STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95, AFL-CIO Complainant, vs. THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, THE GREATER FOX RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS AND THE WISCONSIN RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS AND THEIR AGENTS, Respondents.	Case 3 No. 42838 Ce-2089 Decision No. 26527-B

Appearances:

Mr. Sam Froiland, Business Representative, 111 East Jackson Street, Wisconsin Rapids, Wisconsin 54494, appearing on behalf of Office & Professional Employees International Union, Local 95, AFL-CIO.

Mr. Gerry M. Miller, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of the United Brotherhood of Carpenters and Joiners and on behalf of the Greater Fox River Valley District Council of Carpenters.

Mr. Philipp Cohrs, W4237 County Highway G, Merrill, Wisconsin 54452, appearing on behalf of the Wisconsin River Valley District Council of Carpenters.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 11, 1990, I issued Decision No. 26527-A, which denied motions to dismiss filed by the United Brotherhood of Carpenters and Joiners (UBC) and by the Greater Fox River Valley District Council of Carpenters (GFRVDC), and which ordered Michael Salmon, Business Agent, OPEIU, Local 95 to make his complaint of unfair labor practices more definite and certain. On August 2, 1990, Salmon filed an amended complaint with the Wisconsin Employment Relations Commission (Commission). On August 8, 1990, the GFRVDC filed an answer to the amended complaint. That answer included the following four affirmative defenses:

FIRST DEFENSE

> The amended complaint and/or clarification fails to state a claim upon which relief can be granted against the GFRVDC and its "agents" in that this respondent at no time had, assumed or succeeded to any collective bargaining agreement signed by WRVDC and Local 95.

SECOND DEFENSE

> The Commission lacks subject matter jurisdiction over the allegations of the amended complaint and/or clarification in that the GFRVDC is an employer engaged in an industry affecting commerce within the meaning of the federal labor statutes and subject to the exclusive jurisdiction of the National Labor Relations Board with respect to any duty to bargain collectively on behalf of its employees.

THIRD DEFENSE

> Enforcement of the arbitration provisions of the WRVDC's collective bargaining agreement insofar as they relate to claims under the posthumously and self-servingly negotiated provisions of Article XV and XVI would violate well defined and overriding public policies of the State of Wisconsin and the United States of America.

FOURTH DEFENSE

> Allegations in the complaint, amended complaint and/or clarification relating to actions of any respondent more than one year prior to the filing and service of the initial pleading in this proceeding are barred by the applicable statute of limitations.

Following the filing of this answer, informal attempts were made to schedule hearing on the matter. On September 13, 1990, Gerry M. Miller formally advised the Commission that "this firm has recently been retained to represent the United Brotherhood of Carpenters & Joiners of America in addition to the Greater Fox River Valley District Council." In a letter dated September 26, 1990, I confirmed that attempts to schedule the hearing had been suspended because "settlement discussions have been undertaken." The discussions proved fruitless, and hearing on the matter was conducted in Wisconsin Rapids, Wisconsin, on October 26, 1990. At that hearing, Sam Froiland stated that he had succeeded Michael Salmon as Business Agent for the Office & Professional Employees International Union, Local 95, AFL-CIO, and that Local 95, not Michael Salmon, was the party in interest to this matter. A transcript of the hearing was provided to the Commission on November 12, 1990. The parties filed a brief or waived the right to file a brief by December 10, 1990. On January 8, 1991, the parties submitted an additional exhibit into the evidentiary record.

FINDINGS OF FACT

1. Office & Professional Employees Union, Local 95, AFL-CIO, referred to below as Local 95, is a labor organization which maintains its offices at 111 East Jackson Street, Wisconsin Rapids, Wisconsin 54494.

2. The United Brotherhood of Carpenters and Joiners of America, referred to below as the UBC, is a labor organization which maintains its offices at 101 Constitution Avenue, N.W., Washington, D.C. 20001.

3. The Greater Fox River Valley District Council of Carpenters, referred to below as the GFRVDC, is a labor organization which maintains its offices at 2845 County Road JJ, Neenah, Wisconsin 54956, and which, prior to the restructuring detailed below, was known as the Fox River Valley District Council of Carpenters (FRVDC).

4. The Wisconsin River Valley District Council of Carpenters, referred to below as the WRVDC, was, as is more fully detailed below, a labor organization which maintained an office at 617 North Third Avenue, Wausau, Wisconsin 54401, until March 19, 1989. At all times relevant to this proceeding Philipp Cohrs, W4237 County Highway G, Merrill, Wisconsin 54452, served as Secretary-Treasurer and Business Manager of the WRVDC.

5. The UBC is an international union which, through its constitution, is vested with certain powers. Among those powers are the following, which are set forth in Section 6 of the "Constitution and Laws" of the UBC:

> A. Section 6. The jurisdiction of the United Brotherhood of Carpenters and Joiners of America shall include all branches of the Carpenter and Joiner trade. In it shall be vested the power through the International Body to establish and charter subordinate Local and Auxiliary Unions, District, State and Provincial Councils in all branches of the trade, and its mandates must be observed and obeyed at all times.
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> . . .
>
> The United Brotherhood is empowered, upon agreement of the Local Unions and Councils directly affected, or in the discretion of the General President subject to appeal to the General Executive Board, where the General President finds that it is in the best interests of the United Brotherhood and its members, locally or at large, to establish or dissolve any Local Union or Council, to merge or consolidate Local Unions or Councils. . . .

