STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOCAL UNION 494, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,		
Complainant,	:	Case 1 No. 44561 Ce-2110
vs.	:	Decision No. 26660-A
T & J KOMP ELECTRIC,		
Respondent.		

Appearances:
Mr. John J. Brennan, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson Street, Room 600, P.O. Box 92099, Milwaukee, Wisconsin 53202, appearing on behalf of Local Union 494, International Brotherhood of Electrical Workers.
Mr. George E. Smith, Smith & Sarafiny, Attorneys at Law, 57 South Main Street, P.O. Box 219, Hartford, Wisconsin 53027-0219, appearing on behalf of T & J Komp Electric.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Local Union 494, International Brotherhood of Electrical Workers (IBEW), filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission on September 17, 1990, alleging that T & J Komp Electric had committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act (WEPA), Chapter 111 of the Wisconsin Statutes, by refusing to accept an arbitration award. On October 16, 1990, the Commission appointed James W. Engmann, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07, Stats. On October 31, 1990, T & J Komp Electric filed an answer with the Commission in which it denied that it had violated the collective bargaining agreement and in which it set forth two affirmative defenses. Hearing on said complaint was held on November 15, 1990, in West Bend, Wisconsin, at which time the parties were afforded the opportunity to enter evidence and to make arguments as they wished. Said hearing was transcribed, and a transcription of said hearing was received on November 29, 1990. The parties filed briefs, the last of which was received on January 24, 1991, and the parties waived the filing of reply briefs. The Examiner, having considered the evidence and arguments of the parties, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Local Union 494, International Brotherhood of Electrical Workers (hereinafter IBEW, Union or Complainant), is a labor organization which maintains its offices at 2121 West Wisconsin Avenue, Milwaukee, Wisconsin 53233; and that Paul Welnak (hereinafter Business Manager) is and at all time relevant to this matter has been the Business Manager and the duly authorized representative of the Union.

2. That T & J Komp (hereinafter Employer or Respondent) is an employer within the meaning of Sec. 111.02(7), Stats.; and that Theodore J. Komp is and at all times relevant to this matter has been the operator of and the agent for T & J Komp Electric.

3. That the Employer is a signatory to the Inside Wiremen Agreement (hereinafter Agreement) between the Electrical Contractors Association, Milwaukee Chapter, N.E.C.A., Inc. (hereinafter Association), and the Union, dated June 1, 1988 - May 31, 1991; that R. Drew Gibson (hereinafter Vice President) is and at all times relevant to this matter has been the Executive Vice President and the duly authorized representative of the Association; and that said Agreement includes the following provisions:

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.

. . .

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 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 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 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.

. . .

Section 4.02

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

Section 4.03

. . .

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.

4. That in a letter dated April 5, 1990, the Business Manager wrote to the Vice President as follows:

> Please consider this a formal grievance pursuant to Section 1.06 of our labor agreement. T.J. (sic) Komp Electric is in violation of Article II, Section 2.05 of our agreement by: Subletting bargaining unit work to a non-union electrician in Hartford in 1988, thereby depriving bargaining unit employees of work opportunities, all in violation of Section 2.05 of our labor agreement.
>
> As a remedy for this violation, we seek wages and benefits for each hour of electrical work performed by the, (sic) then non-union electrician in Hartford.
>
> Pursuant to Section 1.06 of our labor agreement, we hereby request a meeting with yourself and a represent-ative of T.J. (sic) Komp Electric within forty-eight hours in attempt to adjust this matter. If we are not able to schedule such meeting, we will refer this matter to the Labor Management Committee provided for under Section 1.05 for hearing.

5. That a grievance meeting was held on May 11, 1990; that in attendance at said meeting were the Business Manager, the Vice President, Theodore J. Komp and George E. Smith (hereinafter Attorney), attorney for the Employer; that at the grievance meeting, the Vice President as the duly authorized representative of the Association and the Business Manager as the duly authorized representative of the Union determined that the Employer had violated the Agreement; and that in a letter dated May 16, 1990, the Vice President wrote to the Employer as follows:

> In accordance with Article I, Section 1.06 of the Milwaukee Inside Wiremen Agreement, the parties have determined that T & J Komp violated Article II, Section 2.05 and Article IV, Section 4.02 by employing Mr. Walter Summers to perform electrical work during 1988.
>
> Please report to us the dates employed and hours worked by Mr. Summers during this period.

