

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 494 INTERNATIONAL :
BROTHERHOOD OF ELECTRICAL :
WORKERS, AFL-CIO, :
: Complainant, : Case 1
: vs. : No. 43903 Ce-2097
: Decision No. 26516-A
: ZIEN HEATING AND AIR CONDITIONING, INC., :
: Respondent. :

Appearances:

Mr. Paul Welnak, Business Manager, Local Union No. 494, International Brotherhood of Electrical Workers, 2121 West Wisconsin Avenue, Milwaukee, Wisconsin 53233, appearing on behalf of Complainant.
Mr. Gerald Barson, President, Zien Heating and Air Conditioning, Inc., 3111 West Mill Road, P.O. Box 11762, Milwaukee, WI 53209, appearing on behalf of Respondent.

FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO filed a complaint on April 12, 1990 with the Wisconsin Employment Relations Commission, alleging that Zien Heating and Air Conditioning, Inc. had violated unspecified sections of Sec. 111, Wis. Stats., by refusing to implement an arbitration award and by refusing to provide information sought by Complainant in its capacity as representative of certain employees. The Commission appointed Christopher Honeyman, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Sec. 111.07, Wis. Stats. The hearing was held in Milwaukee, Wisconsin on July 23, 1990, at which time the parties were given full opportunity to present their evidence and arguments. The Company did not choose to attend the hearing, but filed a written statement of position. Neither party filed a brief. Following a period of time during which the record was held open to permit the Company to respond to a motion for amendment of the complaint, the record was closed on August 16, 1990. The Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Local Union 494, International Brotherhood of Electrical Workers, AFL-CIO [herein IBEW] is a labor organization, and has its principal office at 2121 West Wisconsin Avenue, Milwaukee, Wisconsin 53233. Paul Welnak is Business Manager of Complainant Union and is its agent.
2. Zien Heating and Air Conditioning, Inc. is an Employer within the meaning of Sec. 111.02(7), Wis. Stats., and has its principal office at 3111 West Mill Road, Milwaukee, Wisconsin 53209. Gerald Barson is President of Respondent Company and is its agent.
3. At all times material to this proceeding, Respondent Company has been a signatory Employer to the "Inside Wiremen Agreement" between Complainant Union and the Electrical Contractors Association, Milwaukee Chapter, National Electrical Contractors Association, Inc., which is in effect from June 1, 1988 to May 31, 1991. Complainant is thus the voluntary recognized representative of all electricians employed by the Company.
4. The Company became a signatory Employer to the "Inside Wiremen Agreement" on July 10, 1989, shortly after the Company was purchased and renamed by managers of a former signatory employer. At that time only one electrician, Victor Noe, was performing work for the Company. Noe resigned his employment on January 16, 1990; two other employees employed by the Company as of its date of signing the Agreement, Thomas Alex and John Keane, were laid off on July 12 and July 14, 1989 respectively without performing any actual work for the present Company.
5. The "Inside Wiremen Agreement" contains the following provisions relevant to this matter:

AGREEMENT

Agreement by and between the Electrical Contractors

Association Milwaukee Chapter, N.E.C.A., Inc. and Local Union 494, I.B.E.W. It shall apply to all firms who sign a letter of assent to be bound by this agreement.

As used hereinafter in this agreement, the term "Association" shall mean the Electrical Contractors Association-Milwaukee Chapter, N.E.C.A., Inc., and the term "Union" shall mean Local Union 494, I.B.E.W. The term "Employer" shall mean an individual firm who has been recognized by an assent to this agreement.

. . .

ARTICLE I

EFFECTIVE DATE-CHANGES-GRIEVANCES-DISPUTES

. . .

Section 1.05

There shall be a Labor-Management Committee of three representing the Union and three representing the Employers. It shall meet regularly at such stated times as it may decide.

However, it shall also meet within 48 hours when notice is given by either party. It shall select its own Chairman and Secretary.

Section 1.06

All grievances or questions in dispute shall be adjusted by the duly authorized representatives of each of the parties to this Agreement. In the event that these two are unable to adjust any matter within 48 hours, they shall refer the same to the Labor-Management Committee.

Section 1.07

All matters coming before the Labor-Management Committee shall be decided by a majority vote. Four members of the Committee, two from each of the parties hereto, shall be a quorum for the transaction of business, but each party shall have the right to cast the full vote of its membership and it shall be counted as though all were present and voting.