District councils afford services, such as the negotiation of labor agreements, to local unions within the jurisdiction of a district council. In Wisconsin, the jurisdiction of a district council typically is defined by county. Prior

to January of 1987, the WRVDC and the FRVDC served different counties within northern Wisconsin. Neither district council served local unions in Eau Claire.

6. In January of 1987 the UBC issued a Notice of Hearing concerning a proposed restructuring of subordinate bodies in northern Wisconsin. Hearing on the proposed restructuring was conducted in February of 1987 by a committee appointed by the General President of the UBC. That committee ultimately issued a report of its findings. Among those findings were the following:

> 8. That the Charter of the Wisconsin River Valley District Council be removed and that those counties and Local Unions formerly under the jurisdiction of the Wisconsin River Valley District Council, along with Local Union 1074, Eau Claire, be affiliated with the Fox River Valley District Council.
>
> 9. That upon expiration of existing agreements of those areas in Wisconsin under the jurisdiction of the Twin Cities District Council, Duluth Local Union 361 and the Cloverland District Council be under the jurisdiction of the Fox River Valley District Council.
>
> 10. Because of the mobility of our members and signatory contractors in this northern area of Wisconsin, the Fox River Valley District Council continue to negotiate District Council wide agreements in the Greater Wisconsin bargaining area.
>
> 11. That the Fox River Valley District Council establish a satellite office to service their members in the Central and Western areas of the district council, and that a central location for meetings at the district council be mutually established.

These findings were accepted by the UBC Executive Board and implemented by the UBC General President by April 15, 1987. In June of 1987, representatives of the UBC and of the FRVDC took various actions to dissolve the WRVDC. Among such actions, Ronald Kopp, the Business Manager of the FRVDC, issued a letter, dated June 23, 1987, to Cindy Siikarla and to Julie Rajek, each of whom served as a clerical employe in the offices of the WRVDC. Each letter reads thus:

> As you know, the International Union dissolved the Wisconsin River Valley District Council effective June 30, 1987.
>
> The Fox River Valley District Council will be covering that area since Local Unions 310, 646, 804, will be affiliated with the Fox River Valley District Council. We have no obligation to employ former Wisconsin River Valley District Council employees. However, if you wish to apply for employment with us, we will certainly consider your application.
>
> I want to thank each of you personally for your services to the Carpenters Union, and if we can be of any assistance in the future, as a reference or whatever, please don't hesitate to contact us.

Rajek threw the letter away, because she did not regard the FRVDC as her employer. Kopp also issued a letter, dated June 23, 1987, to Cohrs and to Clifford Bembenek, who was then employed by the WRVDC as an Assistant Business Representative. Each of those letters reads thus:

> Effective July 1, 1987, you will be temporarily employed as a Business Representative under the wages and conditions of employment set forth by the Fox River Valley District Council of Carpenters. If you desire to continue to be employed, you will be required to make application to our screening committee. Employment ultimately is up to the delegates of the Fox River Valley District Council.

7. Local 1074 of Eau Claire, Wisconsin became part of the FRVDC pursuant to the April, 1987, directive. The Business Representative who had served Local 1074 prior to July 1, 1987, went onto the payroll of the FRVDC effective July 1, 1987. The WRVDC did not, however, comply with the directives of the UBC, and continued to do business without regard to the April, 1987, directive. Through a complaint dated July 1, 1987, and filed with the United States District Court for the Western District of Wisconsin, the WRVDC together with Cohrs, Bembenek, and various other individuals initiated an action which sought, among other things, to vacate the findings noted in Finding of Fact 6 above. In January of 1988, counsel for the WRVDC and for the UBC executed a stipulation which served as the basis for the following "ORDER" issued by the

District Court on January 19, 1988:

IT IS HEREBY ORDERED as follows:

> 1. The UBC shall reopen proceedings under Section 6-A of the Constitution, including conducting a proper hearing de novo on reorganization and restructuring involving affiliated bodies in the State of Wisconsin, at which the plaintiffs and other interested members and officials may appear, testify, present evidence, proposals, views, arguments and opinions.
>
> 2. Pending completion of the procedures set forth in paragraph 1 above and thereafter until a final determination regarding reorganization and restructuring is issued by the General President, the UBC shall refrain from implementing or enforcing paragraphs 8 and 10 of the Report of Committee adopted by the UBC and referred to in a letter by the General President Patrick J. Campbell to Thomas J. Hanahan dated April 15, 1987 regarding the implementation of said Report (a copy of which is attached to Defendants' Answer and Counterclaim in this action), insofar as applicable to the Wisconsin River Valley District Council.
>
> 3. Nothing herein shall be construed as an admission of liability or wrongdoing by any party hereto.

. . .