6. That in a letter dated July 17, 1990, the Attorney wrote to the Business Manager in relevant part as follows:

> Mr. Komp, upon receipt of your letter dated July 9, 1990, has furnished our office with the list of dates and hours for Mr. Summers. These hours were worked in the year 1988.
>
> The enclosed list is compiled by Mr. Komp and it is being furnished to you pursuant to our agreement of past date.
>
> Any comments you might have about the enclosure, feel free to call of comment.

and that said letter included a handwritten list which showed that Walter Summers (hereinafter Summers) had worked 210 hours between the weeks of August 1 and December 24, 1988, inclusive.

7. That in a letter dated July 30, 1990, the Vice President wrote to the Employer in relevant part as follows:

> In regard to the recent grievance decision involving the employment of Mr. Walter Summers to perform electrical work during 1988, the following payments should be made:
>
> 1.Checks payable to the following individuals:
>
> a) J. F. Polinski $149.44
> b) R. L. Crowfoot $898.64
> c) D. L. Wildes $149.44
> d) W. J. Hunter $448.32
> e) W. F. Keslin $448.32
> f) G. L. Lubecke $485.68
> g) D. W. Mattila $448.32
> h) C. L. Odum $149.44
> i) J. W. Heather $597.76
> j) P. E. Cain $149.44
>
> 2.Check payable to National Industry Board in the amount of $117.68.
>
> 3.Check payable to Electrical Construction Industry Board in the amount of $1048.24.
>
> Please sign the enclosed form and return with all checks to me. Thank you.

8. That in a letter dated August 20, 1990, the Vice President wrote to the Attorney in relevant part as follows:

> In response to your letter, dated (August) 14, 1990, it is the position of the parties to the Milwaukee Inside Agreement that since T & J Komp Electric is not signatory to the residential agreement, all electrical work performed is covered under the terms and conditions of the Milwaukee Inside Agreement.
>
> Therefore, the monthly payroll report sent to T & J Komp Electric on July 30, 1990 is accurate.

9. That the Agreement provides for final and binding arbitration of disputes arising under the Agreement; that under Section 1.06 of the Agreement, grievances are adjusted by the duly authorized representatives of the parties; that the tribunal established under Section 1.06 of the Agreement has competent jurisdiction over the grievance underlying this complaint; that the Employer is a signatory to the Agreement; that, as a signatory, the Employer has accepted the jurisdiction of the tribunal established under Section 1.06 of the Agreement; that, in accordance with Section 1.06 of the Agreement, the Employer was found to be in violation of Sections 2.05 and 4.02 of the Agreement; that the Employer was advised of the determination of said violation; that, in accordance with Section 1.06 of the Agreement, the duly authorized representatives of the parties determined the remedy for said violation; that the Employer was advised of the remedy so determined; that, absent proper appeal, said determinations are final and binding on all parties, including the Employer; that the Employer has refused to comply with the remedy specified in Finding of Fact 7; and that such refusal is a violation of Section 1.06 of the Agreement.

Based upon the foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. That the grievance determination made by the duly authorized representatives of the parties under Section 1.06 of the Agreement is a legally enforceable collective bargaining agreement under Sec. 111.06(1)(f), Stats.; and that, by refusing to accept the grievance determination rendered in accordance with Section 1.06 of the Agreement, the Employer violated said section and, thereby, violated Sec. 111.06(1)(f), Stats.

2. That Section 1.06 of the Agreement establishes a tribunal which has competent jurisdiction of the grievance underlying this complaint and whose jurisdiction the Employer has accepted; and that, by refusing or failing to recognize or accept the tribunal's determination as to the proper adjustment for the grievance underlying this complaint, the Employer violated Sec. 111.06(1)(g), Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the

Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that T & J Komp Electric, its officers and agents, shall immediately:

1. Cease and desist from violating the Agreement and the Wisconsin Employment Peace Act by refusing to accept grievance determinations rendered in accordance with Section 1.06 of the Agreement.