Section 1.08

Should the Labor-Management Committee fail to agree or to adjust any matter, such shall then be referred to the Council on Industrial Relations for the Electrical Contracting Industry for adjudication. The Council's decisions shall be final and binding on both parties hereto.

Section 1.09

When any matter in dispute has been referred to conciliation or arbitration for adjustment, the provisions and conditions prevailing prior to the time such matters arose shall not be changed abrogated until agreement has been reached or a ruling has been made.

ARTICLE II

RECOGNITION

Section 2.01

The Association, on behalf of its member Employers and other employers who have assented to this agreement, recognizes the Union as the sole and exclusive representative of all their Employees performing work within the jurisdiction of the Union for the purposes of collective bargaining, in respect to rates of pay, wages, hours of employment and other conditions of employment.

. . .

Section 2.05

The Local Union is a part of the International Brotherhood of Electrical Workers and any violation or annulment by an individual Employer of the approved Agreement of this or any other Local Union of the IBEW, other than violations of paragraph 2 of this Section, will be sufficient cause for the cancellation of this Agreement by the Local Union, after a finding has been made by the International President of the Union that such a violation or annulment has occurred.

. . . .

Section 3.07 Jurisdiction

This Agreement shall be effective on all inside electrical construction work in Milwaukee, Waukesha, Washington and Ozaukee Counties in the State of Wisconsin.

. . . .

ARTICLE IV

REFERRAL PROCEDURES

Section 4.01

In the interest of maintaining an efficient system of production in the Industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and of eliminating discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicable for employment.

Section 4.02

The Union shall be the sole and exclusive source of referral of applicants for employment.

Section 4.03

The Employer shall have the right to reject any applicant for employment.

The subletting, assigning, or transfer by an individual Employer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW or one of its Local Unions as the collective bargaining representative of his employees on any electrical work in the jurisdiction of this or any other Local Union to be performed at the site of the construction, alteration, painting, or repair of a building, structure, or other work, will be deemed a material breach of this Agreement.

All charges of violations of paragraph 2 of this Section shall be considered as a dispute and shall be processed in accordance with the provisions of this Agreement covering the procedure for the handling of grievances and the final and binding resolution of disputes.

. . .

Section 4.04

The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, bylaws, constitutional provisions or any other aspect or obligation of Union membership policies or requirements. All such selection and referral shall be in accord with the following procedure.

Section 4.05

The Union shall maintain a register of applicants for employment established on the basis of the Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

. . .

6. Following Noe's January 10, 1990 resignation, Union Business Manager Paul Welnak discovered that the Company had performed work at a site known as the Merle Harmon's Fan Fair which the Union regarded as electrical work, employing a steamfitter for the purpose. On February 26, 1990, Welnak filed a grievance on behalf of Wesley Hunter, the employe then listed at the top of the out of work list maintained under the Union's "hiring hall" system.

7. The grievance requested a meeting within 48 hours, and stated that if no such meeting could be scheduled the Union would refer the matter to the labor-management committee provided for in Section "1.05" of the Agreement. On March 5, 1990, Welnak met with Drew Gibson, Executive Vice President of Electrical Contractors Association, N.E.C.A., Inc., and the two reached a decision as to the grievance pursuant to Section 1.05 of the Agreement. The decision reached was reduced to writing, as follows:

DECISION OF THE PARTIES TO THE MILWAUKEE INSIDE WIREMEN AGREEMENT REGARDING THE GRIEVANCE AGAINST ZIEN HEATING & AIR CONDITIONING, INC.

Local 494, IBEW filed a grievance on February 26, 1990 against Zien Heating & Air Conditioning, Inc. alleging a violation of Article II, Section 2.05 for assigning electrical work to a steamfitter at Merle Harmon's Fan Fair, Southridge Shopping Center.

Zien Heating & Air Conditioning, Inc. assented to the Milwaukee Inside Wiremen Agreement on July 10, 1989. Article II, Section 2.05 states:

"The subletting, assigning, or transfer by an

individual Employer of any work in connection with electrical work to any person, firm, or corporation not recognizing the IBEW or one of its Local Unions, as the collective bargaining representative of its employees on any electrical work in the jurisdiction of this or any other Local Union to be performed at the site of the construction, alteration, painting, or repair of a building, structure, or other work, will be deemed a material breach of this Agreement."

Under the authority granted under Article I, Section 1.06, the parties to the agreement find that Zien Heating & Air Conditioning, Inc. violated Article II, Section 2.05.