In March of 1988 the UBC issued a Notice of Hearing on the proposed restructuring, and in May of 1988, the UBC conducted hearings on the matter. On July 21, 1988, the General President of the UBC issued a decision which essentially affirmed the April 15, 1987, decision, thus "withdrawing the Charter of the Wisconsin River Valley District Council, dissolving that body, and transferring the Counties and Locals formerly encompassed by that Council into an expanded Fox River Valley District Council which will be rechartered accordingly." Cohrs appealed this decision to the Executive Board of the UBC. In a decision dated November 4, 1988, the Executive Board denied Cohrs' appeal. The decision of the Executive Board reads thus:

> The General Executive Board considered an appeal filed by the Wisconsin River Valley District Council with respect to the General President's decision dated July 21, 1988, directing a merger with the Fox River Valley District Council.
>
> Based on hearings held on May 17-18, 1988, the General President directed restructuring in the State of Wisconsin pursuant to Section 6-A of the Constitution of Laws. The General President's decision, among other things, determined that it was in the best interests of the United Brotherhood and its membership that the Wisconsin River Valley District Council be merged into the Fox River Valley District Council.
>
> An appeal was filed by the Wisconsin River Valley District Council, objecting to the merger and dissolution of the Wisconsin River Valley District Council.
>
> The General Executive Board reviewed this appeal, together with the information relied on by the General President in making his decision, and after a full discussion of the question voted without dissent to sustain the decision of the General President and to dismiss the appeal. The Board found that the action of the General President was in accord with Section 6-A of the Constitution and Laws, and that ample opportunity was provided to the Wisconsin River Valley District Council to appear and present evidence at the hearings concerning restructuring.

. . .

The WRVDC continued to operate its offices, and did not comply with the November 4, 1988, Executive Board decision.

8. On March 19, 1989, over Cohrs' objection, the Wausau office of the WRVDC was closed, and the documents maintained at that office were taken by the GFRVDC. Through a complaint dated March 27, 1989, and filed with the United

States District Court for the Western District of Wisconsin, the UBC initiated an action which sought, among other things, a declaratory judgement upholding the effect of the July 21 and November 4, 1988, UBC directives; an order enjoining Cohrs from purporting to act in any capacity on behalf of the WRVDC; and an order requiring certain financial institutions to render an accounting for the assets of the WRVDC. In a letter dated April 10, 1989, Kopp requested that utility service to the WRVDC's Wausau office be discontinued effective April 30, 1989. By June of 1989, counsel for the UBC and Cohrs executed a stipulation which became the basis for a District Court Order dated June 23, 1989. The stipulation, in relevant part, reads thus:

> (1) Pursuant to UBC directives, the Wisconsin River Valley District Council (WRVDC) was dissolved, its charter withdrawn, its counties and local unions transferred into an expanded Fox River Valley District Council (FRVDC), and its property, books, charter and funds became the property of the UBC for future transfer to the FRVDC. The parties agree that the effective date on which the WRVDC in fact ceased operations was March 19, 1989 . . .

The assets of the WRVDC were eventually turned over to the District Court. Creditor claims against the WRVDC were paid from these assets and the balance remaining was paid to the GFRVDC. Neither Local 95 nor Rajek made any claim on those assets.

9. As a result of the restructuring summarized above, the UBC chartered three district councils in Wisconsin: The Southwest Wisconsin District Council; the Milwaukee District Council and the GFRVDC. The GFRVDC maintains, in addition to its Neenah offices, satellite offices in Green Bay, Sheboygan, Oshkosh, Eau Claire, Wausau and Wisconsin Rapids. The FRVDC employed, and the GFRVDC employs, two clerical employes. The only other clerical employe employed by the GFRVDC works at the Eau Claire office, under the direction of Guy Swan, a representative of the UBC Apprenticeship Fund. After March 19, 1989, the services provided to local union members by the WRVDC were provided by the GFRVDC.

10. Julie Rajek is Cohrs' daughter, and worked on a part-time or full-time basis as a clerical employe of the WRVDC for a number of years prior to March 19, 1989. While a WRVDC employe, Rajek performed duties as directed by Cohrs, Bembenek and Swan. She was represented by Local 95 while a WRVDC employe. Siikarla was also represented by Local 95 while she worked for the WRVDC, but she left the employ of the WRVDC sometime in the fall of 1987. Cohrs and Swan hired Rajek. Cohrs set her hours of work, and made her a full-time employe approximately one and one-half years prior to March 19, 1989. The WRVDC issued Rajek's paychecks; paid her retirement benefit; and paid the Unemployment Compensation, Worker's Compensation and Social Security contributions required on her behalf.

11. Local 95 negotiated a series of collective bargaining agreements on Rajek's behalf. In each case, Cohrs represented the WRVDC. Prior to December of 1988, no agreement purporting to cover Rajek contained any provision providing for severance pay. Sometime in December of 1988, Cohrs met with Michael Salmon, a Business Agent for Local 95, to discuss a collective bargaining agreement to cover Rajek. Neither Cohrs nor Rajek specifically informed Salmon that the UBC had acted to dissolve the WRVDC. At some point, Cohrs and Salmon signed a document which contains the following provisions:

> A G R E E M E N T
>
> AGREEMENT is entered into this 1st of January, 1987 between the OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 95, hereinafter referred to as the "UNION" and WISCONSIN RIVER VALLEY DISTRICT COUNCIL OF CARPENTERS AND JOINERS, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, its successors or assigns, hereinafter known as the "EMPLOYER".
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> . . .
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> ARTICLE XI. GRIEVANCE AND ARBITRATION
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> . . .
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> ARTICLE XV. NOTICE OF TERMINATION
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> If for any reason, other than just cause disciplinary reasons, the employment of the employees covered by this agreement is to be terminated, such employees shall be given no less than twelve (12) months prior notice of said termination. Full-time employment (forty hours per week) at rates no less than those specified in Appendix A shall continue during this twelve (12) month period. If it is necessary for the

> Employer to provide alternative employment, such employment must be within the Wausau area. If no, or insufficient, notice is given or suitable alternative employment is not found, the employees will be given pro-rated severence (sic) pay, based on the difference between twelve (12) months full-time employment at the rates specified in Appendix A and whatever notice or employment is actually provided.
>
> ARTICLE XVI. SUCCESSORS
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> In the event the Employer shall, by merger, consolidation, sale of assets, lease, franchise, or by other means, enter into an agreement with another firm, entity, or individual which, in whole or in part, affects the existing appropriate collective bargaining unit, then such successor firm entity, or individual shall be bound by each and every provision of this Agreement. The Employer shall have an affirmative duty to call this provision of the Agreement to the attention of any firm or individual with which it seeks to make such an agreement as aforementioned.
>
> ARTICLE XVII. DURATION
>
> This Agreement shall be in force from December 1, 1988 to November 30, 1990.

Cohrs did not consult with the UBC, the GFRVDC or the delegates to the WRVDC prior to the execution of this document. Rajek can not recall if she specifically asked Salmon to negotiate a provision providing severance pay. Cohrs can not recall if he informed the delegates to the WRVDC of the provisions of Article XV of that document. Prior to the execution of the 1988-90 agreement, Local 95 and Cohrs had negotiated an agreement in effect, by its terms, "from JANUARY 1, 1988 TO DECEMBER 31, 1988." That agreement did not include the provision entitled "ARTICLE XV. NOTICE OF TERMINATION" included in the 1988-90 agreement.

12. In an undated letter to Kopp, Salmon stated:

> Please find enclosed a copy of the contract between OPEIU Local 95 and the Wisconsin River Valley District Carpenters. I would draw your attention to Articles XV and XVI.
>
> While I don't feel I have a full understanding of what has occurred with regard to the WRVDC, whether it has been consolidated or merged. My opinion and the opinion of Local 95 and its legal counsel is that we have negotiated, in good faith, a valid and binding contract on behalf of our member, Julie Rajek. We have every expectation that the contract will be honored.

Gerry Miller, counsel for the GFRVDC, responded to Salmon's letter in a letter dated April 19, 1989.

In a letter to Miller dated May 11, 1989, Salmon stated:

> In response to your request for information regarding negotiation and ratification of the contract between Local 95 and the Wisconsin River Valley District Council, according to our records the negotiations took place on December 7, 1988. Negotiations were conducted by Mr. Philipp W. Cohrs, Secretary/Treasurer-Business Manager of the WRVDC and myself, at the WRVDC offices in Wausau. At that time, Ms. Rajek informed me she was satisfied with the terms of the agreement. Formal signing of the agreement occurred after that date.

In a letter to Kopp dated July 26, 1989, Salmon stated:

> You will find enclosed a partial copy of the Stipulation and Order issued by U.S. District Judge Barbara Crabb, in Case No. 89 C 0306 C. Of relevance, here, is the stipulation that the WRVDC did not cease operations until March 19, 1989, well after Julie Rajek's contract was ratified. Accordingly, as you have refused to honor your contract with Local 95, OPEIU, we request that the Wisconsin Employment Relations Commission be contacted for the purpose of arbitrating this dispute.

Kopp responded in a letter to Salmon dated July 30, 1989, which reads thus:

> It is the position of the Greater Fox River Valley District Council that it is not bound by a collective bargaining agreement with your local union. Therefore, this labor organization is not legally obligated to arbitrate the dispute to which your July 26 letter refers. Therefore, we must decline your request that we agree to have the WERC arbitrate this matter.

13. On July 23, 1990, Local 95 filed with Region 30 of the National Labor Relations Board a charge alleging that the GFRVDC had violated Sections 8(a)(1) and (5) of the National Labor Relations Act by refusing to "bargain the effects of (Rajek's) termination" . . . and by refusing "to submit the matter to binding arbitration as called for in the collective bargaining agreement." Joseph A. Szabo, Regional Director, informed Salmon in a letter dated July 25, 1990, that Region 30 would not issue a complaint in the matter because:

> Your charge alleges that the Employer has refused to bargain where the unit involved consists of one employee. The Board is not empowered to require bargaining in a unit composed of only one employee, Foreign Car Center Inc., 129 NLRB 319. Therefore, I would be precluded from issuing a complaint even if an investigation established a violation of Section 8(a)(5) of the Act.

14. Salmon filed a complaint of unfair labor practices with the Commission on September 15, 1989.

15. Neither the UBC nor the GFRVDC exercised control over the WRVDC or Cohrs from the issuance of the initial restructuring order through December, 1988. Neither the UBC nor the GFRVDC authorized Cohrs or the WRVDC to act on their behalf at any time subsequent to the initial restructuring order. Cohrs and the WRVDC were not, at the time Cohrs and Salmon negotiated the 1988-90 agreement noted in Finding of Fact 11, agents of either the UBC or the GFRVDC. Rajek did not seek to be hired, and was never hired, by either the UBC or the GFRVDC. Neither the UBC nor the GFRVDC is a successor employer to the WRVDC.