2. Cease and desist from violating the Wisconsin Employment Peace Act by refusing and failing to recognize and accept the determination of a tribunal established by the Agreement and authorized to adjust grievances.

3. Take the following affirmative action which the Examiner finds will effectuate the purposes and policies of the Wisconsin Employment Peace Act:

a. Make payments to the Union members and Boards specified in Finding of Fact 7, including interest at the statutory rate from the date of the grievance award.

b. Notify the employes in the bargaining unit represented by the Complainant by posting in conspicuous places on its premises where notice to such employes are usually posted, a copy of the Notice attached hereto and marked "Appendix A". That Notice shall be signed by an authorized representative of the Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

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.

c. Notify the Wisconsin Employment Relations Commission in

1/ Please find footnote 1/ on page 6.

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 26th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

APPENDIX "A"

NOTICE TO EMPLOYES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Peace Act, we hereby notify our employes that:

1. We will not violate the collective bargaining agreement and the Wisconsin Employment Peace Act by refusing to accept grievance decisions rendered in accordance with Section 1.06 of the agreement.

2. We will not violate the Wisconsin Employment Peace Act by refusing or failing to recognize or accept the determination of a tribunal established by the agreement and authorized to adjust grievances.

3. We will immediately make payments to various Union members and Union Boards as properly determined by the authorized representatives of the Association and the Union, including interest at the statutory rate from the date of the grievance award.

Dated at _____, Wisconsin, this _____ day of _____, 1991.

T & J Komp Electric

By _____

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREON AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY MATERIAL.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITION OF THE PARTIES

A. Complainant

The Union asserts that on April 5, 1990, it filed a grievance charging that the Respondent had violated the Agreement by employing Walter Summers, a non-union employe; that on May 11, 1990, representatives of the Union, the Respondent and the Association met pursuant to Article 1.06 of the Agreement; that at the conclusion of the meeting, the Association Executive Vice President and the Union Business Manager agreed that a violation of the Agreement had been proven; that the Respondent was notified of said finding by the Association; that the Association also requested the Respondent to submit all hours worked by the non-union employe; that the Respondent submitted information showing that Summers had worked 210 hours; that the Association notified the Respondent of the total amount due both to the individuals on the hiring hall books and to the various fringe benefit funds; that the amount due to individuals is $3,922.80, reflecting 210 hours at the Journeyman's wage rate of $18.68 per hour; that the amounts due to the various fringe benefit funds are $117.68 to the National Electrical Benefit Fund and $1,048.24 to the Electrical Construction Industry Board; that the decision in accordance with Sec. 1.06 of the Agreement was an award made between the parties to the Agreement pursuant to their obligations under the Agreement; that the decision is final and binding by the terms of the Agreement; and that the unwillingness of the Employer to comply with the terms of that award is a violation of Secs. 111.06(1)(f) and (g), Stats., citing Zien Heating and Air Conditioning, Inc., Dec. 26516-A (Honeyman, 10/90).

As to the Respondent's affirmative defenses that because it is not signatory to the Residential Agreement, any electrical worked performed residential is not covered by the Agreement, the Union argues that the interpretation of the parties to the Agreement and the logical interpretation required by the language of Section 2.05 of the Agreement is that all electrical work is covered by the Agreement; that there is a Residential Agreement but the Employer was not signatory to that Agreement; that the Agreement covers all electrical work performed by the Employer; and that, therefore, the Union requests the Commission to enforce the Union's award against the Respondent and to make the Union whole for the costs of enforcing its lawful award.

B. Respondent

The Respondent argues that the Complainant did not present credible evidence that Walter Summers was not a member of the Union; that all testimony that Summers was employed by the Employer was hearsay testimony; that Summers was not called as a witness; that a Union representative testified as to the Summers' having been employed by the Employer and to his not being a member of the Union; that this testimony was clearly hearsay; that proper objections were made and that all this testimony should be stricken and not considered by the Commission; and that the Complainant did not prove beyond a reasonable doubt that the Employer employed Summers during the year 1988 and that Summers was not a member of the Union.