As a remedy to this violation, Zien Heating & Air Conditioning, Inc. is directed to compensate the applicant for employment at the top of the "out-of-work" book wages and benefits for each hour of electrical work performed by the steamfitter.

This decision rendered on March 5, 1990.

8. The Company did not comply with the grievance decision referred to above, and on March 22, 1990, Welnak and Gibson together wrote to Barson as follows:

In a letter sent to you dated March 5, 1990, Local Union 494, I.B.E.W. requested information regarding the number of hours worked by a steamfitter performing electrical work. This request was precipitated by a grievance decision also dated March 5, 1990, which awarded payment for those hours to the top man on the referral book.

Since you have refused to comply with our request for this information, you leave us no alternative other than to estimate the hours. We have seen the job and based on our experience we estimate the job to be eight hours. We therefore demand a check made payable to Westley Hunter in the amount of \$195.68. Westley Hunter was the first man on the referral list at the time of the incident.

Thank you for your cooperation in this matter.

On the same date Welnak wrote to the Company demanding information as to other possible assignments of electrical work to non-union members, as follows:

I am aware that certain problems exist regarding assignment of electrical work at Zien Heating & Air Conditioning, Inc. It has come to my attention that since January 16, 1990 all electrical work being performed by your firm has been assigned to persons who are not members of Local Union 494, I.B.E.W. This is a flagrant violation of the Milwaukee Inside Agreement to which your company is signatory.

At this time I am demanding that you supply me with the jobs and hours worked by non I.B.E.W. personnel since January 16, 1990 on all electrical work. I have a right to this information. If you choose not to comply with my demand you leave me no choice but to seek a legal remedy through the National Labor Relations Board.

Please give this matter your prompt attention.

9. On May 26, 1990 Barson wrote to the Commission's mediator Karen Mawhinney a letter, which has since been admitted into the record in this matter, as follows:

After the last time we spoke I assumed that this was a dead issue and was not going to be pursued. I received a call on 5-24-90 asking for dates that I could have my attorney appear for a hearing. I informed the person calling that I did not want to get involved in a union dispute and could not afford an attorney.

I submit the following:

Thomas Alex and John Keane have never been employed by Zien Heating and A/C, Inc. They were employed by Zien Mechanical Contractors a totally different company and

ownership. (INCLOSURE #1) (sic)

Electrical work belonging to local union 494 has been accomplished by Thomas Alex as a sub-contract to Zien Heating and A/C, Inc. Thomas Alex is recognized by the IBEW. (INCLOSURE #2) (sic)

A steamfitter did no work belonging to the IBEW. Zien Heating and A/C, Inc. only employees (sic) one steamfitter and was never on the Merle Harmon project.

Zien Heating and A/C, Inc. has replied to the IBEW that no hours were worked by a steamfitter on the Merle Harmon project. (INCLOSURE #3) (sic)

A Refrigeration Maintenance Mechanic (Service man) was working the project doing control and refrigeration work (SERVICE WORK) in accordance with the United Association Of Journeymen letter dated Apr 2nd, 1987 and in agreement with Local Union 601 contract between Zien and 601. (INCLOSURE #4) (sic)

National Labor Relations Board has decided that the charges are not warranted. (INCLOSURE #5) (sic)

Please note the date on the letter from the United Association of Journeymen. As you can see this has been an on going union jurisdiction problem for some time. As I originally stated "this is a union problem not a contractor problem".

The enclosures referred to above state in pertinent part as follows:

(Enclosure 3A - Letter from Barson to Welnak, dated 4/24/90)

On the advice of Gary R. Johnson of the National Labor Relations Board Zien Heating and A/C, Inc submits the following information.

(1) The refrigeration service man (fitter Local 601) worked 8 hours at the Fan Fair Store installing refrigeration piping, refrigeration control valves and re-installing the 24 volt controls necessary to control the replacement air conditioning system. All of the above work is in accordance with the agreement signed between the Fitter Local 601 and Zien Heating and A/C, Inc. and is not an admission of guilt that any work was done in violation of any agreements with either Local Union.

(2) To the best of my knowledge, no work was done by any employee of Zien heating and A/C, Inc in violation of the contracts between the five local unions that we have. Zien Heating and A/C, Inc., is a 100% union shop and not looking for problems with any of the unions.