CONCLUSIONS OF LAW

1. The complaint filed by Local 95 on September 15, 1989, as subsequently amended, is not barred by the application of Sec. 111.07(14), Stats.

2. The UBC, the GFRVDC, and the WRVDC until March 19, 1989, each acted as an "employer" within the meaning of Sec. 111.02(7), Stats.

3. While employed by the WRVDC, Rajek was an "employe" within the meaning of Sec. 111.02(6), Stats.

4. The WRVDC was Rajek's "employer in fact" within the meaning of Sec. 111.02(7), Stats.

5. Neither the UBC nor the GFRVDC can be considered a successor to the duty of the WRVDC to bargain with Local 95 concerning the terms and conditions of Rajek's employment.

6. Neither the UBC nor the GFRVDC can be considered parties to the labor agreements between Local 95 and the WRVDC.

7. Neither the UBC nor the GFRVDC has a duty to bargain with Local 95 regarding Rajek's termination. Neither the UBC nor the GFRVDC has a duty to arbitrate grievances arising under the terms of a labor agreement negotiated by the WRVDC and Local 95. Neither the UBC nor the GFRVDC committed any unfair labor practice within the meaning of Secs. 111.06(1)(d) or (f), Stats., by refusing to negotiate with Local 95 regarding Rajek's termination or by refusing to submit disputes concerning that termination to grievance arbitration.

ORDER 1/

The complaint filed by Local 95 on September 15, 1989, as subsequently amended, is dismissed.

Dated at Madison, Wisconsin, this 16th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By_____
Richard B. McLaughlin, 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.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

The complaint, as amended, alleges that the WRVDC, the GFRVDC and the UBC have committed violations of Secs. 111.06(1)(d) and (f), Stats. Although Local 95 has named the WRVDC as a respondent, it has restricted its claims of liability to the UBC and the GFRVDC. Thus, the allegations of Local 95 as stated in its amended complaint of August 2, 1990, and the affirmative defenses asserted by the UBC and the GFRVDC in their August 8, 1990, answer pose the issues requiring discussion here.

THE PARTIES' POSITIONS

Local 95

Local 95 states the issues posed by its complaint thus:

1. Did the defendant through its agent, Phil Cohrs, become a legal party to the collective bargaining agreement negotiated with Local 95 to cover the period 12/1/88 to 11/30/90?, and if so,

2. Is the defendant required to observe the arbitration provisions of the collective bargaining agreement in effect as of 12/1/90?

Local 95 initially contends that Rajek was terminated as an employe of the WRVDC on March 19, 1989. Since the GFRVDC has refused to honor any provision of the collective bargaining agreement covering Rajek, it follows, according to Local 95, that the GFRVDC has committed unfair labor practices. This conclusion is necessary, Local 95 contends, because the GFRVDC is the successor to the WRVDC, and thus bound to the notice of termination, severance pay, and arbitration provisions of that agreement.

Local 95 contends that the record establishes that "Cohrs was acting with the authority of the WRVDC at the time the contract was executed", and that the WRVDC continued in existence until March 19, 1989. Since "the contract negotiated for Ms. Rajek was negotiated in early December of 1988 to take effect 12/1/88", it follows, Local 95 urges, that "any agreements authorized by Mr. Cohrs as agent for WRVDC during 1988 would be legitimate and binding."

Local 95 asserts that the record establishes that the GFRVDC continued "to conduct the business that had previously been conducted by the (WRVDC)." From this, Local 95 concludes that the GFRVDC is the successor to the WRVDC. Since the UBC effected the reorganization which cost Rajek her job, and since the GFRVDC and the WRVDC "act as subsidiaries of the larger body, the UBC", it follows, according to Local 95, that the "GFRVDC operated as the alter ego of (the) WRVDC". Even if the GFRVDC was not obligated to honor the labor agreement covering Rajek, it and the UBC were bound as a matter of law to bargain with Local 95 before changing any conditions of Rajek's employment.

As the remedy appropriate to the unfair labor practices established by the record, Local 95 asks that "the GFRVDC shall agree to bring this matter to arbitration before the W.E.R.C.".

The UBC and the GFRVDC

After an extensive review of the record, the GFRVDC asserts that it can not be considered the successor of the WRVDC and thus cannot be required to arbitrate the provisions of the WRVDC contract covering Rajek. Contending that the Commission must apply federal successorship law, the GFRVDC asserts that federal law demands the application of the "substantial continuity" test which requires a review of the "totality of the circumstances of a given situation". Determinative among the many factors to be applied in such a review, according to the GFRVDC, is "whether the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor". Because the GFRVDC has not hired any of the employes of the WRVDC, it follows, according to the GFRVDC, that there can be no finding of successorship.

Even if this factor were ignored, the GFRVDC contends that other factors establish it cannot be considered a successor to the WRVDC. Specifically, the GFRVDC asserts that "the location of operations, jurisdictional areas covered by the operations, the supervisors and management, and the number of employees" establish that "the fundamental structure and operation of GFRVDC differs from that of WRVDC".