The Respondent also argues that the Union failed to prove that the Employer owes money to either the Union or Union members; that the Business Manager had the Union's referral administrator ascertain who would have been at the top of the list on the dates at issue here; that Respondent's counsel objected to the Business Manager's testifying to the list of individuals as to who was on the top of the book, to dates listed and who would have performed the work; that it was not the Respondent' obligation to prove up the complaint; that the Union's referral administrator should have been available to prove up the veracity of the information contained in the document; that any information garnered from said document is hearsay and should not have been admitted over objection; that on that basis alone the complainant's complaint should be dismissed as not having proved up the damages alleged in the complaint; that it is not the Respondent's obligation to allege error in the Union's or the Association's computations; that the Complainant must prove the veracity of the computations with credible evidence, not hearsay testimony; that the document in question is not a business record kept in the regular course of business; that, therefore, the Complainant failed to prove the allegations of its complaint; and that the Respondent requests the Commission to dismiss the complaint and to award costs and actual attorney fees to the Respondent.

DISCUSSION

A. Background

On April 15, 1990, the Union filed a grievance with the Association,

alleging that the Employer violated Section 2.05 of the Agreement by subletting bargaining unit work to Walter Summers in Hartford in 1988. Pursuant to Section 1.06 of the Agreement, the Union's Business Manager, the Association's Vice President, the Employer and the Employer's Attorney met on May 11, 1990. In a letter dated May 16, 1990, the Vice President advised the Employer that, in accordance with Section 1.06 of the Agreement, the parties had determined that the Employer had violated Sections 2.05 and 4.02 of the Agreement by employing Summers during 1988. In a letter dated July 17, 1990, the Attorney advised the Business Manager that Summers had worked 210 hours in 1988. In a letter dated July 30, 1990, the Vice President advised the Employer that various amounts were owed to several Union members and Boards. The Employer did not pay said amounts.

On September 17, 1990, the Union filed the complaint in this matter with the Commission, requesting the Commission to enforce the grievance judgement against the Employer and to make the Union whole for its costs of enforcing its lawful award. The Respondent filed its answer on October 31, 1990, denying that it had violated the collective bargaining agreement and offering affirmative defenses that it is not a signatory to the Residential Agreement and that all work performed by Summers was residential. The Respondent requested the Commission to dismiss the complaint and to order payment for costs and disbursement in defending against the complaint.

B. Merits

The Complaint filed by the Union in this matter alleges a violation of the Wisconsin Employment Peace Act (hereinafter WEPA), Chapter 111 of the Wisconsin Statutes.

Section 111.06(1), Stats., makes it an unfair labor practice for an employer:

> (f) To violate the terms of a collective bargaining agreement (including an agreement to accept an arbitration award).

At the onset, it must be clarified as to what violation of the collective bargaining agreement is before this Examiner. Where the collective bargaining agreement does not provide for the final and binding arbitration of grievances, the Commission will assert jurisdiction to determine whether the agreement has been violated with respect to the merits of the dispute. 2/ Such is not the case before this Examiner. Instead, this is a case where the parties' agreement provides a grievance procedure which culminates in final and binding arbitration and the complaining party alleges that the employer refuses to accept an award determined by said procedure. In such a case the Commission will assert jurisdiction to determine whether such refusal violates the grievance and arbitration procedure of the collective bargaining agreement and, thereby, violates Sec. 111.06(1)(f), Stats. 3/

2/ See, i.e., J. I. Case Co., Dec. No. 1593 (WERB, 4/48); and Ladish Co., Inc., Tri-Clover Division, Dec. No. 23390-A (WERC, 7/87).

3/ Bay Shipbuilding Corp., Dec. Nos. 19957-B and 19958-B (Shaw, 4/83), aff'd, Dec. Nos. 19957-C and 19958-C (WERC, 2/84).