(Enclosure (3B) - Letter from Barson to N.E.C.A. representative Dean Gibson, dated 3/1/90)

In reference to the letter dated Feb 26th, 1990, sent by Paul Welnak, Zien Heating did do work t the Fan Fair Store with a service fitter local union 601. Our reasoning in using a service fitter to do low voltage 24 volt controls is that this was a remodeling project. Existing duct work was used as well as some existing controls in a existing space.

We feel that we have met the requirements of items 3, 4, and 5 of the letter dated April 2nd, 1987 by John Budzinski of local 601.

Thank you for your help in resolving this matter.

(Enclosure 5 - Letter from Philip E. Bloedorn, Acting Regional Director, Region 30, N.L.R.B. to Welnak, dated 5/22/90)

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. While it appears that you might be entitled to certain information from the Employer with respect to amounts of work you claim is within the jurisdiction of the IBEW but performed by non-IBEW personnel, your

request for "all electrical work" is extensive subjected to interpretation and is impractical to provide. Moreover, the Employer has expressed a willingness to meet with you in an attempt to explore ways of producing pertinent information in a practical and suitable form. Thus, it would not appear to effectuate the purposes and policies of the Act to proceed further on the charge at this time and I am, therefore, refusing to issue a complaint in this matter.

10. At the hearing held July 23, 1990, no Company representative appeared, and Complainant Union proceeded to present its case. During the course of the hearing Complainant moved to amend its complaint to add an allegation that the Company had failed to comply with its request for additional information as to whether other persons were performing work for the Company which was under the jurisdiction of the "Inside Wiremen Agreement". The undersigned Examiner notified the Company, following receipt of the transcript, of the Union's motion to amend complaint, and held in abeyance ruling on the motion pending an opportunity for the Company to reply. The Company replied with two letters, dated August 6 and August 15, 1990. These state as follows:

(August 6, 1990)

Zien, Inc. is in receipt of your letter dated Aug 2nd, 1990 and have forwarded it to the Plumbing and Mechanical Contractors Association (PMC). The PMC is quite interested in representing this since the Electrical Union is claiming work that has been jurisdictionally and by written agreement, the work of the Fitter Union 601. As we have stated over and over, this is a union fight and not a contractor fight.

Attached is a letter from the PMC requesting the two unions get together and discuss the jurisdiction problem. Zien, Inc has neither the money or the time to be involved with union to union problems. The PMC (John S Braun) is handling this matter for Zien and for all the Mechanical Contractors of Milwaukee since this will affect all contractors and possibly eliminate 50% of the Fitter 601s' refrigeration men who currently do this work.

(August 15, 1990)

A meeting was held with the Plumbing Mechanical Contractors Association, Refrigeration Fitter Union officials, Electrical Union officials, and interested Mechanical Contractors on Monday August 13th to discuss the issue of the Electrical Union claiming work that has not been jurisdictionally and historically theirs.

The two unions agreed to not agree on the basic issue of whos (sic) men should or could do low voltage work.

It was agreed that there are a multiple of unions currently doing this work. One of the major unions being the Sheet Metal Union.

It was suggested by the contractors in attendance that if the work was sold by a electrical contractor he would perform the work with electricians and the same for the fitters and sheet metal contractors. It was stated by the contractors that this is how the work has always been performed in Milwaukee and that the work is special to each trade because of the training programs for each trade.

The two unions did agree to have another meeting and this time invite the Sheetmetal Union officials to discuss this matter further.

Again, I ask that this case be dismissed against Zien, Inc. and let the unions solve their problems and not the State of Wisconsin.

11. The record establishes by a clear and satisfactory preponderance of the evidence that the Company has failed to comply with a grievance decision properly rendered under Section 1.06 of the "Inside Wiremen Agreement", and that the Company has failed and refused to provide information sought by Complainant Union which is relevant to employes' wages, hours and conditions of employment.

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

CONCLUSIONS OF LAW

1. The motion to amend complaint is granted.

2. By refusing to implement the grievance decision reached pursuant to Section 1.06 of the Agreement, the Company violated Sec. 111.06(1)(f) and (g), Wis. Stats.

3. By refusing to provide information relevant to Complainant's exercise of its obligation to represent employes and related to employes' wages, hours and conditions of employment, the Company violated Sec. 111.06(1)(d), Wis. Stats.