Beyond this, the GFRVDC argues that even if it was a successor to the

WRVDC, it would not be bound by the alleged agreement between the WRVDC and Local 95. More specifically, the GFRVDC notes that "(i)n order for a predecessor's contract to bind a successor, there must be clear evidence showing actual or constructive consent to be bound." According to the GFRVDC, there is no such evidence in the present record. The record, according to the GFRVDC, actually offers reason to question whether any agreement at all was reached between the WRVDC and Local 95.

Even if the GFRVDC was considered bound to the alleged agreement, the GFRVDC asserts that Article XV of that agreement could not be enforced against it. Specifically, the GFRVDC contends that Cohrs had no authority to act on behalf of the WRVDC in November of 1988, since that entity had been closed. Beyond this, the GFRVDC asserts that neither it nor the UBC afforded Cohrs any authority to act on their behalf. Even if such authority was implied, the GFRVDC asserts that the law binds an agent to act on behalf of a principal, and denies the agent the power to ignore or defeat the principal's interests. The self-dealing implicit in Article XV, according to the GFRVDC, renders the article unenforceable. Beyond this, the GFRVDC contends that the provision is contrary to the "explicit public policy" set for in 29 USC s. 501(a), and is unenforceable as a matter of public policy.

The GFRVDC then contends that "(t)here is no duty to bargain where one party has a conflict of interest." Contending that Cohrs was furthering his family's interests against those of the dues-paying members of the WRVDC and the GFRVDC, the GFRVDC concludes that it was under no enforceable duty to bargain with Local 95.

Beyond this, the UBC asserts that a local union "is a legal entity apart from its international" and from this concludes that the UBC cannot be held liable for a local's responsibilities. Since, according to the UBC, "ordinary rules of agency (establish that the) WRVDC had neither apparent nor actual agency authority to bind the (UBC) . . . ", it necessarily follows that the UBC cannot be held liable for the contract between Local 95 and the WRVDC. Even if such authority was implied, the GFRVDC asserts that the UBC cannot be considered the "employer in fact" of Rajek within the meaning of Sec. 111.02(7), Stats. The UBC and the GFRVDC conclude that the complaint must be dismissed.

DISCUSSION

The Alleged Violation of Sec. 111.06(1)(d), Stats.

As detailed in Dec. No. 26257-A, this claim is within the Commission's jurisdiction because the NLRB has declined to assert its jurisdiction over the one-person unit at issue here. Although the WEPA becomes the law governing this point, 2/ standards established in federal law must be applied to the merits of this dispute due to the unique circumstances posed here. Issues of successorship underlie both the Sec. 111.06(1)(d) and (f), Stats., claims. As detailed in Dec. No. 26257-A, federal law governs the Sec. 111.06(1)(f), Stats., claim. The Supreme Court, in Howard Johnson v. Detroit Joint Executive Board, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, has noted:

> It would be plainly inconsistent . . . to say that the basic policies found controlling in an unfair labor practice context may be disregarded . . . in a suit under (Section) 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the Union presses its claims. 3/

To avoid this inconsistency, federal law governing successorship will be applied to the merits of both claims.

Before addressing the Union's Sec. 111.06(1)(d), Stats., claim, it is necessary to address the claim of the UBC and the GFRVDC that the claim is not timely. Sec. 111.07(14), Stats., states "the right of any person to proceed under this section shall not extend beyond one year from the date of the

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2/ The NLRA is silent on whether a state agency is to apply state or federal law when acting under Section 14(c)(2). States have typically applied state law: See, for example, Kempf v. Carpenters Local 1273, 229 Ore. 337, 49 LRRM 2637 (1961); and Riker v. New York State Labor Relations Board, 51 LRRM 2558 (NY SupCt, 1962), or a combination of state and federal law. Commentators have viewed either approach to be consistent with the legislative history of Section 14(c)(2): See, for example, Gorman, Labor Law - Basic Text, (West, 1976) at 26; and Aaron, The Labor-Management Reporting and Disclosure Act of 1959, 73 HLR 1086, 1098-1099, (1960).

3/ 417 US 249, 256, 86 LRRM 2449, 2451 (1974).

specific act or unfair labor practice alleged." Whether the dissolution of the WRVDC and the alleged successorship of the UBC and the GFRVDC is dated from March of 1989 or November of 1988, it is apparent that the alleged refusal to bargain the effects of that dissolution falls within a one year period preceding the filing of the September 15, 1989, complaint which initiated this matter.

It is now necessary to address the merits of the amended complaint. The duty to bargain imposed by Sec. 111.06(1)(d), Stats., extends to an "employer", which is defined at Sec. 111.02(7), Stats. This definition extends to "any labor organization or anyone acting in behalf of such organization" if the labor organization "is acting as an employer in fact."

The record will not support a conclusion that the UBC or the GFRVDC has ever acted as the "employer in fact" of Rajek. Cohrs and Swan hired Rajek; Cohrs moved her into a full-time position; set her work schedule; and, with Swan, assigned her duties. He negotiated each contract covering her conditions of employment. At no time did he consult with the UBC or the GFRVDC regarding such matters. When Kopp sent Rajek the June 23, 1987, letter advising her of the dissolution of the WRVDC, and informing her that she would have to apply to the GFRVDC for employment, Rajek threw the letter away because:

> It was from the Fox River Valley. I was not employed by them. I was employed by Wisconsin River Valley. It meant nothing to me. 4/

Thus, the record will not support a conclusion that the UBC or the GFRVDC ever directly functioned as Rajek's "employer in fact."