The Respondent is signatory to a collective bargaining agreement between the Association and the Union. Said Agreement provides a grievance procedure which culminates in final and binding arbitration. Section 1.06 of the Agreement provides for grievances to be adjusted by duly authorized representatives of the parties to the Agreement. Said adjustment constitutes a "collective bargaining agreement" within the meaning of the WEPA and, thus, a violation of such an adjustment constitutes a violation of Sec. 111.06(1)(f), Stats. 4/

In this case, the duly authorized representatives were the Vice President of the Association and the Business Manager of the Union. Said representatives met with the Employer and his Attorney pursuant to Section 1.06 of the Agreement. At said meeting, the duly authorized representatives of the parties determined that the Employer had violated Sections 2.05 and 4.02 of the Agreement. Absent proper appeal, this decision is binding on the parties and the signatories to the Agreement. The duly authorized representatives also determined the remedy for the violation and, again, absent proper appeal, said determination is also binding on the parties and the signatories to the Agreement.

The record is absolutely clear that the Employer has not complied with the remedy, as determined by the duly authorized representatives of the parties in accordance with the collective bargaining agreement. The Employer has not paid the money which said representatives determined the Employer owed to several Union members and Boards. Thus, the Employer is in violation of Section 1.06 of the Agreement in that it has refused to accept the arbitration award. By refusing to accept the arbitration award, the Employer also violates Sec. 111.06(1)(f), Stats.

Section 111.06(1), Stats., also makes it an unfair labor practice for an employer:

> (g) To refuse or fail to recognize or accept as conclusive of any issue in any controversy as to employment relations the final determination (after appeal, if any) of any tribunal having competent jurisdiction of the same or whose jurisdiction the employer accepted.

Section 1.06 of the Agreement provides for grievances to be adjusted by the duly authorized representatives of the parties to the Agreement. This grievance procedure, therefore, establishes a tribunal having competent jurisdiction of the grievance underlying this complaint. 5/ The Employer, by being a signatory to this Agreement, has accepted the jurisdiction of this tribunal. 6/

In this case, the tribunal established by the grievance procedure consisted of the Vice President on behalf of the Association and the Business Manager on behalf of the Union. This tribunal determined that the Employer violated the Agreement and that the Employer, as a remedy for its violation, owed various amounts to several Union members and Boards. The Employer did not appeal the decision of this tribunal and, therefore, its decision was final and binding. Nor has the Employer paid the amounts owed to several Union members and Boards.

The record is absolutely clear that the Employer has neither recognized nor accepted the determination of the tribunal created by the grievance procedure of the Agreement, a tribunal who has jurisdiction over the grievance underlying this dispute and to whose jurisdiction the Employer, by being a signatory to the Agreement, has accepted. By not paying the properly determined remedy, the Employer has refused or failed to recognize or accept the final determination of the tribunal provided for in the agreement and, therefore, the Employer violated Sec. 111.06(1)(g), Stats.

C. Respondent's Arguments

The Respondent spends most of its argument on the merits of the grievance underlying this complaint. Here the Respondent errors. The question before this Examiner is not whether the Employer violated Sections 2.05 and 4.02 of the Agreement. That determination has already been made. Pursuant to Section 1.06 of the Agreement, the duly authorized representatives of the parties adjusted that grievance by, first, finding that the Employer did, indeed, violate Sections 2.05 and 4.02 of the Agreement by employing Summers in 1988 and, second, by directing the Employer to pay various amounts to several

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4/ Ibid at 9.

5/ Zien Heating and Air Conditioning, Inc., Dec. No. 26516-A (Honeyman, 10/90), aff'd by operation of law, Dec. No. 26516-B (WERC, 11/90).

6/ Ibid at 10.

Union members and Boards. This is not a de novo hearing as to the merits of that grievance. Nor is this case part of any appeal process of the grievance award. If the Employer had wanted to appeal that award, it should have used the mechanisms allowed by law to do so. Absent proper appeal, that determination is final and binding on the parties. Instead, the questions before this Examiner are whether the Respondent violated the Wisconsin Employment Peace Act by violating the agreement to accept an arbitration award and by refusing or failing to recognize or accept the final determination of the grievance tribunal having competent jurisdiction of the grievance and whose jurisdiction the Respondent has accepted. 7/

