Union had a signed Sewer and Water Contract with the Employer prior to the referral. Although Complainant did not specifically allege that the Union unfairly processed his grievance, his personal complaint to the Union's Executive Board, or that the Union improperly relayed Evert's 1988 settlement offer, the record is complete on these points and I shall also decide whether the Union breached its duty of fair representation in these areas.

In the instant case, the Complainant failed to show that he was treated differently from other union members with regard to his complaints; he failed to show that Union officials Niebuhr or Kraut harbored any animosity against him for any reason and Schwartz failed to prove that Kraut and/or Niebuhr had acted in bad faith or for some discriminatory reason when they failed to complete the arbitration process regarding Schwartz's pay and benefit dispute with the Employer.

The gravamen of Schwartz's complaint against the Union appears to be that the Union should have known or should have checked whether the City of Middleton job was under Union contract, and finding it was not covered, the Union should then have forced the Employer to sign a Sewer and Water Contract before referring Schwartz to the job, and if the Union could not force the Employer to sign such a contract, the Union should not have referred Schwartz.

The record evidence indicated that the actions the Union took initially with regard to the City of Middleton job were neither arbitrary nor unreasonable. It is undisputed, for example, that as a general rule, contractors who have signed one or more of the Union's contracts will automatically pay union wages and benefits. In addition, where a contractor is constructing connecting sewer and water lines from existing municipal lines to new lines for a new housing/business development -- such jobs are normally "white sheeted" jobs, which require even non-signatory contractors to pay the PWR. In addition, I note that the Employer called the Union to refer a pipe layer to its City of Middleton job, which would reasonably allow the Union to assume that the Employer intended to pay Union wages and benefits. In light of the Employer's fraudulent silence at the time it requested the referral and thereafter regarding its opinion that the job was non-union, I find that the Union could have reasonably believed (at the time it referred Schwartz) that the Employer intended to pay Union wages and benefits to Schwartz. In the circumstances of this case, I am not persuaded that the Union acted arbitrarily

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2/ 345 U.S. 330, 338; 31 LRRM 2548 (1953).

3/ 386 U.S. 171, 64 LRRM 2369, 2376 (1967).

4/ See e.g., Ford Motor Co., supra; Bazarte v. United Transportation Union, 429 F. 2d 868, 75 LRRM 2017 (3d Cir., 1970); Wisconsin Council 40, AFSCME, AFL-CIO, Dec. No. 22051-A (McLaughlin, 3/84) (aff'd by op. of law, (WERC, 4/85)); Local 82, Council 24, AFSCME, AFL-CIO, et.al. Dec. No. 11457-H (WERC, 5/84) (known as the Guthrie case).

in not doing more than it did prior to referring Schwartz to the job.

The fact that the Employer had been delinquent over the years in making payments to the Union's Health and Welfare and Pension Funds does not require a different result on the above point. I note that the Union itself has no authority to pursue an employer in arrears, to initiate any action for collection of any arrearage or to otherwise file a lawsuit regarding an arrearage. Also, the status of the Employer's payments into the Union Funds is a separate question from that raised here -- that is, it does not necessarily follow from the fact that the Employer had been behind in paying into the Union's Funds that the Employer would likely defraud the Union and Schwartz regarding pay and benefits on the City of Middleton job. I note further that the problem which arose in the instant case had never before presented itself to Niebuhr either during his employment as a laborer or during his tenure as Business Manager of the Union. Thus, Niebuhr could not have been forewarned in these circumstances.

In the context of this case, the actions taken by the Union prior to referring Schwartz were largely based on reason and past experience, not on any basis prohibited by law. But even assuming, for the sake of argument, that some of the Union's actions prior to Schwartz's referral to the Middleton job were negligent, in these circumstances they did not amount to more than "mere negligence," and therefore these actions did not violate Sec. 111.06, Stats. 5/

I turn to the Union's processing of the grievance it filed on behalf of Schwartz. It is clear from the record that the facts surrounding the grievance were never in dispute. Further, Niebuhr was fully aware of the effect of the loss of wages and benefits on Schwartz and the extent of Schwartz's monetary injury (as well as that could be known) when Niebuhr filed a grievance with the Employer on Schwartz's behalf. Thereafter, sometime during the Summer and Fall of 1987, prior to his requesting WERC arbitration, Employer Representatives Barb and Dean Evert admitted that they had intentionally misrepresented the status of the City of Middleton job to both the Union and to Schwartz. Despite this fact, Niebuhr requested arbitration by the WERC and a hearing was scheduled for December 22, 1987. However, during the course of discussions between Niebuhr, Dean Evert and WERC staff Arbitrator Jones, Niebuhr became convinced that since there was no effective collective bargaining agreement which covered the work, there was no likelihood that the Union could prevail on Schwartz's case at arbitration. Based upon the evidence here and given the lack of any factual dispute as well as the overwhelming impossibility of success on Schwartz's grievance, I find that Complainant failed to prove by a clear preponderance of the evidence that the Union violated its duty to fairly represent Schwartz when it dropped his grievance short of arbitration.

In regard to the Union's processing of Schwartz's complaint to the Executive Board, I find that the clear preponderance of the evidence demonstrates that the Union dealt with Schwartz's complaint in a fair and reasoned manner. The facts show that upon Schwartz's filing his complaint, the Board promptly scheduled and held a hearing thereon, which hearing Schwartz attended and at which Schwartz pleaded his case. I can find no procedural irregularities at the April 5th hearing on Schwartz's complaint.