Nor will the record support a conclusion that Cohrs or the WRVDC acted on behalf of the UBC or the GFRVDC to bind them as Rajek's employer. Sec. 111.02(7), Stats., provides that the term "employer" can also encompass "any person acting on behalf of an employer within the scope of his authority,

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4/ Transcript (Tr.) at 78.

express or implied". 5/ The record will not, however, support a conclusion that Cohrs or the WRVDC acted on behalf of either the UBC or the GFRVDC. Initially, it should be noted that an International cannot be presumed, as a matter of law, to be responsible for every act of a local union. 6/ More to the point here, the record contains no persuasive evidence that the UBC or the GFRVDC ever authorized Cohrs or the WRVDC to employ Rajek on their behalf. Rather, the record establishes that Cohrs neither sought nor received authorization from the UBC or the GFRVDC regarding employing Rajek or regarding the conditions of her employment. Nor will the record support an implication of such authority. Cohrs and the WRVDC actively opposed every restructuring effort undertaken by the UBC from April of 1987 through June of 1989.

Local 95 has contended that the GFRVDC must be considered the "successor" to the WRVDC, which has succeeded to the WRVDC's duty to bargain with Local 95. The application of this body of law, developed primarily in response to commercial transactions involving unaffiliated business entities, is troublesome. However, given the conclusion that the UBC, the GFRVDC and the WRVDC can not be considered a single entity, the application of this law is inevitable. In Fall River Dyeing & Finishing Corp. v. NLRB, the Court noted that the relevant analysis "is primarily factual in nature and is based on the totality of the circumstances of a given situation." 7/ The goal of the analysis is to determine if the new employer has "acquired substantial assets of its predecessor and continued, without . . . substantial change, the predecessor's business operations." 8/ The Court stated the factors defining this "substantial continuity" analysis thus:

> (W)hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers. 9/

It can be noted that the GFRVDC serves the same members the WRVDC did, and provides the same type of services. However, Rajek did not apply to the GFRVDC for employment, and the GFRVDC has not employed her. Rather, the restructuring eliminated the WRVDC, and provided the clerical services once provided through that office through the GFRVDC and the Eau Claire offices. There is, then, no continuity in working conditions. Since "the threshold criterion in determining successorship is the continuity of the work force" 10/, and since no such continuity exists here, no finding of successorship can be made.

Even if the GFRVDC or the UBC could be considered a successor to the WRVDC, no violation of the duty to bargain has been demonstrated here. A demand to bargain is necessary to trigger the bargaining obligation as a matter of NLRB 11/ and Commission 12/ case law. No such demand has been demonstrated

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5/ The NLRB has "uniformly held that determining whether someone acts as an agent under (the NLRA) requires applying common-law principles of agency." See Morris, The Developing Labor Law, (BNA, 1983). Whether or not this standard is the same as that envisioned by Sec. 111.02(7), Stats., is irrelevant here. Under no standard could Cohrs and the WRVDC be found agents of the UBC and the GFRVDC. Essential to a common law analysis would be mutual consent between a principal and an agent that the agent act on the principal's behalf, and control of the agent by the principal (See footnotes 14/, 15/ and accompanying text). Even assuming the UBC constitution is sufficient to establish the former factor (a dubious assumption, see authority cited at footnote 6/), the latter factor is not present on this record.

6/ See United Mine Workers of America v. Coronado Coal Company, 259 US 344 (1920); Coronado Coal Company v. United Mine Workers of America, 268 US 295 (1925); and American Steamship Company, 222 NLRB 196, 91 LRRM 1527 (1976).

7/ 482 US 27, 43; 125 LRRM 2441, 2447 (1987).

8/ Ibid., citing Golden State Bottling Co. v. NLRB., 414 US 168, 184, 84 LRRM 2839, 2845, (1973).

9/ Fall River, 482 US at 43, 125 LRRM at 2447.

10/ Morris, The Developing Labor Law, (BNA, 1983) at 726. Cf. to the Fifth Supplement (1989) at 357: "Continuity of the work force . . . remains a requirement for determining successorship. In no decision since Burns has the Board found successorship absent a finding of 'majority.'"

11/ See United States Lingerie Corp., 170 NLRB 750, 67 LRRM 1482 (1968).

12/ See Misercordia Hospital, Dec. No. 6931 (WERC, 11/64).

here. Rather, the case argued here focuses on the enforceability of the contract negotiated by Cohrs and Salmon. This is reflected in the amended complaint, as well as in Local 95's statement of the issues posed here. Except for a brief note in the charge filed by Local 95 with the NLRB, Local 95 has not demonstrated that it sought to bargain with either the GFRVDC or the UBC regarding Rajek's termination. In any event, the assertion that the agreement negotiated by Cohrs and Salmon covers the impact of the termination is, in essence, an acknowledgement that bargaining on this point has been waived. 13/ As noted above, the focus of the amended complaint is enforcement of the labor agreement, and it is necessary to address that point.