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

ORDER 1/

IT IS ORDERED that Zien Heating and Air Conditioning, Inc., its officers and agents shall immediately:

1. Cease and desist from refusing to implement decisions reached by a tribunal having competent jurisdiction pursuant to the grievance procedure of the "Inside Wiremen Agreement".
2. Cease and desist from refusing to provide relevant information upon request by Complainant Union.
3. Take the following affirmative action, which the Examiner finds will effectuate the purposes and policies of the Wisconsin Employment Peace Act:
 - a. Pay to Complainant Union on behalf of Wesley Hunter the sum of \$195.68.
 - b. Provide Complainant Union with an opportunity to examine, during normal business hours, any and all records bearing on the assignment to persons other than members of Complainant Union of electrical work.
 - c. Notify the Wisconsin Employment Relations Commission in writing within 20 days of the date of service of this Order as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 12th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

ZIEN HEATING AND AIR CONDITIONING, INC.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER

Upon first being notified of the impending hearing in this matter, the Company advised the undersigned Examiner that it would not attend the hearing, and its May 26, 1990 letter referred to in Finding of Fact 9 was the statement in support of its position which Barson indicated he would file instead of attending the hearing. At the hearing, the evidence introduced was primarily

documentary in nature, and in all relevant aspects is reproduced in the Findings. As this matter was tried ex parte, the findings above contain virtually the entire record in the proceeding, including all of Respondent's relevant arguments. The normal division of a memorandum such as this into sections relating to the background, parties' positions and analysis is therefore unwarranted in this case.

Two facts predominate in this matter. The first is that the Company has steadfastly refused to take part in any of the proceedings initiated by Complainant Union in pursuit of its claims. The second is that according to the probative and undisputed evidence received at the hearing, the Company is, in fact, a signatory to the "Inside Wiremen Agreement" and has by the terms of that Agreement agreed to be represented by N.E.C.A. Inc.

It therefore avails the Company little that it has maintained throughout this and related proceedings that the dispute is fundamentally a dispute between Complainant Union and the plumbers and steamfitters union. The relevant facts are that the Company was the recipient of a properly filed grievance filed against it, not against the plumbers; that pursuant to its Agreement it was represented in the grievance proceeding by the Employer Association N.E.C.A. Inc.; that the Company failed to appear at the grievance meeting to argue its case or present evidence in support thereof; and that N.E.C.A. Inc. and Complainant Union thereupon agreed upon a disposition of the grievance. The Company's subsequent refusal to honor that agreement can be seen as both a violation of contract under Sec. 111.06(1)(f), 2/ and as a violation of the duty to recognize "as conclusive . . . the final determination . . . of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted" under Sec. 111.06(1)(g). 3/ There is nothing in any of the Company's submissions to indicate that N.E.C.A. Inc. was not the Company's representative for purposes of the grievance procedure under the "Inside Wiremen Agreement". The fact that the Company might have preferred to be represented by the Plumbing and Mechanical Contractors' Association is irrelevant under the Agreement involved here.

In turn, the Company has clearly failed to honor the determination of amounts due, again a matter agreed upon by the Union and the Company's own representative. It is possible that the amount assessed against the Company is in error, or that the Company did not, in fact, employ a steamfitter to do an electrician's work. But the proper place for the Company to have made that contention would be in the grievance procedure provided for by the collective bargaining agreement it signed. Having ignored all attempts by the Union to obtain its participation in that procedure, the Company now stands in default of the results.

Similarly, I find that the Company is obligated to provide the information sought by the Union concerning possible additional violations of its Agreement with Complainant. While the Company supplied as part of its documentation a letter from the regional office of the National Labor Relations Board, in which the acting regional director declined to issue a complaint as to a parallel allegation, the terms of that letter clearly indicate that the acting regional director anticipated an early and voluntary resolution of the information issue. The subsequent conduct of the Company makes clear that no information was, in the event, forthcoming; and I find that in view of the Company's past actions with respect to this matter, the Union is entitled to full disclosure of all relevant information under long-standing and well-known principles of good faith bargaining. 4/

Dated at Madison, Wisconsin this 12th day of October, 1990.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Christopher Honeyman, Examiner

2/ See Bay Shipbuilding Corp., Dec. No. 19957-B, 19958-B (WERC, 4/83).

3/ See Giraffe Electric, Inc., Dec. No. 16513-A, D, E (WERC, 12/80).

4/ See, for instance, Frank Carmichael d/b/a Old Market Square Theater, Dec. No. 22243-B, 22244-B (WERC, 6/85).