Furthermore, I find that the Union did not act in an arbitrary, discriminatory or in bad faith manner when the Executive Board determined to deny Schwartz's complaint on the ground inter alia, that it would set a "bad precedent" for the Union to pay Schwartz's claims against the Employer. In my view, it could arguably jeopardize the Union and its treasury, were the Board to pay for lost wages and benefits in a case in which the employer would not be ultimately responsible. In the circumstances, I also agree that to continue to pursue the Employer in a case such as this would merely have wasted the Union's time, effort and funds without any likelihood of gaining a benefit for Schwartz or other Union members. This type of action -- taken presumably on behalf of the greater good of the majority of members which outweighs the harm to one member -- is classically within the Union's lawful power. It was not a breach of the Union's duty of fair representation for the Executive Board to deny Schwartz's claims against the Union. See, e.g. American Motor Corp., Dec. No. 15334-C, (Michelstetter, 11/77), Dec. No. 15334-D (WERC, 11/77); Clevepak Corp., Dec. No. 15555-C (McGilligan, 3/78), Dec. No. 15555-D (WERC, 3/78); Racine Steel Castings, Dec. No. 17054-A (Rothstein, 5-80), Dec. No. 17054-B (WERC, 6/80); Pabst Brewing Co., Dec. No. 17023-B (Hawks, 8/80), Dec. No. 17023-C (WERC, 9/80).

In reaching my decision, I am also mindful of the action Niebuhr took to remedy the Schwartz situation and secure the rights of the majority of affected

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5/ In Office and Professional Employees International Union, Local No. 2, AFL-CIO, 268 NLRB 207 (1984) the National Labor Relations Board stated, that

> . . . to determine whether a union's conduct is "mere negligence" or "something more," we must look beyond the alleged act of negligence and examine the totality of the circumstances. Id. at p. 7.

union members in the future. In this regard, I note that Niebuhr prevailed upon the Employer to sign an Addendum to the Building Contract in mid-March, 1988, which required the Employer to pay union benefits on private jobs, otherwise exempt from coverage by that contract. In addition, during the Summer of 1988, Niebuhr procured a signed Sewer and Water Contract from the Employer which guaranteed that the Schwartz situation would never again occur (so long as the Employer continued to execute this Contract.) Finally, when the Employer filed for Chapter 11 Bankruptcy, Niebuhr petitioned and was granted his request to sit on the creditor's committee which would help decide the Employer's financial fate. To me, these acts on the part of Niebuhr demonstrate the Union's commitment to do whatever it could reasonably do to protect the majority of its members with regard to their treatment by this Employer.

During the instant hearing, a credibility issue arose. Schwartz testified in contradiction of Niebuhr's testimony, regarding the contents of a conversation between Schwartz and Niebuhr on or about March 23, 1988 concerning a settlement offer then made by Dean Evert to Niebuhr. (Finding of Fact No. 11). Specifically, Niebuhr testified that he phoned Schwartz and relayed all of the terms of a settlement offer he (Niebuhr) had received from Evert which included inter alia, Evert's offer to pay all of Schwartz's 1987 wages and benefits due on the City of Middleton job if Schwartz would work for Evert on a new job. Schwartz testified that Niebuhr never told him of the terms of the above-described settlement offer. Rather, Schwartz stated that Niebuhr called and stated that Evert wished to hire Schwartz back and that Evert had made an offer in this regard; that Schwartz told Niebuhr that he (Schwartz) would speak to Evert himself about Evert's offer; that during their subsequent conversation, Evert offered to pay only an insurance premium which Schwartz had recently had to self-pay and that Evert promised to pay proper benefits for Schwartz in 1988 but that Evert refused to pay Schwartz's 1987 past due pay and benefits.

In the context of this case, I credit Niebuhr's version of what was said between he and Schwartz regarding Evert's settlement offer. In this regard, I note that on several points Schwartz corroborates Niebuhr's testimony concerning the disputed conversation: that Evert called Niebuhr hoping to rehire Schwartz and that Evert had made an offer to Niebuhr in this regard; that Schwartz told Niebuhr he was not inclined to work for Evert again after what had happened; that Niebuhr told Schwartz that the Union would not count a refusal to work for the Employer against Schwartz for purposes of Unemployment Compensation. In addition, I believe it is most unlikely that a labor relations professional like Niebuhr would have made such a serious error -- to improperly relay the terms of a settlement offer made to the Union for the benefit of a Union member. However, in the circumstances of this case, I believe it is quite likely that Schwartz, who appears to have been consistently excited and upset about the problems he had had with the Employer, might not have heard Niebuhr correctly or that he might have misunderstood Niebuhr. Finally, given the Employer's prior deceptions regarding the status of the City of Middleton job, I believe it is quite possible that Dean Evert might have attempted to cut a better deal with Schwartz personally than Evert had offered to Niebuhr. In all of these circumstances, I find no violation of the Statute occurred with regard to Niebuhr's conversation with Schwartz regarding Evert's settlement offer.

Having found that the Union did not in any manner breach its duty to fairly represent Complainant, I lack jurisdiction, under settled Commission precedent, to reach any issue or allegation regarding whether the Employer breached its contract(s) with the Union by its conduct (Sec. 111.06(1)(f), Stats.). For the reasons stated herein and based upon the reasoning and cases cited in my Order Granting Stay in this case (Dec. No. 26026-A (Gallagher Dobish, 9/89), I cannot and do not decide the merits of Complainant's allegations herein against the Employer. See, also Ruan Transportation Management Systems, Dec. No. 25074-B (Jones, 7/88) aff'd by op. of law, Dec. No. 25074-B (WERC, 8/88). Therefore, the complaint herein must be dismissed in its entirety.

Dated at Madison, Wisconsin this 16th day of January, 1990.

By _____
Sharon Gallagher Dobish, Examiner