The Alleged Violation Of Sec. 111.06(1)(f), Stats.

As preface to addressing the merits of this claim, it should be noted that this aspect of the amended complaint can not be considered untimely filed. The "specific act or unfair labor practice alleged" by the amended complaint is the failure of the UBC and the GFRVDC to arbitrate Rajek's contractual claims. The amended complaint alleges that the agreement governing the dispute was in effect, by its terms, from December of 1988 until November of 1990. The complaint initiating this matter was filed while this agreement was, by its terms, in effect. The amended complaint, on this point, must be considered timely filed.

Contrary to the assertion of Local 95, Cohrs can not be considered the agent of the UBC or the GFRVDC. The agency relationship has been defined thus:

> (1) Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.
>
> (2) The one for whom action is to be taken is the principal.
>
> (3) The one who is to act is the agent. 14/

Essential to this relationship is the control of the agent by the principal.

> A principal has the right to control the conduct of the agent with respect to matters entrusted to him. 15/

Even assuming the Constitution of the UBC could be considered to establish such a relationship between the UBC and the WRVDC, the record demonstrates that the UBC terminated the relationship before Cohrs attempted to negotiate the collective bargaining agreement Local 95 seeks to enforce. As early as April of 1987, the UBC sought to exercise its authority to dissolve the WRVDC. Even assuming the January, 1988, stipulation issued by the District Court can be read to continue an agency relationship between the UBC and the WRVDC, that relationship was unequivocally terminated by Lucassen's July 21, 1988, decision affirming the dissolution of the WRVDC. Cohrs' appeal of that decision had been denied before he negotiated the labor agreement Local 95 seeks to enforce here. Control is essential to the agency relationship, and by no later than November 4, 1988, the UBC had unequivocally informed Cohrs that he could not act on their behalf.

Cohrs, on behalf of the WRVDC, and in defiance of the action of the UBC and its Executive Board, chose to negotiate a collective bargaining agreement with Salmon in December of 1988. At the time he did so, he was not acting as the agent of the UBC or of the GFRVDC.

The only other basis upon which the labor agreement could be considered binding on the UBC and the GFRVDC is if either of them can be considered a successor to the agreement. As discussed above, neither can be. John Wiley & Sons v. Livingston 16/ marks the most expansive view of the rights of employes of a merged business entity undertaken by the Court. In Wiley, the Court noted the policy basis for imposing on the successor the predecessor's obligation to arbitrate:

> Employees, and the union which represents them ordinarily do not take part in negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the well-being of the employes, whose advantage or disadvantage, potentially great,

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13/ See Metropolitan Edison Co. v. NLRB, 460 US 693, 112 LRRM 3265 (1983).

14/ Restatement, Second, Agency, Section 1 (American Law Institute, 1958).

15/ Ibid., Section 14.

16/ 376 US 543, 549, 55 LRRM 2769, 2772 (1964).

> will inevitably be incidental to the main considerations. The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength . . . of the contending forces,"

These considerations are not posed on this record. In Wiley, the Court acted to protect the interests of employes hired by the successor. Those interests were reflected in a labor agreement negotiated through good faith collective bargaining between the predecessor employer and a union.

This case does not involve employes hired by a successor or the enforcement of a collective bargaining agreement negotiated between parties asserting conflicting, but good-faith interests. In this case, both Rajek and Cohrs were aware that the UBC restructuring would dissolve the WRVDC. Whether or not Salmon understood this at the time the agreement was negotiated can not be determined on this record, since Salmon did not testify and neither Cohrs nor Rajek informed him of the underlying dispute. It is, however, apparent that the contract negotiated by Cohrs with Salmon was not an arms-length transaction between parties with adverse interests. Rather, the agreement was the end result of a bitter fight over the UBC-ordered restructuring, and an attempt on Cohrs' part to impose a substantial amount of severance pay on either the UBC, the GFRVDC, or both. That neither Cohrs nor Rajek could specifically recall the terms of the labor agreement preceding that at issue here reflects this. That none of the agreements preceding the 1988-90 agreement included the severance and notice of termination provisions at issue here also reflects this. That the 1988-90 agreement, which included the "NOTICE OF TERMINATION" provision was made effective during the term of an agreement which did not include the provision reflects this. Finally, that neither Local 95 nor Cohrs made any claim on the assets of the WRVDC reflects this. Whatever may be the merits of the underlying dispute between Cohrs, the UBC and the GFRVDC, that dispute can not serve as a basis to enforce the labor agreement asserted here. Whatever is said of the bargaining context to that agreement, it is apparent that the policy concerns articulated in Wiley do not apply.

In sum, Cohrs was not acting as the agent of the UBC or the GFRVDC when he negotiated the agreement sought to be enforced by Local 95 here. Beyond this, it can not be said that the UBC or the GFRVDC are successors to the WRVDC. It follows that neither the UBC nor the WRVDC can be found to be parties to the agreement negotiated by Cohrs and Salmon, and that neither the UBC nor the GFRVDC was under any obligation to arbitrate any dispute arising under that agreement.

Dated at Madison, Wisconsin, this 16th day of January, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Richard B. McLaughlin, Examiner