Nonetheless, the Respondent argues that the Complainant did not present credible evidence that Walter Summers was not a member of the Union, that all evidence to that effect was hearsay. Irrespective of whether the Complainant presented such evidence, the Complainant did not need to prove to this Examiner that Summers was not a union member; instead, it had to prove that the duly authorized representatives of the parties determined that Summers was not a union member. At hearing, both the Vice President and the Business Manager testified that they had made that determination. These were the duly authorized representatives of the parties. This is credible evidence. This is not hearsay. In fact, the Respondent admits in its brief that the Business Manager and the Vice President concluded that a violation had occurred in that the Employer had, indeed, hired a non-union employe to perform electrical work, and that they had advised the Employer of this violation. By the Respondent's own brief, the issue of whether the duly authorized representatives of the parties determined that Summers was not a union member is no longer in dispute. Regardless of the Respondent's admission, the Union proved that a grievance award has been made by the duly authorized representatives of the parties and that said award determined that the Employer had hired an employe who was not a member of the Union in violation of the Agreement.

The Respondent also argues that the Complainant did not prove beyond a reasonable doubt that the Employer employed Summers during 1988. The burden of proof in this matter is clear and satisfactory preponderance of the evidence; 8/ this is not a criminal trial requiring proof beyond reasonable doubt. Irrespective of what the Complainant proved, the Complainant did not have to prove to this Examiner that the Employer employed Summers during 1988; instead, it had to prove that the duly authorized representatives of the parties deter-mined that the Employer employed Summers during 1988. Again, both the Vice President and the Business Manager testified that they had found that the Employer had employed Summers during 1988. The Respondent offered no testimony or evidence to dispute their testimony. In fact, Complainant Exhibit 3, a letter from the Attorney to the Business Manager admitted without objection, states on its face that Summers worked during 1988 for the Employer. This is proof positive. In fact, the Respondent admitted in its answer that the Employer had employed Summers during 1988. Having so admitted such in its answer, the Respondent cannot now place the issue in dispute. Regardless of the Respondent's admission, again, the Union proved that the duly authorized representatives of the parties had determined that the Respondent employed Summers during 1988.

The Respondent also argues that the Complainant did not prove that the Employer owes money to the Union and Union members. The Respondent is again mistaken that the Complainant had to prove the actual damages to this Examiner; what the Complainant had to prove was that the duly authorized representatives of the parties had determined that the Employer owed damages to several Union members and Boards. This the Union did. As stated above, the duly authorized representatives of the parties determined that the Respondent had violated the agreement by hiring a non-union employe during 1988. Both the Vice President and the Business Manager testified that, based on a document provided by the Employer, they determined the amount owed by the Employer as a remedy for violating the agreement and advised the Employer of that amount. Again, the issue of remedy for the grievance underlying this complaint was a determination to be made through the grievance procedure. 9/ When the duly authorized representatives of the parties, the Vice President and the Business Manager, agreed on the remedy, the remedy was set. If the Employer had wished to appeal said determination of the remedy, it could have done so. It did not. The Complainant only had to prove to this Examiner that a remedy had been determined, that the Respondent had been advised of the remedy, and that the Respondent had not fulfilled the remedy. This the Union did prove.

The Respondent makes much of the admission of Complainant Exhibit 4. Said document was used by the duly authorized representatives of the parties to determine the allocation of some of the damages. Specifically, the document was used to determine which union members should receive pay for each day that

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7/ Ibid.

8/ Wisconsin Environmental Decade, Dec. No. 19962-A (McCormick, 3/84), aff'd by operation of law, Dec. No. 19962-B (WERC, 3/84).

9/ Zien Heating and Air conditioning, Inc., supra, at 10.

the Employer employed a non-union employe. The document did not go to show damages, but to whom said damages should be paid. If the Respondent objected to the allocation of some of the damages, the proper place for the Respondent to do so would have been in the grievance procedure provided for in the collective bargaining agreement to which it is a signatory, 10/ or in a proper appeal of the grievance award as allowed by law. Said document was admitted, not to show the truth of what it contained, but for the purpose of showing the procedure by which the allocation of some of the damages was made. The Complainant did not need to prove that the Union members listed on Complainant Exhibit 4 should receive the damages, but that the duly authorized representatives determined that the Union members on Complainant Exhibit 4 should receive the damages. This the Complainant proved.

The Respondent may misunderstand the complaint it is defending against. The Complainant is not trying to prove that it is right on the merits of the grievance; the Complainant is trying to prove that the Employer has not complied with the grievance award. The Respondent argues as if it was defending itself from a charge that it violated Sections 2.05 and 4.02; all of this argument is a nullity as that issue has already been determined by the duly authorized representatives of the parties who found that the Employer had, indeed, violated Sections 2.05 and 4.02 of the Agreement. What the Respondent is defending itself against is an allegation that it violated Section 1.06 of the Agreement and, by not accepting the arbitration award, that it violated Secs. 111.06(1)(f) and (g), Stats.

The Complainant's case against the Respondent regarding the alleged violations of Secs. 111.06(1)(f) and (g), Stats., is clear and convincing. As stated above, the Complainant has proven that the Employer violated the terms of the collective bargaining agreement by not accepting the arbitration award, in violation of Sec. 111.06(1)(f), and that the Employer refused or failed to recognize or accept the final determination of the grievance tribunal whose jurisdiction the Employer has accepted, in violation of Sec. 111.06(1)(g), Stats.

D. Affirmative Defenses

In its answer, the Respondent offered two affirmative defenses. First, it alleged that the Employer is not a signatory to the residential agreement and, therefore, all electrical worked performed on residences are not covered under the terms and conditions of the Agreement. Second, the Respondent alleged that all electrical work performed by Summers from August 20 through December 24, 1988, was residential.

The Respondent offers no argument on brief in support of these defenses Perhaps it has abandoned said defenses. Indeed, on their face, the defenses are no defense to alleged violations of Secs. 111.06(1)(f) and (g), Stats. These defenses go to the merits of the grievance underlying this complaint; they do not go to the complaint itself. Therefore, such defenses should have been raised at the grievance level. 11/ They are of no use to the Respondent in this proceeding.

For these reasons, these affirmative defenses are rejected.

E. Remedy

The standard remedy in cases involving violations of Secs. 111.06(1)(f) and (g), Stats., includes an order enforcing the arbitration award, including payment of the amount determined to be owed to several Union members and Boards and interest at the statutory rate from the date of the award; an order to cease and desist from action violative of the Agreement and the Wisconsin Employment Peace Act; and an order to post an appropriate notice. Such remedy is ordered here.

In regard to interest on the award, interest is granted in complaint cases seeking enforcement of arbitration awards at the statutory rate on the sum of money due and owing under the award from the date on which the award was received by the party owing said money. 12/ The award of interest is not a punitive measure but an essential feature of a make whole remedy by which the Complainant is restored as closely as possible to the position it would have been in if the Respondent had complied with the grievance determination. 13/ The fact that interest was not demanded in the complaint is of no consequence.

10/ Ibid.

11/ Ibid.

12/ Sparta Manufacturing Company, Inc., Dec. No. 20787-A (McLaughlin, 11/83), aff'd by operation of law, Dec. No. 20787-B (WERC, 12/83).

13/ Ibid at 14.

14/ Section 815.05, Stats., specifies the rate of interest at 12 percent per year. In this case said interest is due and owing from the date the Employer received the letter from the Association dated July 30, 1989, specifying the amount owed by the Employer.

The Union requests to be made whole for costs of enforcing the underlying arbitration award. In complain cases, attorney's fees and costs will not be granted unless the parties have so agreed, or unless the Commission is required to do so by specific statutory language. 15/ Since neither the WEPA nor the parties agreement contains any provision for the award of attorney's fees and costs, and since the parties have not otherwise agreed to such an award, no such award has been made.

Dated at Madison, Wisconsin this 26th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
James W. Engmann, Examiner

14/ West Side Community Center, Inc., Dec. No. 19212-B (WERC, 3/84); Dec. No. 19212-C (WERC, 5/87); aff'd Dec. No. 19212-D (Cir. Ct. Milwaukee County, 6/88). See also Oconomowoc Plumbing, Inc. and Economowoc Plumbing Systems, Inc., Dec. No. 20214-B (WERC, 2/84).

15/ Bay Shipbuilding Corp., supra, at 14; and Sparta Manufacturing Company, Inc., supra, at 15.